



January 17, 2017

To: Members of the House of Delegates

Enclosed are the agenda and background materials for the General Assembly on Friday, January 27, 2017, commencing at 9:00 a.m. The program includes the Annual Meetings of The New York Bar Foundation and the New York State Bar Association, as well as the regular business meeting of the House of Delegates.

We look forward to seeing you at the Annual Meeting.

Claire P. Gutekunst  
President

Sharon Stern Gerstman  
President-Elect



**GENERAL ASSEMBLY  
FRIDAY, JANUARY 27, 2017 – 9:00 A.M.  
TRIANON BALLROOM, THIRD FLOOR  
NEW YORK HILTON MIDTOWN**

**AGENDA**

**THE NEW YORK BAR FOUNDATION ANNUAL MEETING** **9:00 a.m.**  
(The members of the House of Delegates also serve as members of  
The New York Bar Foundation)

**Mr. John H. Gross**  
**President, presiding**

1. Approval of the minutes of the January 29, 2016 Annual Meeting
2. Report of the officers – Mr. John H. Gross
3. Ratification and confirmation of the actions of the Board of Directors since the 2016 Annual Meeting – Mr. John H. Gross
4. Report of the Nominating Committee – Ms. Carla M. Palumbo
5. Other matters
6. Adjournment

**ANNUAL MEETING OF THE NEW YORK STATE BAR ASSOCIATION** **9:15 a.m.**  
**Ms. Claire P. Gutekunst**  
**President, presiding**

1. Call to order and Pledge of Allegiance
2. Approval of the minutes of the January 29, 2016 Annual Meeting
3. Report of Nominating Committee and election of elected delegates to the House of Delegates – Mr. David M. Schrauer
4. Report of Treasurer – Mr. Scott M. Karson
5. Adjournment

**HOUSE OF DELEGATES MEETING****9:30 a.m.****Ms. Sharon Stern Gerstman****Chair, presiding**

1. Approval of minutes of November 5, 2016 meeting 9:30 a.m.
2. Report of Treasurer – Mr. Scott M. Karson 9:32 a.m.
3. Report of Nominating Committee and election of officers and members-at-large of the Executive Committee – Mr. David M. Schraver 9:35 a.m.
4. Address by Hon. Janet DiFiore, Chief Judge of the State of New York 9:45 a.m.
6. Presentation of Ruth G. Schapiro Award – Ms. Claire P. Gutekunst 10:05 a.m.
7. Report and recommendations of Committee on the New York State Constitution – Mr. Henry M. Greenberg 10:20 a.m.
8. Report of President – Ms. Claire P. Gutekunst 10:45 a.m.
9. Report and recommendations of Committee on Continuing Legal Education – Ms. Ellen G. Makofsky and Ms. Mirna M. Santiago 11:00 a.m.
10. Report of ABA Board of Directors – Mr. A. Vincent Buzard 11:35 a.m.
11. Administrative items – Ms. Sharon Stern Gerstman 11:45 a.m.
12. New business 12:00 p.m.
13. Date and place of next meeting:  
Saturday, April 1, 2017  
Bar Center, Albany

**THE NEW YORK BAR FOUNDATION  
Annual Meeting**

**MINUTES  
January 29, 2016  
New York City**

**Present:** Aidala; Alcott; Alden; Alomar; Arenson; Baker; Behe; Block; Bloom; Bonina; Braverman; Brown, E.; Brown, J.; Brown, T.A.; Bruno; Buholtz; Burns, S.; Buzard; Calcagni; Chambers; Chandrasekhar; Chang; Christopher; Cilenti; Clarke; Coffey; Cohen; Connor; Cooper; Coseo; Crumme; Dean; Doyle; Effman; England; Fallek; Fennell; Fernandez; Finerty; First; Fishberg; Fisher; Flynn; Fox, M.; Franchina; Freedman, H.; Friedman; Gaffney; Gallagher; Galligan; Gerbini; Gerstman; Getnick; Glass; Gold; Goldberg; Goldenberg; Goldfarb; Grays; Grossman; Gutekunst; Gutierrez; Hall; Halpern; Heath; Hetherington; Higgins; Himes; Hoffman; Hollyer; Honig; Hyer; Jackson; Jaglom; James; Jankiewicz; Kamins; Karson; Kean; Kelly; Kiesel; King, B.; Kobak; Koch; Krausz; Lanouette; LaRose; Lau-Kee; Lawrence; Lawton-Thames; Leber; Levin; Lindenauer; Ling-Cohan; Makofsky; Mancuso; Marangos, D.; Marangos, J.; Marinaccio; Maroney; Martin, D.; Martin, E.; McCafferty; McCann; McCarron; McCarthy; McGinn; McKay; McKeegan; Meisenheimer; Meyers; Miller, G.; Miller, M.; Millon; Minkowitz; Miranda; Moretti; Morrissey; Moses; Moskowitz; Mulhall; Napoletano; Nathanson; Nowotny; O'Donnell, T.; Ogden; Onderdonk; Owens; Prager; Pressment; Protter; Ranni; Raskin; Reitzfeld; Richardson; Richter, A.; Richter, R.; Riley; Rivera; Robb; Robertson; Rodriguez; Romero; Rothenberg; Rothstein; Ryan; Safer; Samuels; Santiago; Scanlon; Scheinberg; Schrauer; Sciocchetti; Sen; Shafer; Shamoan; Shautsova; Sheehan; Sigmond; Silver; Silverman; Simmons, Smith, A.; Smith, S.; Sonberg; Spiner; Spiro; Spitler; Standard; Starkman; Steinhardt; Stenson Desamours; Stines; Strenger; Sunshine; Tarver; Terranova; Tesser; Thaler; Tilton; Tully; Udell; Ugurlayan; Vigdor; Wallach; Walsh; Weathers; Weinblatt; Weis; Welch; Whittingham; Wicks; Wildgrube; Williams; Wimpfheimer; Winograd; Wood; Yeung-Ha; Younger.

President John H. Gross called the meeting to order at 9:05 a.m.

**Approval of minutes:** On a motion duly made and carried, the minutes of the Annual Meeting of The New York Bar Foundation on January 30, 2015 were approved.

**Report of the Nominating Committee:** Reporting on behalf of the Nominating Committee, the Chair, Michael Getnick, placed in nomination the following slate of nominees presented by the Committee for the position of Director for terms commencing June 1, 2016 for term ending May 31, 2019:

- Hermes Fernandez of Albany
- David M. Schrauer of Rochester

It was reported that Mr. Schrauer will fill the vacancy of William Keniry, beginning in January, 2016.

A motion was adopted electing said Directors.

**Report of Officers:** Mr. Gross presented the 2015 Annual Report of The New York Bar Foundation, copies of which were distributed. The Annual Report sets forth in detail the operations and activities of The Foundation during 2015. Mr. Goss highlighted activities of The Foundation during 2015:

1. Allocating \$530,000 in grants
2. Establishing a new giving group, The Young Lawyer Friends of The Foundation

Mr. Gross showed the new Foundation video that demonstrated what donations and contributions can accomplish through The Foundation.

**Ratification and confirmation of actions of the Board:** A motion was adopted ratifying, confirming and approving the actions of the Board of Directors since the 2015 Annual Meeting.

There being no further business, the meeting was adjourned.



TO: Members of The New York Bar Foundation

FROM: Nominating Committee of The New York Bar Foundation  
Michael E. Getnick, Chair  
Hon. Cheryl E. Chambers  
Martin Minkowitz  
Carla Palumbo

DATE: January 27, 2017

RE: Report of the Nominating Committee

The Nominating Committee of The New York Bar Foundation is pleased to submit the following slate of nominations as Directors of The Foundation Board of Directors commencing June 1, 2017.

**For a term ending May 31, 2020**

New directors for a term commencing June 1, 2017 and concluding May 31, 2020

- June Castellano, Rochester
- Donald Doerr, Syracuse
- James Kobak, New York
- Ellis Mirsky, Nanuet

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF ANNUAL MEETING  
NEW YORK HILTON MIDTOWN, NEW YORK CITY  
JANUARY 29, 2016**

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**PRESENT:** Aidala; Alcott; Alden; Alomar; Arenson; Baker; Behe; Block; Bloom; Bonina; Braverman; Brown, E.; Brown, J.; Brown, T.A.; Bruno; Buholtz; Burns, S.; Buzard; Calcagni; Chambers; Chandrasekhar; Chang; Christopher; Cilenti; Clarke; Coffey; Cohen; Connor; Cooper; Coseo; Crummey; Dean; Doyle; Effman; England; Fallek; Fennell; Fernandez; Finerty; First; Fishberg; Fisher; Flynn; Fox, M.; Franchina; Freedman, H.; Friedman; Gaffney; Gallagher; Galligan; Gerbini; Gerstman; Getnick; Glass; Gold; Goldberg; Goldenberg; Goldfarb; Grays; Grossman; Gutekunst; Gutierrez; Hall; Halpern; Heath; Hetherington; Higgins; Himes; Hoffman; Hollyer; Honig; Hyer; Jackson; Jaglom; James; Jankiewicz; Kamins; Karson; Kean; Kelly; Kiesel; King, B.; Kobak; Koch; Krausz; Lanouette; LaRose; Lau-Kee; Lawrence; Lawton-Thames; Leber; Levin; Lindenauer; Ling-Cohan; Makofsky; Mancuso; Marangos, D.; Marangos, J.; Marinaccio; Maroney; Martin, D.; Martin, E.; McCafferty; McCann; McCarron; McCarthy; McGinn; McKay; McKeegan; Meisenheimer; Meyers; Miller, G.; Miller, M.; Millon; Minkowitz; Miranda; Moretti; Morrissey; Moses; Moskowitz; Mulhall; Napoletano; Nathanson; Nowotny; O'Donnell, T.; Ogden; Onderdonk; Owens; Prager; Pressment; Protter; Ranni; Raskin; Reitzfeld; Richardson; Richter, A.; Richter, R.; Riley; Rivera; Robb; Robertson; Rodriguez; Romero; Rothenberg; Rothstein; Ryan; Safer; Samuels; Santiago; Scanlon; Scheinberg; Schrauer; Sciocchetti; Sen; Shafer; Shamoony; Shautsova; Sheehan; Sigmond; Silver; Silverman; Simmons, Smith, A.; Smith, S.; Sonberg; Spiner; Spiro; Spitler; Standard; Starkman; Steinhardt; Stenson Desamours; Stines; Strenger; Sunshine; Tarver; Terranova; Tesser; Thaler; Tilton; Tully; Udell; Ugurlayan; Vigdor; Wallach; Walsh; Weathers; Weinblatt; Weis; Welch; Whittingham; Wicks; Wildgrube; Williams; Wimpfheimer; Winograd; Wood; Yeung-Ha; Younger.

Mr. Miranda presided over the meeting as President of the Association.

1. The meeting was called to order and the Pledge of Allegiance recited, with the presentation of colors by the New York State Courts Ceremonial Unit.
2. Approval of minutes of the January 30, 2015 meeting. The minutes, as previously distributed, were accepted.
3. Report of the Nominating Committee and election of elected delegates to the House of Delegates. Seymour W. James, Jr., chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election as elected delegates to the House of Delegates for the 2016-2017 Association year:

First District: James B. Kobak, Jr., Susan B. Lindenauer, and Carrie H. Cohen, all of New York City;

Second District: John A. Lonuzzi, Andrea E. Bonina, and Jeffrey S. Sunshine, all of Brooklyn;

Third District: Glinessa D. Gaillard, Robert T. Schofield IV, and David W. Myers, all of Albany;

Fourth District: Marne L. Onderdonk of Albany, Patricia L.R. Rodriguez of Schenectady, and Jeremiah Wood of Gloversville;

Fifth District: Timothy J. Fennell of Oswego, Gioia A. Gensini of Syracuse, and Jean Marie Westlake of Syracuse;

Sixth District: Patrick J. Flanagan of Norwich, Richard C. Lewis of Binghamton, and Bruce J. McKeegan of Delhi;

Seventh District: LaMarr J. Jackson of Rochester, June M. Castellano of Rochester, and Amy L. Christenson of Bath;

Eighth District: Joseph Scott Brown of Buffalo, Jessica M. Lazarin of Buffalo, and Norman P. Effman of Warsaw;

Ninth District: Mary Beth Quaranta Morrissey of White Plains, Joseph J. Ranni of Florida, and Kelly M. Welch of Scarsdale;

Tenth District: William T. Ferris III of Islandia, Rosemarie Tully of Huntington, and Peter J. Mancuso of North Bellmore;

Eleventh District: Frank Bruno, Jr. of Glendale, Chanwoo Lee of Flushing, and Guy R. Vitacco, Jr. of Elmhurst;

Twelfth District: Samuel M. Braverman of the Bronx, Daniel D. Cassidy of Scarsdale, and Richard Weinberger of Spring Valley;

Thirteenth District: Edwina Frances Martin, John Z. Marangos, and Claire Cody Miller, all of Staten Island.

There being no further nominations, a motion was made and carried for the Secretary to cast a single ballot for the elected delegates to the House of Delegates.

4. Report of Treasurer. Sharon Stern Gerstman, Treasurer, reported on the 2015 operating budget, comparing the amounts to those as of December 31, 2014. She reported that through December 31, 2015, the Association's total revenue was \$24.4 million, a decrease of approximately \$1.5 million from the previous year, and total expenses were \$27.1 million, a decrease of approximately \$3.8 million from the previous year. The operating deficit prior to audit (and prior to retirement adjustments) was approximately \$351,000. Ms. Gerstman also reviewed selected revenue and expense items, including membership and CLE revenue. The report was received with thanks.
5. Report of Committee on Bylaws. Eileen E. Buholtz, chair of the Committee on Bylaws, presented proposed amendments to clarify and simplify portions of the Bylaws, as well as amendments with respect to the position of member-at-large of the Nominating



Committee and eligibility to serve on the Nominating Committee while be considered as a candidate for certain offices. A motion was then adopted to approve the amendments to the Bylaws.

6. Adjournment. There being no further business, the Annual Meeting of the Association was adjourned.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Ellen G. Makofsky".

Ellen G. Makofsky  
Secretary

**ANNUAL MEETING  
Agenda Item #3**

**Election of  
2017-2018 Elected Delegates to the  
House of Delegates**

- 1<sup>st</sup> District James B. Kobak, Jr., New York  
Stewart Aaron, New York  
Carrie H. Cohen, New York
- 2<sup>nd</sup> District Andrew M. Fallek, Brooklyn  
Andrea E. Bonina, Brooklyn  
Barton Slavin, Brooklyn
- 3<sup>rd</sup> District Glinessa D. Gaillard, Albany  
Robert T. Schofield IV, Albany  
Hermes Fernandez, Albany
- 4<sup>th</sup> District Marne L. Onderdonk, Albany  
Patricia L.R. Rodriguez, Schenectady  
Peter V. Coffey, Schenectady
- 5<sup>th</sup> District Timothy J. Fennell, Oswego  
Gioia A. Gensini, Syracuse  
L. Graeme Spicer, Syracuse
- 6<sup>th</sup> District Patrick J. Flanagan, Norwich  
Robert M. Shafer, Tully  
Michael R. May, Ithaca
- 7<sup>th</sup> District LaMarr J. Jackson, Rochester  
June M. Castellano, Rochester  
Amy L. Christensen, Bath
- 8<sup>th</sup> District Kathleen Sweet, Buffalo  
Jessica M. Lazarin, Buffalo  
Oliver C. Young, Buffalo
- 9<sup>th</sup> District Julie Cvek Curley, White Plains  
Andrew P. Schriever, White Plains  
Robert B. Marcus, Orangeburg
- 10<sup>th</sup> District William T. Ferris III, Islandia  
Rosemarie Tully, Huntington  
Peter J. Mancuso, North Bellmore

11<sup>th</sup> District Frank Bruno, Jr., Glendale  
Chanwoo Lee, Flushing  
Guy R. Vitacco, Jr., Elmhurst

12<sup>th</sup> District Samuel M. Braverman, Bronx  
Carlos A. Calderón, Scarsdale  
Michael A. Marinaccio, White Plains

13<sup>th</sup> District Edwina Frances Martin, Staten Island  
Orin J. Cohen, Staten Island  
Claire Cody Miller, Staten Island



# Staff Memorandum

## **ANNUAL MEETING Agenda Item #4**

Attached for your reference are the unaudited financial statements for the year ending December 31, 2016.

**NEW YORK STATE BAR ASSOCIATION  
2016 OPERATING BUDGET  
TWELVE MONTHS OF CALENDAR YEAR 2016**

**REVENUE**

	2016 BUDGET	ADJUST- MENTS	2016 BUDGET AS ADJUSTED	UNAUDITED RECEIVED 12/31/2016	% RECEIVED 12/31/2016	2015 BUDGET	UNAUDITED RECEIVED 12/31/2015	% RECEIVED 12/31/2015
<b>MEMBERSHIP DUES</b>	10,925,000		10,925,000	10,426,352	95.44%	11,350,000	10,879,002	95.85%
<b>SECTIONS:</b>								
Dues	1,416,400		1,416,400	1,346,750	95.08%	1,444,600	1,399,689	96.89%
Programs	2,606,550		2,606,550	2,228,618	85.50%	2,495,450	2,146,535	86.02%
<b>INVESTMENT INCOME</b>	390,000		390,000	351,743	90.19%	319,000	376,796	118.12%
<b>ADVERTISING</b>	125,000		125,000	154,426	123.54%	370,000	133,442	36.07%
<b>CLE</b>	4,050,000		4,050,000	3,630,812	89.65%	4,470,000	3,633,015	81.28%
<b>USI AFFINITY PAYMENT</b>	2,025,000		2,025,000	2,269,769	112.09%	2,025,000	2,081,758	102.80%
<b>ANNUAL MEETING</b>	919,500		919,500	865,217	94.10%	933,000	812,353	87.07%
<b>HOUSE OF DELEGATES &amp; COMMITTEES</b>	206,200		206,200	217,437	105.45%	125,200	111,800	89.30%
<b>PUBLICATIONS, ROYALTIES AND OTHER</b>	276,800		276,800	238,918	86.31%	338,500	293,339	86.66%
<b>REFERENCE MATERIALS</b>	1,450,000		1,450,000	1,256,049	86.62%	1,440,000	1,253,532	87.05%
<b>TOTAL REVENUE</b>	<b>24,390,450</b>	<b>0</b>	<b>24,390,450</b>	<b>22,986,091</b>	<b>94.24%</b>	<b>25,310,750</b>	<b>23,121,261</b>	<b>91.35%</b>

**EXPENSE**

	2016 BUDGET	ADJUST- MENTS	2016 BUDGET AS ADJUSTED	UNAUDITED EXPENDED 12/31/2016	% EXPENDED 12/31/2016	2015 BUDGET	UNAUDITED EXPENDED 12/31/2015	% EXPENDED 12/31/2015
<b>SALARIES &amp; FRINGE</b>	10,365,900		10,365,900	9,694,158	93.52%	10,742,600	9,678,528	90.09%
<b>BAR CENTER:</b>								
Rent	288,000		288,000	285,078	98.99%	288,000	285,078	98.99%
Building Services	285,000		285,000	222,093	77.93%	310,700	266,341	85.72%
Insurance	150,000		150,000	151,327	100.88%	157,000	153,194	97.58%
Taxes	7,750		7,750	21,602	278.74%	7,750	12,079	155.86%
Plant and Equipment	620,000		620,000	749,644	120.91%	725,500	675,901	93.16%
Administration	539,700		539,700	551,826	102.25%	633,500	597,527	94.32%
<b>SECTIONS</b>	3,961,650		3,961,650	3,585,095	90.49%	3,886,150	3,445,416	88.66%
<b>PUBLICATIONS:</b>								
Reference Materials	491,050		491,050	368,085	74.96%	493,500	425,832	86.29%
Journal	489,200		489,200	417,317	85.31%	523,200	464,084	88.70%
Law Digest	221,000		221,000	187,063	84.64%	239,000	145,079	60.70%
State Bar News	254,300		254,300	172,559	67.86%	294,300	256,857	87.28%
<b>MEETINGS:</b>								
Annual Meeting	303,100		303,100	321,015	105.91%	402,500	377,758	93.85%
House of Delegates, Officers and Executive Committee	481,250		481,250	486,070	101.00%	467,850	524,161	112.04%
<b>COMMITTEES:</b>								
CLE	1,944,050		1,944,050	1,631,208	83.91%	2,017,800	1,766,276	87.53%
LPM/ECTF	85,300		85,300	87,377	102.43%	89,425	70,091	78.38%
MARKETING / MEMBERSHIP	1,000,650		1,000,650	771,483	77.10%	1,017,900	704,728	69.23%
MEDIA SERVICES	267,750		267,750	115,612	43.18%	302,050	246,038	81.46%
ALL OTHERS	2,612,220		2,612,220	2,251,751	86.20%	2,582,145	2,208,376	85.52%
<b>TOTAL EXPENSE</b>	<b>24,367,870</b>	<b>0</b>	<b>24,367,870</b>	<b>22,070,363</b>	<b>90.57%</b>	<b>25,180,870</b>	<b>22,303,344</b>	<b>88.57%</b>
<b>BUDGETED SURPLUS</b>	<b>22,580</b>	<b>0</b>	<b>22,580</b>	<b>915,728</b>		<b>129,880</b>	<b>817,917</b>	

NEW YORK STATE BAR ASSOCIATION  
STATEMENTS OF FINANCIAL POSITION  
AS OF DECEMBER 30, 2016

<u>ASSETS</u>	<u>UNAUDITED</u> <u>12/31/2016</u>	<u>UNAUDITED</u> <u>12/31/2015</u>	<u>UNAUDITED</u> <u>12/31/2015</u>
<b><u>Current Assets:</u></b>			
General Cash and Cash Equivalents	14,772,245	14,491,557	14,491,557
Accounts Receivable	302,508	119,263	119,263
Accrued interest receivable	0		
Prepaid expenses	1,170,571	1,412,444	1,412,444
Royalties and Admin. Fees receivable	509,750	688,262	688,262
<b>Total Current Assets</b>	<b>16,755,074</b>	<b>16,711,526</b>	<b>16,711,526</b>
<b><u>Board Designated Accounts:</u></b>			
<b><u>Cromwell Fund:</u></b>			
Cash and Investments at Market Value	2,059,470	2,018,735	2,018,735
Accrued interest receivable	0	0	0
	<b>2,059,470</b>	<b>2,018,735</b>	<b>2,018,735</b>
<b><u>Replacement Reserve Account:</u></b>			
Equipment replacement reserve	1,116,611	1,116,332	1,116,332
Repairs replacement reserve	793,686	793,488	793,488
Furniture replacement reserve	219,762	219,707	219,707
	<b>2,130,059</b>	<b>2,129,527</b>	<b>2,129,527</b>
<b><u>Long-Term Reserve Account:</u></b>			
Cash and Investments at Market Value	19,621,129	18,827,847	18,827,847
Accrued interest receivable	0	80,859	80,859
	<b>19,621,129</b>	<b>18,908,706</b>	<b>18,908,706</b>
<b><u>Sections Accounts:</u></b>			
Section Accounts Cash equivalents and Investments at market value	3,527,130	3,472,523	3,472,523
Cash	(9,728)	100,808	100,808
	<b>3,517,402</b>	<b>3,573,331</b>	<b>3,573,331</b>
<b><u>Fixed Assets:</u></b>			
Furniture and fixtures	1,340,918	1,332,511	1,332,511
Leasehold Improvements	1,366,016	1,363,251	1,363,251
Equipment	8,443,257	7,447,657	7,447,657
Telephone	107,636	107,636	107,636
	<b>11,257,827</b>	<b>10,251,055</b>	<b>10,251,055</b>
Less accumulated depreciation	8,548,859	8,228,428	8,228,428
<b>Net fixed assets</b>	<b>2,708,968</b>	<b>2,022,627</b>	<b>2,022,627</b>
<b>Total Assets</b>	<b>46,792,102</b>	<b>45,364,452</b>	<b>45,364,452</b>
<b><u>LIABILITIES AND FUND BALANCES</u></b>			
<b><u>Current liabilities:</u></b>			
Accounts Payable & other accrued expenses	931,002	1,428,944	1,428,944
Deferred dues	8,047,848	7,755,838	7,755,838
Deferred income special	1,153,845	1,389,071	1,389,071
Deferred grant revenue	18,581	31,710	31,710
Other deferred revenue	798,838	556,344	556,344
Unearned Income - CLE	53,485	51,570	51,570
Payable To The New York Bar Foundation	35,681	35,820	35,820
<b>Total current liabilities &amp; Deferred Revenue</b>	<b>11,039,280</b>	<b>11,249,297</b>	<b>11,249,297</b>
<b><u>Long Term Liabilities:</u></b>			
Accrued Pension Costs	1,352,046	1,417,046	1,417,046
Accrued Other Postretirement Benefit Costs	7,155,303	6,855,303	6,855,303
Accrued Supplemental Plan Costs and Defined Contribution Plan Costs	440,199	478,400	478,400
<b>Total Liabilities &amp; Deferred Revenue</b>	<b>19,986,828</b>	<b>20,000,046</b>	<b>20,000,046</b>
<b><u>Board designated for:</u></b>			
Cromwell Account	2,059,470	2,018,735	2,018,735
Replacement Reserve Account	2,130,059	2,129,527	2,129,527
Long-Term Reserve Account	10,673,581	10,077,098	10,077,098
Section Accounts	3,517,402	3,573,331	3,573,331
Invested in Fixed Assets (Less capital lease)	2,708,968	2,022,627	2,022,627
Undesignated	5,715,794	5,543,088	5,543,088
<b>Total Net Assets</b>	<b>26,805,274</b>	<b>25,364,406</b>	<b>25,364,406</b>
<b>Total Liabilities and Net Assets</b>	<b>46,792,102</b>	<b>45,364,452</b>	<b>45,364,452</b>

**New York State Bar Association**  
**Statement of Activities**  
**For the Twelve Months Ending December 31, 2016**

	<u>December 2016</u>	<u>December 2015</u>	<u>December 2015</u>
<b>REVENUES AND OTHER SUPPORT</b>			
Membership dues	\$10,426,352	\$10,879,002	\$10,879,002
Section revenues			
Dues	1,346,750	1,399,689	1,399,689
Programs	2,228,618	2,146,535	2,146,535
Continuing legal education program	3,630,812	3,633,015	3,633,015
Administrative fee and royalty revenue	2,466,667	2,317,167	2,317,167
Annual meeting	865,217	812,353	812,353
Investment income	571,175	796,322	796,322
Reference Books, Formbooks and Disk Products	1,256,049	1,253,532	1,253,532
Other revenue	443,460	299,648	299,648
	<u>23,235,100</u>	<u>23,537,263</u>	<u>23,537,263</u>
<b>PROGRAM EXPENSES</b>			
Continuing legal education program	2,442,451	2,670,495	2,670,495
Graphics	1,938,992	1,896,395	1,896,395
Government relations program	623,037	586,735	586,735
Law, youth and citizenship program	208,223	206,286	206,286
Lawyer assistance program	205,263	215,609	215,609
Lawyer referral and information services	188,349	180,933	180,933
Law practice management services	207,006	207,053	207,053
Media / public relations services	377,031	529,638	529,638
Meetings services	273,523	369,936	369,936
Marketing and Membership services	1,658,916	1,388,916	1,388,916
Pro bono program	188,811	260,902	260,902
Local bar program	135,413	121,702	121,702
House of delegates	445,256	475,566	475,566
Executive committee	40,814	48,595	48,595
Other committees	755,335	652,756	652,756
Sections	3,585,095	3,445,416	3,445,416
Section newsletters	153,930	137,284	137,284
Reference Books, Formbooks and Disk Products	1,068,591	1,134,146	1,134,146
Publications	776,939	866,020	866,020
Annual meeting expenses	321,015	377,758	377,758
	<u>15,593,990</u>	<u>15,772,141</u>	<u>15,772,141</u>
<b>MANAGEMENT AND GENERAL EXPENSES</b>			
Salaries and fringe benefits	3,349,762	3,897,974	3,897,974
Pension plans and other employee benefit plan costs	663,822	(177,496)	(177,496)
Rent and equipment costs	913,696	1,004,743	1,004,743
Consultant and other fees	991,368	899,388	899,388
Depreciation and amortization	606,555	534,727	534,727
Other expenses	237,962	371,703	371,703
	<u>6,763,165</u>	<u>6,531,039</u>	<u>6,531,039</u>
<b>CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS</b>			
Realized and unrealized gain (loss) on investments	877,945	1,234,083	1,234,083
	562,921	(567,227)	(567,227)
	<u>1,440,866</u>	<u>666,856</u>	<u>666,856</u>
Net assets, beginning of year	25,364,570	24,697,714	24,697,714
Net assets, end of year	<u>26,805,436</u>	<u>25,364,570</u>	<u>25,364,570</u>

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF HOUSE OF DELEGATES MEETING  
BAR CENTER, ALBANY, NEW YORK  
NOVEMBER 5, 2016**

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Ms. Gerstman presided over the meeting as Chair of the House.

**PRESENT:** Abbott; Alomar; Alsina; Baker; Barreiro; Bauman; Behe; Berman; Block; Bonina; Braunstein; Brown Spitzmueller; Brown, E.; Brown, T.; Burke, J.; Burns, S.; Calareso; Calcagni; Chambers; Chandrasekhar; Cheng; Christensen; Christian; Christopher; Cilenti; Clouthier; Coffey; Cohen, O.; Connery; Cooper; Davis; DeFelice; Denton; Disare; Doyle; Effman; England; Fay; Fennell; Ferguson; Finerty; First; Fisher; Fox; Gaal; Gaddis; Gallagher; Galligan; Gensini; Gerbini; Gerstman; Getnick; Goldberg; Goldenberg; Goldfarb; Gordon Oliver; Grays; Greenberg; Grossman; Gutekunst; Haig; Halpern; Heath; Hersh; Hetherington; Hillman; Himes; Hines; Hoffman; Hollyer; Hurteau; Hyer; James; Jochmans; Karson; Kean; Kelly; Kenneally; Kenney; Kiernan, P.; Kiesel; Koch; Krausz; LaRose; Lau-Kee; Lazarin; Leber; Lee; Levin; Levy; Lewis; Lindenauer; Madden; Makofsky; Mancuso; Mandell, Andrew; Marangos, D.; Maroney; Martin; McCann; McGinn; McKeegan; McNamara; Miller, C.; Miller, G.; Miller, H.; Miller, M.; Millon; Minkowitz; Miranda; Moretti; Moses; Moskowitz; Murphy; Napoletano; Nowotarski; O'Donnell, T.; Onderdonk; Ostertag; Owens; Poster-Zimmerman; Prager; Richman; Richter; Rivera; Rodriguez; Rosiny; Rosner; Russell; Ryba; Samuels; Scheinberg; Schofield; Schrauer; Schwenker; Sciocchetti; Shafer; Shamoon; Sharkey; Sheehan; Sigmond; Silkenat; Singer; Sonberg; Spirer; Spiro; Spitler; Standard; Starkman; Steinhardt; Strenger; Sulimani; Tarver; Tennant; Thaler-Parker; Tully; Ventura; Vitacco; Wallach; Walsh; Weathers; Weinberger; Weis; Welch; Westlake; Weston; Whiting; Whittingham; Wicks; Wildgrube; Williams; Younger.

1. Approval of minutes of June 18, 2016 meeting. The minutes were deemed accepted as previously distributed.
2. Report of Treasurer. Scott M. Karson, Treasurer, reported that through September 30, 2016, the Association's total revenue was \$20.7 million, an increase of approximately \$250,000 over the previous year, and total expenses were \$17 million, a decrease of approximately \$330,000 over 2015. Mr. Karson also provided a report on the status of the long-term reserve investments. The report was received with thanks.
3. Report and recommendations of Finance Committee re proposed 2016 income and expense budget. T. Andrew Brown, chair of the Finance Committee, reviewed the proposed budget for 2017, which projects income of \$24,348,950, expenses of \$24,313,075, and a projected surplus of \$35,875. A motion was adopted to approve the proposed 2017 budget.
4. Report of President. Ms. Gutekunst highlighted the information contained in her printed report, a copy of which is appended to these minutes. In addition, she reported that Executive Director David R. Watson would leave the Association at the end of the year to take the position of Executive Director of the Institute for Continuing Legal Education at



the University of Michigan, and she asked Mr. Watson to address the House. The House expressed its appreciation for Mr. Watson's service.

5. Report of Nominating Committee. David M. Schraver, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2017-2018 Association year: President Elect: Michael Miller, New York City; Secretary: Sherry Levin Wallach, Mount Kisco; Treasurer: Scott M. Karson, Melville; Vice Presidents: 1st District – Taa R. Grays, New York; 2nd District – Domenick Napoletano, Brooklyn; 3rd District – Henry M. Greenberg, Albany; 4th District – Matthew R. Coseo, Ballston Spa; 5th District – Stuart J. LaRose, Syracuse; 6th District – Alyssa M. Barreiro, Ithaca; 7th District – David H. Tennant, Rochester; 8th District – Norman P. Effman, Warsaw; 9th District – Michael L. Fox, Newburgh; 10th District – Peter H. Levy, Jericho; 11th District – Karina E. Alomar, Ridgewood; 12th District – Steven E. Millon, New York; 13th District – Jonathan B. Behrins, Staten Island. The following individuals were nominated to serve as Executive Committee Members-at-Large for a 2-year term beginning June 1, 2017: Margaret J. Finerty, New York City; William T. Russell, Jr., New York City; and Richard M. Gutierrez, Forest Hills (Diversity Seat). Nominated as Section Member-at-Large was Andre R. Jaglom, New York City. Nominated as Young Lawyer Member-at-Large was Sarah E. Gold, Albany. The following individuals were nominated as delegates to the American Bar Association House of Delegates for the 2017-2019 term: Claire P. Gutekunst, Yonkers; Seymour W. James, Jr., New York City; Glenn Lau-Kee, New York City; Michael Miller, New York City; and Stephen P. Younger, New York City. The report was received with thanks.
6. Report and recommendations of Committee on the New York State Constitution. Henry M. Greenberg, chair of the committee, presented the committee's report on issues a constitutional convention might address with respect to Article XIV of the State Constitution, the conservation article. After discussion, a motion was adopted to approve the report and recommendations.
7. Membership Challenge update. Thomas J. Maroney, chair of the Membership Committee, together with committee member Michelle Wildgrube, outlined the goals for the challenge (a 2% membership increase in 2017 and a 3% increase in 2018) and the committee's plans to achieve these goals. The report was received with thanks.
8. Report and recommendations of President's Committee on Access to Justice. William T. Russell, Jr., co-chair of the President's Committee on Access to Justice, together with committee member Michael Miller, reviewed the committee's report recommending Association support for the concept and utilization of limited scope representation for low and moderate income persons. After discussion, a motion was adopted to endorse the following resolution for favorable action by the House:

WHEREAS, the New York State Bar Association has long supported and encouraged access to justice for all, including for low and moderate income persons who are not able to pay for conventional legal services; and

WHEREAS, as the late New York State Chief Judge Judith S. Kaye noted in 1999: “Access to the legal system is an inherent right of citizenship, yet far too many New Yorkers are currently denied this right because they lack economic resources;” and

WHEREAS, over the past several years, the organized bar, academic institutions and courts have been experimenting with models of legal practice that permit attorneys to provide limited scope representation to clients who want or need to limit their expenses, and may be able to effectively handle the other aspects of their cases on their own; and

WHEREAS, although criminal defendants who cannot afford an attorney have a constitutional right to counsel, there is no such right in most civil matters; and

WHEREAS, it is estimated that 1.8 million New Yorkers, including mostly low income persons, appear unrepresented by counsel in family court, housing court, consumer debt matters, foreclosures and other civil matters in New York State Courts;

WHEREAS, a growing number of New Yorkers are falling into the category of the “working poor” or “modest means” and are living from pay check to pay check and cannot afford traditional legal assistance, and

WHEREAS, this lack of counsel can often mean an outcome that is less favorable for the litigants than it might be were there affordable counsel available and can result in greater strains on both our judicial system and social welfare programs; and

WHEREAS, in recent years, the New York State Court system has been confronted with significant budgetary challenges and an influx of self-represented individuals into the judicial system; and

WHEREAS, the President’s Committee on Access to Justice of the New York State Bar Association has submitted a report calling upon the Association to support the concept and encourage the utilization of limited scope representation for low and moderate income persons in civil matters,

NOW THEREFORE, IT IS

RESOLVED, that the New York State Bar Association adopts the report of the President’s Committee on Access to Justice and supports the concept and encourages the utilization of limited scope representation for low and moderate income persons in civil matters; and it is further

RESOLVED, that the officers of the association are authorized to take such actions as may be necessary to further explore, and where appropriate, implement and expand programs of limited scope representation for low and moderate income persons in civil matters.

9. Point/Counterpoint. Ms. Gerstman reported that she had asked members Kevin W. Goering and Lillian M. Moy to debate the topic of speech restrictions on college campuses. The presentation was received with thanks.
10. Report and recommendations of Committee on Continuing Legal Education. Committee chair Ellen G. Makofsky, together with committee member Mirna M. Santiago, outlined the committee's report recommending that the rules governing mandatory continuing legal education be amended to provide for one credit hour of diversity CLE credit as part of the 32 credit hours required for new attorneys and as part of the 24 credit hours required of experienced attorneys. After discussion, a motion was adopted to approve the following resolution to govern consideration and debate at the January 27, 2017 House meeting for favorable action by the House:

**RESOLVED**, that the House of Delegates hereby adopts the following procedures to govern consideration at the January 27, 2017 meeting of the House, and any subsequent meetings as may be necessary, of the report and recommendations of the Committee on Continuing Legal Education:

1. The report and recommendations of the Committee was circulated to members of the House, sections and committees, county and local bar associations, via the Reports Community on October 20, 2016.
2. **Comments on report and recommendations:** Any comments on or amendments to the Committee's report or particular recommendations contained therein must be submitted in writing to the Secretary of the Association at the Bar Center by January 13, 2017; otherwise they shall not be considered. All comments complying with this procedure shall be distributed to the members of the House in advance of the January 27, 2017 meeting.
3. **Consideration of the report and recommendations at the January 27, 2017 meeting and any subsequent meetings:** The report and recommendations will be scheduled for formal debate and vote at the January 27, 2017 meeting and considered in the following manner:
  - a. The Committee shall be given an opportunity to present its report and recommendations.
  - b. All those wishing to speak with regard to the report and recommendations may do so only once for no more than three minutes.
  - c. The Committee may respond to questions and comments as appropriate.
  - d. Procedural motions shall be considered out of order until debate on substantive issues is concluded.
  - e. A vote on the report and recommendations shall be taken at the conclusion of the debate.

11. Report of The New York Bar Foundation. John H. Gross, President of The New York Bar Foundation, presented a report on some of The Foundation's initiatives, including the establishment of a disaster relief fund for people impacted by flooding in Louisiana; a Cause Award received from New York Nonprofit Media; the Amazon Smile fundraiser; a law firm challenge; a veterans program; and an awards booklet for distribution at the 2017 Annual Meeting. The report was received with thanks.
12. Administrative items. Ms. Gerstman reported on the following items:
  - a. She announced that the House of Delegates Dinner will take place on Thursday, January 26, 2017 at the Metropolitan Club, 1 East 60<sup>th</sup> Street, New York City.
  - b. She announced that the Committee on Leadership Development would host a luncheon immediately following the meeting to discuss leadership opportunities.
13. Date and place of next meeting. Ms. Gerstman announced that the next meeting of the House of Delegates would take place on Friday, January 27, 2017 at the New York Hilton Midtown, New York City.
14. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully submitted,



Ellen G. Makofsky  
Secretary



**CLAIRE P. GUTEKUNST**

President, New York State Bar Association

917-734-5458

cgutekunst@gutekunstdr.com

November 5, 2016

**November 2016  
President's Report to the  
House of Delegates**

**1. PRESIDENT'S INITIATIVES**

**Domestic Violence Initiative**

In September, our Association and the Women's Bar Association of the State of New York announced a joint Initiative to enhance access to legal services by victims of domestic violence. The Domestic Violence Initiative will work with providers of legal services, county and local bar associations, and pro bono organizations to raise awareness of domestic violence; educate and train attorneys to provide services to domestic violence victims; develop pro bono programs that might be adopted in areas in New York that are currently underserved; and recommend possible legislation to strengthen protections for victims. The Initiative held its first meeting last week.

**Membership Challenge**

The President's Membership Challenge will run through the 2018 membership year. Our goal is a 2% increase for 2017 with an additional 3% the following year.

Membership Committee subcommittees are working in concert with our specialized membership staff teams to make this ambitious goal a reality. Each Section has been asked to submit a plan geared toward not only growing membership in their Section but developing new opportunities to better engage members in Section activities. Efforts are particularly focused on increasing young lawyer and diverse lawyer participation.

**NY.FreeLegalAnswers.org**

The Pro Bono Services Department rolled out NY.freelegalanswers.org at the end of August and has been happy to see more low-income New Yorkers from across the state start to receive the legal advice they need, at no cost, from volunteer attorneys. This new pro bono service is part of a national project conducted by the American Bar Association; NYSBA is the host organization for New York's participation in the project.

Free Legal Answers is an online platform for New York attorneys to provide limited scope legal advice to low-income New Yorkers. All attorneys and low-income individuals who meet the project's income eligibility standards may utilize this service in New York.

As of October 4, 2016, New York was one of 21 states actively participating in the national project. As of October 19, 2016, the program had received 23 questions and had 53 volunteer attorneys; these numbers are steadily growing. We launched our official public marketing campaign – to attorneys and the public – in October.

## **2. LEGISLATIVE ACTIVITIES**

### **STATE LEGISLATIVE ADVOCACY**

I am pleased to report that the Association's Legislative Program had success in a number of areas during the 2016 Regular Legislative Session. Set forth below are summaries of the legislation passed by the Legislature that NYSBA has supported, and the status of the bills as of the time that this report was printed.

#### **Indigent Criminal Defense Services – NYSBA Legislative Priority**

The Association's top legislative priority for 2016 involved improving the state's indigent criminal defense system. In the closing hours of the Regular Legislative Session, the Legislature passed a bill that would enhance the quality of public defense by providing sufficient resources to providers of mandated representation and appropriate state oversight of the indigent defense system.

In 2006, the State Commission on the Future of Indigent Defense Services, created by then-Chief Judge Judith S. Kaye, examined New York State's county-based indigent criminal defense system, and made the alarming finding that there is "a crisis in the delivery of defense services to the indigent throughout New York State and that the right to the effective assistance of counsel, guaranteed by both the federal and state constitutions, is not being provided to a large portion of those who are entitled to it."

In 2010, the state created the Office of Indigent Legal Services ("Office"). The New York State Bar Association viewed the creation of that Office as a significant step toward establishment of an independent indigent defense commission with broad powers to adopt standards, evaluate existing programs and service providers, and generally supervise the operation of New York's public defense system.

In the fall of 2014, the state agreed to settle a class-action lawsuit (*Hurrell-Harring v. State*) that accused New York State of failing to provide adequate legal defense for the poor in five counties (Suffolk County on Long Island and four upstate counties: Ontario, Onondaga, Schuyler and Washington). The settlement committed the state to paying for improvements to the indigent defense systems in those counties.

Throughout the 2016 legislative session, the Association urged the Legislature and the Governor to take another important step by enacting legislation to provide appropriate state funding. The bill passed by both houses would provide for state funding of public-defense services in all of New York's counties, phased-in over seven years. The Association has submitted to the Governor a Memorandum urging that he approve the legislation – S.8114.

In an opinion-editorial published in September in the Syracuse Post-Standard, I wrote that with passage of the bill, New York State has begun to take steps to assume responsibility for meeting the constitutional mandate. Because of this year's action by the Legislature, the governor is in a position to take the next critical step forward in resolving the systemic difficulties that have arisen since 1965.

The bill has not yet been delivered to the Governor for his consideration.

## **NYSBA Affirmative Legislative Proposals**

### *Trusts and Estates Law Section*

As a result of the efforts of the Trusts and Estates Law Section, two of the Association's Affirmative Legislative Proposals drafted by the Section were enacted into law this year:

- Chapter 262 of the Laws of 2016 amended Civil Practice Law and Rules 4503(b), to extend the statute's exception to the general protection of privileged communications in probate contests to contests concerning revocable trusts.
- Chapter 198 of the Laws of 2016 amended Article 17-A of the Surrogates Court Procedure Act to update and clarify the statute, replacing the term "Mental Retardation" with the term "Intellectual Disability."

### *Judicial Wellness*

The Association's Judicial Wellness Committee developed a proposal that will enhance the essential work of the judicial wellness and assistance committees operated by bar associations throughout New York State.

Section 499 of the Judiciary Law currently provides that communications between lawyers and members of lawyer assistance committees are privileged, and that the members of such committees are immune from liability when acting in good faith in related matters. This provision, which was enacted in 1993 based on a proposal by the New York State Bar Association, has been critically important to the success of the Association's Lawyer Assistance Program and similar programs of other bar associations.

The Association has been concerned that the members of its Judicial Wellness Committee are not adequately covered by current provisions of the Judiciary Law applicable to lawyer assistance committees. This proposal provides that the protection now covering lawyers being assisted by lawyer assistance committees would apply to judges seeking or obtaining help from judicial wellness or assistance committees throughout the state. One important difference between section 499 and the proposed new Article 22-A is that the privilege does not apply when a judge in the program may commit a substantial violation of the rules governing judicial conduct. This provision was included to protect the public.

This legislation was enacted as Chapter 356 of the Laws of 2016.

### *Revisions to the Non-Profit Revitalization Act*

The Non-Profit Revitalization Act ("NPRA") was one of the Association's legislative priorities in 2013 and was enacted in that year. The Committee on Not-For-Profit Corporations Law of the Business Law Section was integrally involved with that advocacy effort in 2013. The Committee has been active this year and strongly supported current legislation that would enhance compliance by not-for-profit corporations with the NPRA and thereby further improve governance and accountability in the not-for-profit sector. With the experience of the years since enactment of the NPRA, it has become apparent that there is ambiguity in provisions of the law as to what constitutes compliance in certain situations. This has unintentionally hindered the goal of full and effective board oversight.

Legislation to revise and enhance provisions of the 2013 law has passed both houses of the Legislature, but has not yet been delivered to the Governor for his consideration.

## **FEDERAL LEGISLATIVE ACTIVITY**

In my June report to you regarding the Association's advocacy efforts at the federal level, I provided details on several issues, including, funding for the federal judiciary, criminal justice reform, the "Dickey Amendment" and collection of gun-violence information, the so-called Lawsuit Abuse Reduction Act that would impair the courts' ability to manage cases before them, and functioning of the Supreme Court that the vacancy resulting from the death of Justice Antonin Scalia. The Association was very active on these and other issues during the period before Congress adjourned for its summer recess.

The Steering Committee on Legislative Priorities discussed possible advocacy efforts when the Congress reconvened in September after the recess. However, enactment of a Continuing Resolution to continue funding the US government after September 30 and election-year issues dominated the debate in Congress. Therefore, the Steering Committee decided to assess opportunities for the Association's advocacy activity after the elections in November.

### **3. ACTIVITIES AND EVENTS**

#### **ABA Annual Meeting**

The ABA held its Annual Meeting in San Francisco this past August. The ABA's House of Delegates addressed a number of issues of importance to our Association. Among these was an amendment to the Model Rules of Professional Conduct to prohibit lawyers, while participating in their practice, from knowingly engaging in harassment or discrimination. I have asked our Committee on Standards of Attorney Conduct to review this amendment and make a recommendation with respect to amending the New York Rules of Professional Conduct in this regard. A second resolution adopted by the House, co-sponsored by our Association, urges that communications between those contacting a referral service seeking a lawyer and the service be confidential.

Also at the Annual Meeting, the ABA Judicial Section presented retired Chief Judge Jonathan Lippman with the John Marshall Award, which recognizes individuals responsible for extraordinary improvement to the administration of justice in the categories of judicial independence, justice system reform or public awareness about the justice system.

#### **Mid-Atlantic Bar Conference**

Our Association was pleased to host this annual conference, which is attended by bar leaders from Delaware, the District of Columbia, Maryland, New Jersey, New York and Pennsylvania, at The Otesaga in Cooperstown. This conference provides an excellent opportunity to gather with bar leaders from neighboring states to exchange ideas and learn about other bar associations' work on issues of common interest.

#### **Partnership Conference**

Every other year, our Committee on Legal Aid hosts the Legal Assistance Partnership Conference in Albany. This conference brings together lawyers working in the public interest sector and pro bono service providers for continuing legal education programs and networking opportunities. This year's conference, titled "Justice Rising," was attended by over 550 lawyers and paralegals from across the state.

#### **Civil Legal Services Hearing**

In September, Chief Judge Janet DiFiore hosted a statewide public hearing at the Court of Appeals in Albany to evaluate the continuing unmet needs for civil legal services. I was honored to serve on the



hearing panel together with Chief Judge DiFiore, the four Presiding Justices of the Appellate Divisions, and Chief Administrative Judge Lawrence K. Marks.

### **Joint NYSBA/TNYBF Fundraising Effort**

In August, the Association and The Foundation established a fund to provide legal services for residents of flood-ravaged Louisiana, to assist them with issues such as insurance, landlord-tenant disputes, and qualifying for government assistance. To date the fund has raised over \$7,000 and the Foundation has sent these funds to the Louisiana Bar Foundation for flood relief efforts.

### **Section Meetings**

Many of our Sections have multi-day meetings in the summer and the fall, bringing together colleagues for educational programs and social gatherings. I was pleased to be able to attend the Family Law Section summer meeting in Manchester, Vermont; the Real Property Law Section summer meeting in Boston, Massachusetts; the Labor and Employment Law Section fall meeting in Washington, D.C.; the joint fall meeting of the Torts, Insurance and Compensation Law Section and the Trial Lawyers Section in New Orleans, Louisiana; and the International Section seasonal meeting in Paris, France. With respect to the latter, I was privileged to sign a Memorandum of Understanding between the Association and the Union Internationale des Avocats and international non-governmental organization.

### **Bar Association Events**

During the past months I have attended a number of bar association events, including the Schoharie County Bar Association Annual Meeting and Luncheon; the Ulster County Bar Association Dinner; the Women's Bar Association of the State of New York Western New York Chapter Installation Dinner; the Dominican Bar Association 13<sup>th</sup> Annual Scholarship Gala; the South Asian Bar Association of New York 10<sup>th</sup> Annual Leadership Awards Gala; the New York Magistrates Association Dinner; the Bronx County Bar Association 114<sup>th</sup> Officer Installation Dinner; the Puerto Rican Bar Association Scholarship Fund Gala; and the Onondaga County Bar Association Annual Dinner. In addition, together with Executive Director David Watson, I met with the leaders of The New York Bar Foundation, the New York City Bar Association, and the New York County Lawyers Association to discuss issues of mutual concern.

### **Annual Meeting**

The Association's Annual Meeting will take place January 23-28, 2017 at the New York Hilton Midtown in New York City. The Executive Committee will meet on Thursday, January 26 and the House of Delegates will meet on Friday, January 27. I look forward to seeing you there.

*Claire P. Gutekunst*

**HOUSE OF DELEGATES**  
**Agenda Item #3**

**ELECTION OF 2017-2018**  
**OFFICERS AND MEMBERS-AT-LARGE**  
**OF THE EXECUTIVE COMMITTEE**

**PRESIDENT-ELECT**

Michael Miller, New York City

**SECRETARY**

Sherry Levin Wallach, Cross River

**TREASURER**

Scott M. Karson, Melville

**DISTRICT VICE-PRESIDENTS**

**FIRST:**

Taa R. Grays, New York City  
TBD

**SEVENTH:**

David H. Tennant, Rochester

**SECOND:**

Domenick Napoletano, Brooklyn

**EIGHTH:**

Norman P. Effman, Warsaw

**THIRD:**

Henry M. Greenberg, Albany

**NINTH:**

Michael L. Fox, Huguenot

**FOURTH:**

Matthew R. Coseo, Ballston Spa

**TENTH:**

Peter H. Levy, Jericho

**FIFTH:**

Stuart J. LaRose, Syracuse

**ELEVENTH:**

Karina E. Alomar, Ridgewood

**SIXTH:**

Alyssa M. Barreiro, Ithaca

**TWELFTH:**

Steven E. Millon, New York City

**THIRTEENTH:**

Jonathan B. Behrins, Staten Island

**AT-LARGE MEMBERS OF THE EXECUTIVE COMMITTEE**

Margaret J. Finerty, New York City  
William T. Russell, Jr., New York City  
Richard M. Gutierrez, Forest Hills (Diversity Seat)  
Andre R. Jaglom, New York City (Section Representative)  
Sarah E. Gold, Albany (Young Lawyer Representative)

**NOMINATION BY PETITION**

**VICE PRESIDENT, FIRST JUDICIAL DISTRICT**

Carol A. Sigmond, New York City



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #7

**REQUESTED ACTION:** Approval of the report and recommendations of the Committee on the New York State Constitution.

In July 2015, then-NYSBA President David P. Miranda appointed the Committee on the New York State Constitution to serve as a resource on issues or matters relating to the State Constitution; to make recommendations regarding possible constitutional amendments; to provide advice regarding the upcoming 2017 referendum on whether to convene a constitutional convention; and to promote initiatives to educate the legal community and the public about the State Constitution. To date, the committee has presented reports with respect to the establishment of a preparatory commission on a constitutional convention; constitutional home rule; and Article XIV, the conservation article of the State Constitution. In this report, the committee has studied Article VI, the Judiciary Article of the State Constitution.

The Judiciary Article is the basis for the State court system's operating structure, and governs issues such as the number and jurisdiction of trial and appellate courts; administration and finance of the court system; the number of judges; the manner of judicial selection and discipline; and which courts have jurisdiction over particular matters. The report observes that past efforts to restructure and modernize the court system have not been successful, resulting in a complex, costly and inefficient court structure. Noting that the New York State Bar Association has previously taken positions supporting amendment or reform of this Article, this report summarizes – but does not re-assess – those positions.

Part I of the report reviews the background of the committee and its work in developing this report. Part II provides an overview and history of the Judiciary Article, including the structure of the Unified Court System and proposals for restructuring. Part III sets forth issues that the committee believes would be appropriate for consideration in connection with a constitutional convention, as follows:

- Court reorganization;
- The creation of a Fifth Department;
- Selection of judges;

- Judicial retirement age;
- Limited number of Supreme Court Justices;
- The status of New York City Housing Court Judges;
- Terms for trial-level courts;
- Family Court jurisdiction;
- Town and Village Justice Courts;
- Court budgets;
- Commission on Judicial Conduct;
- Participation of judges at a Constitutional Convention;
- The length, style, and outdated portions of the Judiciary Article.

The report was published in the Reports Group Community in December 2016. The Commercial and Federal Litigation Section has submitted a report (attached) outlining concerns specific to the resolution of commercial disputes and recommending adoption of the report.

The report will be presented by Henry M. Greenberg, chair of the Committee on the New York State Constitution.

Report and Recommendations of the  
**New York State Bar Association Committee on the New  
York State Constitution**

**The Judiciary Article of the New York State Constitution  
- Opportunities to Restructure and Modernize  
the New York Courts**



The Committee is solely responsible for the contents of this Report and the recommendations contained herein. Unless and until adopted in whole or in part by the Executive Committee or the House of Delegates of the New York State Bar Association, no part of the Report should be attributed to the Committee or the Association.

December 12, 2016

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## **Membership of the New York State Bar Association's Committee on the New York State Constitution**

### **CHAIR:**

Henry M. Greenberg, Esq.

### **MEMBERS:**

Mark H. Alcott, Esq.

Martin Bienstock, Esq.

Hon. Cheryl E. Chambers

Hon. Carmen Beauchamp Ciparick

Linda Jane Clark, Esq.

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*“There shall be a unified court system for the state.”*

*New York State Constitution Art. VI, § 1*

### **INTRODUCTION AND EXECUTIVE SUMMARY**

Article VI of the New York State Constitution, known as the Judiciary Article, creates the structure and organization of the Unified Court System in New York. It controls a wide range of important issues regarding New York’s Judiciary, such as: a) the number and jurisdiction of our trial and appellate courts, and the interrelationships between those courts and cases that are filed in them; b) how our State’s courts are managed, financed and administered; c) the number of judges of each of the State’s courts; d) how New York’s judges are selected and disciplined, their eligibility for office, their terms, their retirement ages and how their compensation is fixed; and e) which particular courts the families, individuals, corporations, non-profits and government agencies who have disputes must turn to for judicial resolution, which sometimes results in the need to turn to multiple courthouses.

In short, the Judiciary Article sets out the operating structure for our State’s sprawling court system – ranging from:

- Town and Village Courts upstate;
- To District Courts on Long Island;
- To the Courts of New York City;
- To other City Courts around the State;
- To County, Family and Surrogate’s Courts;
- To the Supreme Courts and Court of Claims across the State;
- Up to the four Appellate Divisions; and
- Ultimately, to our State’s highest court, the Court of Appeals.

But there is much more than that in Article VI. In fact, the Judiciary Article contains approximately 16,000 words – representing almost 1/3 of the entire State Constitution. Because of the manner in which the State Constitution was drafted and amended – spanning a period of more than two centuries, the Judiciary Article continues to contain various anachronistic or superseded concepts. These include: a) a mandate that, when called on to make a placement of a child, courts will place children in an “institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child”; and b) a provision specifying that there shall be only 11 Judicial Districts of the Unified Court System and laying out which counties fall into which District, even though the Legislature has since provided for 13 such Districts.

For various reasons, decades have gone by without any successful effort to restructure and modernize the Constitutional underpinnings of our State’s court system. The result has been a Unified Court System that has 11 different trial courts, resulting in an overly complex, unduly costly and unnecessarily inefficient court structure.

The New York State Constitution provides that the question “[s]hall there be a convention to revise the constitution and amend the same” will be presented to voters every twenty years.<sup>1</sup> The next such vote will occur on November 7, 2017.

In July of 2015, the then President of the New York State Bar Association (hereinafter “New York State Bar” or “State Bar”), David P. Miranda, created a Committee on the New York State Constitution to: a) serve as a resource for the State Bar on issues and matters relating to or affecting the State Constitution; b) make recommendations regarding potential constitutional amendments; c) provide advice and counsel regarding the mandatory referendum in 2017 on whether to convene a State Constitutional Convention; and d) promote initiatives designed to educate

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<sup>1</sup> N.Y. Const. art. XIX, § 2.

the legal community and the public about the State Constitution.<sup>2</sup> Thereafter, that Committee created a Subcommittee to analyze Article VI of the State Constitution and its provisions affecting New York’s Judiciary.<sup>3</sup>

Perhaps due to the cumbersomeness, complexity and length of Article VI, as well as its importance to members of the New York State Bar, the State Bar has long taken positions supporting amendment or reform of various provisions of this Article.<sup>4</sup> As a result, the vast majority of the issues addressed in this Report are already the subjects of established State Bar policy that will be summarized – but not re-assessed – in this Report.

What follows is an analysis of Article VI and a discussion of issues that potentially could be addressed at a future Constitutional Convention should one be held. This assessment is not a determination as to whether changes should be made to the Judiciary Article through a Constitutional

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<sup>2</sup> N.Y. State Bar Assn. Comm. on the N.Y. State Const., Report and Recommendations Concerning the Establishment of a Preparatory State Comm’n on a Constitutional Convention (2015), at 4, *available at* <http://www.nysba.org/nysconstitutionreport/>.

<sup>3</sup> The positions taken herein have been reached by the Committee on the New York State Constitution (“Committee”) as an entity and should not be attributed to any particular member of the Committee or to any groups, committees, or affiliations associated with a member. As an example, Hon. Alan D. Scheinkman, a member of the Committee, has been named by Chief Judge Janet DiFiore to serve as Co-Chair of the Judicial Task Force on the New York State Constitution. In addition, the work of the Committee was ably assisted by the input and historical knowledge of Marc Bloustein, who is First Deputy Counsel of the Office of Court Administration and a counsel to the Chief Judge’s Task Force. Any positions asserted in this report are not necessarily positions taken by Justice Scheinkman or the Judicial Task Force.

<sup>4</sup> Other groups, such as the New York City Bar Association, have noted that “[t]he need for constitutional revision of Article VI is great (whether accomplished by constitutional convention or legislative amendment), and the risk of adverse change in this area is small.” New York City Bar Assn., Report of the Task Force on the New York State Constitutional Convention (dated June 1997), at 595, *available at* <http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>.

Convention – or what particular changes should be made from the many available options for reform of the Unified Court System.

This Report is divided into four sections. Part I summarizes the background of the State Bar’s Committee on the New York State Constitution and the issuance of this Report. Part II contains an overview of the current Judiciary Article of the State Constitution and summarizes the history of that Article in New York, including its key provisions in prior versions of the State Constitution. Part III discusses the issues involving the Judiciary Article that the Committee deemed to be most deserving of consideration for reform or revision. Finally, Part IV sets out the conclusions of the Committee’s Report.

## **I. BACKGROUND OF THE REPORT**

### **A. Background on the State Bar’s Committee on the New York State Constitution**

On July 24, 2015, then State Bar President David P. Miranda announced the creation of the Committee on the New York State Constitution. This Committee has identified various issues that would be worthy of consideration should a Constitutional Convention be convened in New York.

The Committee has already accomplished a great deal in the nearly 17-month period since its inception. On October 8, 2015, the Committee issued a report entitled “The Establishment of a Preparatory State Commission on a Constitutional Convention.”<sup>5</sup> That Report was approved unanimously by the State Bar House of Delegates on November 7, 2015.<sup>6</sup> A

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<sup>5</sup> N.Y. State Bar Assn. Comm. on the N.Y. State Const., Report and Recommendations Concerning the Establishment of a Preparatory State Comm’n on a Constitutional Convention (2015), *available at* <http://www.nysba.org/nysconstitutionreport/>.

<sup>6</sup> Press Release, N.Y. State Bar Assn., New York State Bar Association Calls on State Government to Prepare Now for Statewide Vote on State Constitution in 2017 (Nov. 13, 2015), *available at* <http://www.nysba.org/NYSConstitutionVote/>.

second Report concerning Constitutional Home Rule was issued on March 10, 2016. That Report was approved by the House of Delegates on April 2, 2016. Another Report, concerning the Environmental Conservation Article of New York’s Constitution, was issued on August 3, 2016. That Report was approved by the House of Delegates on November 5, 2016.<sup>7</sup>

**B. The Subcommittee’s Work Regarding the Judiciary Article**

The Committee’s Subcommittee on the Judiciary Article sought to consider the views of multiple interest groups both within and outside the Judiciary. For example, the Subcommittee invited members of the Judiciary who represent New York City and/or statewide judicial organizations to share their views on the Judiciary Article.<sup>8</sup>

- The Subcommittee held its first meeting on May 12, 2016. At that meeting, then President David Miranda addressed the Subcommittee and reminded its members of the importance of the Judiciary Article and the work they were about to undertake.
- Chief Administrative Judge Lawrence K. Marks addressed a June 2, 2016 meeting of the full Committee on the New York State Constitution. At that meeting, Judge Marks discussed his opinions on topics such as the utility of court consolidation as it impacts the administration of justice, the problems caused for the court system as a result of the Constitution’s

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<sup>7</sup> See N.Y. State Bar Assn. Comm. on the N.Y. State Const., Report and Recommendations Concerning the Conservation Article in the State Constitution (Article XIV) (2016), *available at* <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=68757>.

<sup>8</sup> Various judicial organizations declined invitations to address the Subcommittee, whether due to scheduling or other concerns. The Subcommittee was informed that the Franklin Williams Commission, Judicial Friends, the Latino Judges Association, and the New York State Family Court Judges Association have decided not to take positions at this time on a potential Convention as it relates to the Judiciary Article. The views of those groups that did address the Subcommittee are summarized in this Section of the Report.

cap on the number of Supreme Court justices, and the need for improvements in the Town and Village Courts.

- The Subcommittee again met on June 15, 2016 and heard comments from Hon. Jonathan Lippman, former Chief Judge of the State of New York. Chief Judge Lippman emphasized the importance of a convention as a means to accomplish some form of court consolidation. When discussing judicial selection, Chief Judge Lippman noted that any form of selection is only as good as the entity or entities doing the selecting. He also noted the potential benefits to be achieved if a Fifth Department of the Appellate Division were to be created. Consistent with his support for the 2013 judicial retirement age proposal, discussed in Section II.b.12 below, he explained that raising and unifying the retirement age for all judges could be a productive use of a Convention.
- The Subcommittee's next meeting was held on July 21, 2016. The meeting began with a discussion with Michael A. Cardozo, a former New York City Corporation Counsel who was involved in the 1977 court reforms discussed in Section II.b.9 below. Cardozo highlighted, *inter alia*, how a Constitutional Convention could be a useful springboard for court reform in New York. He advocated for merger in place, which would combine New York's trial courts into a single court of original jurisdiction. This single court would share a retirement age of 76, including two-year re-certifications. In addition, a Fifth Department could be created, and the Justices of the Appellate Division could be chosen from among all the judges in this new, unified trial court.
- At its July 21<sup>st</sup> meeting, the Subcommittee also was addressed by Hon. Paul Feinman of the Appellate Division, First Department, on behalf of the statewide Association of Supreme Court Justices. Justice Feinman is a Past Chair of the Judicial Section of the New York State Bar. Justice Feinman indicated that the Association of Supreme Court Justices supports the current elective system for Supreme Court Justices and supports restricting eligibility for the Appellate Division to Supreme

Court Justices. He agreed with creating a Fifth Department to cure some of the caseload difficulties experienced in the Second Department.

- The Subcommittee also met on October 25, 2016 to discuss the Report and receive an update on the status of potential speakers.
- On November 8, 2016, the Subcommittee met and heard from Hon. Sarah Cooper, President of the New York City Family Court Judges Association, and Hon. Erik Pitchal, a New York City Family Court Judge who is assigned to Kings County. Judges Cooper and Pitchal discussed the operations of the Family Court. Although their Association does not have a formal position on a Constitutional Convention, in a poll about potential issues, their members expressed a desire to bring parity to the Judges of the Family Court in New York City. Such parity could cover a variety of issues, including: judicial pay, retirement age, term in office and other aspects of a Family Court judgeship. They supported consolidating the Family Courts with the Supreme Court and expanding Family Court jurisdiction to include divorces and certain criminal matters.

## **II. OVERVIEW OF THE JUDICIARY ARTICLE AND ITS HISTORY IN THE STATE CONSTITUTION**

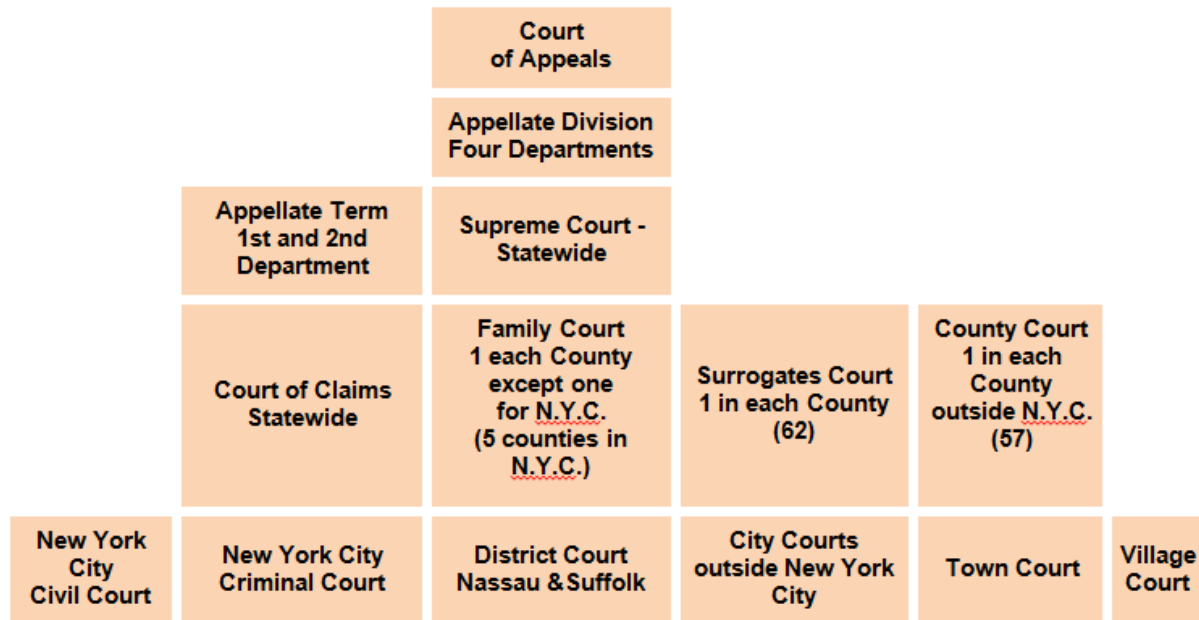
### **A. Overview of the Current Judiciary Article**

Article VI as it exists today establishes a “unified court system”<sup>9</sup> for the State of New York. This court system is comprised of a) at the trial level: the Supreme Court, the Court of Claims, the Family Court, the Surrogate’s Court, New York City-specific courts, such as the New York City Criminal Court and the New York City Civil Court, County Courts outside New York City, District Courts in Nassau and Suffolk counties, various City Courts, and Town and Village Justice Courts around the State; and b) three appellate-level courts: the four Appellate Divisions of the

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<sup>9</sup> N.Y. Const. art. VI, § 1.

Supreme Court, which are New York’s principal, intermediate appellate courts; two Appellate Terms in the New York City metropolitan area; and finally, the Court of Appeals, which is the State’s highest court.<sup>10</sup> As shown in a chart on the Unified Court System’s website,<sup>11</sup> the New York Courts are organized as follows:



The Unified Court System is led by its Chief Judge, who is also a member of the Court of Appeals, and by a Chief Administrator, who need not be but typically is a judge. The State is divided into four Departments of the Appellate Division of the Supreme Court and thirteen Judicial Districts. Each Department is headed by a Presiding Justice. The Chief Judge and the four Presiding Justices of the Appellate Divisions together form the Administrative Board of the Unified Court System.

Article VI prescribes the jurisdiction for each of New York’s courts and establishes the criteria governing how judges are selected, the duration

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<sup>10</sup> All of these courts, except for the Appellate Terms, are expressly mentioned in Section 1 of Article VI; the Appellate Terms are branches of the Supreme Court. *See* N.Y. Const. art. VI, § 8.

<sup>11</sup> <http://www.courts.state.ny.us/ctapps/outline.htm>.



of their respective terms and how their compensation is set.<sup>12</sup> Through a Commission on Judicial Conduct and other provisions, the State Constitution provides for the discipline and removal of judges where necessary.

Article VI provides the framework that defines today’s Judiciary and both its structure and operations in New York. Within that framework, the Legislature has enacted a number of laws – such as the Judiciary Law and various court and procedural acts – which flesh out the details of this system.

Despite its name, the Unified Court System is anything but – with its patchwork quilt of 11 different trial-level courts and multiple levels of appellate courts. As a result, it has been observed that “[n]o state in the nation has a more complex court structure than New York,” with resulting cost and inefficiency.<sup>13</sup>

As discussed below, a Constitutional Convention, if one were held, would provide an opportunity to re-examine the structure of our Unified Court System and to bring long overdue change that could modernize, simplify and bring greater efficiency to the operations of New York’s Judiciary.

## **B. History of the Judiciary Article**

Today’s Judiciary Article is the culmination of a long history of statutes and previous versions of the State’s Constitution. The initial New York State Constitution was drafted over the course of 1776 and 1777 and was promulgated in 1777. Since then, there have been eight other constitutional conventions held in New York in 1801, 1821 (ratified in

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<sup>12</sup> Article VI, § 25(a) provides that judges’ compensation “shall be established by law and shall not be diminished during the term of office....” *See Maron v. Silver*, 14 N.Y.3d 230 (2010).

<sup>13</sup> The Committee for Modern Courts, “Court Simplification in New York State: Budgetary Savings and Economic Efficiencies”, at 1 (2012), *available at* <http://moderncourts.org/files/2013/10/CourtSimplificationinNewYorkState73112.pdf>.

1822), 1846, 1867-68, 1894, 1915, 1938, and 1967. Several additional constitutional commissions sought to revise and rewrite specific portions of the State Constitution. These conventions and commissions have produced several altogether new State Constitutions and many amendments to existing constitutional provisions.

### 1. The Colonial Era

During the Colonial era, New York had a primarily English-based court system, with some Dutch antecedents. In 1683, following the 1674 Treaty of Westminster, the Assembly in New York passed a bill creating a court of law called the Court of Oyer and Terminer and a court with equity jurisdiction called the Court of Chancery.<sup>14</sup> In addition, there was a Court of Sessions in each county of New York<sup>15</sup> and a Petty Court in each town.<sup>16</sup>

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<sup>14</sup> This split between law and equity jurisdiction continues to have relevance today. Article VI, § 7 (specifying that the jurisdiction of New York’s Supreme Court is to encompass law and equity). *See, e.g., IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132 (2009) (applying different statutes of limitations to determine the timeliness of a claim depending on whether the claim is legal or equitable in nature); *see also Waldo v. Schmidt*, 200 N.Y. 199 (1910).

<sup>15</sup> *See* <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-sessions-1684.html>.

<sup>16</sup> *See* <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-petty-1684.html>. The law of England applicable in the Colonial era still has implications for today’s legal system. As the Court of Appeals has explained: “The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, become in fact the common law rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New-York, by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province.” *Melcher v. Greenberg Traurig*, 23 N.Y.3d 10, 14-15 (2014) (quoting *Bogardus v. Trinity Church*, 4 Paige Ch. 178, 198 (1833)). For example, New York’s Judiciary Law § 478 has been traced by the Court of Appeals to the “first Statute of Westminster . . . adopted by the Parliament summoned by King Edward I of England in 1275.” *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 12 (2009).

In 1691, a Supreme Court of Judicature was established in New York.<sup>17</sup> At that time, there also was a Court of Common Pleas,<sup>18</sup> Courts of Sessions<sup>19</sup> and Justice of the Peace Courts.<sup>20</sup>

## 2. State Constitution of 1777<sup>21</sup>

New York's first State Constitution, which was promulgated in 1777, did not contain an article on the Judiciary. Instead, the initial State Constitution combined aspects of the Declaration of Independence with other provisions typical of a state constitution of its day. That original version of New York's Constitution: a) continued the colonial office of Supreme Court Judge, b) created the new judicial office of Chancellor, c) provided that all judicial officers be selected by a Council of Appointment, and d) established a retirement age of 60 years old for the Chancellor, for the other Judges of the Supreme Court and for the first judge of each County Court in every county.<sup>22</sup> The 1777 Constitution barred the Chancellor and Judges of the Supreme Court from holding any other office except for Delegate to the general Congress "upon special occasions."<sup>23</sup>

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<sup>17</sup> See <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-supreme.html>.

<sup>18</sup> See <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-common-pleas.html>.

<sup>19</sup> See <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-quarter-sessions.html>.

<sup>20</sup> See <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-era-01-court-justice-peace.html>.

<sup>21</sup> Available at [http://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_1777-NY-Constitution.pdf](http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1777-NY-Constitution.pdf).

<sup>22</sup> N.Y. Const. art. XXIV (1777).

<sup>23</sup> N.Y. Const. art. XXV (1777).

A Court for the Trial of Impeachments and Correction of Errors, commonly known as the Court of Errors, was also created as a body to hear appeals from certain cases in the Supreme Court.<sup>24</sup>

Otherwise, the 1777 State Constitution provided little in the way of specifics about the structure and operations of New York's Judiciary.

### 3. State Constitution of 1821<sup>25</sup>

Our State's second Constitution was considerably more specific with respect to the Judiciary than the 1777 version. It established a court system with: a) a Supreme Court consisting of a Chief Justice and two other Justices<sup>26</sup> and b) judicial circuits with a Circuit Judge appointed in each and with the same tenure as Justices of the Supreme Court.<sup>27</sup> The Supreme Court was granted jurisdiction over some appeals from Circuit Courts, and the Court for the Correction of Errors had the final word in appellate matters. This new Constitution also continued the office of Chancellor,<sup>28</sup> and provided that the Governor was to nominate and appoint all judicial officers, except justices of the peace.<sup>29</sup>

Nonetheless, the 1821 version of the Constitution contained nothing similar to our State's current form of Article VI.<sup>30</sup>

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<sup>24</sup> N.Y. Const. art. XXXII (1777).

<sup>25</sup> Available at [http://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_1821-NY-Constitution.pdf](http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1821-NY-Constitution.pdf). The Historical Society of the New York Courts and most other sources refer to it as the Constitution of 1821, as it was drafted in and dated that year. However, because the Constitution was voted on and went into effect the next year, it is also "often cited as the Constitution of 1822." *Id.*

<sup>26</sup> N.Y. Const. art. V, § 4 (1821).

<sup>27</sup> N.Y. Const. art. V, § 5 (1821).

<sup>28</sup> N.Y. Const. art. V, § 3, 7 (1821).

<sup>29</sup> N.Y. Const. art. IV, § 7 (1821).

<sup>30</sup> The first judiciary-related amendment was passed in 1845, which established a procedure for removing judicial officers.

#### 4. State Constitution of 1846<sup>31</sup>

Article VI of today's State Constitution had its genesis in the framework found in the State Constitution that was ratified in 1846.

The 1846 State Constitution abolished the Court of Chancery and the position of Chancellor, and provided for “a supreme court, having general jurisdiction in law and equity.”<sup>32</sup> For the first time, a Court of Appeals was established, consisting of eight Judges (four elected for an eight-year term, and four chosen from the “class of justices of the supreme court with the shortest time to serve.”).<sup>33</sup> The elected Judges of the Court of Appeals were chosen by the “electors of the state,” whereas the Supreme Court Justices were to be elected by the electors of the various judicial districts.<sup>34</sup> The Constitution directed the Legislature to develop procedures for the selection of a Chief Judge from among the four elected judges and for selecting the Supreme Court Justices.<sup>35</sup> In the event that a judicial vacancy arose before a term ended, the Governor was charged with filling the vacancy until the next election took place, at which time a judge would be elected for the remainder of the term.<sup>36</sup> With the establishment of the Court of Appeals, the Court for the Trial of Impeachments and the Correction of Errors was abolished.

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<sup>31</sup> Available at [http://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_1846-NY-Constitution.pdf](http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1846-NY-Constitution.pdf).

<sup>32</sup> N.Y. Const. art. VI, § 3 (1846).

<sup>33</sup> N.Y. Const. art. VI, § 2 (1846). For a history of the Court of Appeals, see Francis Bergan, *The History of the New York Court of Appeals, 1847-1932* (1985) and Bernard S. Meyer *et al.*, *The History of the New York Court of Appeals, 1932-2003* (2006).

<sup>34</sup> N.Y. Const. art. VI, § 12 (1846).

<sup>35</sup> N.Y. Const. art. VI, §§ 2, 12 (1846).

<sup>36</sup> N.Y. Const. art. VI, § 13 (1846).

The 1846 State Constitution established eight Judicial Districts across the State.<sup>37</sup> The First District was to be New York City, while the others were to be based on groupings of counties, with those Districts to be as compact and close in population as possible.<sup>38</sup> The Judicial Districts could be restructured at the first session after the return of every state enumeration,<sup>39</sup> but no more than one District could be eliminated at any one time. Each District was to have four justices, but eliminating a District would not remove a judge from office.<sup>40</sup>

Moreover, this Constitution included a section guaranteeing judicial compensation,<sup>41</sup> although the procedures for setting the amount of such compensation were left to the Legislature. In addition, Judges were directed not to hold “any other office or public trust.”<sup>42</sup>

The 1846 Constitution also established a four-year term for County Court Judges.<sup>43</sup>

#### 5. 1869-82 Amendments to Article VI<sup>44</sup>

The State’s Constitutional Convention held in 1867-68 was largely a failure. The sole proposition of the 1867-1868 State Constitutional Convention that was approved by the people was a new Judiciary Article. The people by a vote of 247,240 to 240,442 endorsed a new Judiciary Article VI to replace the Judiciary Article adopted in 1846. Elements of this new Article VI included: a) an authorization for the election of seven judges

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<sup>37</sup> N.Y. Const. art. VI, § 4 (1846).

<sup>38</sup> *Id.*

<sup>39</sup> N.Y. Const. art. VI, § 16 (1846).

<sup>40</sup> *Id.*

<sup>41</sup> N.Y. Const. art. VI, § 7 (1846).

<sup>42</sup> N.Y. Const. art. VI, § 8 (1846).

<sup>43</sup> N.Y. Const. art. VI, § 14 (1846).

<sup>44</sup> Available at [http://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_Votes-Cast-Conventions-Amendments.pdf](http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf).

of the Court of Appeals, each for a term of fourteen years;<sup>45</sup> b) a provision for a Commission on Appeals to aid the Court of Appeals in the disposition of its backlog;<sup>46</sup> c) the establishment of 14-year terms of office for Justices of the Supreme Court, and six-year terms of office for County Judges;<sup>47</sup> d) the establishment of age 70 as the mandatory retirement age for judges;<sup>48</sup> and e) a provision for two 1873 voter referenda on the questions of whether judges of the Court of Appeals and of certain lower courts, respectively, should be appointed.<sup>49</sup>

Eight additional amendments were put to a vote during the 25 years between the 1869 amendments and a new State Constitution that was adopted in 1894. Successful amendments during that period included an 1872 amendment relating to the Commission of Appeals<sup>50</sup> and an 1882 amendment creating a Fifth Judicial Department.

#### 6. State Constitution of 1894<sup>51</sup>

The 1894 State Constitution introduced many aspects of the framework found in today's Judiciary in New York.

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<sup>45</sup> N.Y. Const. art. VI, § 2 (1869).

<sup>46</sup> N.Y. Const. art. VI, § 4 (1869).

<sup>47</sup> N.Y. Const. art. VI, §§ 13, 15 (1869).

<sup>48</sup> N.Y. Const. art. VI, § 13 (1869).

<sup>49</sup> N.Y. Const. art. VI, § 17 (1869).

<sup>50</sup> The Commission of Appeals, originally created through an 1869 constitutional amendment, was given jurisdiction over the remaining appeals pending in the New York courts prior to 1870 in order to allow the newly-created Court of Appeals to begin its work with a new docket. During this time period, both the Commission and the Court of Appeals were co-equal "highest" courts. Although the Commission was supposed to end in 1873, the 1872 amendment extended the Commission of Appeals' jurisdiction for another two-year period.

<sup>51</sup> Available at [http://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_1894-NY-Constitution.pdf](http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1894-NY-Constitution.pdf).

Under the 1894 Constitution, the Judges of the Court of Appeals – chosen by state electors and serving 14-year terms – were continued as provided under the 1869 amendments.<sup>52</sup> The Court’s jurisdiction was limited to questions of law, except for cases involving a judgment of death.<sup>53</sup> Appeals of right to the Court of Appeals – aside from judgments of death – were confined to certain appeals from final judgments or orders, or appeals from orders granting new trials in which the appellant was willing to stipulate that an affirmance would result in a final judgment against the appellant.<sup>54</sup>

The 1894 Constitution continued the pre-existing judicial district system from the 1846 Constitution.<sup>55</sup> Those districts were combined into four Departments – similar to what we have today. The First Department was comprised of New York City, including New York County. The Legislature was instructed to create the other three Departments by grouping counties into Departments which were approximately equal in population.<sup>56</sup> The Legislature was prohibited from creating additional departments.<sup>57</sup>

The court system was to include a Supreme Court having general jurisdiction.<sup>58</sup> Each Department was to have an Appellate Division, with seven Justices in the First Department and five Justices in each of the other three Departments.<sup>59</sup> The Justices of the Appellate Division were to be

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<sup>52</sup> N.Y. Const. art. VI, § 7.

<sup>53</sup> N.Y. Const. art. VI, § 9.

<sup>54</sup> *Id.* This provision is akin to a current form of appeal to the Court of Appeals under CPLR 5601, involving a stipulation to “judgment absolute.”

<sup>55</sup> N.Y. Const. art. VI, § 1.

<sup>56</sup> N.Y. Const. art. VI, § 2.

<sup>57</sup> *Id.*

<sup>58</sup> N.Y. Const. art. VI, § 1.

<sup>59</sup> N.Y. Const. art. VI, § 2.



designated by the Governor from the pool of Supreme Court Justices<sup>60</sup> – similar to the manner of selecting justices for today’s Appellate Divisions.

Supreme Court Justices were to be elected to their positions. In addition, the then-current Justices and specified other judges were to be transferred into the Supreme Court as a result of this restructuring of the courts.<sup>61</sup> These Justices would serve 14-year terms.<sup>62</sup>

Various lower level courts, such as the Superior Court of the City of New York, the Superior Court of Buffalo, and the City Court of Brooklyn were abolished, with pending actions and judges being transferred to the Supreme Court.<sup>63</sup>

Additional provisions of the 1894 Constitution included guaranteeing that judges would be paid and continuing the judicial retirement age at 70.<sup>64</sup> Other provisions continued the County<sup>65</sup> and Surrogate’s<sup>66</sup> Courts.

Multiple amendments to the 1894 Constitution were put to a vote in subsequent years, including: a) several failed amendments to increase judicial salaries, b) a failed amendment to create a new judicial district, and c) successful amendments in 1921, which established the Children’s Courts and the Domestic Relations Courts.<sup>67</sup>

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<sup>60</sup> N.Y. Const. art. VI, § 2.

<sup>61</sup> N.Y. Const. art. VI, § 1.

<sup>62</sup> N.Y. Const. art. VI, § 4. Thereafter, in 1897, the Legislature changed the name of the Board of Claims to the Court of Claims, but that Court did not then have status in Article VI. The Legislature would again replace the Court of Claims with the Board of Claims in 1911, only to revive the Court of Claims again in 1915.

<sup>63</sup> N.Y. Const. art. VI, § 5.

<sup>64</sup> N.Y. Const. art. VI, § 12.

<sup>65</sup> N.Y. Const. art. VI, § 14.

<sup>66</sup> N.Y. Const. art. VI, § 15.

<sup>67</sup> The Court of Domestic Relations is the original predecessor to the Family Court system in New York. The Children’s Courts were a statewide court system similar to the Children’s Part, previously a section of the Court of Special Sessions, in New York City.

## 7. Constitutional Convention of 1915

Although the voters rejected the new Constitution that was proposed as a result of the 1915 Convention, its provisions affecting the Judiciary Article were largely incorporated in a new Article VI that the voters approved in 1925. This new Article VI continued many of the basic elements of the Judiciary as had been adopted in the 1894 Constitution, but it added some new matters, including:

- 1) establishing the Appellate Term as a permanent constitutional court;
- 2) increasing the number of permanent seats on the Appellate Division, Second Department to seven;
- 3) modifying the Court of Appeals' jurisdiction; and
- 4) changing the ratio that governed the maximum number of Supreme Court Justice positions that the Legislature could create in a particular Judicial District.

## 8. Constitutional Amendments of 1938<sup>68</sup>

In 1938, another Constitutional Convention was held. Although the outcome of the Convention was considered to be a new Constitution, the voters only approved six of the proposed 57 amendments.

As a result of the amendments that did pass, Article VI of the 1938 State Constitution:

- 1) continued the Court of Appeals, with seven Judges chosen by state electors;<sup>69</sup>

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<sup>68</sup> Available at [http://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_1938-NY-Constitution.pdf](http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_1938-NY-Constitution.pdf).

<sup>69</sup> N.Y. Const. art. VI, § 5 (1938).

- 2) Maintained limitations on the Court of Appeals' jurisdiction as to certain appeals as of right from final judgments and orders as well as judgments of death;<sup>70</sup>
- 3) called for four Judicial Departments, each with an Appellate Division, and made no provision for the creation of any additional department;<sup>71</sup>
- 4) maintained the four Appellate Divisions of the Supreme Court, each with Justices designated by the Governor from among the Supreme Court Justices in the State, and required that the Presiding Justice and a majority of the Justices designated in any Appellate Division be residents of that department;<sup>72</sup>
- 5) established a general jurisdiction Supreme Court, with Justices elected by Judicial District;<sup>73</sup>
- 6) capped the number of Supreme Court Justices in any Judicial District at one Justice per each sixty thousand or fraction over thirty-five thousand persons within that District, as determined by the last federal census or state enumeration;<sup>74</sup>
- 7) authorized the First and Second Departments to create Appellate Terms "to hear and determine all appeals now or

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<sup>70</sup> N.Y. Const. art. VI, § 7 (1938).

<sup>71</sup> N.Y. Const. art. VI, § 2 (1938).

<sup>72</sup> *Id.*

<sup>73</sup> N.Y. Const. art. VI, § 1 (1938). Although a proposed amendment to establish the Court of Claims as an Article VI court failed in 1938, thereafter, in 1949, the electorate approved the creation of the Court of Claims as an Article VI court under the State Constitution. N.Y. Const. art. VI, § 23 (1949). *See Easley v. N.Y.S. Thruway Auth.*, 1 N.Y.2d 375 (1956) (sustaining validity of a statute passed under Section 23 of Article VI with regard to Court of Claims jurisdiction over claims against the Thruway Authority); *see also* [http://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_Votes-Cast-Conventions-Amendments.pdf](http://www.nycourts.gov/history/legal-history-new-york/documents/Publications_Votes-Cast-Conventions-Amendments.pdf).

<sup>74</sup> N.Y. Const. art. VI, § 1 (1938).

hereafter authorized by law to be taken to the supreme court or the appellate division other than appeals from the supreme court, a surrogate's court, or the court of general sessions of the city of New York[.]" with Appellate Term Justices to be selected by the Appellate Division;<sup>75</sup> and

- 8) set terms of judicial office at: a) 14-year terms for Judges of the Court of Appeals<sup>76</sup> and Supreme Court Justices;<sup>77</sup> b) the remainder of their term in office as a Supreme Court Justice as the term for the Presiding Justice of each Appellate Division;<sup>78</sup> and c) a five-year term for other members of the Appellate Division.<sup>79</sup>

The State Constitution as of 1938 also continued other trial-level courts, such as the County and Surrogate's Courts.<sup>80</sup>

#### 9. 1962 Judiciary Article

In November 1961, New York's electorate voted on whether to revamp the Judiciary Article and the court structure. Passing by an overwhelming margin, this new Judiciary Article ushered in the era of the "unified court system," a term that appeared for the first time in this version of Article VI.

The Article's 1962 revisions largely adopted previously unsuccessful recommendations made by the Tweed Commission following its review of the courts conducted in the 1950s.<sup>81</sup> Among other changes, this new

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<sup>75</sup> N.Y. Const. art. VI, § 3 (1938).

<sup>76</sup> N.Y. Const. art. VI, § 5 (1938).

<sup>77</sup> N.Y. Const. art. VI, § 4 (1938).

<sup>78</sup> N.Y. Const. art. VI, § 2 (1938).

<sup>79</sup> *Id.*

<sup>80</sup> N.Y. Const. art. VI, §§ 11-15 (1938).

<sup>81</sup> *See* A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State

Judiciary Article created the Administrative Board of the Judicial Conference, comprised of the Chief Judge of the Court of Appeals and the Presiding Justices of each Appellate Division. The Administrative Board was charged with establishing statewide policies and procedures for the Unified Court System. The Article also formalized the trial-court system in the State and granted the Appellate Divisions day-to-day oversight over the trial courts located within their respective Departments.

One new feature of this modified trial-court system was the Civil Court of the City of New York, which was formed by combining the City Court and the Municipal Court of the City of New York.<sup>82</sup> Thereafter, in 1972, a Housing Part was established within the Civil Court<sup>83</sup> out of what had been previously known as the Landlord and Tenant Part. This Housing Part is known today as the Housing Court.

In addition, the 1962 court reforms eliminated the Courts of General Sessions in New York City, which had criminal jurisdiction.

#### 10. 1976 Unified Court Budget Act

In response to increasing caseloads and expense throughout the State's judicial system, including the impact of the New York City fiscal crisis, the Legislature passed the Unified Court Budget Act during a special

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Courts, (dated Feb. 2007), at 51-53, *available at* [http://nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://nycourts.gov/reports/courtsys-4future_2007.pdf). The "Tweed Commission" was formally named the New York State Temporary Commission on the Courts. It was formed by Gov. Thomas E. Dewey in 1953 and was chaired by Harrison Tweed. In 1954, the Tweed Commission delivered its preliminary report to the Governor and the Legislature, but its recommendations were largely not implemented.

<sup>82</sup> See <https://www.nycourts.gov/COURTS/nyc/housing/civilhistory.shtml>.

<sup>83</sup> New York Civil Court Act § 110 (McKinney Supp. 1974); L. 1972, ch. 982. Currently, Housing Court Judges are not provided for in Article VI of the State Constitution and they are therefore not Article VI judges.

session held in 1976.<sup>84</sup> The Act provided for State funding of the Unified Court System in New York – aside from Town and Village Justice Courts – and replaced the historical system of local funding of local courts that had been used in New York State for centuries. As a result, all judges and local court employees in these newly state-funded courts became state employees. By passing this Act, the Legislature relieved local-level governments from the burden of paying a substantial portion of the court budget. Although the Unified Court Budget Act transferred court operational costs to the State, it left the obligation to maintain court facilities in the hands of the localities.

#### 11. 1977 Court Reforms

The most recent amendments to the Constitution’s Judiciary Article that have major significance were adopted in 1977. These amendments were the product of a Task Force on Court Reform appointed by then Governor Hugh Carey and chaired by Cyrus R. Vance, known as the Vance Commission.

On December 23, 1974, the Vance Commission issued a report to then Governor-elect Hugh Carey on “Judicial Selection and Court Reform.” That report concluded that Governor Carey’s administration should give “top priority” to court reform in order to “restore public confidence” in the Judiciary and “assure the high caliber judicial system to which New Yorkers are entitled....”<sup>85</sup> Accordingly, the Vance Commission made a series of recommendations for reforming the court system, including that:

- 1) the Governor support “passage of a constitutional amendment requiring merit selection of judges through judicial nominating

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<sup>84</sup> Judiciary Law §39 (1976); L. 1976, ch. 966. This legislation resulted from a 1974 report by the Governor-Elect’s Task Force on Judicial Selection and Court Reform, which was headed by Cyrus R. Vance.

<sup>85</sup> “Report of the Governor-Elect’s Task Force on Judicial Selection and Court Reform” (1974), p.1.

commissions” with the Governor selecting from candidates recommended by those commissions;<sup>86</sup>

- 2) pending a constitutional amendment, political parties “be urged to adopt nominating procedures which would ensure that only qualified persons are presented as potential nominees to the judicial district conventions”;<sup>87</sup>
- 3) the Governor support “a Constitutional amendment establishing a unified system of judicial administration supervised by a chief state court Administrator appointed by and responsible to the Chief Judge...”;<sup>88</sup> and
- 4) the Governor support a measure “dealing with removal and discipline of judges.”<sup>89</sup>

Thereafter, on June 26, 1975, the Vance Commission issued another report, entitled “The Integration and Unification of the New York State Trial Courts,” finding that New York’s then and still “present trial court system... generates unnecessary procedural confusion and results in inefficient and expensive court administration.”<sup>90</sup> As a result, the Vance Commission recommended a comprehensive court merger plan.<sup>91</sup>

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<sup>86</sup> *Id.* at 1-2.

<sup>87</sup> *Id.* at 2.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* That report of the Vance Commission also recommended “centralized state funding of the courts” – which became the Unified Court Budget Act, as discussed in Section II.B.10, *supra*.

<sup>90</sup> The Integration and Unification of the New York State Trial Courts: A Report by the Governor’s Task Force on Court Reform, (1975), at 1.

<sup>91</sup> *Id.* at 3-10. Previously in the 1970s, the Legislature had created what is known as the Dominick Commission headed by then N.Y.S. Senator D. Clinton Dominick. Among other recommendations, that Commission proposed a court merger plan and the creation of a Fifth Department. *See* Temp. Comm’n on the State Court System,...and Justice for All (Pt. 2) (1973). Ultimately, the Legislature failed to enact these proposals.

Ultimately, the Vance Commission recommendations led to a package of Constitutional amendments that were approved by the Legislature. Originally, another possible amendment was discussed which would have consolidated New York's courts but that proposal was not pursued – leaving it for later discussion.

Then Governor Hugh Carey and Chief Judge Charles D. Breitel both met with legislators to encourage passage of the proposed constitutional amendments.<sup>92</sup> As part of this effort, Chief Judge Breitel gave a speech to the Legislature urging support of court reform.<sup>93</sup>

Three amendments relating to the Judiciary were approved by the voters in 1977.

The first – passing by nearly 200,000 votes – created a Commission on Judicial Nomination for the Court of Appeals. That 12-member Commission on Judicial Nomination provides lists of candidates to the Governor for nomination to fill Court of Appeals vacancies. The creation of this Commission in 1977 brought about a “merit selection” system of appointment for selecting judges to the State's highest court.<sup>94</sup>

The second – which passed by more than 425,000 votes – a) provided for statewide court administration under the leadership of the Chief Judge of the State of New York, who was made “the chief judicial officer of the unified court system,” and b) created a new position of Chief Administrator of the Courts.<sup>95</sup> The Chief Administrator was granted the power to run the system of trial courts throughout the State, which had formerly been

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<sup>92</sup> See Linda Greenhouse, *Compromises Speed Windup of Legislature in Albany*, N.Y. Times (June 30, 1976), at 41, available at <http://www.nytimes.com/1976/06/30/archives/compromises-speed-windup-of-legislature-in-albany.html>.

<sup>93</sup> See Richard J. Bartlett Oral History, Session 2 (May 13, 2005) (recalling address to the Legislature by Chief Judge Breitel about restructuring the courts).

<sup>94</sup> N.Y. Const. art. VI, § 2(c) – (f) (1977).

<sup>95</sup> N.Y. Const. art. VI, § 28 (2016) (1977).



exercised by the Appellate Divisions. At the same time, the Chief Judge became responsible for promulgating standards and administrative policies to be applied to courts statewide. This power had formerly been exercised by the Administrative Board of the Judicial Conference, which now was renamed the Administrative Board of the Courts and given more limited responsibilities.

The third – passing by more than 750,000 votes – created an 11-member Commission on Judicial Conduct to supplant the former Court on the Judiciary.<sup>96</sup> That Commission<sup>97</sup> was granted the power to sanction or remove from office members of the Judiciary, subject to review by the Court of Appeals.<sup>98</sup>

## 12. 1985 Amendment Providing for Certified Questions to the Court of Appeals

In 1985, a constitutional amendment was passed modifying the jurisdiction of the Court of Appeals in order to permit it to answer certified questions from certain courts outside the Unified Court System.<sup>99</sup> That amendment enabled “the United States Supreme Court, federal courts of appeals and high courts of other states to send unsettled questions of New York law to the state Court of Appeals for authoritative resolution.”<sup>100</sup>

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<sup>96</sup> The Court on the Judiciary previously held the power to remove New York’s major court judges in the event of misconduct. *See* Raymond J. Cannon, *The New York Court on the Judiciary 1948 to 1963*, 28 *Alb. L. Rev.* 1 (1964).

<sup>97</sup> Despite this amendment, other provisions for removing judges continue to appear in the State Constitution. *See, e.g.*, N.Y. Const. art. VI, § 23 (2015). *See also* Section III.M, *infra*.

<sup>98</sup> N.Y. Const. art. VI, §§ 22 and 24 (1985).

<sup>99</sup> N.Y. Const. art. VI, § 3(b) (1985).

<sup>100</sup> Judith S. Kaye and Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 *Fordham L. Rev.* 373, 373 (2000), available at <http://ir.lawnet.fordham.edu/flr/vol69/iss2/3>. *See also* Sol Wachtler, *Federalism is Alive and Well and Living in New York—Honorable Hugh R. Jones Memorial Lecture*, 75 *Alb. L. Rev.* 659 (2012).

This process allows New York’s highest court to give certain federal and out-of-state courts conclusive answers to questions of New York law that are raised in federal and state disputes being litigated outside the New York courts. Prior to the passage of that amendment, those legal issues were subject to being resolved without sufficient authority or clarity, or being resolved in different ways in different jurisdictions – until such time as a given issue were to come before the Court of Appeals on a direct appeal within New York’s Unified Court System.

### 13. 1986 First Passage of a Court Merger Proposal

In 1986, the Legislature voted for first passage of a comprehensive constitutional amendment calling for a “merger-in-place” of New York’s trial courts – which would involve: a) merger into the Supreme Court of the following courts: the Court of Claims, County Court, Family Court, Surrogate’s Court and the New York City Civil and Criminal Courts, and b) preservation of existing methods of selection for the judges who thereby would become Supreme Court Justices. That amendment also would have authorized the Legislature to create up to two new Judicial Departments. The amendment failed to gain second passage in the Legislature when it came up for consideration in 1987.

### 14. Lopez Torres Litigation

Under existing election law provisions enacted under our current State Constitution, Supreme Court Justices are nominated and elected through a three-step process and are not subject to the primary election process that is applicable to non-judicial or other judicial candidates. First, delegates to a political party’s Judicial Nominating Convention are selected as delegates at the time of the primary elections. Second, a week or two after the primary election – usually in September – each party holds its Judicial Convention to decide who will be selected as the party’s Supreme Court nominee.<sup>101</sup>

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<sup>101</sup> Election Law § 6-158(5) (2016).

Finally, the vote of the electorate at the general election determines who will serve as a Justice of the Supreme Court.

In 1992, Hon. Margarita Lopez Torres was elected to the New York City Civil Court for Kings County. Thereafter, unable to obtain a nomination for Supreme Court in ensuing party judicial conventions, she brought suit challenging the constitutionality of the convention system of nominating candidates for election to the Supreme Court. Justice Lopez Torres asserted that she would not cooperate with party leaders' demands following her election to the Civil Court, and alleged that this resulted in her being blocked from being nominated at the Supreme Court Judicial Conventions held in 1997, 2002, and 2003. She further alleged that she lacked any available means to run independently as a candidate for Supreme Court without being nominated at a Judicial Convention.

In 2006, both the U.S. District Court for the Eastern District of New York and the Court of Appeals for the Second Circuit agreed with Judge Lopez Torres's claim on First Amendment grounds and enjoined New York's judicial convention system for nominating Supreme Court Justices.<sup>102</sup> This led to various initiatives seeking to reform the method of nominating candidates for Supreme Court in New York and trying to promote appointive systems for the selection of Supreme Court Justices.

Before any of those initiatives came to fruition, in 2008, the U.S. Supreme Court unanimously reversed the Second Circuit and sustained the constitutionality of the New York's Judicial Convention system. The Court's majority opinion, written by Justice Scalia, reasoned that, although the political party's process must be "fair" when the party is actively given a role in the election process,<sup>103</sup> "[s]election by convention has never been thought unconstitutional [and] has been a traditional means of choosing

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<sup>102</sup> *Lopez Torres v. N.Y.S. Bd. of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y. 2006); *Lopez Torres v. N.Y.S. Bd. of Elections*, 462 F. 3d 161 (2d Cir. 2006).

<sup>103</sup> *N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 207 (2008).

party nominees.”<sup>104</sup> According to the Court, because Judge Lopez Torres and all potential judicial candidates still had an opportunity to obtain the requisite signatures and be placed on the general election ballot as independent candidates, there was no constitutional violation.<sup>105</sup>

In one concurring opinion, Justice Stevens, quoting Justice Marshall, commented with regard to the wisdom behind the nominating convention process, noting: “[t]he Constitution does not prohibit legislatures from enacting stupid laws.”<sup>106</sup> In another concurrence, Justice Kennedy wrote: “When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence.”<sup>107</sup> Justice Kennedy thus concluded: “If New York statutes for nominating and electing judges do not produce both the perception and the reality of a system committed to the highest ideals of the law, they ought to be changed and to be changed now. But... the present suit does not permit us to invoke the Constitution in order to intervene.”<sup>108</sup>

#### 15. Special Commission on the Future of the New York State Courts

In 2006, before the U.S. Supreme Court’s decision in *Lopez Torres*, New York’s then Chief Judge Judith S. Kaye appointed the Special Commission on the Future of the New York State Courts, headed by Carey Dunne (known as the “Dunne Commission”). From July 2006 through February 2007, the Dunne Commission reviewed New York’s court system

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<sup>104</sup> *Id.* at 206.

<sup>105</sup> *Id.* at 207-08.

<sup>106</sup> *Id.* at 209 (Stevens, J., concurring).

<sup>107</sup> *Id.* at 212 (Kennedy, J., concurring).

<sup>108</sup> *Id.* at 213 (Kennedy, J., concurring).

and assessed what changes should be made, focusing particularly on the structure of the courts.

In February 2007, the Dunne Commission issued a report, entitled “A Court System for the Future: The Promise of Court Restructuring in New York State.”<sup>109</sup> That report called for: a) creating a two-tiered, consolidated trial court system in New York; b) creating a Fifth Department of the Appellate Division; c) removing the population cap on the number of Supreme Court Justices; and d) giving Housing Court Judges in New York City status under Article VI of the State Constitution but changing their selection to appointment by the Mayor of the City of New York (as is currently the case with the New York City Criminal and Family Courts).<sup>110</sup> The report recommended a system of “merger in place” – meaning that its proposal would combine and simplify the various trial-level courts without changing how particular judges were to be appointed or elected or what the terms of those judges would be.<sup>111</sup>

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<sup>109</sup> A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts, (dated Feb. 2007), at 51-53, *available at* [http://nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://nycourts.gov/reports/courtsys-4future_2007.pdf).

<sup>110</sup> *Id.* at 10. Legislation was introduced, but not passed, which proposed to amend the State Constitution in order to implement these Dunne Commission recommendations. Senate Bill S5827 (2007); Assembly Bill A1266 (2007).

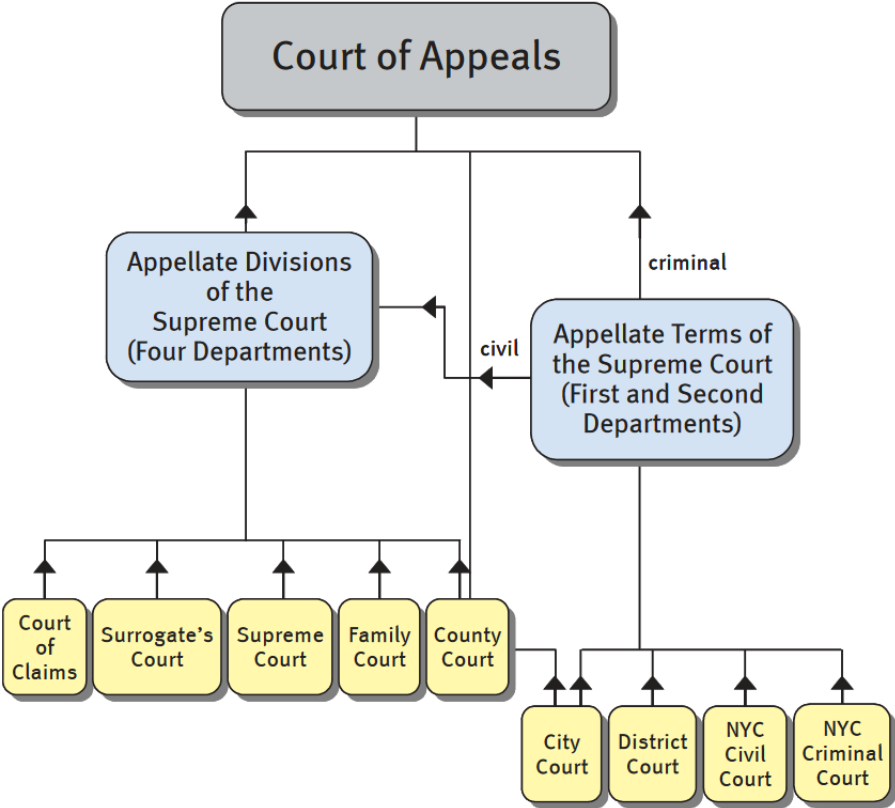
<sup>111</sup> In 1982, the Legislature created the Twelfth Judicial District, consisting of Bronx County. In addition, in 2007, the number of Judicial Districts was further increased to 13 through an act of the Legislature, which passed N.Y. Judiciary Law § 140, creating a Thirteenth Judicial District for Staten Island. As a result, the actual number of judicial districts in New York is greater than the number provided for in the State Constitution and counties are allocated to judicial districts somewhat differently from what the Constitution provides.

The court system as proposed by the Dunne Commission would have modernized and simplified today's Unified Court System, as shown in the diagrams appearing on the following page:<sup>112</sup>

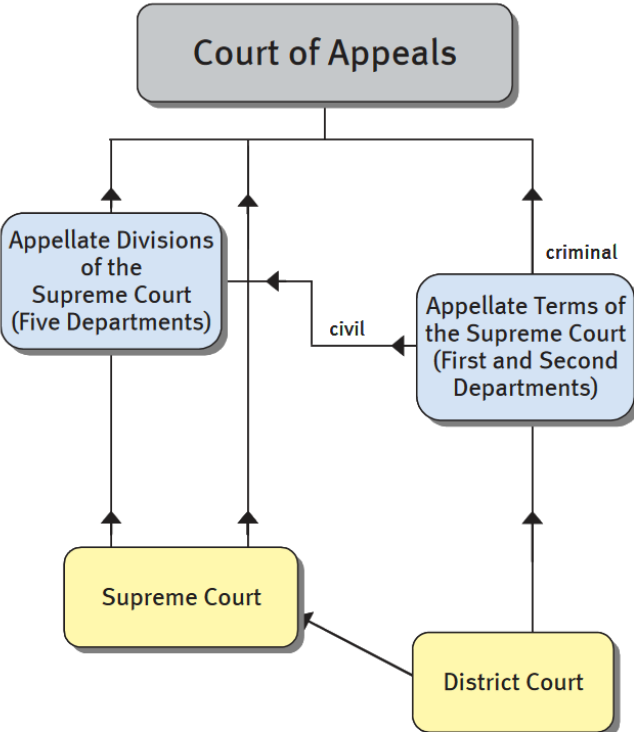
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<sup>112</sup> Town and Village Justice Courts and direct appeals are excluded from the current court structure diagram that is set forth in the Dunne Commission's report. In the Third and Fourth Departments, criminal appeals from the City Court proceed to the County Court and can be further appealed to the Court of Appeals. The Town and Village courts were the subject of their own report by the Dunne Commission, entitled *Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts* (Sept. 2008). The Town and Village Justice Courts are discussed in Section III.I, *infra*.

# CURRENT STRUCTURE



# PROPOSED STRUCTURE



Although the proposals made by the Dunne Commission gained substantial support, particularly within the legal community, they ultimately were not enacted into law.

#### 16. 2013 Judicial Retirement Proposal

In 2013, the Legislature proposed a constitutional amendment that would have allowed Court of Appeals Judges to finish their 14-year terms, although they would not have been able to serve past age 80.<sup>113</sup> Similarly, under this proposal, Supreme Court Justices would have been eligible to be re-certified for five two-year periods, from age 70 through age 80, instead of the three two-year periods that are currently available to them. Other members of the Judiciary were not covered by this proposed amendment, including Court of Claims Judges, Surrogates, Family Court Judges, County Court Judges and Judges of the New York City Criminal and Civil Courts.<sup>114</sup>

In a November 2013 referendum, the voters failed to pass this retirement age amendment.<sup>115</sup>

### **III. JUDICIARY ARTICLE ISSUES THAT THE COMMITTEE CONSIDERS TO BE RIPE FOR CONSIDERATION**

#### **A. Court Reorganization**

The judicial system in New York is a mixture of various types of courts, each with its own particular jurisdiction (although sometimes

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<sup>113</sup> Assembly Bill 4395 (2013); Senate Bill S886A (2013).

<sup>114</sup> At the time when this retirement age proposal received second passage, the Legislature alternatively could have passed a separate proposal that would have raised judicial retirement ages in the Unified Court System to a uniform age of 74 – through a proposed amendment that had previously received first passage by the Legislature. *See* Senate Bill S4587A (2011). That proposal was consistent with the policy of the State Bar. *See* Section III.D, *infra*. However, that age 74 retirement proposal failed to receive second passage from the Legislature.

<sup>115</sup> *See* James C. McKinley Jr., *Plan to Raise Judges' Retirement Age to 80 Is Rejected*, NY Times (Nov. 6, 2013).



overlapping the jurisdiction of other courts), practices and policies. Many of these courts have their own rules, structure, judicial terms of office, and levels of judicial compensation. Significantly, New York has 11 different courts at the trial level alone, which is far more than the typical court structure in other states.

A wide range of groups has long advocated for the consolidation or merger of these trial-level courts in order to reduce or eliminate the unnecessary costs, undue inefficiencies and even confusion that this complex structure engenders.<sup>116</sup> The New York State Bar has done so for over 35 years.<sup>117</sup> The State Bar has consistently supported efforts to simplify the structure of the Unified Court System, based on the Association's belief that it will: a) make the State's courts more accessible to litigants; b) reduce the cost and burden to clients and their counsel involved in navigating the State's multi-faceted court structure; c) remove obstacles to effective case management that are associated with the current trial court structure, and d) result in more cost-effective and efficient courts.<sup>118</sup>

In 1997, then-Chief Judge Judith S. Kaye and then-Chief Administrative Judge Jonathan Lippman proposed a plan to consolidate New

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<sup>116</sup> The Fund for Modern Courts has repeatedly called for court simplification, and in 2011, the Fund organized a broad-based coalition, which was supported by the State Bar, to advocate for this reform. *See* <http://moderncourts.org/programs-advocacy/court-restructuring-and-simplification/>.

<sup>117</sup> New York State Bar Association – Report of Action Unit No. 4 (Court Reorganization) to the House of Delegates on Trial Court Merger and Judicial Selection (dated 1979).

<sup>118</sup> *See, e.g.*, November 4, 2011 New York State Bar Association Executive Committee Minutes, at 3 (noting that the “current court structure creates inefficiencies that waste time and money for judges, lawyers and litigants[.]”). In 2012, the Fund for Modern Courts' Court Restructuring and Simplification Task Force concluded that court system reforms in New York could result in savings of over \$56 million annually. The Committee for Modern Courts, “Court Simplification in New York State: Budgetary Savings and Economic Efficiencies” (2012) at Appendix C, *available at* <http://moderncourts.org/files/2013/10/CourtSimplificationinNewYorkState73112.pdf>.

York's court system. That proposal would have consolidated our State's patchwork quilt of trial courts into just two levels of courts: a) Supreme Court, which would have original jurisdiction over most cases around the State, including most criminal, civil, family and probate matters; and b) District Courts, which would handle housing and minor criminal and civil matters.<sup>119</sup>

A 1998 State Bar resolution endorsed reorganizing the State's courts using this two-tier trial court system, and this remains State Bar policy today.<sup>120</sup> Under this reorganization proposal, the present Supreme Court, Court of Claims, County Court, Family Court, and Surrogate's Court would be merged into a single Supreme Court with Judicial Districts around the State. The New York City Civil Court, New York City Criminal Court, and

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<sup>119</sup> Jan Hoffman, *Chief Judge Offers a Plan to Consolidate the Court System*, N.Y. Times (Mar. 20, 1997), available at <http://www.nytimes.com/1997/03/20/nyregion/chief-judge-offers-a-plan-to-consolidate-the-court-system.html>. The New York City Bar Association has frequently supported consolidating all trial courts into a single trial court of general jurisdiction. See September 27, 1977 Association Statement to the Assembly Committee on the Judiciary by Michael A. Cardozo (Chair, Committee on State Courts of Superior Jurisdiction); April 24, 1979 Association Statement to the Senate Judiciary Committee by Merrell E. Clark, Jr. (President); "Legislative Proposals on Court Merger and Merit Selection of Judges," by the Committee on State Courts of Superior Jurisdiction, 35 *The Record* 66 (1980); December 5, 1983 Association Statement to the Senate and Assembly Judiciary Committees by Michael A. Cardozo (Chair, Council on Judicial Administration); September 30, 1985 Association Statement to the Senate Judiciary Committee by Bettina B. Plevan (Chair, Council on Judicial Administration). In 1997, the City Bar, under its then President Michael A. Cardozo, supported Chief Judge Kaye's plan to create a two-tier trial court in New York. Association of the Bar of the City of New York, Council on Judicial Administration, "The Chief Judge's Court Restructuring Plan, with Certain Modifications, Should Be Adopted," available at [http://www2.nycbar.org/Publications/reports/show\\_html\\_new.php?rid=46](http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=46).

<sup>120</sup> April 1998 New York State Bar Association House of Delegates Minutes; May 31, 2007 New York State Bar Association Executive Committee Minutes; November 4, 2011 New York State Bar Association Executive Committee Minutes. See also Letter from President M. Alcott of the New York State Bar Association to C. Dunne of Davis Polk & Wardwell (dated Feb. 1, 2007).

City Courts and District Courts outside New York City would be merged into a statewide District Court.

As noted previously,<sup>121</sup> in 2007, the Dunne Commission similarly proposed merging the same courts into a statewide Supreme Court and regional District Courts.<sup>122</sup> The State Bar found the Commission's recommendations to be "consistent with the Association's positions and recommended that the Association endorse the Governor's program bill."<sup>123</sup>

During 2011-12, the State Bar participated along with a broad-based coalition in advocating for court simplification and promoting the adoption of a two-tier trial court.<sup>124</sup> Although this effort was not successful, it

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<sup>121</sup> See Section II.B.15, *supra*.

<sup>122</sup> A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* [http://nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://nycourts.gov/reports/courtsys-4future_2007.pdf); NYSBA Committee on Court Structure & Operations: Report by Subcommittee on Court Reorganization (dated Sept. 6, 2011). *See also* II.B.15, *supra*.

<sup>123</sup> May 31, 2007 New York State Bar Association Executive Committee Minutes. While not addressed specifically at that time, the State Bar has also long advocated for raising the age of criminal responsibility in New York to age 18. For a recent discussion of this issue, *see* January 21, 2015: Statement on Raising the Age of Criminal Responsibility from President Glenn Lau-Kee, *available at* <http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=54267>. As a result, a discussion at a Convention about reorganizing the Unified Court System could also include a consideration as to where best to place courts that address charges involving youthful offenders and related issues.

<sup>124</sup> The New York State Bar continues to be listed as a supporter of this effort on the Fund for Modern Courts website. *See* <http://moderncourts.org/programs-advocacy/court-restructuring-and-simplification/>. This is consistent with the position taken by the Executive Committee in 2011, reaffirming the State Bar's policy on court restructuring from April 1998. *See* November 4, 2011 New York State Bar Association Executive Committee Minutes. Nonetheless, as indicated by a 2011 letter from the State Bar's Judicial Section, some concern has been raised in the past about this form of court restructuring. *See* Letter from Hon. D. Karalunas, Presiding Member of the Judicial Section, to President V. Doyle, III of the New York State Bar Association (dated Nov. 1, 2011).

received wide support from: a) a broad range of bar groups across the State who urged reform of the courts; b) good government groups who sought to improve the State's court structure; c) advocates who work in the Family Court and groups opposing domestic violence who experienced difficulties resulting from the Family Court's limited jurisdiction; and d) business groups who were concerned about the inefficiencies that the State's complex court structure creates for business litigation in New York. While restructuring the Unified Court System would require an initial expense, there would be substantial long-term savings for the courts, litigants and counsel resulting from the increased efficiencies of a simplified court structure.<sup>125</sup>

The potential to simplify the State's court system, promote access to justice and reduce unnecessary costs and inefficiencies make the issue of court consolidation one that is ripe for consideration at a Constitutional

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<sup>125</sup> The Committee for Modern Courts, "Court Simplification in New York State: Budgetary Savings and Economic Efficiencies" (2012) at Appendix C, *available at* <http://moderncourts.org/files/2013/10/CourtSimplificationinNewYorkState73112.pdf>. That effort focused particularly on: a) benefits to be attained in the Family Court from court simplification, especially for victims of domestic violence who otherwise may need to access multiple courts, b) benefits to the business community from simplifying commercial litigation, and c) benefits to be attained in certain litigations involving the State where overlapping cases need to be filed in the Court of Claims against the government but also separately in the Supreme Court as to private actors.

In 2004, the Unified Court System experimented with a "merger" model for criminal cases in Bronx County. The project survived a court challenge when the Court of Appeals affirmed the Chief Judge's authority to implement this program. *People v. Correa*, 15 N.Y.3d 213, 220 (2010). In 2012, this project was disbanded as unsuccessful. See Daniel Beekman, "Court administrators will undo 'experiment' that merged Bronx courts in 2004 and created backlog," New York Daily News, Apr. 12, 2012, *available at* <http://www.nydailynews.com/new-york/bronx/court-administrators-undo-experiment-merged-bronx-courts-2004-created-backlog-article-1.1060088>. However, this experience is not germane to the State Bar's position on court restructuring. Significantly, the Bronx criminal court model did not involve the structure proposed by the Dunne Commission – *i.e.*, in Bronx County, the handling of felony cases was merged with misdemeanors, whereas the Dunne Commission proposed placing misdemeanors in a lower level court and continuing felony cases in the Supreme Court.

Convention, should the voters choose to hold one. In short, a Constitutional Convention could provide a unique opportunity to re-design, restructure, modernize and simplify our State’s Unified Court System – whether using the Dunne Commission merger-in-place model or some modification of that plan.<sup>126</sup>

**B. Creation of a Fifth Department**

Under Article VI, New York’s Unified Court System is currently divided into four Departments, *i.e.*:<sup>127</sup>

First Department: Made up of the First Judicial District as established in the State Constitution and the Twelfth Judicial District created by statute.

Second Department: Made up of the Second, Ninth, Tenth, and Eleventh Judicial Districts established in the State Constitution and the Thirteenth Judicial District created by statute.<sup>128</sup>

Third Department: Made up of the Third, Fourth, and Sixth Judicial Districts.

Fourth Department: Made up of the Fifth, Seventh, and Eighth Judicial Districts.

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<sup>126</sup> While the State Bar has not yet formally addressed such issues directly, a review of various appellate jurisdiction issues could also be in order in connection with a Constitutional Convention. This could include whether the manner of granting leave to appeal to the Court of Appeals in criminal cases ought to be reconsidered. *See* Minutes of the Executive Committee of the New York State Bar Association (Nov. 2009); New York State Bar Association, Recommendations of the Committee on Courts of Appellate Jurisdiction Regarding Applications for Leave to Appeal to the New York Court of Appeals in Criminal Cases, (June 10, 2009), at 1-3. In addition, a Convention could consider such matters as: a) whether the finality limitation on the Court of Appeals’ civil jurisdiction continues to be consistent with its current role as a *certiorari* court, and b) whether to provide for *en banc* review of Appellate Division decisions, as is the practice in U.S. Circuit Courts of Appeal.

<sup>127</sup> N.Y. Const. art. VI, § 4 (2015).

<sup>128</sup> N.Y. Judiciary Law § 140 (2016).

As noted in Section II.B.6, *supra*, since 1894, the State Constitution has prohibited increasing the number of Departments which make up the Unified Court System. As a consequence, despite major population changes, the allocation of judicial districts, courts and caseloads within these Departments has not been changed for more than a century.

As a result, certain of these Departments have long been facing significant burdens, particularly the Second Department. The 2007 Dunne Commission Report noted that the Second Department then contained approximately half of the State's population and had a larger caseload than the other three Departments combined.<sup>129</sup> These caseload issues have only been exacerbated since that time. In 2015, there were 8,623 civil and 2,977 criminal appeals filed in the Appellate Division, Second Department, for a total of 11,600 appeals; whereas, the First Department, the next busiest Department in the State, had only 3,072 combined civil and criminal appeals as of the same time period.<sup>130</sup> The Second Department's 11,600 combined appeals stands out when compared to the 6,340 total appeals in all of the three other Departments combined – representing over 80% more filings in the Second Department than the rest of the Appellate Divisions taken together.<sup>131</sup>

One proposal that has been made several times in the past has been to create a Fifth Department on Long Island, splitting up the Second Department and relieving some of the Appellate Division, Second Department's substantial caseload. The New York State Bar has long supported establishing a Fifth Department. For example, the same State Bar resolution that supported the 1998 court merger framework included a

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<sup>129</sup> A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* [http://nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://nycourts.gov/reports/courtsys-4future_2007.pdf).

<sup>130</sup> The New York State Unified Court System, 2015 Annual Report, at 23.

<sup>131</sup> *Id.*

resolution advocating for the establishment of a Fifth Department.<sup>132</sup> The creation of a Fifth Department was also recommended by the Dunne Commission's report in 2007, which was deemed to be consistent with State Bar policy.<sup>133</sup> Because of political considerations involved in establishing a Fifth Department, it has typically been recommended that the particular boundaries of that Department be left to the Legislature.<sup>134</sup>

As an alternative to creating a Fifth Department in order to better balance the caseloads allocated to the four Departments, a Constitutional Convention could decide instead to realign the Judicial Districts that are assigned to the four Departments. As an example, there has been discussion in the past of moving all or parts of the Ninth Judicial District from the Second Department to another Department so as to provide greater balance in population and caseload across the four existing Departments of the State's courts.

While political complications have left this issue unresolved for many years, it is one that could be addressed at a Constitutional Convention as part

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<sup>132</sup> April 1998 New York State Bar Association House of Delegates Minutes; Letter from President M. Alcott of the New York State Bar Association to C. Dunne of Davis Polk & Wardwell (dated Feb. 1, 2007); May 31, 2007 New York State Bar Association Executive Committee Minutes; November 4, 2011 New York State Bar Association Executive Committee Minutes. The New York City Bar has also supported a Fifth Department. *See* Association of the Bar of the City of New York, Council on Judicial Administration, "The Chief Judge's Court Restructuring Plan, with Certain Modifications, Should Be Adopted" (*retrieved* at [http://www2.nycbar.org/Publications/reports/show\\_html\\_new.php?rid=46](http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=46)).

<sup>133</sup> A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* [http://nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://nycourts.gov/reports/courtsys-4future_2007.pdf). *See also* May 31, 2007 New York State Bar Association Executive Committee Minutes.

<sup>134</sup> *See, e.g.*, A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts at 73 n. 149 (noting that past proposals have called for the Legislature to draw boundaries for the State court system's four Departments).

of an overall court restructuring effort. History has shown that judicial restructurings have been tackled successfully at previous Constitutional Conventions and that a Convention could provide an opportunity to address what has long been an intractable issue.

### **C. Selection of Judges**

#### **1. Choice of Appointive or Elective Systems for Selecting Judges**

Currently, New York's Judiciary, as constituted under Article VI, reflects a mixture of elected and appointed judges. As presently structured, the judges of the Court of Appeals,<sup>135</sup> the Appellate Divisions of the Supreme Court,<sup>136</sup> the Court of Claims,<sup>137</sup> the New York City Criminal Court,<sup>138</sup> and the Family Court within New York City<sup>139</sup> are appointed.<sup>140</sup> In contrast, the voters elect the judges of the Supreme Court,<sup>141</sup> the County Court,<sup>142</sup> the Surrogate's Court,<sup>143</sup> the Family Court outside New York City,<sup>144</sup> the District Courts,<sup>145</sup> and the New York City Civil Court,<sup>146</sup> and

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<sup>135</sup> N.Y. Const. art. VI, § 2(e) (2015).

<sup>136</sup> N.Y. Const. art. VI, § 4(c) (2015).

<sup>137</sup> N.Y. Const. art. VI, § 9 (2015).

<sup>138</sup> N.Y. Const. art. VI, § 15(a) (2015).

<sup>139</sup> N.Y. Const. art. VI, § 13(a) (2015).

<sup>140</sup> While the Chief Administrative Judge appoints Housing Court Judges in New York City, those judgeships are not created by Article VI of the State Constitution but are instead creations of statute. *See* Section III.F *infra*.

<sup>141</sup> N.Y. Const. art. VI, § 6(c) (2015).

<sup>142</sup> N.Y. Const. art. VI, § 10(a) (2015).

<sup>143</sup> N.Y. Const. art. VI, § 12(b) (2015).

<sup>144</sup> N.Y. Const. art. VI, § 13(a) (2015).

<sup>145</sup> N.Y. Const. art. VI, § 16(h) (2015).

<sup>146</sup> N.Y. Const. art. VI, § 15(a) (2015).



many of the Justices of Town Courts, and most City and Village Courts<sup>147</sup> outside New York City.<sup>148</sup>

The New York State Bar has frequently advocated for “merit selection” of New York’s Judiciary.<sup>149</sup> For example, in the October 2006 edition of the *State Bar Journal*, then-President Mark H. Alcott noted that one of the opportunities for the State Bar following the *Lopez Torres* lower court decisions (*see* Section II.B.14, *supra*) was “to reform New York’s dysfunctional method of selecting Supreme Court” Justices.<sup>150</sup> The “better way,” as endorsed by President Alcott and the State Bar, was “[m]erit selection, in which the chief elected official of the state, city or county appoints judges from candidates designated by non-partisan nominating commissions, subject to confirmation by the Senate or local legislative body.”<sup>151</sup> Alcott’s President’s Message noted the State Bar House of Delegates’ prior endorsements of “merit selection” in 1973, 1979 and 1993. In 1993, the State Bar had approved a “Model Plan” for selection of all judges, which was similar to that used for the Court of Appeals, except that

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<sup>147</sup> N.Y. Const. art. VI, § 17(d) (2015).

<sup>148</sup> New York’s Town and Village Justice Courts are discussed more fully at Section III.I, *infra*.

<sup>149</sup> *See, e.g.*, April 3, 1993 New York State Bar Association House of Delegates Resolution (“RESOLVED, that this House of Delegates hereby endorses and reaffirms the position adopted by the New York State Bar Association in 1979 in support of the concept of merit selection[.]”)

<sup>150</sup> “President’s Message: Promoting Needed Reform, Defending Core Values,” NYSBA Journal, at 5, October 2006. As discussed in Section II.B.14, *supra*, the *Lopez Torres* litigation involved a challenge to New York’s judicial nominating convention system for the election of Supreme Court Justices. *Lopez Torres, v. N.Y.S. Bd. of Elections*, 411 F. Supp. 2d 212 (E.D.N.Y. 2006), *aff’d*, 462 F. 3d 161(2d Cir.), *rev’d sub nom. N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 196 (2008). Although the Eastern District and the Second Circuit found that the convention system violated the First Amendment, the Supreme Court ultimately upheld the constitutionality of that system. *N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 196 (2008).

<sup>151</sup> *Id.* at 6.

it provided for a retention election at the conclusion of an incumbent's term.<sup>152</sup>

In 2007, Program Bill #34 was introduced in the Senate.<sup>153</sup> Drafted with input from the State Bar, the bill called for “justices of the appellate division” to be “appointed by the governor . . . for terms of fourteen years.” Similarly, the legislation provided for Supreme Court Justices to be appointed by the Governor for 14-year terms. Under that bill, County Court judges, Surrogates and Family Court judges also were to be appointed by the Governor for 14-year terms. The Legislature did not pass that legislation. Nonetheless, the State Bar has continued to support commission-based appointment systems for the Judiciary.

Some have pointed to diversity issues as a factor weighing in favor of judicial elections versus appointive processes for selecting members of New York's Judiciary. It is beyond the scope of this Report to determine whether statistical data support this conclusion. However, it appears that geography and the particular selecting authority – regardless of whether the system is an elective or appointive one – are the biggest factors in promoting diversity within the Judiciary.<sup>154</sup>

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<sup>152</sup> April 3, 1993 House of Delegates Resolution. Similarly, for courts of record, the New York City Bar has long supported “merit selection,” defined as “the nomination of a limited number of well-qualified individuals for a judicial vacancy by a diverse, broad-based committee composed of lawyers and non-lawyers, appointed by a wide range of executive, legislative and judicial officials and possibly individuals not associated with government, guided by standards that look to experience, ability, accomplishments, temperament and diversity.” New York City Bar Association, Report of the Task Force on the New York State Constitutional Convention (dated June 1997), at 596, *available at* <http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>. In that report, the City Bar concluded, *inter alia*, that the judicial elective system may discourage those who have not been previously active in politics from serving in the Judiciary. *Id.*

<sup>153</sup> Senate Bill S06439 (2007).

<sup>154</sup> It has also been suggested that the size of the geographic area from which a judge is chosen could affect the diversity of a given court. For example, courts drawing

In 2014, the State Bar’s Judicial Section prepared a report, entitled “*Judicial Diversity: A Work in Progress*,”<sup>155</sup> discussing the progress and need for further improvement in diversifying the Judiciary. According to that report, the percentage of judges of color in each Department varied from 35% in the First Department to just 1% in the Third Department.<sup>156</sup> At that time, although 52% of New York’s population was female, the percentage of women judges varied from a high of 46% in the First Department to only 19% in the Third Department.<sup>157</sup> That report concluded that the Section hoped its report would “serve as a call to corrective action by the decision makers in both the elective and appointive judicial selection systems.”<sup>158</sup>

Based on the latest data received from the Office of Court Administration (“OCA”), the percentage of female jurists has improved somewhat, to a high of 52% in the First Department and a low of 23% in the Third Department. The percentage of jurists from diverse backgrounds has similarly improved slightly since the time of the Judicial Section’s report. Based on the most recent OCA data, that percentage varies from 38% in the First Department to just 3% in the Third Department.

On the Appellate Divisions, there has been significant progress in advancing diversity since the time of the Judicial Section’s report. For example, according to recent OCA data, a majority of the current Justices on the Appellate Division, First Department (not including those who are certificated) are female and 36% of them are ethnic minorities. On the Appellate Division, Second Department, 35% of the current Justices are

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from smaller areas – such as a single county – may be more diverse than courts having jurisdiction over a multi-county district which covers a much larger geographic area.

<sup>155</sup> Available at [http://www.nysba.org/Sections/Judicial/2014\\_Judicial\\_Diversity\\_Report.html](http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html). The report was approved by the State Bar’s Executive Committee on September 17, 2014.

<sup>156</sup> *Id.* at 5.

<sup>157</sup> *Id.* at 5.

<sup>158</sup> *Id.* at 47.

female and 35% are minorities. While half of the current Justices of the Third Department are female, the remaining diversity statistics for the Third and Fourth Departments are still in need of improvement.

In addition, in New York City, the Mayor's Advisory Committee on the Judiciary was initially formed in 1978 under Mayor Ed Koch "to recruit, to evaluate, to consider and to nominate judicial candidates fully qualified for appointment and to evaluate incumbent judges for reappointment[.]"<sup>159</sup> Still today, the Mayor's Committee nominates and provides to the Mayor a list of qualified candidates from which the Mayor chooses a candidate to appoint as a judge on the New York City Criminal and Family courts.<sup>160</sup> Data provided by the Mayor's Committee has also shown improvement in the diversity of appointed judges to these New York City courts over the past ten years. From 2006 to 2011, there were 36 total Mayoral appointments to these courts. Of these appointees, 53% were female and 31% were ethnic minorities. From 2012 through 2016, there were 64 such appointments. Of this group, 63% of the appointees were female and 42% were minorities.

Statistics from the Court of Appeals nominations process also suggest that there has been improvement in promoting diversity and opportunities for underrepresented groups. A March 7, 2013 press release from the Commission on Judicial Nomination listed demographic data for both applicants to the Commission and nominees to the Governor with respect to vacancies on the Court of Appeals occurring between 1997 and 2008 and two additional vacancies in 2012 and 2013.<sup>161</sup> At the time of the 1997 vacancy, only 18% of the Commission's interviewees were female and 9%

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<sup>159</sup> Executive Order No. 10: Mayor's Committee on the Judiciary (Apr. 11, 1978).

<sup>160</sup> Executive Order No. 4: Mayor's Advisory Committee on the Judiciary (May 29, 2014).

<sup>161</sup> March 7, 2013 Press Release, State of New York Commission on Judicial Nomination, *available at* <http://nysegov.com/cjn/assets/documents/press/Jones%20Vacancy%20Report%20Press%20Release%203-7-2013.pdf>.

were ethnic minorities; in comparison, as of 2013, 41% of the interviewees were female, and 41% were ethnic minorities. While only one of the Commission's seven nominees was female and one of the seven nominees was an ethnic minority in 1997, in contrast, in 2013, three of the seven nominees were female and three of seven were ethnic minorities.<sup>162</sup>

The December 1, 2016 press release of the Commission on Judicial Nomination, reporting on the most recent vacancy on the Court of Appeals, reflects similar data. That press release stated that: a) the Commission had received 35 applications for that particular vacancy, b) 34% of the applications were from female candidates, and c) 25% were from candidates of diverse backgrounds.<sup>163</sup> The Commission further reported that: a) it had interviewed 21 of these 35 applicants; and b) of the 21 interviewees, 38% were female candidates and 29% were ethnic minorities.<sup>164</sup> Moreover, three of the seven nominees forwarded to the Governor in December 2016 were female, with one nominee being a minority.

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<sup>162</sup> After former Chief Judge Judith S. Kaye became Chair of the Commission on Judicial Nomination in 2009, the Commission: a) adopted an express rule that the "commission will strive to identify candidates who reflect the diversity of the citizenry of the State of New York"; b) specifically embraced a commitment to diversity in many characteristics, including, but not limited to, "diversity in race, ethnicity, gender, religion, sexual orientation, community service, nature of legal practice or professional background and geography"; and c) adopted rules that encourage greater publicity of vacancies on the Court of Appeals. 22 N.Y.C.R.R. §§ 7100.6, 7100.8(e). Prior to that time, the Commission had considered diversity as part of the factors listed in Article VI for determining whether candidates were "well qualified" to serve on the Court of Appeals, including by their "professional aptitude and experience." N.Y. Const. art. VI § 2(c). See Feb. 3, 2009 Testimony of Hon. John F. O'Mara before the Senate Standing Committee on the Judiciary on the Nomination Process for Judges to the New York State Court of Appeals, at 10, *available at* [http://nysegov.com/cjn/assets/documents/press/Prepared\\_Testimony\\_of\\_Judge\\_OMara.pdf](http://nysegov.com/cjn/assets/documents/press/Prepared_Testimony_of_Judge_OMara.pdf).

<sup>163</sup> December 1, 2016 Press Release, State of New York Commission on Judicial Nomination, *available at* <http://nysegov.com/cjn/assets/documents/CJN-Vacancy%20List%20Press%20Release%20and%20Report.pdf>.

<sup>164</sup> *Id.*

Additionally, the seven-member Court of Appeals has had in the past and again has today a majority of female judges. The Court currently has, among its 7 members, one African-American judge and two judges of Hispanic heritage.

Accordingly, although it appears that diversity within New York's Judiciary has continued to improve – including among judges selected through appointive systems – there is still much work to be done.

Whether to appoint or elect members of New York's Judiciary has long been a fractious issue. While a wide range of groups successfully coalesced to support appointive selection of Court of Appeals Judges in 1977, the issue has gained the level of traction needed to achieve wider-scale reform of judicial selection in other courts. As a result, in 2007, the Dunne Commission advanced its “merger in place” proposal, which would have continued the election of certain of New York's judges as part of its court consolidation proposal. While the issue of judicial selection drew substantial attention in connection with the *Lopez Torres* litigation and related events, ultimately, systemic change was not accomplished once the U.S. Supreme Court upheld New York's judicial convention system in 2008.

A Constitutional Convention could provide an opportunity to revisit how best to select judges in New York, either as part of an overall restructuring of the Unified Court System or as a stand-alone issue.

## 2. Methods of Electing Judges in Elective Systems

In the event that certain of New York's judges continue to be elected, an additional question arises – *i.e.*, how are these judicial nominees to be selected? As discussed in Section II.B.14, *supra*, the current elective system for the Supreme Court involves: a) selecting delegates to a judicial nominating convention at a primary, b) followed by a judicial convention at which those delegates choose candidates for nomination, and c) thereafter, a general election to choose the winning candidates. This system – which ultimately survived the First Amendment challenge raised in the *Lopez*

*Torres* litigation<sup>165</sup> – may not be the optimal one for nomination and election of Supreme Court Justices if New York continues to elect Supreme Court Justices. Even if a Constitutional Convention were to choose to continue the election of Supreme Court Justices, it could also consider whether: a) to retain this current nominating system for judicial elections (which is statute-based);<sup>166</sup> or b) to switch to another system – whether the pure primary election system advocated by Judge Lopez Torres in her lawsuit or some other method of designating or nominating candidates for election to the bench.

In contrast to the judicial convention procedure for nominating and electing of Supreme Court Justices, candidates wishing to serve as judges of the Surrogate’s Court, the New York City Civil Court, the County Court, Family Courts outside of New York City, and the District Courts are nominated through party primary elections and are thereafter elected at the general election.<sup>167</sup>

The New York State Bar has opposed the use of primaries for judicial elections. In 2007, then-State Bar President Mark Alcott testified before the New York State Senate that the primary system risks the “prospect of judicial candidates promising in advance how they will decide politically-charged cases, or at least being pressured to do so by special interest groups, and negative advertisements attacking judicial candidates for their real or imagined positions on hot-button issues.”<sup>168</sup> Concerns were also raised about

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<sup>165</sup> *N.Y.S. Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

<sup>166</sup> Election Law §§ 6-124, 6-126 (2016).

<sup>167</sup> See New York City Bar, “Judicial Selection methods in the State of New York: A Guide to Understanding and Getting Involved in the Selection Process,” at 23-24 (Mar. 2014) (“Under the election method, which is a partisan political process, candidates must first win the nomination of their political party through a primary election or, in the case of New York State Supreme Court Justices, through a judicial convention.”).

<sup>168</sup> Mark H. Alcott, Testimony before the New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (Jan. 8, 2007). The New York City Bar Association similarly cautioned that “primary elections by

the cost of waging primary campaigns for judicial election. Instead, the State Bar endorsed reforms to the judicial nominating process in an effort to make it more transparent and to promote an improved judicial selection process.<sup>169</sup>

In the event that elections are continued as part of New York’s system for selecting members of the Judiciary, the particular form of judicial election system that New York should embrace is ripe for further discussion, and a Constitutional Convention could serve as a vehicle for such a review.<sup>170</sup>

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themselves (*i.e.*, without a convention system and without public financing) are far from the best constitutional solution for the shortcomings of the current convention system” and concluded that such a system would make elections “undesirable as a means of providing to the electorate a diverse slate of the highest caliber candidates[.]” Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial Selection System in New York* (December 2006), at 21.

<sup>169</sup> The State Bar’s House of Delegates ultimately endorsed recommendations such as: a) providing judicial convention delegates with information about judicial elections, b) providing convention delegates and the general public with a list of candidates at least ten business days before the convention, and c) giving candidates for judicial nomination the opportunity to speak with the convention delegates. *See* New York State Bar Association, Report by New York State Bar Association Special Committee on Court Structure and Judicial Selection on Recommendations Contained in the Report of the Commission to Promote Public Confidence in Judicial Elections of the Committee on Courts of Appellate Jurisdiction Regarding Applications for Leave to Appeal to the New York Court of Appeals in Criminal Cases, (2006); June 24, 2006 New York State Bar Association House of Delegates Minutes (noting passage of report on a voice vote).

<sup>170</sup> Although the State Bar has not taken a direct position on the matter, there is also a question as to whether caps on spending for judicial elections should be implemented in New York. In 2015, the U.S. Supreme Court held that it does not violate the First Amendment for states to prohibit judicial candidates from soliciting campaign contributions personally from supporters. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015). Delegates to a Constitutional Convention delegates could have the opportunity to determine what types of restrictions ought to be placed on the financing, running or administration of judicial campaigns.



### 3. Systems for Appointing Appellate Judges

In addition to the broader-scale issue of whether a Convention could call for changes the methods of electing or appointing trial-level judges, the Committee considered the current method of selecting appellate judges.

As a result of the 1977 court reforms, the process for selecting Judges of the Court of Appeals was changed to an appointive system using a Commission on Judicial Nomination, which reports a limited number of candidates for consideration by the Governor.<sup>171</sup> The State Bar supported those amendments to the State Constitution when they were enacted in 1977.<sup>172</sup>

To be eligible for nomination for appointment to the Court of Appeals, an applicant need only be a New York resident admitted to the New York Bar for at least 10 years and be found by the Commission to be “well qualified” to serve on the Court.<sup>173</sup> As a result, the Commission can consider for recommendation to the Governor any members of the Judiciary who serve on any court within the Unified Court System or any qualified members of the New York bar.

In contrast, with respect to the appointment of Justices of the Appellate Divisions, the State Constitution provides for a Presiding Justice in each Department, seven Supreme Court Justices in each of the First and Second Departments, and five Supreme Court Justices in each of the Third and Fourth Departments, all of whom are appointed by the Governor from

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<sup>171</sup> N.Y. Const. art. VI, § 2(c)-(f) (2015). The Judiciary Law gives the Commission the power to promulgate its own rules. Under former Chief Judge Judith S. Kaye, who was the Commission’s last Chair, the Commission’s rules were updated and modernized. *See* 22 N.Y.C.R.R. Part 7100.

<sup>172</sup> Apr. 16, 1977 New York State Bar Association House of Delegates Minutes (urging the Legislature to give second passage to an amendment providing for merit appointment of judges to the Court of Appeals, improved court administration and management, and strengthened judicial discipline processes).

<sup>173</sup> N.Y. Const. art. VI, § 2(c), (e) (2015).

among the State’s Supreme Court Justices.<sup>174</sup> The Governor has the power to designate additional Justices of the Supreme Court to the respective Appellate Divisions.<sup>175</sup> While not bound to do so, Governor Andrew M. Cuomo has (as have Governors in the recent past) implemented a screening committee mechanism for this appointment process in order to screen candidates for designation and re-appointment to those appellate courts.<sup>176</sup>

Currently, the Governor can only designate a Justice to the Appellate Division from among the existing group of elected Supreme Court Justices, thereby narrowing the pool of potential applicants to the Appellate Division. A potential benefit of court restructuring could be a broadening of the eligible pool for the Appellate Division to include judges who are appointed or elected to other trial-level courts within the Unified Court System – or even qualified members of the bar who are not serving as judges, as is possible with nominations to the Court of Appeals.<sup>177</sup>

With respect to the Appellate Term, Article VI provides that the Chief Administrative Judge has the power to appoint Justices to the Appellate

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<sup>174</sup> N.Y. Const. art. VI, § 4(b) (2015).

<sup>175</sup> N.Y. Const. art. VI, § 4(e) (2015).

<sup>176</sup> Executive Order No. 15, Establishing Judicial Screening Committees, dated Apr. 27, 2011. The Governor’s screening committees also review candidates for the Court of Claims.

<sup>177</sup> Although the State Bar appears not to have taken a specific position as to who ought to be eligible to serve as Appellate Division Justices, it did conclude that the Dunne Commission’s report on court restructuring was “consistent” with the Association’s position. May 31, 2007 New York State Bar Association Executive Committee Minutes. In that report, the Dunne Commission noted that one of the “benefits” of its “merger in place” plan was the expansion of the pool of potential Appellate Division Justices to include the judges of all courts that would be merged into the newly expanded Supreme Court; this would include: Court of Claims Judges, County Court Judges, Family Court Judges, Surrogate’s Court Judges, and Judges in the New York City Civil and Criminal Courts who were serving as Acting Supreme Court Justices. *See A Court System for the Future: The Promise of Court Restructuring in New York State – A Report by the Special Commission on the Future of the New York State Courts*, (dated Feb. 2007), at 51-53, *available at* [http://nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://nycourts.gov/reports/courtsys-4future_2007.pdf).

Terms, with the approval of the Presiding Justice in the respective Appellate Division. As with appointments to the Appellate Division, each appointee to the Appellate Term must be a Justice of the Supreme Court; in addition, such appointees must reside in the Judicial Department of the Appellate Term to which they are appointed.<sup>178</sup> There is no formal screening committee mechanism currently in place for appointments to the Appellate Term.

A Constitutional Convention would provide an opportunity to consider broadening the eligibility criteria for candidates for appointment to the Appellate Division and the Appellate Term.

#### **D. Judicial Retirement Age**

The State Constitution sets a judicial retirement age of 70 for any “judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate’s court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court[.]”<sup>179</sup> This leaves only Town and Village Justice Courts and Housing Court Judges without a constitutionally-mandated retirement age. Justices of the Supreme Court have an additional option that is unique to their positions – even though they must retire at age 70, they can continue to be certificated to continue in office for successive two-year periods up until age 76.<sup>180</sup>

These retirement age restrictions have led to calls for reform. For example, in 2013, there was a failed attempt in 2013 to amend the State Constitution to allow certain Court of Appeals Judges (depending on when

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<sup>178</sup> N.Y. Const. art. VI, § 8(a) (2015).

<sup>179</sup> N.Y. Const. art. VI, § 25(b) (2015).

<sup>180</sup> *Id.* While rarely exercised, this certification process also applies to Court of Appeals Judges who reach age 70 but they must serve on the Supreme Court after age 70.

their terms commenced), and Supreme Court Justices to continue in serving through age 80.<sup>181</sup>

In 2007, the New York State Bar adopted a report advocating a raise in the retirement age for all judges in the Unified Court System to age 76, with two-year re-certification periods available to all judges – other than Court of Appeals Judges, who would need to retire from the Court at age 76.<sup>182</sup> In calling for higher judicial retirement ages across the board, the State Bar pointed to: a) today's longer lifespans as compared to those when New York's Constitution adopted the age of 70 as the retirement age; b) the need for experienced judges to handle an ever-increasing workload in the courts; and c) the desire for parity in retirement ages for all judges within the Unified Court System.<sup>183</sup>

A Constitutional Convention could provide an opportunity to re-examine judicial retirement ages in New York, whether as part of an overall restructuring of the Unified Court System or as a stand-alone issue.<sup>184</sup>

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<sup>181</sup> See James C. McKinley, Jr., "Plan to Raise Judges' Retirement Age to 80 is Rejected," *NY Times*, Nov. 6, 2013, at A20, *available at* <http://www.nytimes.com/2013/11/06/nyregion/plan-to-raise-judges-retirement-age-to-80-is-rejected.html>.

<sup>182</sup> March 31, 2007 New York State Bar Association House of Delegates Minutes.

<sup>183</sup> March 31, 2007 New York State Bar Association House of Delegates Minutes; "Report and Recommendations of the New York State Bar Association Task Force on the Mandatory Retirement of Judges" (Mar. 2007).

<sup>184</sup> At a 2015 State Bar House of Delegates meeting, the House adopted a resolution which advocated changing an aspect of judges' retirement practices so that judges would not be put in the difficult position of needing to retire when they suffer a terminal illness in order to prevent their survivors' pension rights from being jeopardized. Nov. 2015 New York State Bar Association House of Delegates Minutes (*approving* 2015 NYCLA Report on the Death Gamble and Section 60 of the New York Retirement and Social Security Law). A Convention could also provide a vehicle to discuss other judicial retirement issues such as this one or also whether judges should have a separate retirement plan, an issue the State Bar has not yet considered.

### **E. Limited Number of Supreme Court Justices**

The State Constitution allows the Legislature to increase the number of Justices of the Supreme Court once every 10 years; however, such increases are subjected to a cap so that the number of justices in any judicial district “shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration.”<sup>185</sup> This cap is only minimally reduced from the cap that was originally established in 1925.<sup>186</sup> The New York State Bar, like the Dunne Commission, has advocated for removing this cap on the number of Supreme Court Justices.<sup>187</sup> This cap – as well as the burdens it causes to the courts, litigants and the bar – has long been a concern of the State Bar and the legal community at large.<sup>188</sup>

The Committee is cognizant that this cap on the number of Justices and the heavy caseload experienced by the Supreme Court – particularly in

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<sup>185</sup> N.Y. Const. art. VI, § 6(d) (2015).

<sup>186</sup> In 1925, the cap was fixed at one justice for 60,000, or fraction over 35,000, of the population.

<sup>187</sup> See, e.g., April 1998 New York State Bar Association House of Delegates Minutes (“The population cap limiting the number of Supreme Court Justices per district should be abolished.”); May 31, 2007 New York State Bar Association Executive Committee Minutes (finding the Dunne Commission report consistent with State Bar policies); November 4, 2011 New York State Bar Association Executive Committee Minutes (resolving that “[t]he population cap limiting the number of Supreme Court Justices per judicial district should be abolished[.]”).

<sup>188</sup> See, e.g., *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967) (seeking a “judicial re-apportionment” designed to eliminate court delays in the Supreme Court and other trial-level courts of various counties in the State, and asserting allegations about the insufficient number judges assigned to courts in certain New York counties). In the past, the issue of whether there have been too few judges available to litigants has also been alleged to violate the U.S. Constitution. See, e.g., *Kail v. Rockefeller*, 275 F. Supp. 937 (E.D.N.Y. 1967) (alleging on behalf of a group of litigants that the limited number of justices assigned to a particular Judicial District, given the overall population numbers in Queens County, irreparably harmed litigants in that area).

the First and Second Departments – already has resulted in a “work around” system through designations of Acting Supreme Court Justices. Under this system, many judges of the Court of Claims, the New York City Civil Court, Criminal Court and Family Court, and other courts outside New York City frequently are designated as Acting Supreme Court Justices. This is often done to mitigate case management problems presented by the court system’s growing caseload, while technically complying with the constitutional cap.<sup>189</sup>

A Constitutional Convention also could consider whether to: a) remove the population-based cap on the number of Supreme Court Justices; and b) authorize the Legislature to establish the number of judges at a level that is sufficient to dispense justice properly and to meet the needs of the litigants who utilize New York’s courts.

#### **F. Status of New York City Housing Court Judges**

Housing Court Judges handle the Housing Parts of the New York City Civil Court but are not Article VI judges. Unlike most other judges in the Unified Court System, Housing Court judges only serve 5-year terms.<sup>190</sup> These judges are not subject to any mandatory retirement age, nor are they subject to the jurisdiction of the Commission on Judicial Conduct.

Given the duties performed by Housing Court Judges, many have advocated bringing these judges within the purview of a re-drafted Article VI.<sup>191</sup> Although the New York State Bar has supported promoting parity among trial-level judges within the Judiciary through consolidation of trial-level courts (*see* Section III.C.1, *supra*), as far as we can determine, the State

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<sup>189</sup> *See Taylor v. Sise*, 33 N.Y.2d 357 (1974) (rejecting a challenge to the system of long-term, temporary but open-ended administrative assignments to the Supreme Court of judges from other trial-level courts).

<sup>190</sup> New York City Civil Court Act § 110(i)(2016).

<sup>191</sup> *See, e.g.,* A Court System for the Future: The Promise of Court Restructuring in New York State – A report by the Special Commission on the Future of the New York State Courts (dated Feb. 2007), *available at* [http://nycourts.gov/reports/courtsys-4future\\_2007.pdf](http://nycourts.gov/reports/courtsys-4future_2007.pdf).

Bar has not taken an official position on this specific issue. The State Bar did conclude that the report of the Dunne Commission as a whole, which included a recommendation to include Housing Court Judges within the provisions of Article VI, was consistent with State Bar policy.<sup>192</sup>

New York City Housing Court Judges are appointed by the Chief Administrative Judge from a list of qualified applicants compiled by the Housing Court Advisory Council.<sup>193</sup> The Dunne Commission also advocated vesting this appointment authority in the New York City Mayor as part of an overall court restructuring.<sup>194</sup>

A Constitutional Convention could provide a forum in which to reconsider the current status of and method of selecting Housing Court Judges, particularly in the context of an overall court restructuring effort. Such reconsideration could also include determining whether Housing Court Judges: a) should be included within Article VI of the State Constitution, b) should be eligible to serve longer terms, c) should be subject to a mandatory retirement age, and d) should be subject to oversight by the Commission on Judicial Conduct.<sup>195</sup>

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<sup>192</sup> May 31, 2007 New York State Bar Association Executive Committee Minutes.

<sup>193</sup> The Housing Court Advisory Council screens and interviews applicants for Housing Court judgeships. The Council then submits a list of approved candidates to the Chief Administrative Judge from which judges are selected. The Council consists of 14 members – representing a broad range of interests in the City – 12 of whom are appointed by the Chief Administrative Judge. See <https://www.nycourts.gov/COURTS/nyc/housing/advisory.shtml>.

<sup>194</sup> *Id.*

<sup>195</sup> Previous statutory attempts to subject Housing Court Judges to the Commission on Judicial Conduct have been vetoed. See New York State Commission on Judicial Conduct 2016 Annual Report, at 7, available at <http://www.scjc.state.ny.us/Publications/AnnualReports/nyscjc.2016annualreport.pdf> (noting that “[l]egislation that would have given the Commission jurisdiction over New York City housing judges was vetoed in the 1980s”).

## **G. Terms for Trial-Level Courts**

Trial-level judges throughout New York are elected or appointed for differing terms of office. Supreme Court Justices<sup>196</sup> and New York City Surrogates<sup>197</sup> are elected for periods of 14 years. Court of Claims judges are appointed for terms of nine years.<sup>198</sup> Judges of the New York City Civil and Criminal Court,<sup>199</sup> County Court,<sup>200</sup> Family Court,<sup>201</sup> Surrogates in counties outside New York City,<sup>202</sup> and full-time City Court judges<sup>203</sup> have ten-year terms of office. As discussed in Section III.F, *supra*, Housing Court judges serve five-year terms. District Court judges<sup>204</sup> and part-time City Court judges<sup>205</sup> serve six-year terms. Town and Village Justices are elected (and, in some instances, appointed) for terms of four years.<sup>206</sup>

As noted above in the context of judicial selection (*see* Section III.C.1, *supra*), depending on what actions may be taken regarding court restructuring, the appropriate terms of office for judges is an additional issue that could be discussed in a Constitutional Convention. If New York's court system were to be restructured in the manner that the State Bar has advocated or along similar lines – but without standardizing the

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<sup>196</sup> N.Y. Const. art. VI, § 6(c) (2015).

<sup>197</sup> N.Y. Const. art. VI, § 12(c) (2015).

<sup>198</sup> N.Y. Const. art. VI, § 9 (2015).

<sup>199</sup> N.Y. Const. art. VI, § 15(a) (2015).

<sup>200</sup> N.Y. Const. art. VI, § 10(b) (2015).

<sup>201</sup> N.Y. Const. art. VI, § 13(a) (2015).

<sup>202</sup> N.Y. Const. art. VI, § 12(c) (2015).

<sup>203</sup> Uniform City Court Act § 2104(d) (2016).

<sup>204</sup> N.Y. Const. art. VI, § 16(h) (2015).

<sup>205</sup> Uniform City Court Act § 2104(d) (2016).

<sup>206</sup> Village Law § 3-302(3) (2016).



differentiated terms of office within the Judiciary – a restructured Supreme Court would include justices having a variety of different term lengths.<sup>207</sup>

Whether as part of a comprehensive court restructuring effort or otherwise, a Constitutional Convention could provide a mechanism to address parity in judicial terms across the Unified Court System.

#### **H. Family Court Jurisdiction**

Currently, Family Court Judges lack the broad range of jurisdiction that is necessary to address fully matters affecting victims of domestic violence. As a result, in some Judicial Districts of the State, Acting Supreme Court Justice status is granted to a limited number of Family Court Judges as a “work around.” For example, the Unified Court System has implemented Integrated Domestic Violence Parts in some Judicial Districts to address these serious issues.<sup>208</sup> Nonetheless, these solutions are not uniform throughout the State and there remain areas of the State where victims of domestic violence who seek resort to the courts are hampered by the Family Court’s limited jurisdiction.

Should the Family Court be merged into the Supreme Court as part of an overall court restructuring, this issue would necessarily be resolved as a consequence of such a merger. Otherwise, the impact of the Family Court’s limited jurisdiction in domestic violence cases would be an issue that would be ripe for consideration should a Constitutional Convention be held.

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<sup>207</sup> Notably, the State Bar previously found the Dunne Commission report that endorsed “merger in place” – including maintaining different term lengths for New York’s judges – to be consistent with the Association’s prior positions. *See* May 31, 2007 New York State Bar Association Executive Committee Minutes.

<sup>208</sup> For a discussion of these courts, *see* <https://www.nycourts.gov/ip/domesticviolence/>; <http://moderncourts.org/education-and-outreach/integrated-domestic-violence-courts/>. In November 2016, Chief Judge Janet DiFiore announced an innovative program permitting domestic violence victims in certain counties to obtain orders of protection by video-link. *See* [http://www.nycourts.gov/press/PDFs/PR16\\_14.pdf](http://www.nycourts.gov/press/PDFs/PR16_14.pdf).

In addition, New York’s Family Courts currently lack jurisdiction over divorce matters, which jurisdiction is vested only in the Supreme Court. In some districts of the State, this dichotomy has been addressed by designating certain Family Court Judges as Acting Supreme Court Justices so that they may exercise divorce jurisdiction.

The Family Court routinely deals with a wide range of topics affecting families that are ancillary to divorce cases (such as custody of minors, child and spousal support, guardianship of minors, paternity and termination of parental rights). As a result, the exclusion of divorce jurisdiction – and jurisdiction over various related matters that are incidental to a divorce case – from the Family Court appears to be inconsistent with the interests of judicial economy. Although the rise of no-fault divorce may have reduced somewhat the impact of the Family Court’s limited jurisdiction *vis-à-vis* divorce cases themselves, there remains a potential for inconsistent or even conflicting rulings particularly with respect to issues of custody, visitation and support.

Accordingly, it would also be appropriate for a Constitutional Convention to address whether Family Courts should be given sole or concurrent jurisdiction over divorce cases and their ancillary matters. Nonetheless, as discussed above, if the Family Court were merged into the Supreme Court as part of a court consolidation plan, this issue would resolve itself.

### **I. Town and Village Justice Courts**

Outside of New York City, Justice Courts – also known as Town and Village Courts – are found in many municipalities across the State. “These courts have jurisdiction over a broad range of matters, including vehicle and

traffic matters, small claims, evictions, civil matters and criminal offenses.”<sup>209</sup>

Currently, the State Constitution grants the Legislature the power to “regulate [town and village] courts, establish uniform jurisdiction, practice and procedure for city courts outside the city of New York and [] discontinue any village or city court outside the city of New York existing on the effective date of this article.”<sup>210</sup>

The Legislature has exercised this authority in limited instances, such as: a) specifying the terms of office for Village Court Justices (four years by statute);<sup>211</sup> b) limiting the number of such justices in each town or village;<sup>212</sup> and c) imposing residency requirements for elected justices.<sup>213</sup> But there remain substantial issues regarding and proposals for reform of these courts. Most notably, unlike other judges in New York, there is no requirement that these justices be members of the Bar, although they must receive some judicial training after election, the extent of which depends on whether they are members of the Bar.

Given the authority of these Town and Village Justice Courts – especially in criminal matters – many have suggested that New York should require that these judges be attorneys who are admitted to practice in New York. Supporters of the present system point to, among other issues, the practical difficulty in finding resident attorneys to serve as justices in many jurisdictions where Town and Village Justice Courts sit and also New York’s long tradition of such local “citizen judges.”

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<sup>209</sup> <http://www.nycourts.gov/courts/townandvillage>. Note that in some areas of the State, the jurisdiction of Town or Village Justice Courts is more limited, and the District Courts have jurisdiction over many of these matters.

<sup>210</sup> N.Y. Const. art. VI, § 17(b) (2015).

<sup>211</sup> Village Law § 3-302(3) (2016).

<sup>212</sup> Village Law § 3-301(2)(a) (2016).

<sup>213</sup> Public Officers Law § 3 (2016); Town Law § 23 (2016).

In 2001, the New York State Bar adopted the position that all judges in our State’s Justice Courts should be lawyers, concluding that: “[i]t is unfair for litigants in civil or criminal cases to have matters determined by a person who may be unfamiliar with the law.”<sup>214</sup>

A September 2008 Report by the Dunne Commission entitled, “Justice Most Local: The Future of Town and Village Courts in New York State,” concluded that there were serious flaws in New York’s Town and Village Court system. However, the Report found no compelling basis to eliminate these courts altogether or to require that the justices serving in them be admitted attorneys. Instead, the Dunne Commission issued multiple recommendations to ensure that the Town and Village Courts function as intended and to protect the citizens of New York, including: a) developing minimum standards for these courts; and b) developing panels to discuss court consolidation within the Town and Village Court system.<sup>215</sup>

Three months thereafter, the State Bar’s Committee on Court Structure and Judicial Selection prepared a report addressing the Dunne Commission’s recommendations. This State Bar Committee agreed with the Dunne Commission that: a) requiring Town and Village Court justices to be lawyers was no longer feasible; b) that development of minimum standards

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<sup>214</sup> William Glaberson, *How a Reviled Court System Has Outlasted Many Critics*, N.Y. Times, at B8-B9 (Sept. 27, 2006)

<sup>215</sup> Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts (Sept. 2008), at 83-104.

Thereafter, in 2009, the Legislature passed a bill, which was proposed by then-Attorney General Andrew M. Cuomo, allowing for (but not mandating), *inter alia*, petitions and votes on whether to reorganize local government by consolidating or dissolving Towns, Villages and certain other local governmental bodies in the State. See “*New N.Y. Government Reorganization and Citizen Empowerment Act*” (2009), codified at Gen. Mun. Law art. 17-A (2010). At present, this statutory authority could be invoked to seek to consolidate overlapping Town and Village Justice Courts in particular communities of the State.

for all Town and Village Courts was an important goal; and c) that consolidation of these courts was a worthy topic of discussion.<sup>216</sup>

At that time, the State Bar's House of Delegates did not agree with all of the Dunne Commission proposals. For example, the House of Delegates disagreed with the specifics of the proposed minimum eligibility criteria for justices of these courts – as to which the State Bar proposed a minimum age of 30 plus a four-year college degree whereas the Dunne Commission proposed a minimum age of 25 plus a two-year degree.<sup>217</sup>

Given the complexity of the issues concerning New York's Town and Village Courts and the important due process issues involved in proceedings that are held in those courts, discussion of issues affecting the Town and Village Court system would be appropriate for a Constitutional Convention.<sup>218</sup>

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<sup>216</sup> See January 30, 2009 New York State Bar Association House of Delegates Minutes (adopting Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State but rejecting one recommendation in the Committee report in favor of the original recommendation set forth in the Dunne Commission Report); Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State (Dec. 16, 2008). See also Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts (Sept. 2008).

<sup>217</sup> Compare January 30, 2009 New York State Bar Association House of Delegates Minutes (adopting Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State except rejecting one recommendation for the original recommendation found in the Dunne Commission Report) with Report of the Committee on Court Structure and Judicial Selection re: Justice Most Local: The Future of Town and Village Courts in New York State (Dec. 16, 2008); Justice Most Local: The Future of Town and Village Courts in New York State, A Report by the Special Commission on the Future of the New York State Courts (Sept. 2008).

<sup>218</sup> Another major issue affecting the Town and Village Courts involves arraignments and the cost of indigent criminal defense. Those issues are outside the scope of this Report. Certain aspects of those issues are the subject of legislation passed during the Legislature's 2016 legislative session. E.g., Assembly Bill A10360 (2016)

## **J. Court Budgets**

Under Article VII of the State Constitution, the Chief Judge is to transmit the Judiciary's budget to the Governor by December 1<sup>st</sup> of each year for inclusion in the Executive Budget.<sup>219</sup> The Governor is obliged to transmit the Judiciary Budget to the Legislature "without revision but with such recommendations as the governor may deem proper." Once before the Legislature, the Judiciary Budget is subject to customary budget deliberations and negotiation. If the Legislature adds new expenditures to the Judiciary Budget, such expenditures can thereafter be vetoed by the Governor.<sup>220</sup>

As a consequence of this budgeting process, the Judiciary is subject to the outcome of budget negotiations between the Executive Branch and the Legislature. The budgeting process in New York often involves a give and take between legislative representatives and the Executive Branch in which the typical sorts of political horse-trading can take place. As an independent branch of government, the Judiciary should necessarily remain at a distance from this negotiation process to a significant extent.

This year, on December 1, 2016, state court officials released a Judiciary Budget seeking \$2.18 billion for the Unified Court System's 2017-18 spending plan; neither Governor Andrew M. Cuomo nor the Legislature has weighed in publicly on the court budget as of the time of this Report.<sup>221</sup>

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(providing for off-hours arraignment); Senate Bill S07209-A (2016) (same). This bill was signed by Governor Cuomo on November 28. Joel Stashenko, *New Law Allows Centralized Arraignments Outside New York City*, N.Y.L.J. (Nov. 29, 2016).

<sup>219</sup> N.Y. Const. art. VII, § 1 (2015).

<sup>220</sup> N.Y. Const. art. VII, §§ 1, 4 (2015); *see* N.Y. Const. art. IV, § 7 (2015).

<sup>221</sup> In reporting on the Judiciary's 2017-18 budget proposal, the New York Law Journal noted previous conflicts between the Governor and the Judiciary over past budget proposals. *See* Joel Stashenko, "Judicial Budget Proposal Calls for 200 Hires, Security Gear," N.Y.L.J. (Dec. 1, 2016), *available at* <http://www.newyorklawjournal.com/home/>

At times in the past, this constitutional construct has led to friction, if not outright budget disputes, between the Judiciary and other branches of government. For example, in 1991, a budget stand-off between the then-Chief Judge and the Governor led to litigation captioned *Wachtler v. Cuomo*. In that lawsuit, then Chief Judge Sol Wachtler challenged Governor Mario Cuomo's unilateral action to reduce the Judiciary's budget submission to the Legislature for the 1991-92 State fiscal year.<sup>222</sup>

Following the 2008 fiscal crisis, the American Bar Association ("ABA") established a Task Force on Preservation of the Justice System, noting that "many of our state court systems have been in a crisis because of severe underfunding."<sup>223</sup> Through several initiatives, the ABA sought to

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id=1202773591040/Judicial-Budget-Proposal-Calls-for-200-Hires-Security-Gear?mcode=1202617075062&curindex=0.

<sup>222</sup> No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991). See Walter E. Swearingen, *Wachtler v. Cuomo: Does New York's Judiciary Have an Inherent Right of Self-Preservation?*, 14 Pace L. Rev. 153, 155-56 (1994). In response to this litigation, the State Bar's House of Delegates authorized the Association's Executive Committee to file an amicus brief (although the case was resolved before such a brief was needed). See November 2, 1991 New York State Bar Association House of Delegates Minutes. This House resolution followed a discussion within the Executive Committee, in which members "noted that the budgetary problems and the current impasse among the three branches of government were essentially political and would likely require negotiations outside the context of litigation if a successful, long-term solution is to be found." October 7, 1991 New York State Bar Association Executive Committee Minutes.

<sup>223</sup> This ABA Task Force issued a "toolkit" to address funding issues affecting state courts across the country. This "toolkit" can be found at [http://www.americanbar.org/groups/committees/american\\_judicial\\_system/task\\_force\\_on\\_the\\_preservation\\_of\\_the\\_justice\\_system/Court\\_Funding\\_Toolkit.html](http://www.americanbar.org/groups/committees/american_judicial_system/task_force_on_the_preservation_of_the_justice_system/Court_Funding_Toolkit.html).

In 2011 and thereafter, similar issues affected New York's Judiciary after the court budget was cut. See March 30, 2012 New York State Bar Association Executive Committee Minutes (noting efforts to inform legislators of the "negative impact on individuals and businesses that are seeking nothing more from the court system than a fair and timely resolution to their legal problems"). See also New York County Lawyers' Association Task Force on Judicial Budget Cuts, "Preliminary Report on the Effect of Judicial Budget Cuts on New York State Courts," available at [https://www.nycla.org/siteFiles/Publications/Publications1475\\_0.pdf](https://www.nycla.org/siteFiles/Publications/Publications1475_0.pdf) (highlighting the

explore this underfunding and supply solutions and ideas designed to ensure that state courts receive their necessary funding. In 2012, the Task Force on Preservation of the Justice System worked with the National Center for State Courts and Justice at Stake to produce a report, entitled “Funding Justice: Strategies and Messages for Restoring Court Funding.”<sup>224</sup> The suggestions made in that report included: a) developing a year-round relationship with those involved in enacting laws within the Executive and Legislative branches of state government; b) proposing credible court budgets for state court systems; and c) presenting data about court systems in ways that could easily be understood by branches of government that are unfamiliar with – or perhaps unsympathetic – to the budgetary woes of the Judiciary.

A Constitutional Convention would provide an opportunity to look afresh at the process through which the Judiciary Budget is determined in New York and to help ensure that the Judiciary receives adequate funds to support its operations and to promote access to justice in this State.<sup>225</sup>

#### **K. Commission on Judicial Conduct**

As a result of the 1977 court reforms, the State Constitution provides for a Commission on Judicial Conduct which is authorized to: “receive, initiate, investigate, and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system.”<sup>226</sup> Given the need to safeguard

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delays, increased workloads, and reductions in service that were visible months after the Judiciary budget cuts were made in 2011).

<sup>224</sup> This National Center for State Courts’ report was intended to set forth important lessons about: a) how the public views the courts and their funding needs; and b) how to tell the story of the courts, and why they matter to the citizenry at large. *See* [http://www.justiceatstake.org/media/cms/Funding\\_Justice\\_Online2012\\_D28F63CA32368.pdf](http://www.justiceatstake.org/media/cms/Funding_Justice_Online2012_D28F63CA32368.pdf).

<sup>225</sup> Each year the State Bar President appears before the Legislature at hearings on the court budget, frequently to support the budget allocations requested by the Chief Judge.

<sup>226</sup> N.Y. Const. art. VI, § 22(a) (2015).



the appearance of fairness and justice in the court system, a well-functioning Commission that reviews these sensitive matters helps assure our State's citizenry that the judicial process is sound. But any such safeguard for the judicial system ought to be careful not to encroach on the independence of the judicial process. Moreover, unless there is a fair process for investigating, reviewing and adjudicating judicial disciplinary complaints, the work of the Commission could carry the potential to do more harm than good.

In 2009, the Task Force on Judicial Independence of the New York County Lawyers' Association ("NYCLA") issued a report on the Commission on Judicial Conduct.<sup>227</sup> This report assessed the Commission's operations and made various suggestions and recommendations which were intended to preserve judicial independence while maintaining a robust oversight function for judicial discipline. These recommendations included: a) establishing and maintaining a "firewall" between the prosecutorial and adjudicative roles of the Commission; b) giving respondent judges in the disciplinary process notice of Commission inquiries; c) affording respondent judges subpoena power so they can compel the production of documents and witnesses in matters before the Commission; d) strengthening confidentiality protections for the Commission's process; and e) modifying the Commission's standards and processes to better match the ABA's Model Rules of Judicial Disciplinary Enforcement.<sup>228</sup>

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<sup>227</sup> See New York County Lawyers' Association Task Force on Judicial Independence, "Report on the New York State Commission on Judicial Conduct," available at [http://www.nycla.org/siteFiles/Publications/Publications1303\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications1303_0.pdf).

<sup>228</sup> ABA Model Rules of Judicial Disciplinary Enforcement (1994), available at [http://www.americanbar.org/groups/professional\\_responsibility/model\\_rules\\_judicial\\_disciplinary\\_enforcement.html](http://www.americanbar.org/groups/professional_responsibility/model_rules_judicial_disciplinary_enforcement.html).

NYCLA's Board of Directors approved this report on September 14, 2009.<sup>229</sup> After the Commission agreed to adopt certain of NYCLA's recommendations, but not others,<sup>230</sup> the State Bar's House of Delegates adopted the remaining recommendations in January 2011.<sup>231</sup>

A Constitutional Convention may provide an appropriate opportunity to review the functions of the Commission on Judicial Conduct and the extent of the due process protections that are afforded to subjects of Commission investigations.<sup>232</sup>

#### **L. Participation of Judges at a Constitutional Convention**

While qualifications for members of a constitutional convention are to be established from time to time by the State legislature, the State Constitution specifically permits judges to serve as members of a constitutional convention.<sup>233</sup> Nonetheless, some have raised concerns that earlier conventions encountered potential conflict issues when judges served as convention delegates while also serving on the bench.<sup>234</sup>

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<sup>229</sup> See New York County Lawyers' Association Task Force on Judicial Independence, "Report on the New York State Commission on Judicial Conduct," available at [http://www.nycla.org/siteFiles/Publications/Publications1303\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications1303_0.pdf).

<sup>230</sup> See generally 22 N.Y.C.R.R. 7000.1 *et seq.*

<sup>231</sup> See January 28, 2011 New York State Bar Association House of Delegates Minutes (approving NYCLA's recommendations regarding sanctions, liability insurance for judges, training for referees, separation of Commission functions, and certain recommendations on notice and discovery in the Commission process). See also "NYCLA Recommendations Regarding Commission on Judicial Conduct Adopted by NYSBA," [https://www.nycla.org/siteFiles/Publications/Publications1423\\_0.pdf](https://www.nycla.org/siteFiles/Publications/Publications1423_0.pdf).

<sup>232</sup> Additionally, the State Constitution still references convening a Court on the Judiciary (N.Y. Const. art. VI, § 22(j) (2015)) and the availability of a Court for the Trial of Impeachments within the Legislature (N.Y. Const. art. VI, § 24 (2015)). Should a Constitutional Convention be called, any potential redundancy in these provisions could be cleared up as well. See Section III.M, *infra*.

<sup>233</sup> N.Y. Const. art. VI, § 20(b)(1) (2015).

<sup>234</sup> See, e.g., The Delegate Selection Process: Interim Report of the Temporary New York State Commission on Constitutional Revision (March 1994) (quoting

Recently, on June 16, 2016, the Unified Court System’s Advisory Committee on Judicial Ethics issued an opinion addressing a judge’s potential activities around a constitutional convention.<sup>235</sup> That Advisory Committee recognized that the State Constitution specifically permits judges to seek election to serve as a delegate. The Committee also drew attention to the seeming inconsistency between: a) permitting judges to engage in “publicly discuss[ing] the need for judicial reform and a constitutional convention, as these are matters relating to the law, the legal system or the administration of justice”, while b) prohibiting judges from discussing anything that would “cast reasonable doubt on the judge’s capacity to act impartially as a judge, detract from the dignity of judicial office, or otherwise interfere with the proper performance of judicial duties.”<sup>236</sup>

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concurring statement of commission member Hon. Malcolm Wilson that “there is no logical basis for permitting judges to serve as Convention delegates”), reprinted in DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 434 (Gerald Benjamin & Hendrik N. Dullea eds., 1997); William J. van den Heuvel, Reflections on Constitutional Conventions, 40 N.Y.S.B.J. 261, 266 (June 1968) (“No single group of delegates [at the 1967 Convention] came in for more criticism both from the public and from themselves than did the judges. The public image of the judiciary is of a non-partisan branch of government delicately weighing the needs of justice and rendering those impartial decisions far removed from political pressures and interests. Suddenly these robed men become gladiators in a political arena-and even worse, they seem to enjoy it. And then comes the debate on the judiciary article. Instead of divorcing themselves from the committee in which the article is drafted, they dominate it; and in the public debate, all of the rivalries and resentments which are hidden by the heavy curtains of the courts are suddenly revealed.”). Concerns have also been raised regarding the potential receipt of dual salaries both as a convention delegate and as a judicial officer.

<sup>235</sup> Opinion 16-94 (June 16, 2016). *See also* Opinion 96-146 (Mar. 19, 1997) (confirming that a judge can serve as a delegate to a State constitutional convention).

<sup>236</sup> Opinion 16-94 (June 16, 2016). This is different from judges being involved in a public group that develops proposals for how to change the State Constitution prior to a convention being called; the language of this ethics opinion language suggests that judges are prohibited from engaging in this type of activity. Opinion 16-60 (May 5, 2016).

Some discussion of the participation by judges in future conventions would be ripe for consideration if a Constitutional Convention were to be approved in 2017.

**M. Length, Style, and Outdated Portions of the Judiciary Article**

The text of the Judiciary Article alone comprises approximately 16,000 words – representing almost one-third of the State Constitution as a whole. The City Bar’s 1997 Report of the Task Force on the New York State Constitutional Convention called the article “substantially more comprehensive and detailed than any other part of the Constitution.”<sup>237</sup>

Some provisions of the Judiciary Article appear to be outdated or potentially inappropriate for a modern court environment. For example, Section 32 of Article VI mandates that, when called on to make child placements, courts are to place children in “an institution or agency governed by persons, or in the custody of a person, of the same religious persuasion as the child.” Other provisions appear to be anachronistic. As an example, the number of Judicial Districts provided for in the Judiciary Article is less than the number actually specified by the Legislature pursuant to its authority to make such changes; and Article VI still references a Court for the Trial of Impeachments which includes judges and a Court on the Judiciary, despite the creation of the Commission on Judicial Conduct 40 years ago.<sup>238</sup>

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<sup>237</sup> New York City Bar Association, Report of the Task Force on the New York State Constitutional Convention (dated June 1997), at 595, *available at* <http://www.nycbar.org/pdf/report/uploads/603--ReportoftheTaskForceontheNYSConstitutionalConvention.pdf>. *See also* Peter J. Galie & Christopher Bopst, “Constitutional ‘Stuff’: House Cleaning the New York Constitution – Part I,” 77 Alb. L. Rev. 1385, 1424 (2013 & 2014) (“[T]here are numerous provisions of the article that can either be removed or truncated without significantly changing the substantive nature of the article.”).

<sup>238</sup> N.Y. Const. art. VI, §§ 22(j), 24 (2015).

In addition, the Judiciary Article contains minute details – such as the location of particular courts and the numbers of judges assigned to them. Those details could be more appropriate subjects of legislative action, thereby permitting such provisions to be updated more readily.

In the event that a Convention is called, a re-drafting effort addressed to the Judiciary Article would be appropriate, with a goal of simplifying and updating Article VI. This sort of re-drafting could prove to be beneficial for the Judiciary, users of the court system and the bar.<sup>239</sup>

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<sup>239</sup> If delegates to a Convention were to decide to make certain other changes to the Constitution noted in this Report, it may of necessity result in simplifying and shortening Article VI before separate attention is paid to the length and language of the Article's remaining provisions.

#### **IV. CONCLUSION**

At present, the Judiciary Article represents an unnecessarily large and complex portion of the State Constitution. Article VI governs a multitude of critical aspects of New York's legal system – certain of which are ripe for discussion if a Constitutional Convention is called in 2017. Moreover, other issues that are central to the functioning of a statewide court system are not adequately addressed by the existing Judiciary Article. Certain other issues affecting the Judiciary are currently treated at the constitutional level when they might better be addressed by the Legislature, from time to time as may be needed.

A theme that is common to many of the most significant reform issues concerning Article VI, is the opportunity that a Convention would provide to reorganize, modernize and simplify the constitutional structure of the Unified Court System. If the voters were to decide in 2017 to call a Constitutional Convention, various other changes to Article VI could be considered in order to improve the Judiciary in New York, and those reforms could be tied to an overall court restructuring effort.

December 12, 2016

**Membership of the New York State Bar Association's Subcommittee  
on the Judiciary Article of the New York State Constitution**

**CHAIR OF THE COMMITTEE ON THE NEW YORK STATE  
CONSTITUTION:**

- Henry M. Greenberg, Esq.  
Greenberg Traurig, LLP

**CHAIR OF THE SUBCOMMITTEE ON THE JUDICIARY ARTICLE:**

- Stephen P. Younger, Esq.  
Patterson Belknap Webb & Tyler LLP

**MEMBERS OF THE SUBCOMMITTEE:**

- Mark H. Alcott, Esq.  
Paul Weiss Rifkind Wharton & Garrison
- Hon. Cheryl E. Chambers  
New York State Supreme Court, Appellate Division, Second  
Department
- Hon. Carmen Beauchamp Ciparick (Ret.)  
Greenberg Traurig, LLP
- Hon. John R. Dunne (Ret.)  
Whiteman Osterman & Hanna LLP
- Hon. Margaret J. Finerty (Ret.)  
Getnick & Getnick LLP
- Hon. Helen E. Freedman (Ret.)  
JAMS
- A. Thomas Levin, Esq.  
Meyer, Suozzi, English & Klein P.C.
- Hon. Alan D. Scheinkman  
Administrative Judge, Ninth Judicial District

EX OFICIO:

- Alan J. Pierce, Esq.  
Hancock Estabrook, LLP  
Chair, NYSBA Committee on Courts of Appellate Jurisdiction

SECRETARY:

- William F. Schmedlin, Esq.  
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NYSBA STAFF:

- Ronald F. Kennedy, Esq., NYSBA Staff Liaison  
New York State Bar Association
- Richard Rifkin, Esq., NYSBA Staff Liaison  
New York State Bar Association





REPORT  
OF THE  
COMMERCIAL AND FEDERAL LITIGATION SECTION  
OF THE  
NEW YORK STATE BAR ASSOCIATION  
CONCERNING THE  
REPORT AND RECOMMENDATIONS OF THE  
NEW YORK STATE BAR ASSOCIATION COMMITTEE ON THE  
NEW YORK STATE CONSTITUTION

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THE JUDICIARY ARTICLE OF THE NEW YORK STATE CONSTITUTION  
– OPPORTUNITIES TO RESTRUCTURE AND MODERNIZE  
THE NEW YORK COURTS

JANUARY 10, 2017

**Opinions expressed herein are those of the  
Commercial & Federal Litigation Section or of the New York State Bar  
Association unless and until they have been adopted by the  
Section's Executive Committee or NYSBA's House of Delegates.**

The Commercial and Federal Litigation Section (the “Section”) of the New York State Bar Association (“NYSBA”) is pleased to provide its views on the Report and Recommendations of the NYSBA Committee on the New York State Constitution concerning the Judiciary Article of the New York State Constitution – Opportunities to Restructure and Modernize the New York Courts as it specifically relates to commercial disputes (the “Report”), and recommends the Report’s adoption.

The Section believes that if a Constitutional Convention seeking to amend our New York State Constitution is held it would offer significant opportunities to consider changes to the Judiciary Article that would greatly improve efficiencies in the administration of commercial disputes, thus helping commercial litigators provide “faster, cheaper and smarter” legal services to their business clients.

The Section takes no position as to whether a Constitutional Convention should be held, but if one is convened, the Section is generally in favor of reasonable and realizable changes to the Judiciary Article that would help achieve these goals relating to commercial disputes.

Of note are the following non-exclusive items of interest specifically relating to commercial disputes:

1. The caseload of the New York State Appellate Division, Second Department, is anathema to the efficient and timely disposition of cases before that Court, including commercial cases. Currently, cases frequently take in excess of one year from the date of perfection to be decided, which means that often in commercial disputes which are time-sensitive, the trial decision is the court of “last resort.” Compounding this problem is the inability of the Court to provide sufficient time to hear extended argument on all of its complex commercial disputes. New York State cannot lay claim to being “the” jurisdiction for the resolution of commercial disputes if the appellate process, especially in the Second Department, is not properly dealt with. Without taking a position as to the creation of a “Fifth Department,” the Section is in support of initiatives that would seek to relieve the above issues concerning the Second Department.

2. The cap on the number of Supreme Court justices provided by Article VI §6(d) of the New York Constitution similarly, unfortunately, imposes too heavy a burden on the dockets of our courts, especially within the First and Second Departments. Specifically, to address the increasing number of commercial cases within the New York County Commercial Division, the amount in controversy recently has been raised to \$500,000. However, if the number of complex commercial cases continues to rise, without adding additional judges, access to this court will need to be further limited by another increase in the jurisdictional limit. This, however, would deny significant commercial disputes with a lower amount in controversy access to the New York County Commercial Division. Although the use of “acting” Supreme Court justices has provided some relief, there is value in strongly considering a change to the Article that would allow the Legislature to increase the number of justices (whether by removal of the constitutional cap or an adjustment to it) needed to dispense justice properly within (and, of course, without) the Commercial Divisions.

3. The Section believes that there is also value in the opportunity to evaluate the process by which the Judiciary Budget is debated among the three branches of our State Government, and ultimately decided by the Legislative and Executive branches. The Judiciary needs to receive sufficient funds to provide the level of service necessary to address litigation in the 21<sup>st</sup> century, noting that business clients and the legal service providers that serve them within the State of New York generate significant revenues, and the court system is an important component of that “ecosystem.” As a coordinate branch of State government, the Judiciary should not continue to be relegated to “second class” status in determining its budget. Many business clients have options where to litigate their disputes and their decision-making should be determined by legal principles, not by the inadequacy of court facilities, technology and the availability and work load of members of the Judiciary. Business disputes that could be resolved in New York State that are brought in other jurisdictions result in a direct loss of revenues to the New York State Budget and damage our State economy.

The Section limits its specific comments to the above three areas, which significantly impact continuing efforts to enhance and advance the administration of commercial disputes in New York State, but notes that the Report discusses other issues important to the functioning of New York’s judicial branch, including the process of Appellate Division justice selection, mandatory retirement age of Judges of the New York State Court of Appeals and Justices of the Supreme Court, and reforms to the Commission on Judicial Conduct.

# COMMENTS ON THE REPORT AND RECOMMENDATIONS OF THE NYSBA COMMITTEE ON THE STATE CONSTITUTION REGARDING THE JUDICIARY ARTICLE

Submitted by:  
Steven H. Richman  
House of Delegates Member  
for the Entertainment, Arts and Sports Law Section  
January 17, 2017

***I am disappointed that the Committee failed to consider many of the ideas that have been offered to reinvigorate our State's Judiciary by increasing the public's participation and confidence in its ability to function effectively on behalf of the people of the Empire State. It also does not address the urgent need to promote greater integrity in the judicial branch by imposing at least the same modest disclosure and conflict of interest rules that applies to the remainder of State Government.***

Among the items I would have like to see at least discussed by the Committee and the Bar Association to generate credible information for intelligent public debate are:

1. The election of all Judges to Courts of Record within the State of New York. New York has a rich history of electing true giants to its court system. We should enable the voters of this State to elect those they deem worthy to all of our Courts, beginning with the Court of Appeals down to every village magistrate. In addition, the Justices of the Appellate Divisions should be elected by the voters of their respective departments.
2. The current denial of equal rights to the voters in New York City should end and the Judges of the Criminal and Family Courts in the City should be elected, just like their equivalent Family, County and District Courts are outside the City of New York.

3. All judicial officers should be elected for a uniform term (# of years).
4. Term limits for judicial office.
5. Assignment of any Judge as Acting Supreme Court Justices should be prohibited. A mandatory formula should be added to the Constitution to provide for the election of additional Supreme Court Justices when the population or workload of the Judicial District requires the same.
6. Similar language should also be added to address the workloads of the Civil, Criminal, Family, County, District and Surrogates courts throughout the State.
7. Cross-Endorsements by multiple political parties and independent bodies should be prohibited for judicial candidates.
8. There should be a system of matching public funds for judicial candidates who qualify for the ballot and raise a sufficient amount of small donor contributions.
9. No judicial officer shall be appointed to any position, including Chief Administrator of the Office of Court Administration. Judges should be in Courtrooms administering justice, not in offices, pushing paper.
10. Like the federal system, the senior Justice or Judge in the Judicial District or for each of the inferior courts in the City or County shall serve as the Administrative Judge for that Court and each such Administrative Judge such have a Court Administrator to assist in the performance of administrative matters under the direction of the Chief Administrator.
11. The same fundamental financial reporting and code of ethics for all State Government officers should apply to the members of the judicial branch, in addition to any other regulations promulgated by the Administrative Board of the Courts.
12. The Court of Claims should be limited to hearing only claims against the State of New York. Its Judges should be elected, one from each of the State's Judicial Districts.



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #9

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Continuing Legal Education supporting a diversity and inclusion requirement in New York's mandatory continuing legal education regulations.

Attached is a report from the Committee on Continuing Legal Education supporting an amendment to the rules governing mandatory continuing legal education to provide for one credit hour of diversity and inclusion CLE as part of the 32 credit hours required for new attorneys and as part of the 24 credit hours required of experienced attorneys. The proposal is based on a proposal adopted by the American Bar Association's House of Delegates in February 2016. As set forth in the report, the changing demographics of the United States demonstrate a need for attorneys to be well versed in issues relating to the representation of minorities and other diverse individuals. The report sets forth a proposed definition of diversity and inclusion to encompass diversity and inclusion in both the legal profession and the practice of law.

The report notes that in July 2016, the New York City Bar Association submitted a letter, subscribed to by a number of other bar associations, supporting diversity CLE, followed by letters to Hon. Betty Weinberg Ellerin, chair of the New York State CLE Board. These letters are attached as Appendix A to the report. An Appendix B sets forth sample CLE programs focusing on diversity and inclusion.

This report was submitted on October 19, 2016 and posted in the Reports Community. It was presented on an informational basis at the November 5, 2016 House meeting, at which time a scheduling resolution was adopted to govern the submission of comments and presentation at the January 27, 2017 meeting. The scheduling resolution is attached. Comments submitted in accordance with the resolution are included in your materials under cover of a separate staff memorandum.

Following the informational presentation in November, the Continuing Legal Education Board of the Unified Court System published for 60-day review and comment its proposed amendment of the MCLE rule to provide a one-credit requirement addressing diversity, inclusion and elimination of bias. The request for comment from the Office of Court Administration and accompanying materials also are attached.

The proposal will be presented by Ellen G. Makofsky, chair of the Committee on Continuing Legal Education, and committee member Mirna M. Santiago.

**RESOLUTION TO GOVERN CONSIDERATION OF THE  
REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON CONTINUING  
LEGAL EDUCATION**

**RESOLVED**, that the House of Delegates hereby adopts the following procedures to govern consideration at the January 27, 2017 meeting of the House, and any subsequent meetings as may be necessary, of the report and recommendations of the Committee on Continuing Legal Education:

1. The report and recommendations of the Committee was circulated to members of the House, sections and committees, county and local bar associations, via the Reports Community on October 20, 2016.
2. **Comments on report and recommendations:** Any comments on or amendments to the Committee's report or particular recommendations contained therein must be submitted in writing to the Secretary of the Association at the Bar Center by January 13, 2017; otherwise they shall not be considered. All comments complying with this procedure shall be distributed to the members of the House in advance of the January 27, 2017 meeting.
3. **Consideration of the report and recommendations at the January 27, 2017 meeting and any subsequent meetings:** The report and recommendations will be scheduled for formal debate and vote at the January 27, 2017 meeting and considered in the following manner:
  - a. The Committee shall be given an opportunity to present its report and recommendations.
  - b. All those wishing to speak with regard to the report and recommendations may do so only once for no more than three minutes.
  - c. The Committee may respond to questions and comments as appropriate.
  - d. Procedural motions shall be considered out of order until debate on substantive issues is concluded.
  - e. A vote on the report and recommendations shall be taken at the conclusion of the debate.



REPORT OF THE NYSBA COMMITTEE ON CONTINUING LEGAL EDUCATION  
Presentation to the House of Delegates November 5, 2016

Re: Proposed Diversity and Inclusion and Elimination of Bias CLE Requirement for  
New York State Attorneys

A. The Proposed Mandatory Diversity and Inclusion and Elimination of Bias CLE  
Requirement for New York State Attorneys

The New York State Bar Association (“NYSBA”) has a long history of encouraging and promoting diversity and inclusion and elimination of bias in the legal profession and in our society. Accordingly, we support the American Bar Association’s (“ABA”) proposal that diversity and inclusion and elimination of bias be made a mandatory part of the attorney continuing legal education (“CLE”) requirement in New York (“D&I CLE”), and propose a method to achieve this goal as described more fully in Sections E and F, below.<sup>1</sup>

The issue of diversity and inclusion and elimination of bias was an agenda item at the ABA’s mid-year meeting in February 2016 as Resolution 107, which was approved unanimously and without opposition by the ABA House of Delegates.<sup>2</sup>

Resolution 107 in relevant part:

[E]ncourages all state, territorial and tribal courts, bar associations and other licensing and regulatory authorities that *currently* require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”).

California and Minnesota have already established D&I CLE requirements for their attorneys.<sup>3</sup> We believe that New York should also.

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<sup>1</sup> In July 21, 2016, the New York City Bar Association submitted a letter, subscribed to by a number of diversity bar associations, supporting the call for a mandatory D&I CLE requirement. This was followed by additional correspondence from the leadership of the New York City Bar to the Chair of the New York State CLE Board, Justice Betty Weinberg Ellerin. See Appendix A. Upon review, NYSBA decided to submit its own proposal based on the makeup and needs of its membership and the legal profession as a whole, rather than sign onto the City Bar letter. After a period of extensive review and discussion by the NYSBA CLE Subcommittee on Diversity, Mirna M. Santiago, Chair of the NYSBA CLE Subcommittee on Diversity, and H. Douglas Guevara, Senior Director of NYSBA CLE, drafted the proposal for the implementation of a D&I CLE requirement, which was reviewed and approved by the majority of the NYSBA CLE Committee and also approved without comment by the NYSBA Committee on Diversity and Inclusion.

<sup>2</sup> Resolution 107 and the ABA’s related report are available at [http://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html](http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html).

<sup>3</sup> The California Bar’s website (<http://mcle.calbar.ca.gov/MCLE/OnlineCLE.aspx>) lists 34 online programs that qualify for “elimination of bias” credit and which are offered in a variety of formats, including on demand,

## B. The Historical, Societal and Legal Profession Backdrop

Issues of race, ethnicity, gender identity and religion<sup>4</sup> – including issues related to economic disparity, unequal access to opportunities, statistically disproportionate outcomes in the criminal justice system,<sup>5</sup> educational differences, mistrust of minority ethnic groups or religions, bias crimes, police conduct, overt discrimination, and even implicit or unintended bias by well-meaning people – remain among the most critical and divisive issues of our time. In addition, other diverse groups (such as the disabled and the elderly) are now a large segment of the population due to returning war veterans and “baby boomers” reaching retirement age.

Women continue to lag behind men with respect to earnings in the legal profession.<sup>6</sup> A recent survey by Vault.com and The Minority Corporate Counsel Association showed that successful recruitment of minority lawyers continues at a glacial pace, with 15% of attorneys at surveyed firms in 2016 as compared to 13.8% in 2007. In addition, lawyers of color continue to leave their firms at a disproportionate rate<sup>7</sup> and female attorneys of color, in particular, feel like they are being pushed out of Big Law.<sup>8</sup> These statistics reflect a small part of the obstacles faced overall in the society at large by people of color and other diverse groups, including attorneys of color and others who do not fit within the norms recognized by society.

These findings, coupled with the changing demographics of the nation, where – as of 2014 – 50.2% of all children born in the United States were minorities,<sup>9</sup> make it clear that lawyers – as thought leaders – must address the issues flowing from these historical and societal realities.

## C. How Will Mandatory D&I CLE Increase New York Attorneys’ Professional Legal Competency?

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CLEtoGo (podcasts), and self-study articles. The Minnesota State Bar Association also has an established D&I CLE requirement offering a wide variety of D&I/Elimination of Bias CLE courses through their website (<http://www.mnbar.org/cle-events/on-demand-cle/on-demand-elimination-of-bias-cles>). See Appendix B for a complete list of courses.

<sup>4</sup> “Actions Speak Too: Uncovering Possible Implicit and Explicit Discrimination in the Employment Interview Process,” Therese Macan and Stephanie Merritt, *International Review of Industrial and Organizational Psychology* 2011, Volume 26 (2011).

<sup>5</sup> Incarceration rates for men and women of color continue to be significantly higher than those of white prisoners. A 2013 U.S. Department of Justice report cited that non-Hispanic blacks (37%) comprised the largest portion of male inmates under state or federal jurisdiction as compared to non-Hispanic whites, while the imprisonment rate for black females was twice the rate of white females. <http://www.bjs.gov/content/pub/pdf/p13.pdf>

<sup>6</sup> “Male partners make 44% more on average than female partners, survey finds,” *ABA Journal*, October 13, 2016. [http://www.abajournal.com/news/article/male\\_partners\\_make\\_44\\_percent\\_more\\_on\\_average\\_than\\_female\\_partners\\_survey\\_f/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/male_partners_make_44_percent_more_on_average_than_female_partners_survey_f/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email)

<sup>7</sup> <http://abovethelaw.com/2016/03/high-minority-attrition-rates-continue-to-plague-large-law-firms/>.

<sup>8</sup> A recent report in the *ABA Journal* showed that 85% of female attorneys of color in the United States will quit large firms within seven years of starting their practice, with a number surveyed stating that they “feel they have no choice.”

[http://www.abajournal.com/mobile/mag\\_article/minority\\_women\\_are\\_disappearing\\_from\\_biglaw\\_and\\_heres\\_why](http://www.abajournal.com/mobile/mag_article/minority_women_are_disappearing_from_biglaw_and_heres_why)

<sup>9</sup> <http://www.usnews.com/news/articles/2015/07/06/its-official-the-us-is-becoming-a-minority-majority-nation>. See also <https://www.census.gov/quickfacts/table/PST045215/00> (showing declining numbers of “white alone” individuals in the United States).

NYSBA considers increasing diversity and inclusion and elimination of bias in the profession and in the practice of law to be essential to respond effectively to the needs of our changing society. The D&I CLE requirement proposed by NYSBA relates directly to professional legal competency because it is designed to educate lawyers to better serve their clients.

Mandatory CLE was initially conceived, supported and implemented as a way to enhance both lawyer competence and public trust in the profession. The ABA's 1992 MacCrate Report entitled "Law Schools and the Profession: Narrowing the Gap," which provided a platform for states considering whether to mandate CLE requirements, identified four basic values of professional responsibility. As described by one commentator in 1998:

The [four] values are: '1) providing competent representation; 2) striving to promote justice, fairness and morality; 3) striving to improve the profession; and 4) professional self-development.' This [MacCrate] report helped to solidify the ABA's commitment to recommending MCLE programming. . . . The ABA and various state bar associations are talking seriously about what can be done to enforce the four values emphasized in the MacCrate Report. Michigan hired through bar dues a public relations firm to provide enhanced access to the media. This, however, only treats a symptom and does not focus on preventing the problem. The root of the problem is attorney behavior.... At least twenty-one bar associations have recognized that the public perception is based, with good reason, on how attorneys behave. The way to solve the problem is to provide better training for attorneys through MCLE programs aimed at professionalism and ethics.<sup>10</sup>

Including a mandatory diversity and inclusion component as part of New York lawyers' CLE obligations will help advance all four values, by providing attorneys with ongoing education in this important area while helping erode discrimination and implicit bias in the practice of law.

#### D. Other New York Bars' Support for D&I CLE

The New York City Bar Association has taken the lead in advocating for adoption of a D&I CLE requirement, initially focusing on the elimination of bias in attorney hiring, retention and promotion, advising the State CLE Board that a "required D&I CLE program would be an important tool to raise awareness of both explicit and implicit bias within the profession and to educate and empower those who can affect change, particularly law firm leaders."<sup>11</sup> The New York City Bar subsequently submitted two additional letters to the CLE Board, discussing the

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<sup>10</sup> Grigg, L., *The Mandatory Continuing Legal Education (MCLE) Debate: Is It Improving Lawyer Competence or Just Busy Work?*, 12 *BYU J. Pub. L.* 417, 430 (1998).

<sup>11</sup> See note "1" above and Appendix A..

need for a D&I CLE requirement and the proposed scope of courses that would satisfy that requirement.<sup>12</sup>

There is agreement among the Amistad Long Island Black Bar Association, Association of Black Women Attorneys, Association of Law Firm Diversity Professionals, Dominican Bar Association, Hispanic National Bar Association, Jewish Lawyers Guild, LGBT Bar Association of Greater New York, Long Island Hispanic Bar Association, Metropolitan Black Bar Association, Muslim Bar Association of New York, Puerto Rican Bar Association, New York City Bar Association and South Asian Bar Association of New York that the adoption of a mandatory D&I CLE credit would be a positive development for attorneys in New York. The presidents of these organizations signed onto the letter sent by the New York City Bar to the New York State CLE Board in July 2016, recommending this action.<sup>13</sup>

#### E. NYSBA's Proposal

NYSBA recommends that all CLE providers should be encouraged to create a wide range of programs for all practice areas that incorporate diversity and inclusion, which would include the elimination of bias – whether dealing with other attorneys, clients, courts or anyone else in the legal system.

The NYSBA CLE Committee concluded that diversity and inclusion CLE need not be limited to employment decisions and trends in the legal profession or to the elimination of bias in the profession itself. As noted above, because of the changing demographics of the country, the need is apparent for attorneys to be fully versed in issues relating to the legal representation of minorities and other diverse individuals (e.g., LGBTQ, the elderly and the disabled). In discussions between NYSBA and the New York City Bar, a consensus was reached that any D&I CLE requirement should be broadly defined.

Based on a survey of existing offerings by accredited providers, it appears that courses that would satisfy a D&I CLE requirement fall into one or more of the following categories: (I) how lawyers perceive and interact with each other as employers, colleagues and partners; (II) how lawyers perceive and interact with those they come in contact with during the course of practicing law, such as court personnel, witnesses, jurors, judges and opposing counsel; (III) ways in which lawyers can better understand and represent their clients who face barriers, biases and discrimination; (IV) non-discrimination, non-harassment and competent representation as part of a lawyer's ethical obligations; (V) discrimination and bias in the broader legal and societal context and the role of lawyers in addressing them; and (VI) the law and legal issues as they relate to diverse groups and protected classes.<sup>14</sup>

#### F. How NYSBA Proposes the Mandatory CLE Be Implemented

The NYSBA CLE Committee proposes that one (1) or two (2) credit hours of D&I CLE be required for the biennial reporting period. We recommend that the diversity and inclusion

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<sup>12</sup> Id.

<sup>13</sup> See Appendix A.

<sup>14</sup> See Appendix A (October 17, 2016 letter) and Appendix B.

CLE be a stand-alone (“floating”) CLE requirement, but not add to the thirty-two (32) credit hours required for new attorneys or the twenty-four (24) hours required for more experienced attorneys.<sup>15</sup> The D&I CLE could count toward any of the required credit hours, including Ethics, Skills or Areas of Professional Practice/Law Practice Management.

To implement this change, NYSBA proposes that §1500.2 (Definitions) of the CLE Board Rules and Regulations be amended to include the following definition for “Diversity and Inclusion”:

Diversity and Inclusion must address diversity and inclusion in the legal profession and the practice of law of all persons regardless of race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, age or disability and may include, among other things, how issues of diversity and inclusion may arise within the scope of the Rules of Professional Conduct, application within the procedural and substantive aspects of law practice, and law practice management, including elimination of bias. The diversity and inclusion requirement may be fulfilled through courses addressing diversity and inclusion within the existing categories of credit listed in §1500.2.

Should the D&I CLE rule be implemented, New York State accredited providers would continue to consider each program on its individual merits and decide whether to award skills, professional practice, ethics, law practice management or D&I credit, or some combination thereof. CLE providers make these assessments in the ordinary course of business and it is not anticipated that a different approach would be used in assessing D&I CLE programming for potential accreditation.

#### G. Conclusion

We urge the members of the House of Delegates to support this important initiative by voting in support of NYSBA’s recommendation to the New York State CLE Board.

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<sup>15</sup> For example, a one-hour program titled “Disparate Impact of Sentencing Guidelines” would fall under both the Professional Practice category and Diversity and Inclusion. The attorney would count that class as one credit (not two) that would count toward a practice area CLE and the aggregate biennial CLE requirement of 24 or 32 credits, but the attorney would also be able to attest in his/her biennial registration that s/he met his/her D&I requirement. Similarly, a one-hour program titled “The Ethics of Diversity and Inclusion” would count toward the Ethics requirement, but – again – the attorney also would be able to attest that the D&I requirement had been met.

## **Appendix A:**

New York City Bar Association D&I CLE Proposal and  
Subsequent Correspondence with New York State CLE Board

July 21, 2016

Hon. Janet DiFiore  
Chief Judge of the State of New York  
New York State Unified Court System  
Office of Court Administration, Rm. 852  
25 Beaver Street  
New York, NY 10004

**Re: Diversity & Inclusion CLE requirement for New York State attorneys**

Dear Chief Judge DiFiore:

The undersigned bar associations respectfully urge the licensing and regulatory authorities governing attorney admission in New York State to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession and programs regarding the elimination of bias (“D&I CLE”).

This issue was an agenda item at the American Bar Association (ABA)’s mid-year meeting this past February as Resolution 107, which was approved unanimously and without opposition by the ABA House of Delegates.<sup>1</sup> The resolution expands upon a 2004 House of Delegates resolution—Resolution 110—which amended the language of the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education to provide that regulatory systems require lawyers—either through a separate credit or through existing ethics and professionalism credits—to complete programs related to racial and ethnic diversity and the elimination of bias in the profession. Resolution 107 **expands the definition** of diversity and inclusion to include all persons regardless of race, ethnicity, gender, sexual orientation, gender identity or disabilities; and it also encourages all licensing and regulatory authorities that currently require mandatory continuing legal education (MCLE) to include, **as a separate required credit**, D&I CLE. The resolution does not specify the number of hours of D&I CLE required or call for an increase in the total number of MCLE credits required per cycle.

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<sup>1</sup> Resolution 107 and the ABA’s related report are available at [http://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html](http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html).

Of the 45 states that currently have mandatory continuing legal education, only two—California and Minnesota—have adopted stand-alone D&I CLE requirements. Thus, the resolution, if implemented nationally, would have a wide-ranging impact on attorneys licensed to practice law in the United States. Despite efforts by many New York City law firms to increase their engagement and investment in diversity progress and retention, the attrition rate of minority attorneys at those and other New York law firms remains disproportionately high. We must do more to reverse this trend.

Instituting D&I CLE as a separate required credit for attorneys licensed to practice in New York would be a significant step toward addressing this pervasive, but often unspoken, problem within our profession. We believe this change would be straightforward and easily understood by attorneys. Similar to the stand-alone ethics requirement under our current continuing legal education system, all lawyers renewing their New York State registration would certify that they had completed, as part of their required 20 hours of non-ethics credits, the required number of credit hours in D&I CLE during the immediately preceding biennial reporting cycle.

Moreover, we need not limit diversity and inclusion to the ABA's suggested definition. Rather, we suggest that the Board adopt the broader definition set forth in New York's Human Rights Law, which prohibits discrimination on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status or marital status (Executive Law § 296). Since New York has defined its protected classes under state law, any New York CLE program that educates lawyers on diversity, inclusion and the elimination of bias should follow suit.

The legal profession is grounded on principles of equality, access to justice and the rule of law. It therefore behooves us—as legal practitioners who advocate for these principles in the courtroom—to learn to recognize discrimination within our own organizations and law firms and to work toward eliminating bias in all aspects of the profession, including in our workplaces, in the courthouses and vis-à-vis our clients. CLE programs are an important tool to raise awareness of both explicit and implicit bias within the profession and to educate and empower those who can effect change, particularly law firm leaders. And, like the ABA, we believe that D&I



programs are appropriate for MCLE certification because their “primary objective [is] to increase the professional legal competency of the attorney in ethics and professionalism, skills, practice management and/or areas of professional practice.” See 22 NYCRR 1500.4(b)(2).

We stand ready to assist in whatever way will help the Board to implement this important addition to our state’s CLE requirements. Thank you for your consideration.

Respectfully,

**Amistad Long Island Black Bar Association**

Cherice Vanderhall, *President*

**Association of Law Firm Diversity Professionals**

Carlos Dávila-Caballero, *President*

**Hispanic National Bar Association**

Robert Maldonado, *National President*

**LGBT Bar Association of Greater New York (LeGaL)**

Meredith R. Miller, *President*

**Metropolitan Black Bar Association**

Taa Grays, *President*

**Puerto Rican Bar Association**

Betty Lugo, *President*

**South Asian Bar Association of New York**

Rippi Gill, *President*

**Association of Black Women Attorneys**

Kaylin Whittingham, *President*

**Dominican Bar Association**

Queenie Paniagua, *President*

Vianny Pichardo, *Director & President-Elect*

**Jewish Lawyers Guild**

Bruce Raskin, *Board Chair*

Shoshana Bookson, *President*

**Long Island Hispanic Bar Association**

Frank Torres, *President*

**Muslim Bar Association of New York**

Atif Rehman, *President*

**New York City Bar Association**

John S. Kiernan, *President*

Cc: Hon. Betty Weinberg Ellerin, Chair, NYS Continuing Legal Education Board  
Elise Geltzer, Esq., Counsel, NYS Continuing Legal Education Board

Contact: Maria Cilenti, Senior Policy Counsel, New York City Bar Association  
[mcilenti@nycbar.org](mailto:mcilenti@nycbar.org) or 212-382-6655



NEW YORK  
CITY BAR

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August 25, 2016

Hon. Betty Weinberg Ellerin  
Chair, NYS Continuing Legal Education Board  
c/o Alston & Bird LLP  
90 Park Ave.  
New York, NY 10016-1387

**Re: Diversity & Inclusion CLE requirement for New York State attorneys**

Dear Judge Ellerin:

Thank you for taking the time to speak with me and Maria Cilenti recently regarding the proposal that New York modify its existing CLE requirement (calling for 24 hours of training every two years, of which at least four must be directed to ethics), by adding a further required allocation to training in enhancing diversity and inclusion and promoting the elimination of bias in the legal profession. As explained in our July 21 letter to Chief Judge DiFiore, this proposal is modeled after ABA Resolution 107 passed by the House of Delegates in February, 2016.<sup>1</sup> This letter represents an effort to provide some further context for this proposal, in a manner responsive to points you raised in our call.

### **The Problem**

As news events of the past year have dramatically illustrated, issues of race – including issues related to economic disparity, unequal access to opportunities, statistically disproportionate outcomes in the criminal justice system, educational differences, mistrust of minority ethnic groups or religions, bias crimes, police conduct, overt discrimination, and even implicit or unintended bias by well-meaning people – remain among the most critical and divisive issues of our time. Our country’s defining national commitment to equality, tolerance and embrace of differences has always been, and remains today, in fundamental tension with our historical legacy of racial discrimination and segregation, and with the continuing current effects of that legacy. That incongruity warrants continued effort to promote equal opportunity, to attack and remedy discrimination and to promote and celebrate diversity. That need exists not

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<sup>1</sup> The City Bar’s July 21 letter is available at <http://bit.ly/29On4j9>.

only with regard to race discrimination, but also with regard to treatment based on gender, religion, national origin, sexual orientation, age, disability and other categorizations that have led to intentional or unintentional discrimination.

The legal profession has recognized that it must participate in this effort, engaging in critical self-analysis regarding the persistent underrepresentation of minorities in its ranks, a topic that has been the subject of bar association reports and public discussion in recent years.<sup>2</sup> While lawyers have been in the forefront of efforts to combat discrimination – through innumerable instances of claims advanced, laws advocated for and enacted, programs developed, judicial decisions issued and positions taken in support of promoting diversity, inclusion and equality of opportunity – the legal profession has fallen short, too, particularly as a model for professional development. Studies show that members of minority groups continue to lag white males significantly in hiring, retention and leadership within the legal profession – more even

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<sup>2</sup> Rhode, Deborah L, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, May 27, 2015, available at [https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm\\_term=.c047d0733fbd](https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.c047d0733fbd) (“Women constitute more than a third of the profession, but only about a fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans. . . . Although blacks, Latinos, Asian Americans and Native Americans now constitute about a third of the population and a fifth of law school graduates, they make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations. In major law firms, only 3 percent of associates and less than 2 percent of partners are African Americans.”);

Jackson, Liane, *Minority women are disappearing from BigLaw – and here's why*, March 1, 2016, available at [http://www.abajournal.com/magazine/article/minority\\_women\\_are\\_disappearing\\_from\\_biglaw\\_and\\_heres\\_why](http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why) (“Studies and surveys by groups such as the ABA and the National Association of Women Lawyers show that law firms have made limited progress in promoting female lawyers over the course of decades, and women of color are at the bottom.”);

Greene, Michael, *Minorities, Women Still Underrepresented in Law*, April 16, 2015, available at <https://bol.bna.com/minorities-women-still-underrepresented-in-law/> (“Based on Department of Labor Statistics, the IILP [Institute for Inclusion in the Legal Profession] found that ‘aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs.’”);

National Association for Law Placement Press Release, *Women, Black/African-American Associates Lose Ground at Major U.S. Law Firms*, Nov. 19, 2015, available at <http://www.nalp.org/uploads/PressReleases/2015NALPWomenandMinorityPressRelease.pdf> (noting in particular that the percentage of African-American firm associates has declined each year since 2009);

American Bar Association, *Summary Report and Recommendations From 2009 ABA Study of the State of Diversity in the Legal Profession, examining Race and Ethnicity Gender Sexual Orientation Disabilities*, April 2010, available at [http://www.americanbar.org/content/dam/aba/administrative/diversity/next\\_steps\\_2011\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011_authcheckdam.pdf) (citing as a top disappointment that “[t]he legal profession is less racially diverse than most other professions, and racial diversity has slowed considerably since 1995.”);

Lam, Bourree, *The Least Diverse Jobs in America*, June 29, 2015, available at <http://www.theatlantic.com/business/archive/2015/06/diversity-jobs-professions-america/396632/> (citing data from the U.S. Census showing that 81% of lawyers are white, topping the list);

New York State Bar Association, *Judicial Diversity: A Work in Progress*, Sept. 17, 2014, available at [http://www.nysba.org/Sections/Judicial/2014\\_Judicial\\_Diversity\\_Report.html](http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html) (“People of color and women remain significantly under-represented on the bench. This under-representation most starkly manifests in our upstate judicial districts, but can also be observed in certain downstate districts with large minority populations”), at p. 8.

than in other professions – and that women and people of color make up a far smaller portion of the legal community than of the population generally.<sup>3</sup> While representation of women and minorities in legal jobs has improved over the past few decades, the rate of progress has been very slow, and some recent evidence has suggested the movement has not been steadily forward.

For example, the City Bar’s 2014 Diversity Benchmarking Report of results from 55 firms that have signed a public statement of commitment to enhance diversity and inclusion presented results reflecting “multiple setbacks for minority attorneys, with small declines in representation at key levels, reduced racial and ethnic diversity across the associate pool, and a small increase in the percentage of signatory firms with no attorneys of color on the management committee. Additionally, the prevalence of attorneys of color in non-equity versus equity roles increased in 2014.”<sup>4</sup> Despite broadly asserted support for diversity and inclusion goals, New York City law firms continue to experience higher rates of attrition among minority and women attorneys: 23.6% of minority attorneys and 21.3% of women of all levels of seniority left signatory firms in 2014, for example, compared to 14.7% of white men. These firms obviously represent only a portion of the New York State legal marketplace, but these disappointing results may be particularly notable, and possibly even somewhat better than the overall legal market, because they come from legal enterprises that have made public commitments to diversity, have allowed their results to be counted and generally have had larger numbers to work with.

These results do not arise in a statistical vacuum. Minority and women lawyers at law firms and other legal offices consistently confirm believing that their professional experiences are adversely impacted by their “otherness” and unfamiliarity to the white male majority, by implicit bias and sometimes by outright instances of discriminatory speech or conduct.<sup>5</sup> Those lawyers also bring to their law firm environment their experiences of implicit or explicit bias outside their offices. (As just one example, at a recent discussion of racial issues at my firm, a highly regarded Black member of our staff reported that police officers have stopped and aggressively questioned and/or frisked him dozens of times in the past few years, including within a block of our offices and when he was wearing a suit as he does every workday.)

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<sup>3</sup> See n. 2, *supra*.

<sup>4</sup> New York City Bar Office of Diversity and Inclusion, *2014 Benchmarking Report*, available at <http://www.nycbar.org/images/stories/pdfs/diversity/benchmarking2014.pdf>

<sup>5</sup> See, e.g., Strickler, Andrew, *How Minority Attorneys Encounter BigLaw Bias*, available at <http://www.law360.com/articles/795806/how-minority-attys-encounter-biglaw-bias>; Rhode, n. 1, *supra* (“Minorities still lack a presumption of competence granted to white male counterparts, as illustrated in a recent study by a consulting firm. It gave a legal memo to law firm partners for “writing analysis” and told half the partners that the author was African American. The other half were told that the writer was white. The partners gave the white man’s memo a rating of 4.1 on a scale of 5, while the African American’s memo got a 3.2.”); Negowetti, Nicole E., *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection*, University of Nevada Law Journal, Spring 2015, available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1600&context=nlj> (examining, at pp. 945-949, the relationship between implicit bias and lawyering and the impact on associate experience and retention: “[t]he nature of lawyering predisposes lawyers to evaluate each other using a subjective system of evaluation. Legal work contains discretionary judgment, a product of external factors and ‘the lawyer’s own character, insight, and experience.’ . . . Without specific metrics to objectively evaluate the quality of an associate’s work, stereotypes and implicit biases will influence one’s judgment.”); Reeves, A., *Diversity in Practice: What Does Your Brain See?*, Nov. 2012, available at [http://www.nextions.com/wp-content/files\\_mf/1352727388\\_magicfields\\_attach\\_1\\_1.pdf](http://www.nextions.com/wp-content/files_mf/1352727388_magicfields_attach_1_1.pdf) (“The research effectively disproves that any of us are ‘color-blind’ or ‘gender-blind.’ We ‘see’ race and gender even when those characteristics are undefined.”).

Promotion of diversity, inclusiveness and non-discrimination will remain essential as the face of our country and of New York continues to change. Based on census data, the population of white New York State residents has decreased from 62% to 56% from 2000-2015, while the percentage of Black, Asian and Hispanic New Yorkers has increased roughly 3% each during that period.<sup>6</sup> Legal clients are more diverse, practices are more international and multi-jurisdictional, and the judiciary continues to grow in its diversity. Lawyers need to be equipped to recognize cultural differences and biases that may impact their personal interactions in all aspects of their practice – not just as lawyers, but as arbitrators, mediators, advisors, employers, partners and officers of the court.

### **The Importance of Efforts to Increase Diversity and Inclusion and Promote Equality of Opportunity in the Legal Profession**

Legislatures, bar groups, diversity professionals and law firms and other law offices have increasingly acknowledged the importance of leadership within the legal profession in promotion of diversity, inclusion and equal opportunity.

In January 2016, New York State’s Assembly Judiciary Committee and its Subcommittee on Diversity in Law held a roundtable to discuss strategies for promoting increased diversity in the legal profession. That roundtable arose directly out of views regarding the importance of ensuring that the legal profession be as diverse and inclusive as the population it serves, and in response to reports highlighting continued minority under-representation in the profession. The City Bar’s Director of Diversity and Inclusion and the Chair of our Diversity Pipeline Initiatives Committee provided testimony to discuss the work of the Association, its most recent law firm benchmarking report and its student pipeline initiative.

Studies of law firm and other enterprise dynamics have demonstrated that diversity in staffing promotes differences in perspective that enhance professional performance.<sup>7</sup> Many law firms and law offices are already engaging in diversity and inclusion trainings, often through law firm professional development efforts, diversity offices and bar association programs. Some trainings are afforded CLE credits as ethics or practice management courses, but the granting of credit has been on an ad hoc basis.<sup>8</sup> The U.S. Department of Justice also recently announced

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<sup>6</sup> For 2010-15 data, see <http://www.census.gov/quickfacts/table/PST045215/36>. Note that 2015 data is estimated. For 2000-10 actual census data, see “Comparison of 2000 and 2010 Populations by Race and Ethnicity” at <https://labor.ny.gov/stats/nys/statewide-population-data.shtm>.

<sup>7</sup> Roellig, M., *Why Diversity and Inclusion are Critical to the Success of Your Law Department*, 2011, available at <https://www.massmutual.com/~media/files/why-diversity-and-inclusion-is-critical-to-the-success-of-your-law-department.pdf> (“Building a culture of diversity and inclusion in your legal team is critical because it will improve your team’s performance.”), at p. 1; Phillips, Katherine W., *How Diversity Makes Us Smarter*, *Scientific American*, Oct. 2014, available at <http://www.scientificamerican.com/article/how-diversity-makes-us-smarter> (“Decades of research by organizational scientists, psychologists, sociologists, economists and demographers show that socially diverse groups [that is, those with a diversity of race, ethnicity, gender and sexual orientation] are more innovative than homogeneous groups.”), at p. 2; Reeves, A., *Value Proposition for Diversity and Inclusion in the Legal Profession*, Summer 2010, available at <http://www.nextions.com/wp-content/uploads/ABA-Diversity-Voice-2.pdf>.

<sup>8</sup> See, e.g., the following two most recent City Bar programs: April 22, 2016 Professional Development Workshop Series, *The Explicit Impact of Implicit Bias: Unpacking and Interrupting Implicit Bias to Create More*

(June 27, 2016 press release) the roll-out of a department-wide required Implicit Bias Training Program for 28,000 lawyers and investigators, predicating this step on views that “[t]he research is clear that most people experience some degree of unconscious bias, and that the effects of that bias can be countered by acknowledging its existence and utilizing response strategies.” On August 23, 2016, New York City Corporation Counsel Zachary W. Carter wrote to Chief Judge DiFiore in support of requiring CLE credit in diversity and inclusion and elimination of bias. Mr. Carter indicated that “[f]or the last ten years the Law Department has required all of its employees to participate in Diversity and Inclusion programs” and that the “evaluations of our programs by our participants have been overwhelmingly favorable, notwithstanding some initial skepticism.” The New York State Judicial Institute also offers diversity training for new judges as part of its curriculum.

One of the signatories to our July 21 letter is the Association of Law Firm Diversity Professionals, indicating institutional support for this initiative from law firms they represent. Legal Services NYC publicly supported this proposal in a letter to the New York Law Journal.<sup>9</sup> Such widespread support and efforts reflect an environment in which many lawyers want to improve their understanding of diversity, inclusion and anti-bias issues and to contribute to improving the profession. These efforts are proceeding against a national backdrop that includes ongoing debate about how this country can best address perceived and indisputable racial disparities in our justice system, a challenge of particular importance to lawyers as essential champions and guardians of the rule of law.

The ABA has taken two major steps in the past six months to act on a broad consensus among the legal profession’s leadership regarding the importance of addressing nationwide concerns and reinforcing the profession’s commitment to diversity and equal opportunity. First, in February 2016 the ABA House of Delegates unanimously passed Resolution 107, encouraging states to require lawyers to participate in diversity and inclusion training as a standalone component of their CLE requirements.<sup>10</sup> As explained in our July 21 letter, this can and should be done without increasing New York’s current 24-credit biennial requirement. Resolution 107 was co-sponsored by the ABA Standing Committee on CLE, reflecting its perceived importance as part of a lawyer’s continuing education. Resolution 107 was meant to expand on Resolution 110, passed in 2004, which encouraged states to require D&I training either as part of ethics or professionalism credits, or as a standalone credit. Resolution 107’s recommendation that D&I

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*Diverse and Inclusive Workplaces* (featuring Dr. Arin N. Reeves and awarding 2.0 CLE credits in law practice management), and May 24, 2016 *Diversity and Inclusion Conference* (1.5 CLE credits in ethics). For a sample of “elimination of bias” CLE offerings, some of which are recognized in particular states, *see* <http://mcleblog.net/category/elimination-of-bias/>. *See also* Kang, Jerry, *Implicit Bias: A Primer for Courts*, Aug. 2009, available at <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf>.

<sup>9</sup> Rasmussen, Raun J., *CLE Should Include Diversity Training*, New York Law Journal, Aug. 1, 2016, available at [http://www.newyorklawjournal.com/id=1202764038752/CLE-Should-Include-Diversity-Training?cmp=share\\_twitter&slreturn=20160725141143](http://www.newyorklawjournal.com/id=1202764038752/CLE-Should-Include-Diversity-Training?cmp=share_twitter&slreturn=20160725141143).

<sup>10</sup> Resolution 107 and the ABA’s related report are available at [http://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html](http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html).

CLE be a standalone credit was intended to increase overall attorney participation in D&I trainings.<sup>11</sup> Resolution 107's approach appears appropriate and sound.

Then, two weeks ago, on August 8, the ABA House of Delegates unanimously passed Resolution 109, which amends Model Rule of Professional Conduct 8.4 to provide that it is professional misconduct to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”<sup>12</sup> As explained in the Resolution's underlying report, “Discrimination and harassment by lawyers . . . undermines confidence in the legal profession and the legal system.” Although non-discrimination/non-harassment is only one component of the umbrella of diversity, inclusion and anti-bias concerns facing the legal profession, Resolution 109 reaffirms its importance to the legal profession as an institutional matter. While New York has not yet considered and determined whether to expand Rule 8.4 of the N.Y. Rules of Professional Conduct to mirror the language of Resolution 109, the sensibilities about how a lawyer should act as a professional that underlie this new language should be a matter of consensus.<sup>13</sup>

### **The Value of CLE in Advancing Diversity, Inclusion and Equality of Opportunity**

CLE plays an important role in both the quality and public perception of our self-regulated profession.<sup>14</sup> Like the mandatory allocation of at least four hours to ethics training, an allocation of a portion of the CLE requirement to D&I training will convey an important

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<sup>11</sup> At present, only California and Minnesota have adopted standalone D&I CLE requirements. A representative from the Minnesota Board of Law Examiners reported that in 2014, 508 of the 12,619 courses approved for credit in Minnesota had at least one segment qualifying for elimination of bias credit. Given the speed of market reactions and plentitude of diversity training programs already in place, there is ample reason to expect that there will be numerous available offerings from which lawyers can satisfy a D&I training requirement. In addition, a diversity and inclusion segment could readily be included as part of a broader course and could be tailored to diversity issues particular to a lawyer's location or substantive practice area.

<sup>12</sup> Resolution 109 and the ABA's related report are available at [http://www.americanbar.org/news/reporter\\_resources/annual-meeting-2016/house-of-delegates-resolutions/109.html](http://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/109.html).

<sup>13</sup> New York's judges are required to hold trial lawyers to a standard similar to the one expressed in Resolution 109. Therefore, judges also stand to benefit from diversity and inclusion training for lawyers. Judicial Code of Conduct Section 100.3(B)(5) states, “A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.”

<sup>14</sup> See, e.g., Harris, C., *MCLE: The Perils, Pitfalls, and Promise of Regulation*, 40 Val. U. L. Rev. 359, 365 (Spring 2006) (citing a 2005 paper delivered by Professor Linda Sorenson Ewald “pointing out that for decades ABA committee and conference reports have reflected concern over the state of the profession and recommended MCLE as part of the solution. She describes this as a ‘**unanimous belief that continuing [legal] education has a role to play in addressing these concerns.**’”). (Emphasis added.)

message about the weight that the legal profession and those who oversee it attach to these values.

Mandatory CLE was initially conceived, supported and implemented as a way to enhance both lawyer competence and public trust in the profession. The ABA's 1992 MacCrate Report entitled "Law Schools and the Profession: Narrowing the Gap," which provided a platform for states considering whether to mandate CLE requirements, identified four basic values of professional responsibility. As described by one commentator in 1998:

"The [four] values are: '1) providing competent representation; 2) striving to promote justice, fairness and morality; 3) striving to improve the profession; and 4) professional self-development.' This [MacCrate] report helped to solidify the ABA's commitment to recommending MCLE programming. . . . The ABA and various state bar associations are talking seriously about what can be done to enforce the four values emphasized in the MacCrate Report. Michigan hired through bar dues a public relations firm to provide enhanced access to the media. This, however, only treats a symptom and does not focus on preventing the problem. The root of the problem is attorney behavior.... At least twenty-one bar associations have recognized that the public perception is based, with good reason, on how attorneys behave. The way to solve the problem is to provide better training for attorneys through MCLE programs aimed at professionalism and ethics."<sup>15</sup>

These values were expressed even earlier by the group of over 100 lawyers who attended what came to be known as the "Arden House Conference" held in New York in 1958. As described in a 1960 paper by then-City Bar President Harrison Tweed, who attended the conference:

"Until 1957 almost all of the education offered to practicing lawyers was designed to improve professional competence and to do nothing more. In the fall of that year, it was felt by many of those interested in the cause that something should be done to put new life into the movement. The formula adopted contained two innovations. First, putting the education offered to practicing lawyers on a somewhat professional basis.... Second, introducing education designed to equip the practicing lawyer to understand and meet his professional responsibilities beyond his primary obligation to be competent."<sup>16</sup>

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<sup>15</sup> Grigg, L., *The Mandatory Continuing Legal Education (MCLE) Debate: Is it Improving Lawyer Competence or Just Busy Work?*, 12 *BYU J. Pub. L.* 417, 430 (1998).

<sup>16</sup> 15 *Rec. Ass'n B. City N.Y.* 481, 485 (1960) (available on HeinOnline).



Of particular relevance here, the lawyers who convened at the Arden House Conference developed a Final Statement that

“brought into the continuing legal education picture for the first time, and in bold relief, the importance that the educational opportunities should not be aimed simply at an improvement in professional competence but, in addition, should be designed to ‘help the lawyer to fulfill a wide range of professional responsibilities: to the courts, to the administration of justice, to law reform, to the law-making process, to his profession and to the public.’”<sup>17</sup>

Including a mandatory diversity and inclusion component as part of lawyers’ CLE obligations should advance all of these purposes. It should continue the ongoing education of the profession in one of the most foundational and important elements of our national self-definition and one of the core components of the rule of law. It should foster an ongoing increase in the vitality of diversity and inclusion, and ongoing progress in the slow erosion of discrimination and implicit bias. It should also convey an important public message, in a time of intense attention to matters of race and other forms of discrimination, regarding the legal profession’s institutional commitment to equality of opportunity.

Just as Justice Sandra Day O’Connor expressed in a 2003 opinion the hope that the need for legal protection for affirmative efforts to increase diversity in education would diminish or disappear in 25 years, *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), it is possible to hope that including diversity, inclusion and anti-bias training as a mandatory component of CLE will not necessarily have to be permanent. But history suggests that this focused effort will likely need to continue into the currently foreseeable future. As one commentator has observed, “The first thing to acknowledge about diversity is that it can be difficult. In the U.S., where dialogue of inclusion is relatively advanced, even the mention of the word ‘diversity’ can lead to anxiety and conflict.”<sup>18</sup> Improvements in diversity, inclusion and avoidance of discrimination tend to come slowly.

We fully appreciate that even if there is broad consensus regarding the need for greater diversity and inclusion, greater equality of opportunity and less overt or unintended discrimination in the operations of the legal profession and in the administration of justice, some lawyers may resist the notion that an authority can properly require each individual lawyer to undergo further education on this subject over the course of a career. But just as the imposition of a particularized ethics requirement was intended, at least in part, to convey a message about priority and commitment rather than to imply that this requirement was needed because all lawyers were unethical, imposition of a diversity and inclusion requirement would reflect the profession’s formal public embrace of its aspirational best self. We expect that the passage of ABA Resolution 107 will spur numerous states to act, and we believe that New York should be in the forefront of these actions.

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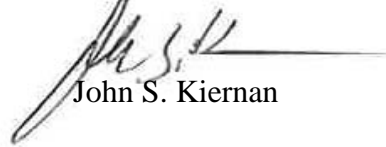
<sup>17</sup> Id. at 486.

<sup>18</sup> Phillips, *supra* n. 7 at p. 3.

We at the New York City Bar Association, and the other signatories of the July 21 letter to Chief Judge DiFiore, would welcome an opportunity to support and participate in further discussions regarding the Continuing Legal Education Board's consideration of this issue. The City Bar and many firms also have worked with numerous experts on these subjects, and we would be happy to make some of these resources available to the Board if you think that would be helpful.

Thank you for your consideration of this important matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John S. Kiernan", is written over a horizontal line. The signature is fluid and cursive.

Cc: Elise Geltzer, Esq., Counsel, NYS Continuing Legal Education Board  
Hon. Rosalyn Richter & Nate Saint-Victor, Co-Chairs, New York City Bar Association  
Enhance Diversity in the Profession Committee



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October 17, 2016

Hon. Betty Weinberg Ellerin  
Chair, NYS Continuing Legal Education Board  
c/o Alston & Bird LLP  
90 Park Ave.  
New York, NY 10016-1387

**Re: Proposal that New York adopt a separate CLE requirement for diversity, inclusion and the elimination of bias (“D&I CLE”) as per ABA Resolution 107**

Dear Justice Ellerin:

Thank you for your continued consideration of the proposal to modify New York’s existing CLE requirements (without increasing the total required hours) by adopting a separate CLE requirement for diversity, inclusion and the elimination of bias. I am writing in response to your request for information about programs that already are being offered for CLE credit either under the D&I category or, in those states that do not currently recognize a D&I category, under some other category for accreditation.

To respond to your request, we surveyed CLE program offerings that we believe providers would consider accrediting for a D&I CLE requirement in New York, as well as courses that already are accredited in California and Minnesota, the two states that have long required attorneys to fulfill separate D&I CLE requirements. We also reviewed multistate online D&I CLE offerings because they provide a good overview of the types of courses that will be accessible to lawyers regardless of the location or size of their practices.

Based on our survey of existing offerings, it appears that D&I CLE courses fall into one or more of the following categories: (i) how lawyers perceive and interact with each other as employers, colleagues and partners; (ii) how lawyers perceive and interact with those they come in contact with during the course of practicing law, such as court personnel, witnesses, jurors, judges, opposing counsel, etc.; (iii) ways lawyers can better understand and represent their clients who face barriers, biases and discrimination; (iv) non-discrimination, non-harassment and competent representation as part of a lawyer’s ethical obligations; (v) discrimination and bias in the broader legal and societal context and the role of lawyers in addressing them; and (vi) the law and legal issues as they relate to diverse groups and protected classes.

This letter provides an overview of CLE courses we believe may be relevant to your consideration of this proposal. We understand that definitional and apportionment issues among the accreditation categories – i.e., ethics and professionalism, skills, areas of professional practice, law practice management, and diversity, inclusion and the elimination of bias - may still need to be discussed and ironed out. We are happy to continue participating in those discussions if you think that would be helpful.

#### **New York City Bar Association:**

In 2016, the New York City Bar Association hosted two diversity and inclusion programs as to which we awarded CLE credit. In light of the City Bar’s position as a New York State accredited CLE provider, the City Bar’s programs are presumptively accredited after being reviewed by our CLE Department for compliance with the CLE Board’s regulations. Because of the special nature of these programs, however, we engaged in a dialogue with the CLE Board staff to ensure “pre-approval” and to maintain our own best practices for program review.

On April 22, 2016, we hosted Dr. Arin N. Reeves as she presented, “The Explicit Impact of Implicit Bias: Unpacking and Interrupting Implicit Bias to Create More Diverse and Inclusive Legal Workplaces,” for which attendees received 2.0 credits of law practice management. The program materials are attached. Dr. Reeves is in great demand for this type of programming and we hope to engage her for similar programming in the future. Her program was extremely well received and well reviewed.

On May 24, 2016, we hosted a full-day Diversity and Inclusion Conference, sponsored by our Enhance Diversity in the Profession Committee. We had originally advocated for accreditation of three separate segments: (i) “Intersectionality”; (ii) “From Bystanders to Upstanders: Activating Allies and Advocates for Inclusion”; and (iii) a General Counsel and Managing Partners Forum. We received approval for only the third segment because, in the view of the CLE Board, the first two were not sufficiently related to the legal profession or the practice of law, and did not have the required legal “wrapper”. Therefore, for the third segment, attendees received 1.5 credits in ethics. The program materials are attached.

In addition, the City Bar frequently hosts programs that cover anti-discrimination laws, civil rights and legal issues pertaining to diverse groups and protected classes. These programs currently are typically accredited for professional practice credits.

We anticipate that, should New York adopt this proposal, our CLE Department would consider each program on its individual merits and decide whether to award skills, professional practice, ethics, law practice management or D&I credit, or some combination. CLE providers make these assessments in the ordinary course of business and we do not anticipate a different approach to assessing D&I CLE programming for potential accreditation.

#### **New York State Bar Association:**

A sampling of recent and upcoming offerings of the State Bar that appear to fall into one of the above-mentioned six categories include:

- Representing LGBT Clients After Obergefell
- Human Trafficking in NYS: Legal Issues and Advocating for the Victim
- Representing the Transgender Client Through the Arc of Life
- The Path to Marriage Equality & Beyond: Representing LGBT Clients in a Post-DOMA World
- Justice, Race and Police Force
- Contemporary Civil Rights in Relation to the 50<sup>th</sup> Anniversary of the Civil Rights Act
- The Impact of Implicit Bias on Lawyers and the Legal Profession

Timed agendas and outlines for these programs are attached.<sup>1</sup>

### **American Bar Association:**

The ABA<sup>2</sup> offers online D&I/elimination of bias CLEs, including, “Canaries in the Coalmine: Succeeding as Female Counsel in Male-Dominated Industries,” and recently hosted a webinar entitled, “Transgender Issues in the Legal Profession and its Impact on Diversity and Inclusion.” Furthermore, as part of Resolution 107, the ABA has pledged to assist in the development and creation of D&I CLE. Thus, we can anticipate additional relevant programming and materials to be offered through the ABA in the future. For instance, on October 6, 2016, the ABA held a program entitled “Implicit Bias: How to Recognize and Address It – and New Model Rule 8.4(g),” which awarded attendees 1.0 credit in the “elimination of bias” category.

### **California:**

The State Bar of California website<sup>3</sup> lists 34 online programs that qualify for elimination of bias credit and are offered in a variety of formats, including on demand, CLEtoGo (podcasts), self-study articles (review an article and answer 20 questions at the end—counts as 1 hour of credit) and webcasts.

Some programs focus on elimination of bias within the profession:

- Bias in the Legal Profession
- Discrimination and Bias: Strategies for Preventing and Responding in the Intellectual Property Bar
- Guess Who’s Coming to Court

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<sup>1</sup> Questions regarding State Bar programming can be directed to H. Douglas Guevara, Senior Director, Continuing Legal Education, 518-487-5580 or [dguevara@nysba.org](mailto:dguevara@nysba.org).

<sup>2</sup> <http://www.americanbar.org/aba.html>.

<sup>3</sup> <http://mcle.calbar.ca.gov/MCLE/OnlineCLE.aspx>.

- Recognizing and Addressing Implicit Gender Bias in the Arena of the Solo & Small Firm
- Avoiding Cultural Missteps

Other programs focus on elimination of bias across a broad range of practice areas, relevant to both large firm and solo practitioners, including criminal justice, environmental law, family law and litigation:

- Addressing the Needs of Persons with Disabilities in the Criminal Justice System
- Bias: The Enemy of Persuasion
- Bring Diversity and Equity in Environmental Planning
- Cultural Competency in Domestic Violence Cases
- Delights, Diversions, and Discriminations: The Bias and Business of Show Business
- Elimination of Bias in Jury Selection: Wheeler/Batson/Lenix in the Courtroom
- Religion Issues Affecting Family Law Strategy
- Does Gender Matter in Antitrust Law? Tips from Experienced Practitioners in Private Practice, Government and In-house Roles on How to Survive and Thrive in Your Antitrust Practice
- Ten Common Mistakes in Mediation and How to Avoid Them

In addition, California lawyers can access CLE programs sponsored by State Bar of California-approved MCLE providers through online vendors like Versatape,<sup>4</sup> which offers elimination of bias programs such as:

- Elimination of Bias: Transgender Rights
- Challenges Faced by Minorities and Women in the Legal Profession
- How to Recognize Cross Cultural Issues in Litigation, Negotiation and Mediation
- Understanding and Mitigating Bias (including a professional responsibility segment)

### **Minnesota:**

The Minnesota State Bar Association offers a wide variety of D&I/Elimination of Bias CLE courses through their website,<sup>5</sup> including the following programs on-demand or through teleconference and webcast:

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<sup>4</sup> <http://www.versatape.com/>.

<sup>5</sup> <http://www.mnbar.org/cle-events/on-demand-cle/on-demand-elimination-of-bias-cles>.

- Impact of Technology on Diversity and Inclusion in the Legal Profession
- Fisher v. University of Texas at Austin (a conversation about the value of diversity in education and legal practice as well as the challenges and contributions of black attorneys and law students in Minnesota, in response to questions raised by Chief Justice Roberts)
- Helping Your Client Legally Change Gender
- The Mall of America Protest Cases, Black Lives Matter, and the Minnesota Legal System
- Understanding Ogbergefell v. Hodges: The decision and its effects on related areas of law
- Clients from Other Cultures: Traps & Tips
- Transgender People Interacting with the Legal and Healthcare Industries— Personal and Practical Insights

In addition, the Minnesota state court system offered a program in May 2012, “Ramsey County Mental Health Court: Working with the Mentally Ill Defendant”.<sup>6</sup>

### **Multistate:**

Multistate CLE providers offer a range of programs as well. For example, the Practising Law Institute<sup>7</sup> lists upcoming online programs that qualify for elimination of bias credit in California and/or Minnesota, as well as for ethics or other CLE credit in multiple other states, including New York:

- PLI’s California MCLE Marathon 2016: Current Developments in Legal Ethics – Competence Issues—Elimination of Bias (approved in California for 4 credits in ethics, 1 credit in elimination of bias, and 1 credit in competence issues; approved in New York for 7 credits in ethics)
- How to Become a Culturally Competent Attorney (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in ethics)
- Representing Transgender Clients: Practical Skills and Cultural Competency (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 1 ethics credit and 6.5 credits in professional practice)
- Working with Immigrants: The Intersection of Basic Immigration, Housing and Domestic Violence Issues in California (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 7 credits in professional practice)

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<sup>6</sup> Available at [http://www.mncourts.gov/Documents/2/Public/Criminal/RCMHC\\_CLE\\_Flyer\\_5-23-12.pdf](http://www.mncourts.gov/Documents/2/Public/Criminal/RCMHC_CLE_Flyer_5-23-12.pdf).

<sup>7</sup> <http://www.pli.edu/>.

- Diversity & Inclusion in Law Practice 2016 (approved in California and Minnesota for 2.25 elimination of bias credits and 1 general credit; approved in New York for 2.5 ethics credits and 1.5 credits in professional practice)
- Providing Respectful and Culturally Competent Services to LGBT Clients (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in professional practice)

Likewise, LawLine<sup>8</sup> offers multiple programs that qualify for elimination of bias credit in states that have that requirement and for ethics or other types of CLE credit in other states, including New York. Course offerings include:

- Steps to Eliminate Bias in the Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Implicit Bias: The Bias You Didn't Know You Have... But You Do (approved in Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Leveling the Playing Field: Elimination of Bias in the Legal Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)

Similarly, LexVid<sup>9</sup> offers courses that qualify for elimination of bias credit in California and/or Minnesota and are approved for credit in multiple other states, including New York, such as:

- Respect in the Workplace—The Legal Landscape of Harassment, Bias & Discrimination in the Workplace, Part II (approved in California for 1.75 elimination of bias credits; approved in New York for 2.0 credits {unspecified; presumably professional practice});
- Unconscious Bias and the Legal Profession (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)
- Bias and LGBT Issues in the Legal Workplace (approved in California for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- The Elimination of Bias in the Practice of Law (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)

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<sup>8</sup> <https://www.lawline.com/>.

<sup>9</sup> <http://www.lexvid.com/>.



\* \* \*

I hope this information is useful for your purposes. Please let me know if I can be of any further assistance. Thank you again for your attention to this important proposal.

Respectfully,

A handwritten signature in black ink, appearing to read "John S. Kiernan", with a horizontal line extending to the right from the end of the signature.

John S. Kiernan

Encl.

cc: Elise Geltzer, Esq., Counsel, NYS Continuing Legal Education Board (w/encl.)  
Office of Court Administration  
25 Beaver Street  
New York, NY 10004

## **Appendix B:**

Sample D&I CLE Programs from  
New York and Around the Country

## Appendix B

### Sample Programs from New York and Around the Country

#### **New York:**

Despite not having a mandatory diversity and inclusion and/or elimination of bias CLE requirement, the New York State Bar Association has presented the following programs that would qualify for D&I credit:

- Justice, Race and Police Force
- Going Beyond Ferguson and Garner
- Constance Baker Motley Symposium: The Impact of Implicit Bias on Lawyers and the Legal Profession
- Representing LGBT Clients after Obergefell
- Human Trafficking in New York State: Legal Issues and Advocating for the Victim
- Contemporary Civil Rights in Relation to the 50<sup>th</sup> Anniversary of the Civil Rights Act
- The Path to Marriage Equality & Beyond: Representing LGBT Clients in a Post-DOMA World
- Representing the Transgender Client through the Arc of Life

The New York City Bar Association has presented the following programs that would also qualify for D&I credit:

- The Explicit Impact of Implicit Bias: Unpacking and Interrupting Implicit Bias to Create More Diverse and Inclusive Legal Workplaces
- Diversity and Inclusion Conference: a General Counsel and Managing Partners Forum

Other CLE providers have also presented D&I programs.

#### **California:**

California is one of two states that currently have a D&I CLE requirement. California Bar's website (<http://mcle.calbar.ca.gov/MCLE/OnlineCLE.aspx>) lists 34 online programs that qualify for elimination of bias credit and which are offered in a variety of formats, including on demand, CLEtoGo (podcasts), self-study articles (review an article and answer 20 questions at the end—counts as 1 hour of credit) and webcasts.

Some programs focus on elimination of bias within the profession:

- Bias in the Legal Profession
- Discrimination and Bias: Strategies for Preventing and Responding in the Intellectual Property Bar
- Guess Who's Coming to Court
- Recognizing and Addressing Implicit Gender Bias in the Arena of the Solo & Small Firm
- Avoiding Cultural Missteps

Other programs focus on diversity and inclusion and the elimination of bias across a broad range of practice areas, relevant to both large firm and solo practitioners, including criminal justice, environmental law, family law and litigation:

- Addressing the Needs of Persons with Disabilities in the Criminal Justice System
- Bias: The Enemy of Persuasion
- Bring Diversity and Equity in Environmental Planning
- Cultural Competency in Domestic Violence Cases
- Delights, Diversions, and Discriminations: The Bias and Business of Show Business
- Elimination of Bias in Jury Selection: Wheeler/Batson/Lenix in the Courtroom
- Religion Issues Affecting Family Law Strategy
- Does Gender Matter in Antitrust Law? Tips from Experienced Practitioners in Private Practice, Government and In-house Roles on How to Survive and Thrive in Your Antitrust Practice
- Ten Common Mistakes in Mediation and How to Avoid Them

In addition, California lawyers can access CLE programs sponsored by State Bar of California-approved MCLE providers through online vendors like Versatape ([www.versatape.com](http://www.versatape.com)), which offers elimination of bias programs, such as:

- Elimination of Bias: Transgender Rights
- Challenges Faced by Minorities and Women in the Legal Profession
- How to Recognize Cross Cultural Issues in Litigation, Negotiation and Mediation
- Understanding and Mitigating Bias (including a professional responsibility segment)

### **Minnesota:**

Minnesota is the second state with a mandatory D&I CLE requirement. The Minnesota State Bar Association offers a wide variety of D&I/Elimination of Bias CLE courses through their website (<http://www.mnbar.org/cle-events/on-demand-cle/on-demand-elimination-of-bias-cles>), including the following programs on-demand or through teleconference and webcast:

- Impact of Technology on Diversity and Inclusion in the Legal Profession
- *Fisher v. University of Texas at Austin* (a conversation about the value of diversity in education and legal practice as well as the challenges and contributions of black attorneys and law students in Minnesota, in response to questions raised by Chief Justice Roberts)
- Helping Your Client Legally Change Gender
- The Mall of America Protest Cases, Black Lives Matter, and the Minnesota Legal System
- Understanding *Ogbergefell v. Hodges*: The decision and its effects on related areas of law
- Clients from Other Cultures: Traps & Tips
- Transgender People Interacting with the Legal and Healthcare Industries—Personal and Practical Insights

In addition, the Minnesota state court system offered a program in May 2012, “Ramsey County Mental Health Court: Working with the Mentally Ill Defendant” at [http://www.mncourts.gov/Documents/2/Public/Criminal/RCMHC\\_CLE\\_Flyer\\_5-23-12.pdf](http://www.mncourts.gov/Documents/2/Public/Criminal/RCMHC_CLE_Flyer_5-23-12.pdf).

### **Multistate:**

There are a range of programs offered through multistate CLE providers as well. By way of example, the Practising Law Institute (<https://pli.edu/>) lists upcoming online programs that qualify for elimination of bias credit in California and/or Minnesota, as well as for ethics or other CLE credit in multiple other states, including New York. For example:

- PLI’s California MCLE Marathon 2016: Current Developments in Legal Ethics – Competence Issues—Elimination of Bias (approved in California for 4 credits in ethics, 1 credit in elimination of bias, and 1 credit in competence issues; approved in New York for 7 credits in ethics)
- How to Become a Culturally Competent Attorney (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in ethics)
- Representing Transgender Clients: Practical Skills and Cultural Competency (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 1 ethics credit and 6.5 credits in professional practice)
- Working with Immigrants: The Intersection of Basic Immigration, Housing and Domestic Violence Issues in California (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 7 credits in professional practice)
- Diversity & Inclusion in Law Practice 2016 (approved in California and Minnesota for 2.25 elimination of bias credits and 1 general credit; approved in New York for 2.5 ethics credits and 1.5 credits in professional practice)
- Providing Respectful and Culturally Competent Services to LGBT Clients (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in professional practice)

Likewise, LawLine ([www.lawline.com](http://www.lawline.com)) offers multiple programs that qualify for elimination of bias credit in states that have that requirement and for ethics or other types of CLE credit in other states, including New York. Course offerings include:

- Steps to Eliminate Bias in the Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Implicit Bias: The Bias You Didn’t Know You Have... But You Do (approved in Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Leveling the Playing Field: Elimination of Bias in the Legal Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)

Similarly, LexVid ([www.lexvid.com](http://www.lexvid.com)) offers courses that qualify for elimination of bias credit in California and/or Minnesota and are also approved for credit in multiple other states, including New York, such as:

- Respect in the Workplace—The Legal Landscape of Harassment, Bias & Discrimination in the Workplace, Part II (approved in California for 1.75 elimination of bias credits; approved in New York for 2.0 credits {unspecified; presumably professional practice});
- Unconscious Bias and the Legal Profession (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)
- Bias and LGBT Issues in the Legal Workplace (approved in California for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- The Elimination of Bias in the Practice of Law (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)

Finally, the ABA (<http://www.americanbar.org/aba.html>) also offers online D&I/elimination of bias CLEs, including:

- Canaries in the Coalmine: Succeeding as Female Counsel in Male-Dominated Industries
- Transgender Issues in the Legal Profession and its Impact on Diversity and Inclusion.



MEMORANDUM

December 14, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed New York Continuing Legal Education Requirement for Diversity, Inclusion, and the Elimination of Bias

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The Continuing Legal Education Board of the Unified Court System is seeking public comment on a proposed amendment of the rule addressing mandatory continuing legal education (CLE) for attorneys in the State of New York (22 NYCRR §1500) that would impose a one-credit requirement in CLE for experienced attorneys (admitted to the New York Bar for more than two years) addressing the subject of diversity, inclusion, and the elimination of bias (Exh. A). This credit would be included within, and would not add to, the current requirement of 24 credit hours of accredited CLE in each attorney biennial reporting cycle (see, 22 NYCRR §1500.22[a]).

As reported in a memorandum provided by representatives of various bar associations (Exh. B) and correspondence from the New York City Bar Association (Exhs. C and D), the proposal builds upon the recommendations of the American Bar Association set forth in ABA Resolution 107 (February 2016; Exh. E), and is designed to increase diversity and inclusion and to promote equality of opportunity in the legal profession.

Currently, only California and Minnesota have adopted stand-alone diversity and inclusion CLE requirements. Proponents of the amendment note that New York adoption of this requirement would have a substantial impact on the legal profession's awareness of issues of bias and inclusion – both in New York State and in the nation at large (Exh. B, p. 2).

Any amendment of Part 1500 would require the approval of the Departments of the New York State Supreme Court, Appellate Division.

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Persons wishing to comment on the proposed rules should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than February 15, 2017.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System, the Continuing Legal Education Board, the Departments of the Appellate Division, or the Office of Court Administration.



**EXHIBIT A**

Proposed Amendment of 22 NYCRR §1500.22  
Issued for Public Comment on December 15, 2016

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Subpart C. Mandatory Continuing Legal Education for Attorneys Other Than Newly Admitted Attorneys

\* \* \*

§1500.22. Minimum Requirements.

(a) Credit Hours. Each attorney shall complete a minimum of 24 credit hours of accredited continuing legal education each biennial reporting cycle in ethics and professionalism, skills, law practice management, ~~or~~ areas of professional practice or diversity, inclusion, and the elimination of bias, at least four (4) credit hours of which shall be in ethics and professionalism and at least one (1) credit hour of which shall be in diversity, inclusion, and the elimination of bias. Ethics and professionalism, skills, law practice management, ~~and~~ areas of professional practice and diversity, inclusion, and the elimination of bias are defined in §1500.2.\* The ethics and professionalism components or the diversity, inclusion, and the elimination of bias component may be intertwined with other courses.

\*Section 1500.2 will be revised to include a definition of diversity, inclusion and the elimination of bias.

**EXHIBIT B**

July 21, 2016

Hon. Janet DiFiore  
Chief Judge of the State of New York  
New York State Unified Court System  
Office of Court Administration, Rm. 852  
25 Beaver Street  
New York, NY 10004

**Re: Diversity & Inclusion CLE requirement for New York State attorneys**

Dear Chief Judge DiFiore:

The undersigned bar associations respectfully urge the licensing and regulatory authorities governing attorney admission in New York State to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession and programs regarding the elimination of bias (“D&I CLE”).

This issue was an agenda item at the American Bar Association (ABA)’s mid-year meeting this past February as Resolution 107, which was approved unanimously and without opposition by the ABA House of Delegates.<sup>1</sup> The resolution expands upon a 2004 House of Delegates resolution—Resolution 110—which amended the language of the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education to provide that regulatory systems require lawyers—either through a separate credit or through existing ethics and professionalism credits—to complete programs related to racial and ethnic diversity and the elimination of bias in the profession. Resolution 107 **expands the definition** of diversity and inclusion to include all persons regardless of race, ethnicity, gender, sexual orientation, gender identity or disabilities; and it also encourages all licensing and regulatory authorities that currently require mandatory continuing legal education (MCLE) to include, **as a separate required credit**, D&I CLE. The resolution does not specify the number of hours of D&I CLE required or call for an increase in the total number of MCLE credits required per cycle.

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<sup>1</sup> Resolution 107 and the ABA’s related report are available at [http://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html](http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html).

Of the 45 states that currently have mandatory continuing legal education, only two—California and Minnesota—have adopted stand-alone D&I CLE requirements. Thus, the resolution, if implemented nationally, would have a wide-ranging impact on attorneys licensed to practice law in the United States. Despite efforts by many New York City law firms to increase their engagement and investment in diversity progress and retention, the attrition rate of minority attorneys at those and other New York law firms remains disproportionately high. We must do more to reverse this trend.

Instituting D&I CLE as a separate required credit for attorneys licensed to practice in New York would be a significant step toward addressing this pervasive, but often unspoken, problem within our profession. We believe this change would be straightforward and easily understood by attorneys. Similar to the stand-alone ethics requirement under our current continuing legal education system, all lawyers renewing their New York State registration would certify that they had completed, as part of their required 20 hours of non-ethics credits, the required number of credit hours in D&I CLE during the immediately preceding biennial reporting cycle.

Moreover, we need not limit diversity and inclusion to the ABA's suggested definition. Rather, we suggest that the Board adopt the broader definition set forth in New York's Human Rights Law, which prohibits discrimination on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status or marital status (Executive Law § 296). Since New York has defined its protected classes under state law, any New York CLE program that educates lawyers on diversity, inclusion and the elimination of bias should follow suit.

The legal profession is grounded on principles of equality, access to justice and the rule of law. It therefore behooves us—as legal practitioners who advocate for these principles in the courtroom—to learn to recognize discrimination within our own organizations and law firms and to work toward eliminating bias in all aspects of the profession, including in our workplaces, in the courthouses and vis-à-vis our clients. CLE programs are an important tool to raise awareness of both explicit and implicit bias within the profession and to educate and empower those who can effect change, particularly law firm leaders. And, like the ABA, we believe that D&I

programs are appropriate for MCLE certification because their “primary objective [is] to increase the professional legal competency of the attorney in ethics and professionalism, skills, practice management and/or areas of professional practice.” See 22 NYCRR 1500.4(b)(2).

We stand ready to assist in whatever way will help the Board to implement this important addition to our state’s CLE requirements. Thank you for your consideration.

Respectfully,

**Amistad Long Island Black Bar Association**  
Cherice Vanderhall, *President*

**Association of Black Women Attorneys**  
Kaylin Whittingham, *President*

**Association of Law Firm Diversity Professionals**  
Carlos Dávila-Caballero, *President*

**Dominican Bar Association**  
Queenie Paniagua, *President*  
Vianny Pichardo, *Director & President-Elect*

**Hispanic National Bar Association**  
Robert Maldonado, *National President*

**Jewish Lawyers Guild**  
Bruce Raskin, *Board Chair*  
Shoshana Bookson, *President*

**LGBT Bar Association of Greater New York (LeGaL)**  
Meredith R. Miller, *President*

**Long Island Hispanic Bar Association**  
Frank Torres, *President*

**Metropolitan Black Bar Association**  
Taa Grays, *President*

**Muslim Bar Association of New York**  
Atif Rehman, *President*

**Puerto Rican Bar Association**  
Betty Lugo, *President*

**New York City Bar Association**  
John S. Kiernan, *President*

**South Asian Bar Association of New York**  
Rippi Gill, *President*

Cc: Hon. Betty Weinberg Ellerin, Chair, NYS Continuing Legal Education Board  
Elise Geltzer, Esq., Counsel, NYS Continuing Legal Education Board

Contact: Maria Cilenti, Senior Policy Counsel, New York City Bar Association  
[mcilenti@nycbar.org](mailto:mcilenti@nycbar.org) or 212-382-6655

**EXHIBIT C**



NEW YORK  
CITY BAR

JOHN S. KIERNAN  
PRESIDENT  
Phone: (212) 382-6700  
Fax: (212) 768-8116  
jkiernan@nycbar.org

August 25, 2016

Hon. Betty Weinberg Ellerin  
Chair, NYS Continuing Legal Education Board  
c/o Alston & Bird LLP  
90 Park Ave.  
New York, NY 10016-1387

**Re: Diversity & Inclusion CLE requirement for New York State attorneys**

Dear Judge Ellerin:

Thank you for taking the time to speak with me and Maria Cilenti recently regarding the proposal that New York modify its existing CLE requirement (calling for 24 hours of training every two years, of which at least four must be directed to ethics), by adding a further required allocation to training in enhancing diversity and inclusion and promoting the elimination of bias in the legal profession. As explained in our July 21 letter to Chief Judge DiFiore, this proposal is modeled after ABA Resolution 107 passed by the House of Delegates in February, 2016.<sup>1</sup> This letter represents an effort to provide some further context for this proposal, in a manner responsive to points you raised in our call.

### **The Problem**

As news events of the past year have dramatically illustrated, issues of race – including issues related to economic disparity, unequal access to opportunities, statistically disproportionate outcomes in the criminal justice system, educational differences, mistrust of minority ethnic groups or religions, bias crimes, police conduct, overt discrimination, and even implicit or unintended bias by well-meaning people – remain among the most critical and divisive issues of our time. Our country’s defining national commitment to equality, tolerance and embrace of differences has always been, and remains today, in fundamental tension with our historical legacy of racial discrimination and segregation, and with the continuing current effects of that legacy. That incongruity warrants continued effort to promote equal opportunity, to attack and remedy discrimination and to promote and celebrate diversity. That need exists not

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<sup>1</sup> The City Bar’s July 21 letter is available at <http://bit.ly/29On4j9>.



only with regard to race discrimination, but also with regard to treatment based on gender, religion, national origin, sexual orientation, age, disability and other categorizations that have led to intentional or unintentional discrimination.

The legal profession has recognized that it must participate in this effort, engaging in critical self-analysis regarding the persistent underrepresentation of minorities in its ranks, a topic that has been the subject of bar association reports and public discussion in recent years.<sup>2</sup> While lawyers have been in the forefront of efforts to combat discrimination – through innumerable instances of claims advanced, laws advocated for and enacted, programs developed, judicial decisions issued and positions taken in support of promoting diversity, inclusion and equality of opportunity – the legal profession has fallen short, too, particularly as a model for professional development. Studies show that members of minority groups continue to lag white males significantly in hiring, retention and leadership within the legal profession – more even

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<sup>2</sup> Rhode, Deborah L, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, May 27, 2015, available at [https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm\\_term=.c047d0733fbd](https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.c047d0733fbd) (“Women constitute more than a third of the profession, but only about a fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans. . . . Although blacks, Latinos, Asian Americans and Native Americans now constitute about a third of the population and a fifth of law school graduates, they make up fewer than 7 percent of law firm partners and 9 percent of general counsels of large corporations. In major law firms, only 3 percent of associates and less than 2 percent of partners are African Americans.”);

Jackson, Liane, *Minority women are disappearing from BigLaw – and here's why*, March 1, 2016, available at [http://www.abajournal.com/magazine/article/minority\\_women\\_are\\_disappearing\\_from\\_biglaw\\_and\\_heres\\_why](http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why) (“Studies and surveys by groups such as the ABA and the National Association of Women Lawyers show that law firms have made limited progress in promoting female lawyers over the course of decades, and women of color are at the bottom.”);

Greene, Michael, *Minorities, Women Still Underrepresented in Law*, April 16, 2015, available at <https://bol.bna.com/minorities-women-still-underrepresented-in-law/> (“Based on Department of Labor Statistics, the IILP [Institute for Inclusion in the Legal Profession] found that ‘aggregate minority representation among lawyers is significantly lower than minority representation in most other management and professional jobs.’”);

National Association for Law Placement Press Release, *Women, Black/African-American Associates Lose Ground at Major U.S. Law Firms*, Nov. 19, 2015, available at <http://www.nalp.org/uploads/PressReleases/2015NALPWomenandMinorityPressRelease.pdf> (noting in particular that the percentage of African-American firm associates has declined each year since 2009);

American Bar Association, *Summary Report and Recommendations From 2009 ABA Study of the State of Diversity in the Legal Profession, examining Race and Ethnicity Gender Sexual Orientation Disabilities*, April 2010, available at [http://www.americanbar.org/content/dam/aba/administrative/diversity/next\\_steps\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf) (citing as a top disappointment that “[t]he legal profession is less racially diverse than most other professions, and racial diversity has slowed considerably since 1995.”);

Lam, Bourree, *The Least Diverse Jobs in America*, June 29, 2015, available at <http://www.theatlantic.com/business/archive/2015/06/diversity-jobs-professions-america/396632/> (citing data from the U.S. Census showing that 81% of lawyers are white, topping the list);

New York State Bar Association, *Judicial Diversity: A Work in Progress*, Sept. 17, 2014, available at [http://www.nysba.org/Sections/Judicial/2014\\_Judicial\\_Diversity\\_Report.html](http://www.nysba.org/Sections/Judicial/2014_Judicial_Diversity_Report.html) (“People of color and women remain significantly under-represented on the bench. This under-representation most starkly manifests in our upstate judicial districts, but can also be observed in certain downstate districts with large minority populations”), at p. 8.

than in other professions – and that women and people of color make up a far smaller portion of the legal community than of the population generally.<sup>3</sup> While representation of women and minorities in legal jobs has improved over the past few decades, the rate of progress has been very slow, and some recent evidence has suggested the movement has not been steadily forward.

For example, the City Bar’s 2014 Diversity Benchmarking Report of results from 55 firms that have signed a public statement of commitment to enhance diversity and inclusion presented results reflecting “multiple setbacks for minority attorneys, with small declines in representation at key levels, reduced racial and ethnic diversity across the associate pool, and a small increase in the percentage of signatory firms with no attorneys of color on the management committee. Additionally, the prevalence of attorneys of color in non-equity versus equity roles increased in 2014.”<sup>4</sup> Despite broadly asserted support for diversity and inclusion goals, New York City law firms continue to experience higher rates of attrition among minority and women attorneys: 23.6% of minority attorneys and 21.3% of women of all levels of seniority left signatory firms in 2014, for example, compared to 14.7% of white men. These firms obviously represent only a portion of the New York State legal marketplace, but these disappointing results may be particularly notable, and possibly even somewhat better than the overall legal market, because they come from legal enterprises that have made public commitments to diversity, have allowed their results to be counted and generally have had larger numbers to work with.

These results do not arise in a statistical vacuum. Minority and women lawyers at law firms and other legal offices consistently confirm believing that their professional experiences are adversely impacted by their “otherness” and unfamiliarity to the white male majority, by implicit bias and sometimes by outright instances of discriminatory speech or conduct.<sup>5</sup> Those lawyers also bring to their law firm environment their experiences of implicit or explicit bias outside their offices. (As just one example, at a recent discussion of racial issues at my firm, a highly regarded Black member of our staff reported that police officers have stopped and aggressively questioned and/or frisked him dozens of times in the past few years, including within a block of our offices and when he was wearing a suit as he does every workday.)

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<sup>3</sup> See n. 2, *supra*.

<sup>4</sup> New York City Bar Office of Diversity and Inclusion, *2014 Benchmarking Report*, available at <http://www.nycbar.org/images/stories/pdfs/diversity/benchmarking2014.pdf>

<sup>5</sup> See, e.g., Strickler, Andrew, *How Minority Attorneys Encounter BigLaw Bias*, available at <http://www.law360.com/articles/795806/how-minority-attys-encounter-biglaw-bias>; Rhode, n. 1, *supra* (“Minorities still lack a presumption of competence granted to white male counterparts, as illustrated in a recent study by a consulting firm. It gave a legal memo to law firm partners for “writing analysis” and told half the partners that the author was African American. The other half were told that the writer was white. The partners gave the white man’s memo a rating of 4.1 on a scale of 5, while the African American’s memo got a 3.2.”); Negowetti, Nicole E., *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection*, University of Nevada Law Journal, Spring 2015, available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1600&context=nlj> (examining, at pp. 945-949, the relationship between implicit bias and lawyering and the impact on associate experience and retention: “[t]he nature of lawyering predisposes lawyers to evaluate each other using a subjective system of evaluation. Legal work contains discretionary judgment, a product of external factors and ‘the lawyer’s own character, insight, and experience.’ . . . Without specific metrics to objectively evaluate the quality of an associate’s work, stereotypes and implicit biases will influence one’s judgment.”); Reeves, A., *Diversity in Practice: What Does Your Brain See?*, Nov. 2012, available at [http://www.nextions.com/wp-content/files\\_mf/1352727388\\_magicfields\\_attach\\_1\\_1.pdf](http://www.nextions.com/wp-content/files_mf/1352727388_magicfields_attach_1_1.pdf) (“The research effectively disproves that any of us are ‘color-blind’ or ‘gender-blind.’ We ‘see’ race and gender even when those characteristics are undefined.”).

Promotion of diversity, inclusiveness and non-discrimination will remain essential as the face of our country and of New York continues to change. Based on census data, the population of white New York State residents has decreased from 62% to 56% from 2000-2015, while the percentage of Black, Asian and Hispanic New Yorkers has increased roughly 3% each during that period.<sup>6</sup> Legal clients are more diverse, practices are more international and multi-jurisdictional, and the judiciary continues to grow in its diversity. Lawyers need to be equipped to recognize cultural differences and biases that may impact their personal interactions in all aspects of their practice – not just as lawyers, but as arbitrators, mediators, advisors, employers, partners and officers of the court.

### **The Importance of Efforts to Increase Diversity and Inclusion and Promote Equality of Opportunity in the Legal Profession**

Legislatures, bar groups, diversity professionals and law firms and other law offices have increasingly acknowledged the importance of leadership within the legal profession in promotion of diversity, inclusion and equal opportunity.

In January 2016, New York State’s Assembly Judiciary Committee and its Subcommittee on Diversity in Law held a roundtable to discuss strategies for promoting increased diversity in the legal profession. That roundtable arose directly out of views regarding the importance of ensuring that the legal profession be as diverse and inclusive as the population it serves, and in response to reports highlighting continued minority under-representation in the profession. The City Bar’s Director of Diversity and Inclusion and the Chair of our Diversity Pipeline Initiatives Committee provided testimony to discuss the work of the Association, its most recent law firm benchmarking report and its student pipeline initiative.

Studies of law firm and other enterprise dynamics have demonstrated that diversity in staffing promotes differences in perspective that enhance professional performance.<sup>7</sup> Many law firms and law offices are already engaging in diversity and inclusion trainings, often through law firm professional development efforts, diversity offices and bar association programs. Some trainings are afforded CLE credits as ethics or practice management courses, but the granting of credit has been on an ad hoc basis.<sup>8</sup> The U.S. Department of Justice also recently announced

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<sup>6</sup> For 2010-15 data, see <http://www.census.gov/quickfacts/table/PST045215/36>. Note that 2015 data is estimated. For 2000-10 actual census data, see “Comparison of 2000 and 2010 Populations by Race and Ethnicity” at <https://labor.ny.gov/stats/nys/statewide-population-data.shtm>.

<sup>7</sup> Roellig, M., *Why Diversity and Inclusion are Critical to the Success of Your Law Department*, 2011, available at <https://www.massmutual.com/~media/files/why-diversity-and-inclusion-is-critical-to-the-success-of-your-law-department.pdf> (“Building a culture of diversity and inclusion in your legal team is critical because it will improve your team’s performance.”), at p. 1; Phillips, Katherine W., *How Diversity Makes Us Smarter*, Scientific American, Oct. 2014, available at <http://www.scientificamerican.com/article/how-diversity-makes-us-smarter> (“Decades of research by organizational scientists, psychologists, sociologists, economists and demographers show that socially diverse groups [that is, those with a diversity of race, ethnicity, gender and sexual orientation] are more innovative than homogeneous groups.”), at p. 2; Reeves, A., *Value Proposition for Diversity and Inclusion in the Legal Profession*, Summer 2010, available at <http://www.nextions.com/wp-content/uploads/ABA-Diversity-Voice-2.pdf>.

<sup>8</sup> See, e.g., the following two most recent City Bar programs: April 22, 2016 Professional Development Workshop Series, *The Explicit Impact of Implicit Bias: Unpacking and Interrupting Implicit Bias to Create More*

(June 27, 2016 press release) the roll-out of a department-wide required Implicit Bias Training Program for 28,000 lawyers and investigators, predicating this step on views that “[t]he research is clear that most people experience some degree of unconscious bias, and that the effects of that bias can be countered by acknowledging its existence and utilizing response strategies.” On August 23, 2016, New York City Corporation Counsel Zachary W. Carter wrote to Chief Judge DiFiore in support of requiring CLE credit in diversity and inclusion and elimination of bias. Mr. Carter indicated that “[f]or the last ten years the Law Department has required all of its employees to participate in Diversity and Inclusion programs” and that the “evaluations of our programs by our participants have been overwhelmingly favorable, notwithstanding some initial skepticism.” The New York State Judicial Institute also offers diversity training for new judges as part of its curriculum.

One of the signatories to our July 21 letter is the Association of Law Firm Diversity Professionals, indicating institutional support for this initiative from law firms they represent. Legal Services NYC publicly supported this proposal in a letter to the New York Law Journal.<sup>9</sup> Such widespread support and efforts reflect an environment in which many lawyers want to improve their understanding of diversity, inclusion and anti-bias issues and to contribute to improving the profession. These efforts are proceeding against a national backdrop that includes ongoing debate about how this country can best address perceived and indisputable racial disparities in our justice system, a challenge of particular importance to lawyers as essential champions and guardians of the rule of law.

The ABA has taken two major steps in the past six months to act on a broad consensus among the legal profession’s leadership regarding the importance of addressing nationwide concerns and reinforcing the profession’s commitment to diversity and equal opportunity. First, in February 2016 the ABA House of Delegates unanimously passed Resolution 107, encouraging states to require lawyers to participate in diversity and inclusion training as a standalone component of their CLE requirements.<sup>10</sup> As explained in our July 21 letter, this can and should be done without increasing New York’s current 24-credit biennial requirement. Resolution 107 was co-sponsored by the ABA Standing Committee on CLE, reflecting its perceived importance as part of a lawyer’s continuing education. Resolution 107 was meant to expand on Resolution 110, passed in 2004, which encouraged states to require D&I training either as part of ethics or professionalism credits, or as a standalone credit. Resolution 107’s recommendation that D&I

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*Diverse and Inclusive Workplaces* (featuring Dr. Arin N. Reeves and awarding 2.0 CLE credits in law practice management), and May 24, 2016 *Diversity and Inclusion Conference* (1.5 CLE credits in ethics). For a sample of “elimination of bias” CLE offerings, some of which are recognized in particular states, see <http://mcleblog.net/category/elimination-of-bias/>. See also Kang, Jerry, *Implicit Bias: A Primer for Courts*, Aug. 2009, available at <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf>.

<sup>9</sup> Rasmussen, Raun J., *CLE Should Include Diversity Training*, New York Law Journal, Aug. 1, 2016, available at [http://www.newyorklawjournal.com/id=1202764038752/CLE-Should-Include-Diversity-Training?cmp=share\\_twitter&slreturn=20160725141143](http://www.newyorklawjournal.com/id=1202764038752/CLE-Should-Include-Diversity-Training?cmp=share_twitter&slreturn=20160725141143).

<sup>10</sup> Resolution 107 and the ABA’s related report are available at [http://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html](http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/107.html).

CLE be a standalone credit was intended to increase overall attorney participation in D&I trainings.<sup>11</sup> Resolution 107's approach appears appropriate and sound.

Then, two weeks ago, on August 8, the ABA House of Delegates unanimously passed Resolution 109, which amends Model Rule of Professional Conduct 8.4 to provide that it is professional misconduct to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”<sup>12</sup> As explained in the Resolution's underlying report, “Discrimination and harassment by lawyers . . . undermines confidence in the legal profession and the legal system.” Although non-discrimination/non-harassment is only one component of the umbrella of diversity, inclusion and anti-bias concerns facing the legal profession, Resolution 109 reaffirms its importance to the legal profession as an institutional matter. While New York has not yet considered and determined whether to expand Rule 8.4 of the N.Y. Rules of Professional Conduct to mirror the language of Resolution 109, the sensibilities about how a lawyer should act as a professional that underlie this new language should be a matter of consensus.<sup>13</sup>

### **The Value of CLE in Advancing Diversity, Inclusion and Equality of Opportunity**

CLE plays an important role in both the quality and public perception of our self-regulated profession.<sup>14</sup> Like the mandatory allocation of at least four hours to ethics training, an allocation of a portion of the CLE requirement to D&I training will convey an important

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<sup>11</sup> At present, only California and Minnesota have adopted standalone D&I CLE requirements. A representative from the Minnesota Board of Law Examiners reported that in 2014, 508 of the 12,619 courses approved for credit in Minnesota had at least one segment qualifying for elimination of bias credit. Given the speed of market reactions and plentitude of diversity training programs already in place, there is ample reason to expect that there will be numerous available offerings from which lawyers can satisfy a D&I training requirement. In addition, a diversity and inclusion segment could readily be included as part of a broader course and could be tailored to diversity issues particular to a lawyer's location or substantive practice area.

<sup>12</sup> Resolution 109 and the ABA's related report are available at [http://www.americanbar.org/news/reporter\\_resources/annual-meeting-2016/house-of-delegates-resolutions/109.html](http://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/109.html).

<sup>13</sup> New York's judges are required to hold trial lawyers to a standard similar to the one expressed in Resolution 109. Therefore, judges also stand to benefit from diversity and inclusion training for lawyers. Judicial Code of Conduct Section 100.3(B)(5) states, “A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, against parties, witnesses, counsel or others. This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding.”

<sup>14</sup> See, e.g., Harris, C., *MCLE: The Perils, Pitfalls, and Promise of Regulation*, 40 Val. U. L. Rev. 359, 365 (Spring 2006) (citing a 2005 paper delivered by Professor Linda Sorenson Ewald “pointing out that for decades ABA committee and conference reports have reflected concern over the state of the profession and recommended MCLE as part of the solution. She describes this as a ‘unanimous belief that continuing [legal] education has a role to play in addressing these concerns.’”). (Emphasis added.)

message about the weight that the legal profession and those who oversee it attach to these values.

Mandatory CLE was initially conceived, supported and implemented as a way to enhance both lawyer competence and public trust in the profession. The ABA's 1992 MacCrate Report entitled "Law Schools and the Profession: Narrowing the Gap," which provided a platform for states considering whether to mandate CLE requirements, identified four basic values of professional responsibility. As described by one commentator in 1998:

"The [four] values are: '1) providing competent representation; 2) striving to promote justice, fairness and morality; 3) striving to improve the profession; and 4) professional self-development.' This [MacCrate] report helped to solidify the ABA's commitment to recommending MCLE programming. . . . The ABA and various state bar associations are talking seriously about what can be done to enforce the four values emphasized in the MacCrate Report. Michigan hired through bar dues a public relations firm to provide enhanced access to the media. This, however, only treats a symptom and does not focus on preventing the problem. The root of the problem is attorney behavior.... At least twenty-one bar associations have recognized that the public perception is based, with good reason, on how attorneys behave. The way to solve the problem is to provide better training for attorneys through MCLE programs aimed at professionalism and ethics."<sup>15</sup>

These values were expressed even earlier by the group of over 100 lawyers who attended what came to be known as the "Arden House Conference" held in New York in 1958. As described in a 1960 paper by then-City Bar President Harrison Tweed, who attended the conference:

"Until 1957 almost all of the education offered to practicing lawyers was designed to improve professional competence and to do nothing more. In the fall of that year, it was felt by many of those interested in the cause that something should be done to put new life into the movement. The formula adopted contained two innovations. First, putting the education offered to practicing lawyers on a somewhat professional basis.... Second, introducing education designed to equip the practicing lawyer to understand and meet his professional responsibilities beyond his primary obligation to be competent."<sup>16</sup>

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<sup>15</sup> Grigg, L., *The Mandatory Continuing Legal Education (MCLE) Debate: Is it Improving Lawyer Competence or Just Busy Work?*, 12 *BYU J. Pub. L.* 417, 430 (1998).

<sup>16</sup> 15 *Rec. Ass'n B. City N.Y.* 481, 485 (1960) (available on HeinOnline).

Of particular relevance here, the lawyers who convened at the Arden House Conference developed a Final Statement that

“brought into the continuing legal education picture for the first time, and in bold relief, the importance that the educational opportunities should not be aimed simply at an improvement in professional competence but, in addition, should be designed to ‘help the lawyer to fulfill a wide range of professional responsibilities: to the courts, to the administration of justice, to law reform, to the law-making process, to his profession and to the public.’”<sup>17</sup>

Including a mandatory diversity and inclusion component as part of lawyers’ CLE obligations should advance all of these purposes. It should continue the ongoing education of the profession in one of the most foundational and important elements of our national self-definition and one of the core components of the rule of law. It should foster an ongoing increase in the vitality of diversity and inclusion, and ongoing progress in the slow erosion of discrimination and implicit bias. It should also convey an important public message, in a time of intense attention to matters of race and other forms of discrimination, regarding the legal profession’s institutional commitment to equality of opportunity.

Just as Justice Sandra Day O’Connor expressed in a 2003 opinion the hope that the need for legal protection for affirmative efforts to increase diversity in education would diminish or disappear in 25 years, *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), it is possible to hope that including diversity, inclusion and anti-bias training as a mandatory component of CLE will not necessarily have to be permanent. But history suggests that this focused effort will likely need to continue into the currently foreseeable future. As one commentator has observed, “The first thing to acknowledge about diversity is that it can be difficult. In the U.S., where dialogue of inclusion is relatively advanced, even the mention of the word ‘diversity’ can lead to anxiety and conflict.”<sup>18</sup> Improvements in diversity, inclusion and avoidance of discrimination tend to come slowly.

We fully appreciate that even if there is broad consensus regarding the need for greater diversity and inclusion, greater equality of opportunity and less overt or unintended discrimination in the operations of the legal profession and in the administration of justice, some lawyers may resist the notion that an authority can properly require each individual lawyer to undergo further education on this subject over the course of a career. But just as the imposition of a particularized ethics requirement was intended, at least in part, to convey a message about priority and commitment rather than to imply that this requirement was needed because all lawyers were unethical, imposition of a diversity and inclusion requirement would reflect the profession’s formal public embrace of its aspirational best self. We expect that the passage of ABA Resolution 107 will spur numerous states to act, and we believe that New York should be in the forefront of these actions.

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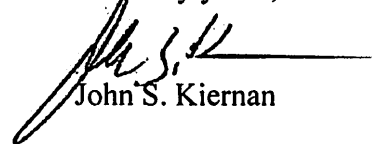
<sup>17</sup> Id. at 486.

<sup>18</sup> Phillips, *supra* n. 7 at p. 3.

We at the New York City Bar Association, and the other signatories of the July 21 letter to Chief Judge DiFiore, would welcome an opportunity to support and participate in further discussions regarding the Continuing Legal Education Board's consideration of this issue. The City Bar and many firms also have worked with numerous experts on these subjects, and we would be happy to make some of these resources available to the Board if you think that would be helpful.

Thank you for your consideration of this important matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John S. Kiernan", is written over a horizontal line. The signature is stylized and cursive.

Cc: Elise Geltzer, Esq., Counsel, NYS Continuing Legal Education Board  
Hon. Rosalyn Richter & Nate Saint-Victor, Co-Chairs, New York City Bar Association  
Enhance Diversity in the Profession Committee



**EXHIBIT D**



NEW YORK  
CITY BAR

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October 17, 2016

Hon. Betty Weinberg Ellerin  
Chair, NYS Continuing Legal Education Board  
c/o Alston & Bird LLP  
90 Park Ave.  
New York, NY 10016-1387

**Re: Proposal that New York adopt a separate CLE requirement for diversity, inclusion and the elimination of bias (“D&I CLE”) as per ABA Resolution 107**

Dear Justice Ellerin:

Thank you for your continued consideration of the proposal to modify New York’s existing CLE requirements (without increasing the total required hours) by adopting a separate CLE requirement for diversity, inclusion and the elimination of bias. I am writing in response to your request for information about programs that already are being offered for CLE credit either under the D&I category or, in those states that do not currently recognize a D&I category, under some other category for accreditation.

To respond to your request, we surveyed CLE program offerings that we believe providers would consider accrediting for a D&I CLE requirement in New York, as well as courses that already are accredited in California and Minnesota, the two states that have long required attorneys to fulfill separate D&I CLE requirements. We also reviewed multistate online D&I CLE offerings because they provide a good overview of the types of courses that will be accessible to lawyers regardless of the location or size of their practices.

Based on our survey of existing offerings, it appears that D&I CLE courses fall into one or more of the following categories: (i) how lawyers perceive and interact with each other as employers, colleagues and partners; (ii) how lawyers perceive and interact with those they come in contact with during the course of practicing law, such as court personnel, witnesses, jurors, judges, opposing counsel, etc.; (iii) ways lawyers can better understand and represent their clients who face barriers, biases and discrimination; (iv) non-discrimination, non-harassment and competent representation as part of a lawyer’s ethical obligations; (v) discrimination and bias in the broader legal and societal context and the role of lawyers in addressing them; and (vi) the law and legal issues as they relate to diverse groups and protected classes.

This letter provides an overview of CLE courses we believe may be relevant to your consideration of this proposal. We understand that definitional and apportionment issues among the accreditation categories – i.e., ethics and professionalism, skills, areas of professional practice, law practice management, and diversity, inclusion and the elimination of bias - may still need to be discussed and ironed out. We are happy to continue participating in those discussions if you think that would be helpful.

**New York City Bar Association:**

In 2016, the New York City Bar Association hosted two diversity and inclusion programs as to which we awarded CLE credit. In light of the City Bar’s position as a New York State accredited CLE provider, the City Bar’s programs are presumptively accredited after being reviewed by our CLE Department for compliance with the CLE Board’s regulations. Because of the special nature of these programs, however, we engaged in a dialogue with the CLE Board staff to ensure “pre-approval” and to maintain our own best practices for program review.

On April 22, 2016, we hosted Dr. Arin N. Reeves as she presented, “The Explicit Impact of Implicit Bias: Unpacking and Interrupting Implicit Bias to Create More Diverse and Inclusive Legal Workplaces,” for which attendees received 2.0 credits of law practice management. The program materials are attached. Dr. Reeves is in great demand for this type of programming and we hope to engage her for similar programming in the future. Her program was extremely well received and well reviewed.

On May 24, 2016, we hosted a full-day Diversity and Inclusion Conference, sponsored by our Enhance Diversity in the Profession Committee. We had originally advocated for accreditation of three separate segments: (i) “Intersectionality”; (ii) “From Bystanders to Upstanders: Activating Allies and Advocates for Inclusion”; and (iii) a General Counsel and Managing Partners Forum. We received approval for only the third segment because, in the view of the CLE Board, the first two were not sufficiently related to the legal profession or the practice of law, and did not have the required legal “wrapper”. Therefore, for the third segment, attendees received 1.5 credits in ethics. The program materials are attached.

In addition, the City Bar frequently hosts programs that cover anti-discrimination laws, civil rights and legal issues pertaining to diverse groups and protected classes. These programs currently are typically accredited for professional practice credits.

We anticipate that, should New York adopt this proposal, our CLE Department would consider each program on its individual merits and decide whether to award skills, professional practice, ethics, law practice management or D&I credit, or some combination. CLE providers make these assessments in the ordinary course of business and we do not anticipate a different approach to assessing D&I CLE programming for potential accreditation.

**New York State Bar Association:**

A sampling of recent and upcoming offerings of the State Bar that appear to fall into one of the above-mentioned six categories include:

- Representing LGBT Clients After Obergefell
- Human Trafficking in NYS: Legal Issues and Advocating for the Victim
- Representing the Transgender Client Through the Arc of Life
- The Path to Marriage Equality & Beyond: Representing LGBT Clients in a Post-DOMA World
- Justice, Race and Police Force
- Contemporary Civil Rights in Relation to the 50<sup>th</sup> Anniversary of the Civil Rights Act
- The Impact of Implicit Bias on Lawyers and the Legal Profession

Timed agendas and outlines for these programs are attached.<sup>1</sup>

**American Bar Association:**

The ABA<sup>2</sup> offers online D&I/elimination of bias CLEs, including, “Canaries in the Coalmine: Succeeding as Female Counsel in Male-Dominated Industries,” and recently hosted a webinar entitled, “Transgender Issues in the Legal Profession and its Impact on Diversity and Inclusion.” Furthermore, as part of Resolution 107, the ABA has pledged to assist in the development and creation of D&I CLE. Thus, we can anticipate additional relevant programming and materials to be offered through the ABA in the future. For instance, on October 6, 2016, the ABA held a program entitled “Implicit Bias: How to Recognize and Address It – and New Model Rule 8.4(g),” which awarded attendees 1.0 credit in the “elimination of bias” category.

**California:**

The State Bar of California website<sup>3</sup> lists 34 online programs that qualify for elimination of bias credit and are offered in a variety of formats, including on demand, CLEtoGo (podcasts), self-study articles (review an article and answer 20 questions at the end—counts as 1 hour of credit) and webcasts.

Some programs focus on elimination of bias within the profession:

- Bias in the Legal Profession
- Discrimination and Bias: Strategies for Preventing and Responding in the Intellectual Property Bar
- Guess Who’s Coming to Court

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<sup>1</sup> Questions regarding State Bar programming can be directed to H. Douglas Guevara, Senior Director, Continuing Legal Education, 518-487-5580 or [dguevara@nysba.org](mailto:dguevara@nysba.org).

<sup>2</sup> <http://www.americanbar.org/aba.html>.

<sup>3</sup> <http://mcle.calbar.ca.gov/MCLE/OnlineCLE.aspx>.

- Recognizing and Addressing Implicit Gender Bias in the Arena of the Solo & Small Firm
- Avoiding Cultural Missteps

Other programs focus on elimination of bias across a broad range of practice areas, relevant to both large firm and solo practitioners, including criminal justice, environmental law, family law and litigation:

- Addressing the Needs of Persons with Disabilities in the Criminal Justice System
- Bias: The Enemy of Persuasion
- Bring Diversity and Equity in Environmental Planning
- Cultural Competency in Domestic Violence Cases
- Delights, Diversions, and Discriminations: The Bias and Business of Show Business
- Elimination of Bias in Jury Selection: Wheeler/Batson/Lenix in the Courtroom
- Religion Issues Affecting Family Law Strategy
- Does Gender Matter in Antitrust Law? Tips from Experienced Practitioners in Private Practice, Government and In-house Roles on How to Survive and Thrive in Your Antitrust Practice
- Ten Common Mistakes in Mediation and How to Avoid Them

In addition, California lawyers can access CLE programs sponsored by State Bar of California-approved MCLE providers through online vendors like Versatape,<sup>4</sup> which offers elimination of bias programs such as:

- Elimination of Bias: Transgender Rights
- Challenges Faced by Minorities and Women in the Legal Profession
- How to Recognize Cross Cultural Issues in Litigation, Negotiation and Mediation
- Understanding and Mitigating Bias (including a professional responsibility segment)

#### **Minnesota:**

The Minnesota State Bar Association offers a wide variety of D&I/Elimination of Bias CLE courses through their website,<sup>5</sup> including the following programs on-demand or through teleconference and webcast:

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<sup>4</sup> <http://www.versatape.com/>.

<sup>5</sup> <http://www.mnbar.org/cle-events/on-demand-cle/on-demand-elimination-of-bias-cles>.

- Impact of Technology on Diversity and Inclusion in the Legal Profession
- Fisher v. University of Texas at Austin (a conversation about the value of diversity in education and legal practice as well as the challenges and contributions of black attorneys and law students in Minnesota, in response to questions raised by Chief Justice Roberts)
- Helping Your Client Legally Change Gender
- The Mall of America Protest Cases, Black Lives Matter, and the Minnesota Legal System
- Understanding Ogbergefell v. Hodges: The decision and its effects on related areas of law
- Clients from Other Cultures: Traps & Tips
- Transgender People Interacting with the Legal and Healthcare Industries—Personal and Practical Insights

In addition, the Minnesota state court system offered a program in May 2012, “Ramsey County Mental Health Court: Working with the Mentally Ill Defendant”.<sup>6</sup>

**Multistate:**

Multistate CLE providers offer a range of programs as well. For example, the Practising Law Institute<sup>7</sup> lists upcoming online programs that qualify for elimination of bias credit in California and/or Minnesota, as well as for ethics or other CLE credit in multiple other states, including New York:

- PLI’s California MCLE Marathon 2016: Current Developments in Legal Ethics – Competence Issues—Elimination of Bias (approved in California for 4 credits in ethics, 1 credit in elimination of bias, and 1 credit in competence issues; approved in New York for 7 credits in ethics)
- How to Become a Culturally Competent Attorney (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in ethics)
- Representing Transgender Clients: Practical Skills and Cultural Competency (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 1 ethics credit and 6.5 credits in professional practice)
- Working with Immigrants: The Intersection of Basic Immigration, Housing and Domestic Violence Issues in California (approved in California for 1 credit in elimination of bias and 5.25 general credits; approved in New York for 7 credits in professional practice)

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<sup>6</sup> Available at [http://www.mncourts.gov/Documents/2/Public/Criminal/RCMHC\\_CLE\\_Flyer\\_5-23-12.pdf](http://www.mncourts.gov/Documents/2/Public/Criminal/RCMHC_CLE_Flyer_5-23-12.pdf).

<sup>7</sup> <http://www.pli.edu/>.

- Diversity & Inclusion in Law Practice 2016 (approved in California and Minnesota for 2.25 elimination of bias credits and 1 general credit; approved in New York for 2.5 ethics credits and 1.5 credits in professional practice)
- Providing Respectful and Culturally Competent Services to LGBT Clients (approved in California for 1 credit in elimination of bias; approved in New York for 1 credit in professional practice)

Likewise, LawLine<sup>8</sup> offers multiple programs that qualify for elimination of bias credit in states that have that requirement and for ethics or other types of CLE credit in other states, including New York. Course offerings include:

- Steps to Eliminate Bias in the Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Implicit Bias: The Bias You Didn't Know You Have... But You Do (approved in Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- Leveling the Playing Field: Elimination of Bias in the Legal Profession (approved in California and Minnesota for 1 elimination of bias credit; approved in New York for 1 ethics credit)

Similarly, LexVid<sup>9</sup> offers courses that qualify for elimination of bias credit in California and/or Minnesota and are approved for credit in multiple other states, including New York, such as:

- Respect in the Workplace—The Legal Landscape of Harassment, Bias & Discrimination in the Workplace, Part II (approved in California for 1.75 elimination of bias credits; approved in New York for 2.0 credits {unspecified; presumably professional practice});
- Unconscious Bias and the Legal Profession (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)
- Bias and LGBT Issues in the Legal Workplace (approved in California for 1 elimination of bias credit; approved in New York for 1 ethics credit)
- The Elimination of Bias in the Practice of Law (approved in California for 1 hour of elimination of bias credit; approved in New York for 1 hour of ethics credit)

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<sup>8</sup> <https://www.lawline.com/>.

<sup>9</sup> <http://www.lexvid.com/>.

\* \* \*

I hope this information is useful for your purposes. Please let me know if I can be of any further assistance. Thank you again for your attention to this important proposal.

Respectfully,



John S. Kiernan

Encl.

cc: Elise Geltzer, Esq., Counsel, NYS Continuing Legal Education Board (w/encl.)  
Office of Court Administration  
25 Beaver Street  
New York, NY 10004



**EXHIBIT E**

**ADOPTED**

**RESOLUTION**

1 RESOLVED, That the American Bar Association encourages all state, territorial, and  
2 tribal courts, bar associations and other licensing and regulatory authorities, that have  
3 mandatory or minimum continuing legal education requirements (MCLE) to modify their  
4 rules to:

- 5
- 6 1. include as a separate credit programs regarding diversity and inclusion in the legal  
7 profession of all persons regardless of race, ethnicity, gender, sexual orientation,  
8 gender identity, or disabilities, and programs regarding the elimination of bias  
9 (“D&I CLE”); and
  - 10
  - 11 2. require a designated minimum number of hours for this separate credit without  
12 increasing the total number of required MCLE hours and without changing the  
13 criteria for MCLE credit.

14 FURTHER RESOLVED, That the American Bar Association, through its Goal III and  
15 other entities, assist in the development and creation of diversity and inclusion continuing  
16 legal education programs to ensure attorneys can meet their MCLE requirements.

**AMERICAN BAR ASSOCIATION**  
**Diversity and Inclusion 360 Commission**  
**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

- 1 RESOLVED, That the American Bar Association encourages all state, territorial, and  
2 tribal courts, bar associations and other licensing and regulatory authorities, that have  
3 mandatory or minimum continuing legal education requirements (MCLE) to modify their  
4 rules to:  
5  
6 1. include as a separate credit programs regarding diversity and inclusion in the  
7 legal profession of all persons regardless of race, ethnicity, gender, sexual  
8 orientation, gender identity, or disabilities, and programs regarding the  
9 elimination of bias (“D&I CLE”); and  
10  
11 2. require a designated minimum number of hours for this separate credit without  
12 increasing the total number of required MCLE hours and without changing the  
13 criteria for MCLE credit.
- 14 FURTHER RESOLVED, That the American Bar Association, through its Goal III and  
15 other entities, assist in the development and creation of diversity and inclusion continuing  
16 legal education programs to ensure attorneys can meet their MCLE requirements.  
17

## REPORT

### **I. Introduction**

The ABA Diversity & Inclusion 360 Commission (the “Commission”) was created in August 2015 to formulate methods, policy, standards and practices to best advance diversity and inclusion over the next ten years. The Commission was charged with reviewing and analyzing diversity and inclusion in the legal profession, the judicial system, and the American Bar Association. Moreover, the Commission was charged with recommending specific action items to move the needle on diversity and inclusion in an impactful way. The Commission has examined diversity and inclusion related continuing legal education because of its potential to significantly impact the profession, the judicial system and the rule of law.

In 2004, the House of Delegates approved Resolution 110 amending the language of the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education. The amended language provided that regulatory systems require lawyers, either through a separate credit or through existing ethics and professionalism credits, complete as part of their mandatory continuing legal education those programs related to racial and ethnic diversity and the elimination of bias in the profession. The resolution being sponsored by the Diversity & Inclusion 360 Commission builds and expands on that prior recognition of the importance and need for programs regarding diversity and inclusion in the legal profession and further expands the definition of diversity and inclusion consistent with current ABA Goal III to include all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities. The Commission believes that while the 2004 resolution was a good start to address the need for diversity and inclusion programs, more can be and should be done to advance diversity and inclusion in a meaningful and productive manner.

The resolution encourages all state, territorial and tribal courts, bar associations and other licensing and regulatory authorities that *currently* require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Although several states currently allow MCLE credits for D&I CLE, only California and Minnesota have adopted stand-alone D&I CLE requirements.

The resolution does not specify the number of hours for D&I CLE, or increase the total number of MCLE hours required. Rather, the resolution encourages the adoption of a separate credit within those MCLE requirements to ensure that all attorneys receive education regarding the elimination of bias, and diversity and inclusion.

## II. Current Status of MCLE and Diversity and Inclusion CLE

Forty five states currently have mandatory continuing legal education. Therefore, the proposed resolution has the potential to impact the vast majority of attorneys in the United States. As referenced above, California and Minnesota have already adopted stand-alone D&I MCLE requirements. Their requirements are as follows:

California: California requires one (1) hour of “Recognition and Elimination of Bias in the Legal Profession and Society” as a component of its three-year MCLE requirements. <http://mcle.calbar.ca.gov/Attorneys/Requirements.aspx>.

Minnesota: Minnesota requires two (2) hours related to “Elimination of Bias” as a component of its three-year MCLE requirements. [https://www.mbcle.state.mn.us/mbcle/pages/general\\_info.asp](https://www.mbcle.state.mn.us/mbcle/pages/general_info.asp).

Additional states allow programs on elimination of bias to qualify for ethics and/or professionalism credits, but do not create separate D&I CLE requirements. Those states include Hawaii, Kansas, Illinois, Maine, Nebraska, Oregon, Washington, and West Virginia.

The Commission considered the merits of both approaches – those that create a separate D&I CLE category, and those that provide ethics credits for D&I CLE. Ultimately, the Commission concluded that the California and Minnesota models best advance the goal of diversity and inclusion by ensuring *all* attorneys actually receive D&I CLE.

Recognizing the wide array of existing MCLE requirements, the Commission declined to specify a precise number of required hours. Rather, each jurisdiction should determine the appropriate number of required hours within their current MCLE requirements

## III. The Availability of D&I Inclusion CLE

The resolution calls upon the ABA, through its Goal III and other entities, to assist in the development and creation of D&I CLE. This is to ensure that all attorneys can satisfy their new D&I CLE requirement. Although we are confident that CLE providers will ultimately develop programming in response to the new D&I CLE requirement (similar to the prevalence of ethics and professionalism CLE classes), the Commission wants to ensure that *all* attorneys have access to D&I CLE, and that a potential lack of availability of D&I CLE does not deter any jurisdiction from adopting a D&I CLE requirement.

## IV. Conclusion

The resolution encourages each jurisdiction that currently has MCLE to designate a minimum number of credit hours for D&I CLE. In order to ensure that all state and territorial bar associations’ attorneys can meet those requirements, the resolution calls upon the American Bar Association, through its Goal III and other entities, to assist in the development and creation of D&I CLE. The resolution is consistent with the ABA’s

longstanding commitment to diversity and inclusion in the legal profession as evidenced in Resolution 110 approved by the House of Delegates in 2004. It is also consistent with multiple states that have recognized the need for D&I CLE. As such, we respectfully request that House of Delegates adopt the resolution.

Respectfully submitted,

Diversity and Inclusion 360 Commission

**GENERAL INFORMATION FORM**

Submitting Entity: Diversity & Inclusion 360 Commission

Submitted By:

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1. Summary of Resolution(s). The resolution encourages all state, territorial, and tribal courts, bar associations and other licensing and regulatory authorities that currently require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate required credit, programs regarding diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Although several states currently allow MCLE credits for D&I CLE, only California and Minnesota have adopted stand-alone D&I CLE requirements.
2. Approval by Submitting Entity. The Diversity and Inclusion 360 Commission approved this Resolution at its fall meeting on October 6, 2015.
3. Has this or a similar resolution been submitted to the House or Board previously? In 2004, the House approved Resolution 110 amending the language in the Commentary to Section 2 of the Model Rule for Minimum Continuing Legal Education. The amended language provided that regulatory systems require lawyers, either through a separate credit or through existing ethics and professionalism credits, complete as part of their mandatory continuing legal education those programs related to racial and ethnic diversity and elimination of bias in the profession.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This resolution builds and expands on Resolution 110. Additionally, Goal III of our Association seeks increased awareness of diversity and inclusion, and the elimination of bias. This resolution addresses the intent of Goal III.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a
6. Status of Legislation. (If applicable) n/a

- 7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
- 8. Cost to the Association. (Both direct and indirect costs) None anticipated
- 9. Disclosure of Interest. (If applicable) n/a
- 10. Referrals. We have or will refer to all committees, sections, and divisions, particularly the Standing Committee on CLE, Litigation Section, TIPS, Business Law, Young Lawyers Division, and the entities within the Diversity Center, and NCBP.
- 11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Darcee S. Siegel  
 169 Camden Drive  
 Bal Harbour, Florida 33154  
[Darcee.siegel@gmail.com](mailto:Darcee.siegel@gmail.com)  
 (305) 409-9670

David B. Wolfe  
 Skoloff & Wolfe PC  
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 Livingston, NJ 07039-1784  
[dwolfe@skoloffwolfe.com](mailto:dwolfe@skoloffwolfe.com)  
 (973) 992-0900

Eileen M. Letts  
 Greene and Letts  
 55 W. Monroe St. Ste. 600  
 Chicago, IL 60603-5091  
[emletts@greeneandletts.com](mailto:emletts@greeneandletts.com)  
 (312) 346-1100

- 12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This Resolution encourages all state, territorial, and tribal courts, bar associations and other licensing and regulatory authorities who require mandatory continuing legal education (MCLE) to modify their rules to include, as a separate credit, programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias (“D&I CLE”). Further, this resolution while requiring a designated minimum number of hours for a separate credit, will not increase the total number of required MCLE hours or in any way change or alter the criteria for MCLE credit.

### 2. Summary of the Issue that the Resolution Addresses

This Resolution addresses the need to provide stand-alone Diversity and Inclusion CLE requirements for all attorneys who practice in MCLE states. The Resolution also advances Diversity and Inclusion by assisting in the development and creation of diversity and inclusion continuing legal education programs to ensure all attorneys can meet their MCLE requirements. The Resolution is in accordance with Goal III of the American Bar Association, which is to eliminate bias and enhance diversity in the profession.

### 3. Please Explain How the Proposed Policy Position will address the issue

This Resolution will increase the legal profession’s understanding and awareness of issues relating to diversity and inclusion, and the elimination of bias, by ensuring that all attorneys who are obligated to comply with MCLE requirements receive education related to diversity and inclusion, and the elimination of bias.

### 4. Summary of Minority Views

No minority views or opposition to this Resolution have been identified.



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #9

Attached are comments submitted with respect to the report and recommendations of the Committee on Continuing Legal Education from the following sections, committees, and bar associations represented in the House:

Albany County Bar Association  
Committee on Attorney Professionalism  
Bronx County Bar Association  
Chemung County Bar Association  
Committee on Civil Rights  
Committee on Diversity and Inclusion  
Committee on LGBT People and the Law  
Nassau County Bar Association  
New York County Lawyers' Association  
Suffolk County Bar Association  
Westchester County Bar Association  
Sections Caucus (plus individual comments submitted by Judicial Section, Torts, Insurance and Compensation Law Section, Labor and Employment Law Section, Antitrust Section, Commercial and Federal Litigation Section, Local and State Government Law Section, Health Law Section, and Dispute Resolution Section)

ALBANY COUNTY BAR ASSOCIATION

**PRESIDENT**  
DANIEL W. COFFEY

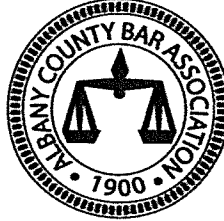
**PRESIDENT-ELECT**  
JAMES E. HACKER

**VICE PRESIDENT**  
HON. CHRISTINA L. RYBA

**TREASURER**  
DANIEL J. HURTEAU

**SECRETARY**  
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**IMMEDIATE PAST PRESIDENT**  
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KATHLEEN A. BARCLAY

**EXECUTIVE DIRECTOR**  
MARQUITA JO RHODES

January 4, 2017

Ellen G. Makofsky  
Chair of the Committee on Continuing Legal Education  
NYSBA  
One Elk Street  
Albany, NY 12207

Re: Report and Recommendations of the Committee on Continuing Legal Education supporting diversity and inclusion requirement in New York's mandatory CLE regulations.

Dear Ms. Makofsky:

Upon careful review and consideration of the above referenced Report and Recommendations, the Albany County Bar Association ("ACBA") would like to extend its support for the NYSBA CLE Committee's proposal that one (1) or two (2) credit hours of Diversity and Inclusion be required for the biennial reporting period. Since the proposal will serve to promote diversity and eliminate bias in the legal profession while leaving the total number of CLE credits required the same, the ACBA wholeheartedly supports the initiative. The initiative is clearly in line with the ACBA's goal to promote and enhance the legal community both inside and outside of the courtroom.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel W. Coffey".

Daniel W. Coffey  
ACBA President



**COMMITTEE ON ATTORNEY PROFESSIONALISM**

**LILLIAN M. MOY**

Chair

Legal Aid Society of Northeastern NY, Inc.

55 Colvin Avenue

Albany, NY 12206

518/689-6304

[lmoy@lasnny.org](mailto:lmoy@lasnny.org)

January 3, 2017

Claire Gutekunst, President  
New York State Bar Association  
One Elk Street  
Albany, NY 12206

Dear Claire:

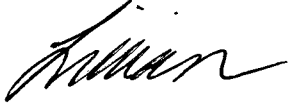
Please accept these comments from the Committee on Attorney Professionalism in strong support of the Report and Recommendations of the Committee on Continuing Legal Education supporting a Diversity and Inclusion requirement in New York's Mandatory Continuing Legal Education Regulations. We agree with the Committee's proposal that either one or two credit hours of D&I CLE be required for each biennial reporting period. We agree that the Diversity and Inclusion CLE be a stand-alone ("floating") CLE requirement, but not add to the 32 credit hours required for new attorneys or the 24 hours required for more experienced attorneys. The D&I CLE credit could count towards any other required credit hours including Ethics, Skills or Areas of Professional Practice/Law Practice Management.

We believe that the D&I CLE credit is needed to enhance our professionalism. We believe that attorney professionalism is most clearly manifested in dedication to service to our diverse clients, and in our commitment to promoting respect of the legal system in pursuit of justice and the public good, characterized by ethical conduct, competence, good judgment, integrity and civility. The D&I CLE credit will enhance every aspect of our professionalism. By increasing the cultural competence of New York's attorneys, we will enhance our ability to behave with courtesy and respect to diverse clients, witnesses and adverse parties. Our cultural competence will also enhance our ability to exercise good judgment in providing client services as well as enhance our competency in seeking the best possible results for our clients.

This Committee stands ready to assist in developing a substantive and practical Diversity and Inclusion CLE, with the special eye towards enhancing our professionalism. We note that CLE requirements can sometimes be difficult to meet for small firms or solo practitioners – we would like to be of service.

If we can provide you with any additional information, please contact me at [lmoy@lasny.org](mailto:lmoy@lasny.org) or 518-689-6304.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Lillian M. Moy". The signature is fluid and cursive, with a prominent initial "L" and "M".

Lillian M. Moy, Chair  
Committee on Attorney Professionalism

**From:** [Godotman@aol.com](mailto:Godotman@aol.com) [mailto:Godotman@aol.com]

**Sent:** Friday, January 13, 2017 4:30 PM

**To:** Wilson, Mark

**Cc:** [Godotman@aol.com](mailto:Godotman@aol.com)

**Subject:** Subcommittee of Local & Speciality Bar Leaders : Request for Public Comment on

Good Afternoon Mr. Wilson,

While the Bronx County Bar Association supports offering CLE courses focused on Diversity, Inclusion and Elimination of Bias, our Bar Association opposes the proposed NYSBA resolution that would recommend to the NY CLE Board that it adopt a rule making such attendance mandatory.

Sincerely,

Corey Sokoler  
President  
Bronx County Bar Association

## Position Statement of the Chemung County Bar Association

on

### *Proposed Mandatory Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys*

As Delegate for a portion of upstate New York, I submit the following comments on the *Proposed Mandatory Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys*

The NYSBA Committee on Continuing Legal Education has written a fascinating and detailed report on the social phenomenon commonly known as diversity and inclusion.

It appears that the NYSBA is proposing that a Mandatory Diversity and Inclusion and Elimination of Bias course be taken biennially by each and every lawyer in the State of New York as a condition of their license to practice law. The Committee's proposal, although well intentioned, is misguided.

#### An Unnecessary Distortion of the Concept of Legal Education

Firstly, the behavioral changes which the Committee seeks, regardless of their merits, are not within the purview of the normal and logical meaning of the phrase "Continuing Legal Education". Indeed, the proposal stretches the definition of "Legal" to include any subject matter which is designed to alter the social behavior of the members of the legal profession.

Secondly, using the CLE program in this way is inherently ineffectual and inappropriate. It has the odor of political indoctrination. I know of no competent attorney who willingly submits to indoctrination of any kind. To propose such a method of social change to independently minded legal professionals is a fool's errand. Such 'education' will be seen and regarded for what it really is: mandatory cultural engineering. Nothing could be more antithetical to an independent and reflective legal mind.

#### The Wrong Method Directed at the Wrong People

As a mandatory CLE course, this proposal wrongly presumes that each of us is racist, sexist, ageist, classist, insensitive, and prejudiced against anyone who looks, acts, believes, or speaks differently from us. Such a presumption is not only disrespectful and offensive (with its air of an adult who 'knows better what is good for the child'), it also perpetuates the very ignorance, bias, and stigmatization that the 'education' would seek to overcome. The presumption of bias is itself an invidious bias. This proposal tends to increase the divide among people, not narrow it.

The proposal also fails to acknowledge that bias may arise from many causes. Racism, sexism, ageism, etc., are simply names for different species of prejudice. Adding 'ism' to a word only hinders our understanding of the real origins for humans problems: fear, sloth, jealousy, pride, selfishness, revenge, arrogance, anger, greed, and grief. The 'isms' which this proposal intends to address ultimately arise out of these ephemeral emotions. To suppose that a cultural engineering course is going to arrest those inherent human characteristics is naïve. Only a non-legalistic, shared core morality can ameliorate such innate traits. Such a morality cannot be, nor would we want it to be, legislated.

## The Elevation of Good Intentions into a New Orthodoxy

We all need to find a way to overcome inherent primitive instincts, but the 'how', the 'when' and 'by what method' to achieve this, ought not to be forced upon each of us as a condition of practicing law. This proposal can be called the 'camel's nose under the tent' or 'mission creep', but either way, these cultural mandates are akin to a religion and are advanced as gospel. Disagree with any part of the gospel or the methods of their adherents and the wrath of the Protectors of the Faith rains down in instant public condemnation, as we have seen practiced so many times by both sides in the most recent Presidential campaign.

If we are not prudent in our processes for advancing "Diversity and Inclusion", we can easily cause them to become an abusive method for gaining social, political and/or financial advantage. By twisting the powerful human emotions of sympathy and compassion into a morbid sense of collective guilt (a concept deservedly discredited), mandatory diversity training risks becoming a form of cultural bullying. Such bullying is anathema to what diversity and inclusion seek.

The proposal has forgotten that the ends, no matter how good or righteous, do not justify the means. Process and procedures matter. They are the foundation of our legal protections. It is often said that the Bill of Rights is a guaranteed criminal procedure law, made unbreakable in the face of the whims of executives, legislatures, or the courts.

## The Conversion of Differences into Privileges

This proposal implicitly ranks differences legally and socially. It balkanizes differences among people into legally 'protected classes', thereby converting these differences into privileges. This conversion of differences to privilege tends to create, in other non-protected classes (who have an identifiable difference), an incentive to lobby for the 'protected class' designation for themselves in order to obtain the benefits afforded a 'protected class'. (Such as the right to sue, the right to recover attorney's fees, and the right to use statistical variabilities to create a presumption that the class member should recover money in the lawsuit). Indeed, the number of protected classes seems to expand with every new presidential election. Is this 'balkanization' the route which we want to travel? Better that we treat all men and women with respect and without prejudice than to prioritize our respect to only those who have been anointed with the status of a 'protected class'.

## Importance of Self-Discipline and Personal Persistence

This proposal advances the easy and seductive temptation to submit to the attitude that every ill of a member of a protected class is or was caused by some other class either now or in the past. That barriers exist outside of ourselves is not in doubt. However, the traits of personal discipline and persistence have shown to be all powerful. Witness the success of African American, Asian American, and Hispanic men and women in American history despite institutional barriers 100 times worse than those of today. Relying on a mandatory course in diversity and inclusion masks the personal recognition of our own daily failures and offers each of us an excuse for not facing the hard work of making ourselves better.

We need to take care, in our zeal for diversity and inclusion, to not forget to sharpen and skillfully employ our individual traits of self-discipline, persistence, competence, and dignity in the face of adversity. Leading by example is the strongest form of pedagogy.



## Unity

In discussions of diversity and inclusion, one seldom ever hears the word 'unity'. This is because the social policy of diversity and inclusion, as currently conceived, presumes that there can never be a dominant central core culture around which all citizens can unite. Identity politics has now shown itself not to be a panacea, but rather a great divider.

It fails to recognize that the inequities which existed in the past millennia were never substantially addressed by humans until this country came into being. It fails to acknowledge the uniqueness of what has been accomplished in this country. We cannot let diversity become a form of culling, i.e. separating one class or group from the others in order to gain social, political and/or financial advantage, thereby creating a culture of double standards (formerly called hypocrisy) instead of equal opportunity. Double standards are the very definition of inequality; such duplicity can only tear this great country apart.

Perhaps we all should begin to think about an alternative to an orthodoxy which denies that there can be a unifying culture. It is axiomatic that to have unity everyone must surrender something that they otherwise hold dear.

A start would be to surrender one's sense of injury and to embrace the notion that the word 'injury' is simply an emotional characterization of an unwanted change. In other words, each of us, by giving up one's emotional sense of injury, creates an environment where each of us can better adjust to the changes we are experiencing.

Secondly, we ought to consider adopting those parts of other people's ideas, principles and concepts which may be useful and valuable to each of us, without having to accept them *in toto*. By removing our ideological blinders we may better adjust to the constant changes in our world. Pragmatism and eclecticism are not flaws, but rather are thoughtful manifestations of Darwin's conclusion that the species which survive are those which are most responsive to change.

Diversity without adaption leads to balkanization and disunity. Rather than balkanize our culture and exaggerate our differences further, we ought instead to remove our ideological blinders. We need to call upon ourselves to accept each other in dignity and honest competition, in understanding and forgiveness, accepting the frail humanity in us all.

For all these reasons, I oppose the proposal, and I will therefore vote against it.

Christopher Denton, Esq.  
Delegate

January 3, 2017



# NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • PH 518.463.3200 • [www.nysba.org](http://www.nysba.org)

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## COMMITTEE ON CIVIL RIGHTS

JEREMY A. BENJAMIN

Chair

New York State Bar Association  
One Elk Street  
Albany, NY 12207  
646/320-8240  
[jbenjamin@paulweiss.com](mailto:jbenjamin@paulweiss.com)

January 13, 2017

## VIA EMAIL & U.S. MAIL

House of Delegates  
New York State Bar Association  
One Elk Street  
Albany, NY 12207

### **Re: Proposed Diversity and Inclusion and Elimination of Bias CLE Requirement for New York State Attorneys**

The New York State Bar Association (the “Association”)'s Committee on Civil Rights (the “Committee”) enthusiastically supports the Committee on Continuing Legal Education’s report to the House of Delegates recommending that the Association formally support the addition of a Diversity and Inclusion and Elimination of Bias requirement to the New York State MCLE requirements.

As you know, diversity, inclusion, and implicit bias in the legal profession have been a focus of the Committee in recent years, evidenced by our programming at last year’s annual meeting of the Association, as well the Association’s upcoming annual meeting later this month. In just a few weeks, the Committee, along with the Committee on Diversity and Inclusion, will be presenting a program for Association members on countering the effects of implicit bias in the legal profession in order to advance diversity and inclusion. However, discussion of these important issues should not be limited to just those attorneys who have a preexisting interest in the initiative.

Implicit bias impacts all of our practices and our clients. It affects lawyer training, hiring, compensation, promotion, and retention.<sup>1</sup> It has been observed in the courts and in our criminal justice system, where race and ethnicity, for example, can significantly impact outcomes.<sup>2</sup> New York has often been at the forefront of advances in civil rights, diversity, and the legal profession. Take, for example,

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<sup>1</sup> See, e.g., Joan C. Williams and Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597 (2011).

<sup>2</sup> See, e.g., Vera Institute of Justice, *End of An Era? The Impact of Drug Law Reform in New York City* (Jan. 2015), available at <http://archive.vera.org/sites/default/files/resources/downloads/drug-law-reform-new-york-city-summary-01.pdf>; Amer. Bar Ass’n, *Justice by Gender: The Lack of Appropriate Prevention, Diversion, and Treatment Alternative for Girls in the Justice System* (2001), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_juvjus\\_justicebygenderweb.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_justicebygenderweb.authcheckdam.pdf); Michael Winerip, Michael Schwartz and Robert Gebeloff, *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES, Dec. 4, 2016, at A1, available at <https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html>; Michael Schwartz, Micheal Winerip and Robert Gebeloff, *The Scourge of Racial Bias in New York State Prisons*, N.Y. TIMES, Dec. 3, 2016, at A1, available at [https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html?\\_r=0](https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html?_r=0).

the State Legislature's 2009 elimination of mandatory minimum sentences under the Rockefeller Drug Laws, which disproportionately affected minorities, and restoration of judges' authority to divert drug offenders into treatment programs, rather than jail. Or last year's legislation increasing the state's minimum wage and providing paid family leave benefits.<sup>3</sup>

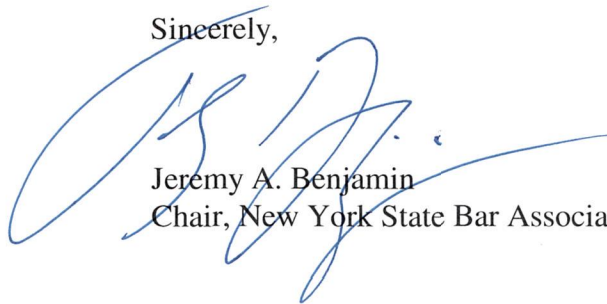
Our state and the country as a whole are becoming increasingly diverse, and the legal profession and practice of law must continue to grow with them. New York has one of the largest minority populations in the country,<sup>4</sup> eclipsed only by California and Texas. Notably, California has already established a diversity and inclusion CLE requirement for its attorneys. New York should follow suit. Although increasing numbers of women and minorities are attending and graduating from law school, that increased diversity still does not fully carry over into "big law" recruiting or the partnership ranks.<sup>5</sup> Addressing the issues of diversity, inclusion, and bias statewide through mandatory CLE for all attorneys will help our profession match and understand the populations we have a duty to serve.

The Association's commitment to fostering and celebrating diversity in the legal profession is well-established. Reaffirming that commitment this month by supporting the addition of a mandatory diversity and inclusion CLE component for all attorneys is especially well-timed considering that at this month's annual meeting, the Association will be celebrating diversity in the bar and honoring Judge Denny Chin as a diversity trailblazer.

As outlined more fully in the Committee on Continuing Legal Education's report to the House of Delegates, which has our enthusiastic and full support, a diversity and inclusion CLE component has widespread backing from several other bar associations in the state, and would bolster a diverse legal profession that is able to better support the clients we serve.

Thank you for your consideration of this important and timely initiative.

Sincerely,



Jeremy A. Benjamin  
Chair, New York State Bar Association Committee on Civil Rights

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<sup>3</sup> See Ch. 54, Laws of 2016.

<sup>4</sup> See, e.g., U.S. Census Bureau, 2010 Census Brief, Overview of Race and Hispanic Origin: 2010 (Mar. 2011), available at <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

<sup>5</sup> See, e.g., Aviva Cuyler, *Diversity in the Practice of Law: How Far Have we Come?*, 29 ABA Journal 5 (Sept./Oct. 2012), available at [http://www.americanbar.org/publications/gp\\_solo/2012/september\\_october/diversity\\_practice\\_law\\_how\\_far\\_have\\_we\\_come.html](http://www.americanbar.org/publications/gp_solo/2012/september_october/diversity_practice_law_how_far_have_we_come.html); Liane Jackson, *Minority Women are Disappearing from BigLaw and Here's Why*, ABA JOURNAL (Mar. 1, 2016), available at [http://www.abajournal.com/mobile/mag\\_article/minority\\_women\\_are\\_disappearing\\_from\\_biglaw\\_and\\_heres\\_why](http://www.abajournal.com/mobile/mag_article/minority_women_are_disappearing_from_biglaw_and_heres_why).



COMMITTEE ON DIVERSITY  
AND INCLUSION

SANDRA BUCHANAN

Chair  
Special Council for Ethics  
The Office of Court  
Administration  
25 Beaver Street  
New York, NY 10004

January 13, 2017

Ellen G. Makofsky, Esq.  
Chair of the Committee on Continuing Legal Education  
New York State Bar Association  
One Elk Street  
Albany, NY 12207

Re: Report and Recommendations of the Committee on Continuing Legal Education supporting diversity and inclusion requirement in New York's mandatory CLE regulations

Dear Ms. Makofsky,

After carefully reviewing and considering the Report and Recommendations of the Committee on Continuing Legal Education, the Committee on Diversity and Inclusion (the "Committee on D&I") unequivocally supports your Committee's (the "Committee on CLE") proposal that one or two Diversity and Inclusion credit hours ("D&I CLE") be required for biennial reporting by licensed New York State legal practitioners. We also support the recommendation that D&I CLE credit be a stand-alone or floating CLE requirement within the 32 credit hours required for new attorneys or the 24 credit hours required for experienced attorneys. Moreover, we concur in urging members of the House of Delegates to vote in support of this recommendation to the New York State CLE Board.

As your report has articulated, mandatory CLE was implemented to strengthen lawyer competence and public trust in the profession. The ethics CLE requirement – as stand-alone, floating credits – demonstrates our profession's commitment to protecting the public from not only unscrupulous practices, but also educating attorneys on ethical practices that are not particularly intuitive and are often fact-specific and nuanced. Requiring D&I Credit should be viewed through the same lenses. D&I Credit will help educate lawyers to better serve their clients. It will also show our commitment to eradicating discrimination and implicit bias in the practice of law.

The Committee on D&I commends the thoroughness of Committee on CLE's report and concludes that it is in line with our Committee's mission: promoting diversity and inclusion in all aspects of the profession. Therefore, we support your report and recommendations without reservation.

Respectfully submitted,

Sandra Buchanan

New York State Bar Association, Diversity and Inclusion Committee, Chair

# New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>



## COMMITTEE ON LGBT PEOPLE AND THE LAW

### ERIC WRUBEL

Chair  
Warsaw Burnstein, LLP  
555 Fifth Avenue  
New York, NY 10017  
TEL 212/984-7735  
FAX 212/972-9150  
[ewrubel@wbcsk.com](mailto:ewrubel@wbcsk.com)

To: NYSBA Executive Committee  
From: Eric Wrubel, Chair of the NYSBA Committee on LGBT People and the Law  
Date: 1/11/2017  
Re: MCLE Diversity Requirement Proposal

The New York State Bar Association's Committee on LGBT People and the Law supports the Committee on Continuing Legal Education's proposed resolution to require New York lawyers to complete a diversity and inclusion component as a part of continuing legal education credit.

Over the past two months, members of the Committee on LGBT People and the Law have contacted academics, community support organizations, attorneys, and the state and federal courts within New York in an attempt to ascertain the scope of discrimination New York attorneys and litigants face as a result of being a member of the LGBTQ community. While our efforts have not yielded reported instances of discrimination against LGBT community members within the New York court system, we believe that requiring a diversity and inclusion component to mandatory continuing legal education is integral to promoting continued understanding and acceptance of the diversity within our state.

Even though the LGBT community has made gains in recent years, widespread discrimination and violence against the LGBT community persist. It is our sincere hope that the New York State Bar Association, the Committee on Continuing Legal Education, and the Committee on LGBT People and the Law will continue to lead the march towards equality by requiring that all New York attorneys receive continuing training in diversity and inclusion.

Memo prepared by: Avish Dhaniram, Nicholas Reeder and Robert J Kauffman

# NASSAU COUNTY BAR ASSOCIATION



**NASSAU ACADEMY OF LAW COMMENT/RECOMMENDATION ON THE  
REPORT AND RECOMMENDATIONS OF THE NYSBA COMMITTEE ON  
CONTINUING LEGAL EDUCATION, AS ADOPTED BY THE NASSAU  
COUNTY BAR ASSOCIATION BOARD OF DIRECTORS AT ITS JANUARY  
10, 2017 MEETING**



Mili Makhijani, Dean  
Nassau Academy of Law

Nassau County Bar Association  
15th & West Streets  
Mineola, NY 11501

**Nassau Academy of Law Comment/Recommendation on the Report and Recommendations  
of the Committee on Continuing Legal Education**

The American Bar Association (“ABA”) proposed a Diversity and Inclusion and Elimination of Bias Continuing Legal Education (“CLE”) Requirement for New York State attorneys. The New York State Bar Association (“NYSBA”) Committee on CLE issued a report proposing to recommend the amendment to the New York State CLE Board.

The NYSBA proposes a broad definition and encourages CLE providers to create a wide range of programs for all practice areas that incorporate diversity and inclusion and the elimination of bias in dealing with other attorneys, clients, the judiciary, court personnel, and others in the legal system. The proposal is to amend the “Definitions” section of the CLE Board Rules and Regulations to include the following definition for Diversity and Inclusion:

Diversity and Inclusion must address diversity and inclusion in the legal profession and the practice of law of all persons regardless of race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, age or disability and may include, among other things, how issues of diversity and inclusion may arise within the scope of the Rules of Professional Conduct, application within the procedural and substantive aspects of law practice, and law practice management, including elimination of bias. The diversity and inclusion requirement may be fulfilled through courses addressing diversity and inclusion within the existing categories of credit listed in Section 1500.2.

The NYSBA CLE Committee proposes that one (1) or two (2) credit hour(s) of D&I CLE be required for an attorney’s biennial reporting period. The recommendation is for the diversity and inclusion credit(s) to be “stand-alone”, but not add to the current credit requirements for new or experienced attorneys. The D&I CLE credit(s) could also count toward any of the currently required credit hours, including Ethics, Skills or Areas of Professional Practice/Law Management.

The one (1) or two (2) credit(s) could be satisfied by attending a program under a broad range of categories, including, but not limited to, the following:

- (i) how lawyers perceive and interact with each other as employers, colleagues and partners;

- (ii) how lawyers perceive and interact with those they come in contact with during the course of practicing law, such as court personnel, witnesses, jurors, judges and opposing counsel;
- (iii) ways in which lawyers can better understand and represent their clients who face barriers, biases and discrimination;
- (iv) non-discrimination, non-harassment and competent representation as part of a lawyer's ethical obligations;
- (v) discrimination and bias in the broader legal and societal context and the role of lawyers in addressing them; and
- (vi) the law and legal issues as they relate to diverse groups and protected classes.

NYSBA's diversity initiative was tabled at its November 2016 meeting for a vote and such vote is scheduled to occur at the next NYSBA meeting of the house of delegates on January 27, 2017. The instant comments on behalf of the Nassau County Bar Association ("NCBA") and the Nassau Academy of Law ("NAL"), the teaching arm of the NCBA, are submitted in full support of the proposed amendment based on the reasons set forth herein. However, the NCBA and NAL recommend launching this initiative by requiring a "minimum of one (1) credit hour" in the area of diversity and inclusion and elimination of bias.

The New York City Bar Association spearheaded the diversity initiative due to the attrition rate of minority attorneys in NYC law firms and lack of diversity in our profession. We agree with our sister bar associations that support this proposal based on principles of equality, access to justice and the rule of law. Indeed, the Constitution and Declaration of Independence promote such principles upon which our society is grounded. We add that the amendment further promotes civility in the practice of law. Diversity and inclusion and the elimination of bias are goals the legal profession should strive to take steps to achieve, spread and encourage others to adopt. Every little bit helps. As a teaching organization, we should take every opportunity to foster and promote these goals rather than remaining neutral, or worse, opposing such efforts.

One of our sister organizations supports the underlying principles of diversity and inclusion, but opposes the mandatory CLE requirement based on an article issued by the Harvard Business Review entitled "Why Diversity Programs Fail". The article is based on an analysis isolating the effects of diversity programs in 829 midsize and large U.S. Firms over a five (5) year period.



Specifically, the article reflects that one of the reasons many firms see adverse effects is that “three-quarters use negative messages in their [diversity] training.

However, the article also discusses other types of diversity programs that *are effective* in achieving more diversity (i.e. mentoring programs, cross-training). As an educational body, one of our incentives would be to raise awareness among attorneys regarding the programs that prove to be effective and those that do not – based on studies exactly like the one conducted by Harvard Business Review.

While our association currently offers several programs that fall under the umbrella of “diversity and inclusion and elimination of bias”, more can be done from a marketing and training perspective to specifically address the concerns raised by the ABA, NYSBA and several of our sister bar associations. Requiring one (1) credit of diversity and inclusion and elimination of bias CLE out of the thirty-two (32) (currently required for new attorneys), and twenty-four (24) (currently required for more experienced attorneys), is a minimal obligation which does not hinder an attorney’s ability to attend programs addressing other societal and professional issues. The amendment is but a small step towards achieving the goals of a society where all men and women are treated equal. While some may consider this a utopian ideal, it is one that should be encouraged by members of the legal profession.

MM



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January 13, 2017

TO: New York State Bar Association

FROM: New York County Lawyers Association

RE: Proposed CLE Requirement for Diversity, Inclusion and Elimination of Bias

The New York County Lawyers Association (“NYCLA”) has been asked to provide comments regarding the recent proposals by both the CLE Committee of the New York State Bar Association (“NYSBA”) and the New York State Unified Court System (“UCS”) to impose a requirement that attorneys admitted to the New York State Bar take at least one credit hour of CLE addressing the subject of diversity, inclusion and elimination of bias (“D&I CLE”) during each biennial reporting cycle. (Respectively, the “NYSBA Proposal” and the “UCS Proposal”.) The following comments are based on a report of the NYCLA Committee on Professionalism and Professional Discipline that was approved by the NYCLA Board of Directors on January 9, 2017.

NYCLA has a long history of promoting diversity and inclusion in the legal profession; it was the first major bar association in the country to admit members without regard to race, ethnicity, religion or gender. The NYCLA Board of Directors considers both the NYSBA Proposal and UCS Proposal to be excellent but recommends that the UCS Proposal be adopted with the provision that it include the definition of “diversity and inclusion” contained in the NYSBA Proposal.

The concept of D&I CLE is consistent with one of NYCLA’s important missions: to foster professionalism among members of the New York Bar. Put another way, we seek to foster a sense among lawyers that we are a single, unified profession, mindful of our important role in society as well as our need to service our specific clients. In its landmark 1986 report, “. . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*,” the ABA Commission on Professionalism [at 10] adopted the definition of “profession” espoused by Dean Roscoe Pound:

The term refers to a group . . . *pursuing a learned art as a common calling in the spirit of public service* – no less a public service because it may incidentally be a means of livelihood. *Pursuit of the learned art in the spirit of public service is the primary purpose.* (Emphasis added.)

For us, the idea that we, as lawyers, are engaged in a “common calling” means that *all* members of the profession must have an equal opportunity to succeed, and to do so in whatever milieu they choose to practice: in private law firms, government agencies or public defender offices; in large law firms or small; and as litigators, transactional lawyers, trust &

estates attorney or any other field.

Recent reports, as well as our own anecdotal experience, tell us that the goal of equal opportunity and treatment within our profession remains elusive. A group of affinity bar associations, in a letter to Hon. Janet Defiore dated July 21, 2016, described this as a “pervasive, but often unspoken problem within our profession.” Statistics back this up. Professor Deborah Rhode reports that “women constitute more than a third of the profession, but only about one-fifth of all law firm partners, general counsels of Fortune 500 companies and law school deans,” and that “blacks, Latinos, Asian Americans and Native Americans, while making up a fifth of law school graduates, make up fewer than 7% of law firm partners and 9% of general counsels of large corporations.” Rhode, Deborah L., *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*,” Washington Post, May 27, 2015. The New York City Bar Association’s Diversity Benchmarking Report for 2014 showed that law firms continue to experience higher rates of attrition among women and minority attorneys: 23.6% of minority attorneys and 21.3% of women of all levels of seniority left a sample of large firms in 2014, compared to 14.7% of white men. See J. Kiernan Letter to Hon. Betty Weinberg Ellerin dated August 25, 2016 at 3. Numerous studies back up these figures, not just with women and minority lawyers, but also with respect to the LGBT community. *Id.* at 2 n.2 (citing articles and studies).

But even if one is not content to rely on the numbers, the day-to-day experiences of those who practice in this City tell us that women, minority, disabled and LGBT lawyers are falling behind. White, straight males predominate among law firm partners and on the executive committees that manage their firms, no matter what the firms’ size. Women lawyers are often asked to get coffee, to manage firm parties and get-togethers, to take notes at meetings and court conferences. Women and minority lawyers rarely argue in court, especially in our Commercial Divisions. All these categories of lawyers are often passed over for promotions and for the best assignments. They often struggle to find adequate mentors, as well as adequate maternity and paternity leave policies, adequate child care opportunities and adequate accommodations for the disabled.

The list goes on. While D&I CLE is no panacea, and may strike some as a nod to “political correctness,” NYCLA believes it can serve only to help the legal profession fulfill its mission, both symbolically and on a day-to-day basis, of making available “justice for all.” It can sensitize the profession to the pervasiveness of this problem, and to the many ways – large and small – that lawyers contribute to it. It can foster a recognition of the importance of an inclusive profession to the administration of justice. It can help continue the effort to eliminate implicit bias and discrimination, both in interactions among lawyers and in communications between lawyers and clients. And it can help make the profession more vital by calling on, and allowing the full development of, the talents of all lawyers, no matter their gender, ethnic background, disability status or sexual orientation.

In considering the NYSBA and UCS Proposals on D&I CLE, we note that there are subtle but important differences. The NYSBA Proposal broadly defines “diversity and

inclusion” to include “all persons regardless of race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, age or disability,” while the UCS Proposal has yet to adopt a definition. Under the NYSBA Proposal, either one or two hours for each reporting period will be required, while only one hour is required under the UCS Proposal. Under the NYSBA Proposal, the one or two hours for D&I CLE may be deducted from the mandatory four hour ethics and professionalism component, while the UCS Proposal would not allow such a deduction.

Because NYCLA believes that it is important to continue to require New York attorneys to have four full hours of ethics and professionalism credits in each reporting period, while also making D&I CLE mandatory, we recommend adoption of the UCS Proposal, on the assumption that the UCS Proposal define “diversity and inclusion” as broadly as the NYSBA Proposal does. We also feel that one hour of D&I CLE in each reporting period should be adequate to accomplish the goals of D&I CLE, and will feel less onerous, and thus more welcomed, by the Bar as a whole.

We therefore support adoption of the UCS Proposal to impose a requirement for D&I CLE with amendment to include the definition of “diversity and inclusion” contained in the NYSBA proposal.

# THE SUFFOLK COUNTY BAR ASSOCIATION



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John R. Calcagni

December 13, 2016

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New York State Bar Association  
One Elk Street  
Albany, New York 12207

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Re: Report of NYSBA Committee on Continuing Legal Education  
Regarding Proposed Rule Change Providing for Mandatory  
Attendance at CLE courses on Diversity, Inclusion and  
Elimination of Bias

## Treasurer

Hon. Derrick J. Robinson

## Secretary

Daniel J. Tambasco

Dear Ms. Makofsky:

## Executive Director

Sarah Jane LaCova

I write in reference to the above-captioned Report of the NYSBA Committee on Continuing Legal Education ("Report") proposing to recommend to the NYS CLE Board an amendment to CLE Rules that would require NYS attorneys to attend one or two credit hours of CLE focused on issues related to diversity, inclusion and elimination of bias ("D&I Training") during each biennial reporting period.

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During the October and November meetings at which our Bar Association's Board of Directors discussed the Report, the Board made clear that our Association joins with the ABA, NYSBA, the City Bar and the Affiliate Bars named in the Report in opposing all forms of bias and prejudice. Our Board also agrees with its brother and sister bar associations that providing educational opportunities to attorneys on how to recognize and address bias is an effective means of addressing D&I issues. However, it was the unanimous opinion of our Board that making attendance at D&I Training *mandatory* is not an effective solution to these societal issues. Therefore, it opposes the proposed change being recommended by the NYSBA.

## Past President Directors

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## Counsel

John H. Gross

A recent cover article in the July/August 2016 issue of the *Harvard Business Review* entitled "Why Diversity Programs Fail" fully supports our Board's position. See it at <http://hbr.org/2016/07/why-diversity-programs-fail>.

In the article, Harvard Sociology Professor Frank Dobbin and University of Tel Aviv Associate Sociology Professor Alexandra Kalev explain why compulsory diversity training may do more harm than good. The article summarizes the results of a series of studies they conducted on almost 830 companies over a five-year period using data compiled over three decades.

Their studies showed that companies that imposed *mandatory* diversity training on their managers actually experienced *declines* in the numbers of African American women and Asian American men and women promoted to the ranks of management and *no* improvement among white women and other minorities. According to Professors Dobbin and Kalev:

“In analyzing three decades’ worth of data from more than 800 U.S. firms and interviewing hundreds of line managers and executives at length, we’ve seen that companies get better results when they ease up on the control tactics. It’s more effective to engage managers in solving the problem, increase their on-the-job contact with female and minority workers, and promote social accountability-the desire to look fair minded.”

Professors Dobbin and Kalev also point to other social science studies indicating that top-down, control type efforts to reduce prejudice can actually lead to increases in hostility and bias. According to Prof. Dobbin, “Social Scientists have long known that if you try to control people’s thoughts and behavior, they rebel. That’s what we find – programs designed to reeducate managers or stop them from discriminating directly tend to backfire.”

Our Board agrees with Professors Dobbin and Kalev that making D&I Training mandatory is likely to be counterproductive to achieving the intended result. It also agrees that *engagement* rather than *coercion* is a more successful road to inclusiveness and diversity. To put it another way, having people “buy into” a mind-set of inclusiveness, rather than having it thrust upon them, is more effective if one is seeking behavioral change.

It is understandable that our brother and sister bar associations believe that requiring attorneys to attend such programs will help to increase their awareness of the benefits of inclusiveness and diversity as well as to reduce bias within the legal profession. After all, the private sector has been mandating that their employees attend D&I Training programs for decades.

Ellen G. Makofsky, Secretary\\December 13, 2016

As Professors Dobbin and Kalev have concluded, however, due to the very mandatory nature of such training, it has been not only largely ineffective in achieving its intended goal but has often resulted in actual declines in inclusiveness and diversity within the almost 830 companies the Professors studied. Our Bar Association does not want to see a well-intended but largely failed policy implemented through the adoption of the proposed rule change.

Thank you for considering our Association's input on this very important issue.

Very truly yours,

  
JOHN R. CALCAGNI  
PRESIDENT

cc: Peter Levy, Esq., NYSBA VP, 10<sup>th</sup> Judicial District  
SCBA Board of Directors



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EXECUTIVE DIRECTOR

January 13, 2017

New York State Bar Association  
Attn: Kathleen Mulligan-Baxter  
1 Elk Street  
Albany, NY 12207

**Sent Via E-Mail & Regular Mail**

**Re: Request for Public Comment on Proposed New York Continuing Legal Education Requirement for Diversity, Inclusion and the Elimination of Bias**

Dear Ms. Mulligan/Baxter:

This letter is being submitted by the Westchester County Bar Association ("WCBA") in response to the Request for Public Comment on Proposed New York Continuing Legal Education Requirement for Diversity, Inclusion and the Elimination of Bias to provide comments from our association. The WCBA remains steadfast in our support of diversity, inclusion and the elimination of bias throughout the legal profession and greater society. However, the WCBA will only offer our support for the requested change to the current New York State Continuing Legal Education ("CLE") requirement if a modification to this proposal is made.

Currently, the requested change will impose a one-credit CLE requirement for experienced attorneys (admitted to the New York State Bar for more than two years) addressing the subject of diversity, inclusion and the elimination of bias. This credit would be included within, and would not add to, the current requirement of 24 credit hours of CLE required of each attorney in each biennial reporting cycle. The requested change would then require that a diversity component be incorporated into a CLE offered within one of the currently existing CLE subject areas, being (1) Ethics and Professionalism, (2) Skills, (3) Law Practice Management and (4) Areas of Professional Practice. Accordingly, a CLE offered within "Law Practice Management" for at least one credit may also serve as a "Diversity" credit if it incorporates an issue pertaining to diversity, inclusion and the elimination of bias.

The WCBA notes the importance of the current CLE structure offering New York State attorneys the much needed continuing education in the areas of Skills, Law Practice Management and Areas of Professional Practice, and asks that any Diversity CLE requirement ONLY be required if such a credit may be completed in place of one (1) required Ethics and Professionalism credit. By making this one modification to the proposed change, the goals sought by the proposal will be achieved, while the vital skills and education offered by the other current CLE subject areas will not be diminished.

Thank you for your review of the comments of the WCBA.

Luis A. Rivera, Esq.  
Executive Director- WCBA





**COMMENTS**  
OF THE  
NEW YORK STATE BAR ASSOCIATION'S  
**SECTIONS CAUCUS**

ON

THE REPORT OF THE NYSBA COMMITTEE ON  
CONTINUING LEGAL EDUCATION RE:  
PROPOSED DIVERSITY AND INCLUSION AND  
ELIMINATION OF BIAS CLE REQUIREMENT  
FOR NEW YORK STATE ATTORNEYS

JANUARY 5, 2017

The New York State Bar Association Committee on Continuing Legal Education has issued a report recommending a continuing legal education requirement for New York State attorneys covering diversity and inclusion and elimination of bias. The Sections Caucus and all the Sections that have commented on the report support the goal of encouraging and promoting diversity and inclusion and eliminating bias in the legal profession and in our society, a core value of the Association. The Caucus and seven of the eight Sections that have commented on the report support a mandatory CLE requirement to implement this goal. The Local and State Government Law Section opposes the mandatory requirement, while agreeing that CLE providers should be encouraged to create a wide range of programs that incorporate diversity and inclusion.

### **The Proposal**

The NYSBA CLE Committee proposes that a one- or two-hour CLE credit covering diversity and inclusion be a stand-alone requirement for each attorney biennial reporting period. It would not add to the 32 hours required for newly admitted attorneys or to the 24 hours required for more experienced attorneys. The CLE Committee suggests the following definition:

Diversity and Inclusion must address diversity and inclusion in the legal profession and the practice of law of all persons regardless of race, ethnicity, national origin, gender, sexual orientation, gender identity, religion, age or disability and may include, among other things, how issues of diversity and inclusion may arise within the scope of the Rules of Professional Conduct, application within the procedural and substantive aspects of law practice, and law practice management, including the elimination of bias.

Thus, the diversity and inclusion CLE requirement could count toward any of the required credit hours in ethics, skills, areas of professional practice, or law office management.

The NYSBA CLE Committee report describes six categories of programs already offered by accredited providers that would appear to satisfy the proposed diversity and inclusion

requirement and includes a list of sample diversity and inclusion programs from New York and around the country in its Appendix B.

### **Other Bar Associations**

In February 2016, the House of Delegates of the American Bar Association unanimously adopted Resolution 107 encouraging all state bar associations and other licensing and regulatory authorities to include programs regarding diversity and inclusion and the elimination of bias as a separate requirement of mandatory continuing legal education. In July 2016, the New York City Bar Association, together with 12 other New York-based diversity bar associations, urged the New York State Continuing Legal Education Board to modify the existing New York mandatory CLE requirements to include a separate diversity and inclusion requirement, as California and Minnesota had already done.

### **Individual Sections' Views**

The Judicial Section thinks that the proposal is “a great idea.” *See* Exhibit 1. The Torts, Insurance and Compensation Law Section (TICL) “embrace[s] this initiative.” *See* Exhibit 2. The Labor and Employment Law Section “applaud[s] the focus on diversity,” although one member was against “legislating social issues” and some members balked at the mandatory nature of the requirement. *See* Exhibit 3. The Antitrust Law Section “support[s]” the addition of a diversity and inclusion CLE requirement. *See* Exhibit 4. The Commercial and Federal Litigation Section (ComFed) “recommends” the adoption of the NYSBA CLE Committee’s report, although it requests a decision whether the requirement should be one or two hours. *See* Exhibit 5. The Health Section “approve[s]” the proposal. *See* Exhibit 7. The Dispute Resolution Section “wholeheartedly support[s]” the proposal but recommends that acceptable course descriptions be

broadened to include lawyers' perceptions of, and interactions with, arbitrators, mediators, and legal support staff. *See* Exhibit 8.

Comments by the Labor and Employment Law, the Antitrust, TICL, and the Health Sections indicate that each could readily present programs satisfying the proposed diversity and inclusion requirement. *See* Exhibits 2-4, 7. ComFed notes that fulfilling the requirement "should not be onerous." *See* Exhibit 5. Nonetheless, both the Labor and Employment Law Section and ComFed would like clear guidelines covering both the substance to be presented and course descriptions for programs qualifying for the diversity-and-inclusion requirement. *See* Exhibits 3 and 5. The Antitrust Section recommends that the Association CLE Department take a broad and flexible approach to the requirement to include programs that relate directly to an attorney's day-to-day practice. *See* Exhibit 4.

The Local and State Government Law Section supports the efforts of the Association to promote awareness of diversity and inclusion and the elimination of bias and agrees that CLE providers should be encouraged to create a wide range of programs incorporating diversity and inclusion and the elimination of bias. *See* Exhibit 6. However, this Section opposes a separate mandatory diversity-and-inclusion CLE requirement. *Id.* It draws a distinction between ethical rules that are embodied in the Code of Professional Responsibility and the aspirational nature of diversity and inclusion in the legal profession, finding that the former is an appropriate topic for mandatory continuing legal education, while the latter is not. *Id.* The Local and State Government Law Section also suggests that adopting a mandatory diversity-and-inclusion CLE requirement could, and, if adopted, perhaps should, lead to mandated CLE training on equally important causes such as access to justice, child or elder abuse, or substance abuse, as other state CLE boards have done. *Id.*

## **The Sections Caucus's Position**

The legal profession should promote diversity and inclusion and the elimination of bias. While having come far in the last half century, American society and the legal profession still have a great distance to travel in this area. It is in the profession's interest that practitioners learn to recognize often unspoken and unrealized discrimination, as well as more overt bias, and develop techniques to combat both. This is more than an aspirational goal. It is a moral imperative that must be learned, lived, and reinforced. Accordingly, it is appropriate to mandate that all experienced practitioners or recently admitted attorneys be required to receive one or two hours of diversity-and-inclusion education (the number of hours of the credit to be determined by the New York State Continuing Legal Education Board) every two years as part of the required 24 or 32 hours of CLE that each group must, respectively, satisfy. The Sections Caucus endorses and urges the House of Delegates to adopt the report of the NYSBA CLE Committee on a proposed CLE requirement for New York State attorneys regarding diversity and inclusion and elimination of bias.

# **EXHIBIT 1**

**Judicial Section**

I am writing on behalf of the Judicial Section to say that we think that the mandatory bias/diversity credits are a great idea and we are in favor of the resolution.

Judge Marsha Steinhardt  
November 22, 2016

# **EXHIBIT 2**



## Torts, Insurance and Compensation Law

To: Sections Caucus CLE Committee  
From: Jean Gerbini (Delegate) on behalf of the Torts, Insurance and Compensation Law Section  
Date: December 1, 2016  
Re: CLE Diversity and Inclusion Proposal

The Torts, Insurance and Compensation Law (“TICL”) Section strongly supports the Report of the NYSBA Committee on Continuing Legal Education, presented to the House of Delegates on November 5, 2016. The Report recommends adoption of a mandatory diversity and inclusion and elimination of bias (“D&I”) CLE requirement for all New York State attorneys.

On October 20, the Chair of the TICL Section, Kenneth Krajewski, urged the Section to embrace the initiative. His comments, in pertinent part:

*As you will read, the CLE Committee will recommend to the House of Delegates that “one (1) or two (2) credit hours of diversity and inclusion CLE be required for the biennial reporting period.” The Committee will recommend that “the diversity and inclusion CLE be a stand-alone (“floating”) CLE requirement, but not add to the thirty-two (32) credit hours required for new attorneys or the twenty-four (24) hours required for more experienced attorneys.”*

*Here’s what the CLE Committee envisions:*

*Based on a survey of existing offerings by accredited providers, it appears that courses that would satisfy a D&I CLE requirement fall into one or more of the following categories: (I) how lawyers perceive and interact with each other as employers, colleagues and partners; (II) how lawyers perceive and interact with those they come in contact with during the course of practicing law, such as court personnel, witnesses, jurors, judges and opposing counsel; (III) ways in which lawyers can better understand and represent their clients who face barriers, biases and discrimination; (IV) non-discrimination, non-harassment and competent representation as part of a lawyer’s ethical obligations; (V) discrimination and bias in the broader legal and societal context and the role of lawyers in addressing them; and (VI) the law and legal issues as they relate to diverse groups and protected classes.*

*TICL should embrace this initiative.*

...

*I think there are many topics that could easily fit into many TICL CLEs. For instance,*

- *Elimination of Bias in Jury Selection: Wheeler/Batson/Lenix in the Courtroom*
- *Bias: The Enemy of Persuasion*

- *Ten Common Mistakes in Mediation and How to Avoid Them*
- *How to Recognize Cross Cultural Issues in Litigation, Negotiation and Mediation*
- *Clients from Other Cultures: Traps & Tips*

*Many of these could easily fit into almost any TICL CLE program.*

*Perhaps TICL could even do a joint program with the Labor & Employment Section in which is part “Respect in the Workplace—The Legal Landscape of Harassment, Bias & Discrimination in the Workplace,” and we could add a couple of topics such as “Am I Covered? What Happens When An Employee Brings a Discrimination Claim?”*

....

*I am proud of the efforts the TICL Executive Committee has made relative to diversity and inclusion. But, as Mirna called to my attention at the EC in New Orleans, we can't ever let our efforts fall behind. My recommendation is that even if the House of Delegates doesn't adopt this – TICL should with respect to its upcoming programs.*

The TICL leadership has urged its Section Delegates to vote in support of the measure. Compliance should be easy, based on our experience as a Section. Under the slogan, “Strength by Association,” the TICL Section has hosted a number of CLE programs that featured or included diversity, inclusion and elimination of bias topics over a number of years. We would be happy to share our experience with other Sections. As noted by our Section Chair:

*In November of 2014, TICL held an Open Executive Committee Meeting at the Sheraton LaGuardia East Hotel. The program included Strength by Association and Mentoring and the Power of Diversity. ...*

*Our Fall Deposition CLE in 2014 contained a “Dos and don'ts of deposing the non-English speaking witness” topic item.*

*In August 2012, TICL had its Summer Meeting in Montreal, Quebec. This meeting was co-sponsored by the Association of Black Women Attorneys, the Latino Lawyers Association of Queens County, the Minority Bar Association of Western New York and the Nigerian Lawyers Association. Our second topic of the program was Mentoring for Diversity Charrette: A collaborative workshop involving small group discussion and role-playing.*

*At the TICL/Trial Lawyers Joint Meeting at the Annual Meeting in 2012, we another Strength by Association Program. This was Recruitment and Retention of the Diverse Associate and Partner.*

*At the TICL Summer Meeting in Bar Harbor, Maine in 2011, we had a program another Strength by Association Program. This was The Benefits of Bar Association Professional Memberships, Diversity and Mentoring.*

*In November 2011, TICL held another Open Executive Committee at the Sheraton Brooklyn New York Hotel. At this meeting, TICL had another Strength by Association Program. This one was titled Mentoring and Power of Diversity.*

*TICL has a history of fostering diversity and inclusion. TICL programs have contained topics on diversity and inclusion for at least the past 5 years. TICL meeting programs that include topics on diversity and inclusion are well-received and well-attended. Our experience has been positive. TICL CLEs have contained diversity and inclusion topics. I am proud of the efforts TICL has made to be diverse and to include and foster mentoring of diverse members of the bar. And I'm proud of the efforts TICL has made to assist lawyers in their representation and contact with diverse clients and parties.*

*As current Chair, I feel that while we've done much – we can and should do more. Hence, as Chair, I support the CLE Diversity Report and the goals it seeks achieve.*

Respectfully submitted,

Jean Gerbini



# NYSBA

## **TICL Open Executive Committee Meeting**

### **Ethics CLE Program and Reception**

**November 6, 2014**

Sheraton LaGuardia East Hotel

135-20 39th Avenue

Flushing, New York 11354

2.0 CLE Ethics Credits



# STRENGTH BY ASSOCIATION

## MENTORING AND THE POWER OF DIVERSITY

Join us on November 6th and meet the members of the TICL Section's Executive Committee. Then join our distinguished panel for an interactive discussion of a series of real-life ethical problems that arise in the practice of law. One focus will be the process of mentoring (or being mentored by) an attorney whose background may be very different from one's own. Finish the evening with a networking reception to celebrate diversity in the Bar and the Judiciary.

### Program Schedule

- 3:00 pm – 4:00 pm** TICL Open Executive Committee Meeting  
**4:00 pm – 6:00 pm** Interactive Mentoring Panel Discussion  
**6:00 pm – 8:00 pm** Reception to Celebrate Diversity

The panel discussion will qualify for 2.0 hours of MCLE Ethics and Professionalism Credits suitable for all attorneys including newly admitted attorneys. It is offered for \$20.00 for TICL section members; \$50.00 for non-members. NYSBA members enroll in TICL now (\$40). Your section membership continues through 2015. Not a NYSBA member? **Click here** for a special NYSBA membership offer through 2015 for non-NYSBA members.

### Planning Committee:

**Sean Downes, Esq.**  
**Maiaklovsky Preval, Esq.**  
**Mirna Santiago, Esq.**  
**Michael C. Tromello, Esq.**

### Moderator:

**Mirna Santiago, Esq.**



Sheraton LaGuardia East Hotel

### PLANNING COMMITTEE



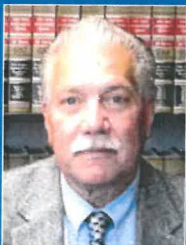
Sean Downes, Esq.



Maiaklovsky Preval, Esq.



Mirna Santiago, Esq.



Michael C. Tromello, Esq.

### PANEL



Hon. Jenny Rivera  
Court of Appeals



Lawton W. Squires, Esq.  
Herzfeld & Rubin



Joseph M. Hanna, Esq.  
Goldberg Segalla



Claire F. Rush  
Rush & Sabatino, PLLC

### SECTION CHAIR



Robert H. Coughlin, Jr., Esq.  
Hink Smith Law LLC

# Torts, Insurance and Compensation Law Section

**STRENGTH BY ASSOCIATION** MENTORING AND THE POWER OF DIVERSITY

November 6, 2014 | Sheraton LaGuardia East Hotel, Flushing, NY

Name \_\_\_\_\_

Firm/Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

E-mail Address \_\_\_\_\_

Phone ( \_\_\_\_\_ ) \_\_\_\_\_ Fax ( \_\_\_\_\_ ) \_\_\_\_\_

## Program Schedule

**3:00 – 4:00 pm TICL Open Executive Committee meeting**

\_\_\_\_\_ I will attend \_\_\_\_\_ I am unable to attend

**4:00 – 6:00 pm Strength by Association – Interactive Mentoring Workshop with a Focus on Legal Ethics**

**\$20 TICL Member Registration Fee Qualifies for CLE credit** \_\_\_\_\_ I will attend \_\_\_\_\_ I am unable to attend

**\$50 Non-Member Registration Fee Qualifies for CLE credit** \_\_\_\_\_ I will attend \_\_\_\_\_ I am unable to attend

**6:00 – 8:00 pm Networking Reception to Celebrate Diversity in the Bar and Judiciary**

\_\_\_\_\_ I will attend \_\_\_\_\_ I am unable to attend

NYSBA members **enroll in TICL now** (\$40). Your section membership continues through 2015. Not a NYSBA member? **Click here** for a special NYSBA membership offer through 2015 for non-NYSBA members.

## Payment Information

**Check or money order enclosed.**

(Make checks payable to **New York State Bar Association**)

**Charge \$** \_\_\_\_\_ **to**

American Express  Discover  MasterCard  Visa

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Card number

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Authorized Signature

## Fax or mail this form to:

State Bar Service Center  
NYS Bar Association  
One Elk Street  
Albany, NY 12207

**Phone** 800.582.2482

**Secure Fax** 518.463.5993

## Questions?

Contact Tina Rothaupt  
trothaupt@nysba.org or Pat  
Johnson (518) 487-5688,  
pjohnson@nysba.org

**IMPORTANT INFORMATION:** The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Under New York's MCLE rule, this program has been approved for up to a total of 2.0 credit hours in Ethics and Professionalism. This is a program suitable for transitional and non-transitional credit for newly admitted attorneys.

**Accommodations for Persons with Disabilities:** NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Patricia Johnson at 518.487.5688 or pjohnson@nysba.org

**Discounts and Scholarships:** New York State Bar Association members and non-members may receive financial aid to attend this program. Under this policy, any member of our Association or non-member who has a genuine basis for his/her hardship, if approved, can receive a discount or scholarship, depending on the circumstances. To apply for a discount or scholarship, please send your request in writing to: Pat Johnson, New York State Bar Association, One Elk Street, Albany, New York 12207.

**Torts, Insurance and Compensation Law Section and  
Trial Lawyers Section Annual Meeting**

<p><b>Wednesday, January 25, 2012</b> Torts, Insurance and Compensation Law Section and Trial Lawyers Section Annual Dinner Cipriani Wall Street 55 Wall Street New York City Reception - 6:00 p.m. Dinner - 7:00 p.m.</p>	<p><b>Thursday, January 26, 2012</b> Torts, Insurance and Compensation Law Section and Trial Lawyers Section Annual Meeting Petit Trianon, 3rd Floor Hilton New York 1335 Avenue of the Americas, New York City Morning Program - 8:30 a.m. Afternoon Program - 1:30 p.m.</p>
--	---

**Torts, Insurance and Compensation Law Section and Trial Lawyers Section Joint Annual Dinner**  
**Cipriani Wall Street, 55 Wall Street, New York City**  
**Buses will depart from the 54th Street side of the Hilton New York at 5:30 p.m.**

**Dinner Speaker: HONORABLE A. GAIL PRUDENTI**, Chief Administrative Judge, of all NYS Courts

**IMPORTANT INFORMATION**

Under New York's MCLE rule, this program has been approved for    credit hours in Professional Practice. This program is NOT a transitional program and will not qualify for credit for newly admitted attorneys.

**Discounts and Scholarships:** New York State Bar Association members and non-members may apply for a discount or scholarship to attend this program, based on financial hardship. *This discount applies to the educational portion of the program only.* Under that policy, any member of our Association or non-member who has a genuine basis of his/her hardship, if approved, can receive a discount or scholarship, depending on the circumstances. To apply for a discount or scholarship, please send your request in writing to Lori Nicoll at lnicoll@nysba or New York State Bar Association, One Elk Street, Albany, New York 12207. *Written requests must be submitted by Thursday, January 19th.*

**TORTS, INSURANCE AND COMPENSATION LAW SECTION**

**SECTION CHAIR**

**THOMAS J. MARONEY, ESQ.**  
Maroney O'Connor LLP  
New York City

**PROGRAM Co-CHAIRS**

**RICHARD W. KOKEL, ESQ.**  
New York City

**MIRNA M. SANTIAGO, ESQ.**  
White Fleischner & Fino  
White Plains

**TRIAL LAWYERS SECTION**

**SECTION CHAIR**

**WILLIAM J. KENIRY ESQ.**  
Tabner Ryan & Keniry LLP  
Albany

**PROGRAM CHAIR  
, ESQ.**

- 8:30 a.m.** Business Meeting and Election of Officers and District Representatives of the Torts, Insurance and Compensation Law Section and Business Meeting and Election of Officers and District Representatives of the Trial Lawyers Section
- 8:45 - 10:00 a.m.** **STRENGTH BY ASSOCIATION: RECRUITMENT AND RETENTION OF THE DIVERSE ASSOCIATE AND PARTNER**
- Moderators:** **KENNETH A. KRAJEWSKI, ESQ.**  
Brown & Kelly, LLP  
Buffalo
- MIRNA M. SANTIAGO, ESQ.**  
White Fleischner & Fino  
White Plains
- Panelists:** **MILES R. AFSHARNIK, ESQ.**  
Senior Vice President  
Claim & Legal Resource Director  
Professional Risk Group  
Wells Fargo Insurance Services USA, Inc.  
New York City
- MERCEDES COLWIN, ESQ.**  
Managing Partner New York Offices  
Gordon & Rees LLP  
New York City
- PAUL F. JONES, ESQ.**  
Partner, Phillips Lytle LLP  
Buffalo
- RICHARD T. LAU, ESQ.**  
Managing Partner, Richard Lau Associates  
Jericho
- MATTHEW J. KELLY, ESQ.**  
Roemer Wallens Gold & Mineaux LLP  
Albany
- 10:00 - 10:15 a.m.** **Refreshment Break**
- 10:15 a.m. - 12:05 p.m.**



12:05 - 1:30 p.m. Lunch (on your own)

**AFTERNOON SESSION**

1:30 - 3:10 p.m.

Panel Chair: , ESQ.

Panelists: ESQ.

, ESQ. , ESQ.

, ESQ.

3:10 - 3:25 p.m. Refreshment Break

3:25 - 4:40 p.m.

Panel Chair: ESQ.

Panelists: J ESQ.

, ESQ. , ESQ.

, ESQ.



Accommodations for Persons with Disabilities: NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Lori Nicoll at 518-487-5563.



For overnight room accommodations, please call the Hilton New York at 1-800-445-8667 and identify yourself as a member of the New York State Bar Association. Room rates are \$259.00 for single/double occupancy. You also can reserve your overnight room on the web at [www.nysba.org/11accomm](http://www.nysba.org/11accomm). **Reservations must be made by December 31, 2011.**



For questions about this specific program, please contact Lori Nicoll at 518-487-5563. **For registration questions only, please call 518-487-5621. Fax registration form to 866-680-0946.**

**Torts, Insurance and Compensation  
Law Section  
and Trial Lawyers Section**

**Wednesday, January 25, 2012  
Cipriani Wall Street  
55 Wall Street, NYC  
Reception - 6:00 p.m.  
Dinner - 7:00 p.m.**

**Thursday, January 26, 2012  
Petit Trianon, 3rd Floor  
Hilton New York  
1335 Avenue of the Americas, New York City  
Morning Program - 8:30 a.m.  
Afternoon Program - 1:30 p.m.**





**Section Chair**

**Thomas J. Maroney, Esq.**  
Maroney O'Connor LLP  
New York City

**Program Co-Chairs**

**Brendan F. Baynes, Esq.**  
The Baynes Law Firm PLLC  
Ravena

**Sean Downes, Esq.**  
Law Offices of Sean Downes  
New York City

**James P. O'Connor Esq.**  
Maroney O'Connor LLP  
New York City

# NYSBA

## Torts, Insurance and Compensation Law Section

### Summer Meeting

The Harborside Hotel & Marina  
Bar Harbor, Maine  
August 14 -17, 2011

This program provides up to **7 MCLE credit** hours consisting of 5 credits in Professional Practice, 1 credit in Law Practice Management and 1 credit in Ethics. Only the Ethics portion of this program is transitional and therefore suitable for newly admitted attorneys.



# SCHEDULE OF EVENTS

## Sunday, August 14

- 2:00 - 6:00 p.m.**      **Registration**
- 3:00 - 5:00 p.m.**      **Executive Committee Meeting**
- 5:30 - 6:30 p.m.**      **Opening Night Cocktail Reception**  
Come meet and mingle with attorneys from the Maine Bar Association.  
*Sponsored by PrintingHousePress, Full Service Appellate Printers*  
(Hors d'oeuvres will be served)
- Dinner is on your own this evening*
- 8:30 - 10:30 p.m.**      **Hospitality Suite and Ice Cream Social for Children & Adults**

## Monday, August 15

- 7:00 a.m.**      **Registration**
- 7:30 - 8:15 am**      **Executive Committee Breakfast Meeting**
- 8:30 a.m. - 12:30 p.m.**      **General Session**
- |  |   |
|--|---|
| <b>Welcoming Remarks</b><br><b>THOMAS J. MARONEY, ESQ.</b><br>Section Chair<br>Maroney O'Connor LLP<br>New York City | <b>Introductory Remarks</b><br><b>BRENDAN F. BAYNES, ESQ.</b><br>Program Co-Chair<br>The Baynes Law Firm PLLC<br>Ravena |
|--|---|
- NYSBA Welcome**  
**VINCENT E. DOYLE III, ESQ.**  
NYSBA President  
Connors & Vilaro, LLP  
Buffalo
- 8:45 - 9:35 a.m.**      **Strength By Association: The Benefits of Bar Association and Professional Memberships, Diversity and Mentoring**
- Panel Chair:**      **THOMAS J. MARONEY, ESQ.**  
Section Chair  
Maroney O'Connor LLP  
New York City
- |  |   |
|--|---|
| <b>Panelists:</b> <b>VINCENT E. DOYLE III, ESQ.</b><br>NYSBA President<br>Connors & Vilaro, LLP<br>Buffalo | <b>STEPHEN P. YOUNGER, ESQ.</b><br>Immediate Past President, NYSBA<br>Patterson Belknap Webb & Tyler LLP<br>New York City |
|--|---|

## SCHEDULE OF EVENTS

### Monday, August 15 continued

**R. MATTHEW CAIRNS, ESQ.**

DRI President  
Gallagher, Callahan & Gartrell, PC  
Concord, New Hampshire

**EDWARD GERSOWITZ, ESQ.**

New York State Trials Lawyers Association  
Gersowitz Libo & Korek, PC  
New York City

9:35 - 9:45 a.m.

**Refreshment Break**

*Sponsored by Steve Goldman, Esq.,  
Funder to the Trial Bar & Law Cash (212-370-1359)*

9:45 - 10:35 a.m.

**Legislative Update & Recent Significant Case Update**

Panel Chair:

**ELIZABETH A. FITZPATRICK, ESQ.**

Lewis Johs Avallone Aviles, LLP  
Melville

Panelists:

**JULIAN D. EHRlich, ESQ.**

Aon Risk Services, Inc.  
Aon Construction Services Group  
Jericho

**SHARON STERN GERSTMAN, ESQ.**

Magavern Magavern Grimm LLP  
Buffalo

**RICHARD W. KOKEL, ESQ.**

AAA No-Fault Arbitrator  
Law Offices of Richard W. Kokel  
New York City

10:35 - 11:25 a.m.

**Ethical Considerations in Automobile Liability Cases**

Panel Chair:

**RODERICK J. COYNE, ESQ.**

McMahon, Martine & Gallagher, LLP  
Brooklyn

Panelists:

**HON. GEORGE J. SILVER**

New York State Supreme Court  
Justice, New York County  
New York City

*Plaintiff's Perspective:*

**CODY K. McCONE, ESQ.**

O'Dwyer & Bernstein  
New York City

*Defendant's Perspective:*

**TIMOTHY D. GALLAGHER, ESQ.**

McMahon, Martine & Gallagher, LLP  
Brooklyn

**ANTHONY D. MARTINE, ESQ.**

McMahon, Martine & Gallagher, LLP  
Brooklyn

## SCHEDULE OF EVENTS

### Monday, August 15 continued

**11:25 - 11:35 a.m.**      **Refreshment Break**  
*Sponsored by Medical Management Group of New York*

**11:35 a.m. - 12:25 p.m.** **Emerging Trends & Technologies in Automobile Litigation - Part 2**

**Panel Chair:**            **JAMES P. O'CONNOR, ESQ.**  
Maroney O'Connor LLP  
New York City

**Panelists:**            **CHRIS BROGAN**  
AssureNet

**TIM BROGAN**  
AssureNet

**SEAN M. CONNORS, ESQ.**  
Global Biomechanical Solutions, Inc.  
New York City

**ROBERT S. FIJAN, Ph.D.**  
Biomechanical Engineering  
and ScienceExpert  
West Chester, PA

**JOHN MONTALBANO**  
Global Biomechanical Solutions, Inc.  
New York City

**1:30 p.m.**            **Transportation departs for our adventure at Acadia National Park.**  
This will be a family fun excursion. More details to come.

**6:00 - 7:30 p.m.**    **Cocktail Reception**  
*Sponsored by Jay Dietz Associates, Court Reporting Services*  
(Hors d'oeuvres will be served)

***Dinner is on your own this evening***

**9:30 p.m. - Midnight**    **Hospitality Suite**  
Time to socialize and relax with your colleagues.

# SCHEDULE OF EVENTS

## Tuesday, August 16

7:00 a.m. **Registration**

7:30 - 8:15 a.m. **Executive Committee Breakfast Meeting**

8:30 - 11:30 a.m. **General Session**

8:30 - 9:40 a.m. **Handling a Catastrophic Injury Case**

**Panelists:**

*Judicial/Mediator Perspective:*

**HON. ALLEN Z. HURKIN-TORRES**

Former New York State Supreme  
Court Justice, Kings County  
JAMS Mediator  
New York City

*Plaintiff's Perspective:*

**JEFFREY A. BLOCK, ESQ.**

Block O'Toole & Murphy, LLP  
New York City

*Defendent's Perspective:*

**JOHN J. MCDONOUGH III, ESQ.**

Cozen O'Connor  
New York City

9:40 - 9:50 a.m. **Refreshment Break**

*Sponsored by Ringler Associates, Structured Settlements*

9:50 - 10:40 a.m. **Bench and Bar Best Practices and the Claims Professional**

**Panel Chair:**

**MIRNA MARTINEZ SANTIAGO, ESQ.**

White Fleischner & Fino  
White Plains

**Panelists:**

**DEBORAH BOUCHER**

Nationwide Mutual Insurance Co.  
Woodbury

**JOHN FIXTER**

Travelers Insurance Co.

*Judicial/Mediator Perspective:*

**HON. ALLEN Z. HURKIN-TORRES**

Former New York State Supreme  
Court Justice, Kings County  
JAMS Mediator  
New York City

**HON. GEORGE J. SILVER**

New York State Supreme Court  
Justice, New York County  
New York City

*Plaintiff's Perspective:*

**LAURIE A. GIORDANO, ESQ.**

Leclair Korona Giordano Cole LLP  
Rochester

*Defendent's Perspective*

**DENNIS J. BRADY, ESQ.**

Mackay Wrynn & Brady LLP  
Douglaston

# SCHEDULE OF EVENTS

## Tuesday, August 16 *continued*

10:40 - 11:30 a.m.

### **No Fault Serious Injury Threshold Update**

Panel Chair:

**HON. DOUGLAS J. HAYDEN**

Wright Risk Management  
Uniondale

Panelists:

*Plaintiff's Perspective:*

**PROF. MICHAEL J. HUTTER, JR.**

Albany Law School  
Albany

*Defendant's Perspective:*

**H. NEAL CONOLLY, ESQ.**

Wright Risk Management  
Uniondale

*Arbitrator's Perspective*

**WALTER P. HIGGINS, ESQ.**

AAA No-Fault Arbitrator  
Walter P. Higgins, P.C.  
Garden City

1:00 p.m.

### **Kebo Valley Golf Club - Sponsored by Terrier Claims Services**

Fee is \$104.00 per player (includes play and golf cart and boxed lunch). Kebo Valley Golf Club was founded in 1888. It is the 8th oldest golf club in the United States. Nestled between Cadillac and Dorr Mountain, Kebo includes 18 spectacular holes, each one very different from the rest. Since much of Kebo Valley Golf Course shares its borders with Acadia National Park, you may encounter many forms of wildlife, such as Whitetail Deer and Red Fox, during your round. American Bald Eagles are also frequently seen soaring above the links. Advanced sign up is required.

2:00 p.m.

**Tennis Tournament** - based upon interest and availability of tennis courts a round robin tournament will be held. Advanced sign up is required to determine interest in this event.

*Sponsored by Terrier Claims Services*

6:00 - 8:30 p.m.

### **Closing Cocktail Reception and Dinner**

*Sponsored by Matson Driscoll & Damico LLP, Certified Public Accountants, Forensic Accountants*

9:00 p.m. - Midnight

### **Hospitality Suite**

Time to socialize and relax with your colleagues.

## Wednesday, August 17

### **Departure**



## IMPORTANT INFORMATION

Under New York's MCLE rule, this program has been approved for a total of **7 MCLE credit hours** consisting of 5 credits in Professional Practice, 1 credit in Law Practice Management, and 1 credit in Ethics. Only the Ethics portion of this program is transitional and therefore suitable for newly admitted attorneys.

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*Vice President of Appellate Services*

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## BAR HARBOR AND THE HOTEL

The Harborside Hotel, Spa & Marina is the premier resort facility in Bar Harbor, Maine. Nestled in downtown Bar Harbor, and just moments away from Acadia National Park. The Harborside offers breathtaking views of Frenchman's Bay and the ocean beyond.

The Harborside Hotel, Spa & Marina boasts a fantastic variety of leisure activities. There is the grandeur of the beautifully restored Bar Harbor Club, the awe-inspiring sights on a whale watching tour, and explorations through Acadia National Park, where you can hike granite peaks, bike historic carriage roads, or relax and enjoy the scenery. The hotel's full-service marina welcomes boaters and yachtsmen on their travels to Bar Harbor.

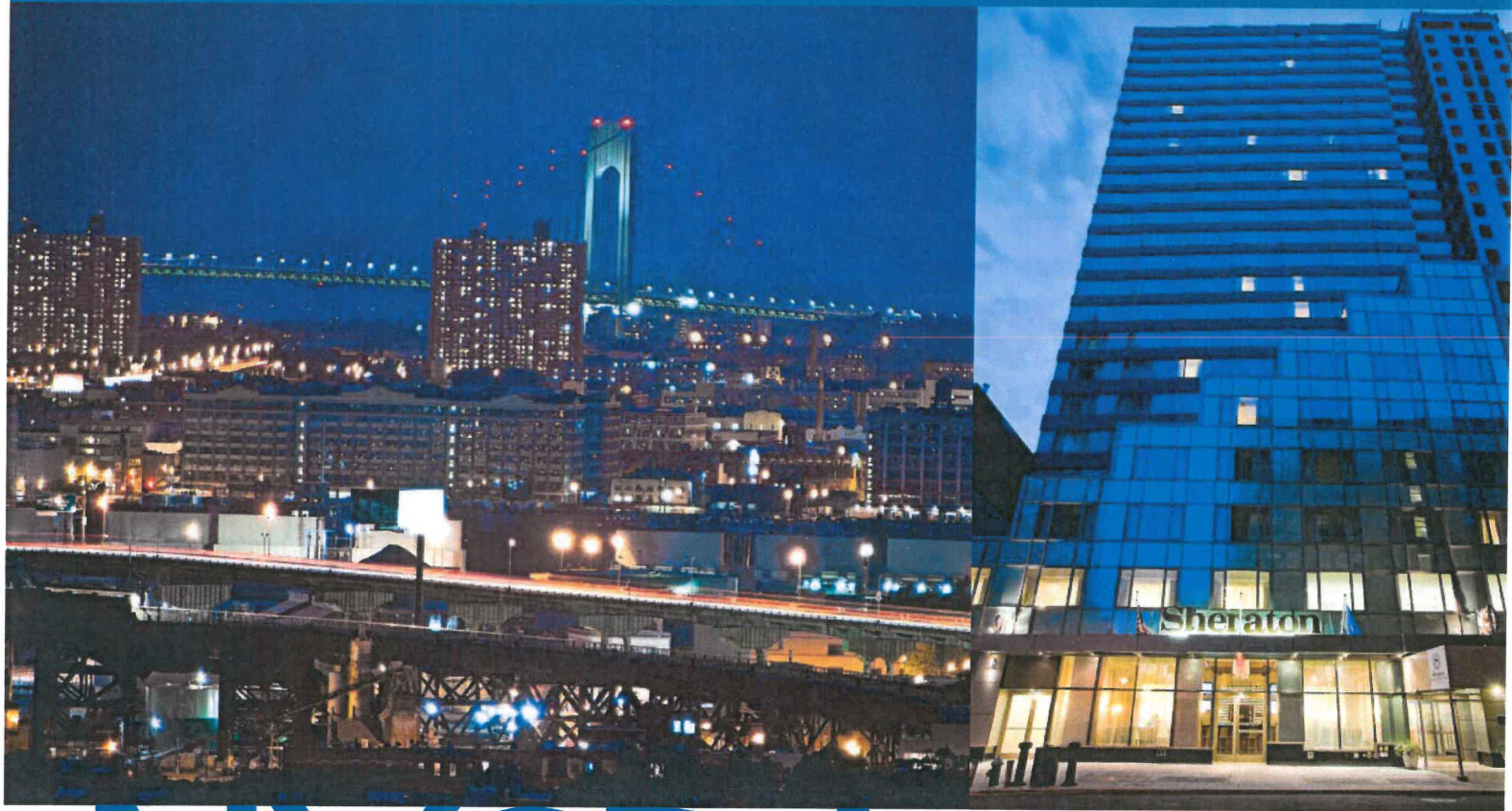
The Bar Harbor Club has been restored to its original grand state and features clay tennis courts, oceanside food and beverage in the Pool House, and spectacular grounds in one of Maine's most scenic ocean-front locations. Experience a world of self-indulgence at our spa, engage in a friendly game of tennis or cool off in the ocean-front pool.

Acadia National Park contains over 120 miles of the most varied and beautiful hiking trails in the eastern United States. In addition, the Park maintains approximately 55 miles of gravel carriage roads for walking as well as bicycling, horseback or horse carriage riding, and cross-country skiing. While the trails in Acadia are extremely scenic, they are relatively short. The average one-way length is about one mile.

When it comes to the arts and performing arts, Bar Harbor offers something for all tastes. Since its early days when two Hudson River Valley artists, Thomas Cole and Frederic Church, set out one summer in the early 1800s in search of a scenic fishing village called Eden on the coast of Maine, Bar Harbor has been world-renown as an artist community. And so began America's love affair with one of the most beautiful places in the world—Bar Harbor, Maine. The town has several art galleries, art shows and two celebrated music festivals offering everything from string orchestras, through chamber music, to jazz. Bars and clubs host a range of bands and solo artists that complete the musical mix. Movies have never seemed more enjoyable than when seen in our Art Deco theater.







# NYSBA

## **TICL Open Executive Committee meeting**

**Strength by Association –  
Mentoring and the Power  
of Diversity**

**November 17, 2011**

**Sheraton Brooklyn New York Hotel**

1.5 CLE Ethics and Professionalism Credits



# STRENGTH BY ASSOCIATION MENTORING AND THE POWER OF DIVERSITY

Join us for a free networking TICL event: Open Executive Committee Meeting, CLE, and reception immediately following to shine a light on minority members of the judiciary including JUDGES Hon. LUCINDO SUAREZ (Supreme Court, Bronx County), Hon. GEORGE SILVER (Supreme Court, New York County), Hon. LAURA DOUGLAS (Supreme Court, Bronx County) and Hon. GLORIA DABIRI (Supreme Court, Kings County)

**3:00 – 4:45 pm** TICL Open Executive Committee meeting

**5:00 – 6:30 pm** "Strength by Association – Mentoring and the Power of Diversity"

**6:30 – 8:30 pm** Reception



## 1.5 CLE Ethics and Professionalism Credits

**5:00 – 6:30 pm**

Join our distinguished panel to review best practices for firms, law students and schools, public sector and corporate law departments regarding diversity and mentoring professional values including professional development, improving the profession, and the promotion of fairness, justice and morality. Local Judges will emphasize how diversity and mentoring promotes professional values.

### Moderator:

**Mirna M. Santiago, Esq.**, White Fleischner & Fino, LLP

### Floor Moderators:

**Joanna Young**, Carroll, McNulty & Kull LLC

**Carlos Calderón**, Weisman & Calderon LLP

## PANEL

Judges **Hon. Lucindo Suarez** (Supreme Court, Bronx County), **Hon. George Silver** (Supreme Court, New York County), **Laura Douglas** (Supreme Court, Bronx County), **Gloria Dabiri** (Supreme Court, Kings County)



## PLANNING COMMITTEE



**Mirna M. Santiago**  
White Fleischner  
& Fino



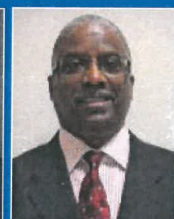
**Joanna L. Young**  
Carroll McNultyKull



**James P. Delaney**  
O'Dwyer & Bernstein



**Roderick J. Coyne**  
McMahon, Martine  
Gallagher



**Lawton W. Squires**  
Herzfeld & Rubin



**Thomas J. Maroney**  
Maroney O'Connor



**Jean F. Gerbini**  
Whiteman Osterman



**Carlos M. Calderon**  
Weisman & Calderon

# Torts, Insurance and Compensation Law Section

## STRENGTH BY ASSOCIATION: MENTORING AND THE POWER OF DIVERSITY

November 17, 2011

Sheraton Brooklyn New York Hotel  
228 Duffield Street, Brooklyn, New York 11201

### 3:00 – 4:45 pm TICL Open Executive Committee meeting

\_\_\_\_\_ yes I will be able to attend

### 5:00 – 6:30 pm “Strength by Association – Mentoring and the Power of Diversity” 1.5 CLE and Panel Discussion

\_\_\_\_\_ yes I will be able to attend

### 6:30-8:30 pm The 2011 TICL Open Networking Reception

\_\_\_\_\_ yes I will be able to attend

Register by fax or email Pat Johnson [pjohnson@nysba.org](mailto:pjohnson@nysba.org); 518.487.5758  
Register early, space is limited.

Name \_\_\_\_\_

Firm/Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

E-mail Address \_\_\_\_\_

Phone ( \_\_\_\_\_ ) \_\_\_\_\_ Fax ( \_\_\_\_\_ ) \_\_\_\_\_

### IMPORTANT INFORMATION

The New York State Bar Association’s Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Under New York’s MCLE rule, this program has been approved for a total of 1.5 credit hours in Ethics and Professionalism. This is a program suitable for transitional and non-transitional credit for newly-admitted and other attorneys.

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Watch for the Strength by Association series to continue at the NYSBA Annual Meeting on January 26, 2012 when TICL presents:

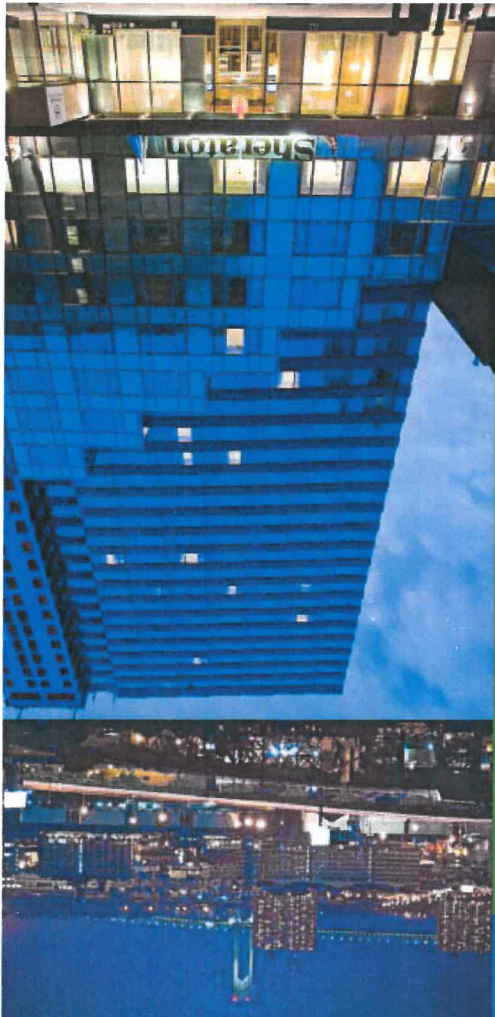
**“Strength by Association—Recruitment and Retention  
of the Diverse Associate and Partner”**



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Sheraton Brooklyn New York Hotel

November 17, 2011

Strength by Association –  
 Mentoring and the Power  
 of Diversity

# TICL Open Executive Committee meeting

NEW YORK STATE BAR ASSOCIATION



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# NYSBA

## Torts, Insurance and Compensation Law Section

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### Summer Meeting

Intercontinental Montreal  
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August 16 -19, 2012

This program provides up to **8.0 MCLE credit** hours consisting of 6.5 credits in Professional Practice and 1.5 credit in Ethics.





# SCHEDULE OF EVENTS

## Friday, August 17 *continued*

10:00 a.m. - 11:15 a.m. **Mentoring for Diversity Charrette: A collaborative workshop involving small group discussion and role-playing** (1.5 Ethics)

Mentoring for diversity will be put into practice by having the participants be “mentored” by the designated speakers/judges. We will discuss ethics in the legal practice, in mediation and in the judicial setting through role playing.

**Moderator:** **MIRNA SANTIAGO, ESQ.**  
White Fleischner & Fino, LLP  
White Plains

**Speakers:** **HON. GEORGE J. SILVER**  
New York State Supreme Court  
Justice, New York County  
New York City

**HON. LUCINDO SUAREZ**  
New York State Supreme Court  
Justice, Bronx County  
Bronx

**YOMI AJAIYEGBA, ESQ.**  
Association of Black Women Attorneys  
and Nigerian Lawyers Association

**JOSEPH HANNA, ESQ.**  
Minority Bar Association  
of Western New York

**ALEXANDER ROSADO, ESQ.**  
Latino Lawyers Association  
of Queens County

11:15 a.m. - 12:05 p.m. **When the Car Crosses the Border: Guest Statutes and Cross-Border Disputes**(1 professional practice)

**Moderator:** **KENNETH A. KRAJEWSKI, ESQ.**  
Brown & Kelly, LLP  
Buffalo

**Speakers:** **GENEVIÈVE COTNAM, ESQ.**  
Stein Monast L.L.P. Attorneys  
Québec, Canada

**STEVEN P. CURVIN, ESQ.**  
Burgio, Kita & Curvin  
Buffalo

**SHARON STERN GERSTMAN, ESQ.**  
Magavern Magavern Grimm LLP  
Buffalo

# SCHEDULE OF EVENTS

## Friday, August 17 *continued*

1:00 p.m.

### ***Walking Excursion Through Old Montreal***

Take in the cobblestoned streets and historic buildings of Old Montreal, a city with roots in the 1600s. Visit the Basilica of Notre-Dame, the public square of Place Jacques-Cartier (with performing and visual artists and craftspeople), and the Pointe-a-Calliere Museum of Archaeology (which contains a real archaeological conservation site). Tour is without charge; museum entrance fee is between \$12-\$16 CN, depending on size of group, age and student status (paid at entrance).

***Sign up on Meeting Registration Form.***

***Ride on the Rapids*** - Complete the tour with an exciting ride (for extra charge) on the St. Lawrence rapids in a "saute-moutons" speedboat. ***Sign up on Meeting Registration Form.***

6:30 - 7:30 p.m.

### **Cocktail Reception - Les Voutes**

***Sponsored by Legal Med***

(Hors d'oeuvres will be served)

***Dinner is on your own this evening***

8:30 p.m.

### **Hospitality - Hospitality Suite**

## Saturday, August 18

7:00 a.m.

### **Registration - Foyer Saint-Jacques**

7:30 a.m. - 8:15 a.m.

### **Executive Committee Breakfast Meeting - Vieux-Montreal**

8:15 a.m. - 12:05 p.m.

### **General Session - Saint-Jacques**

8:15 a.m.

### **Opening Remarks**

**GEORGE SKANDALIS, ESQ.**

Pinsky & Skandalis

Syracuse

8:20 a.m. - 9:10 a.m.

### **Update on the No-Fault Serious Injury Threshold (1 professional practice)**

Speaker:

**LAURIE A. GIORDANO, ESQ.**

Leclair Korona Giordano Cole LLP

Rochester



# SCHEDULE OF EVENTS

## Saturday, August 18 *continued*

9:10 a.m. - 9:40 a.m. **Top 10 Insurance Hits: An Update on Insurance Law**  
(1/2 professional practice)

Speaker: **DANIEL KOHANE, ESQ.**  
Hurwitz & Fine, P.C.  
Buffalo

9:50 a.m. - 10:15 a.m. **Workers' Compensation: Due Process on the Edge**  
(1/2 professional practice)

Speaker: **JOHN SNYDER, ESQ.**  
Gitto & Niefer LLP  
New Hartford, NY

10:15 a.m. - 10:45 a.m. **Structured Settlements: The End of a 40-Year Experiment?**  
(1/2 professional practice)

Speaker: **DENNIS R. McCOY, ESQ.**  
Hiscock & Barclay LLP  
Buffalo

10:45 a.m. - 10:55 a.m. **Refreshment Break**  
*Sponsored by Franklin Court Press, Inc.*

10:55 a.m. - 11:20 a.m. **Are New York Courts Ready for E-Filings?** (1/2 professional practice)

Speakers: **HON. GEORGE SILVER**  
New York State Supreme Court  
Justice, New York County  
New York City

**RICHARD W. DAWSON, ESQ.**  
Conway, Farrell, Curtin & Kelly, P.C.  
New York City

**CHARLES SIEGEL, ESQ.**  
Law Offices of Charles J. Siegel  
New York City

11:20 a.m. - 12:10 p.m. **Social Media and Claims Investigation-Dinosaur to Avatar**  
(1 professional practice)

Speaker: **DANIEL W. GERBER, ESQ.**  
Goldberg Segalla LLP  
Buffalo

**DENIS GIGUÉRE, B ADM., FPA**  
Expert en sinistres  
Chartis Insurance  
Analyste, Responsabilité Civile  
Service des Sinistres/Claims Management  
Québec, Canada

## SCHEDULE OF EVENTS

### Saturday, August 18 *continued*

- 1:00 p.m.                    **Guided City Bus Tour** - Experience the climates, plants and animals of North America up close at the Biodôme in Montréal's Olympic Park. Pick up local flavors at the Jean-Talon Farmers' Market—the largest in North America. Take in a panoramic view from atop Mount Royal, for which the city was named. The tour is arranged to appeal to all ages. **Cost of tour is \$20 per person. Sign up on Meeting Registration Form.**
- 6:30 p.m. - 7:30 p.m.    **Cocktail Reception - Foyer Sarah Bernhardt**  
*Sponsored by Jay Dietz & Associates, Ltd.*
- 7:30 p.m.                    **Farewell Dinner - Sarah Bernhardt**
- 8:30 p.m.                    **Hospitality - Hospitality Suite**  
Presentation by the Children  
Team Awards

### Sunday, August 19

**Departure**

## IMPORTANT INFORMATION

Under New York's MCLE rule, this program has been approved for a total of **8.0 MCLE credit hours** consisting of 6.5 credits in Professional Practice and 1.5 credit in Ethics.

**Discounts and Scholarships:** New York State Bar Association members and non-members may apply for a discount or scholarship to attend this program, based on financial hardship. This discount applies to the educational portion of the program only. Under that policy, any member of our Association or non-member who has a genuine basis of his/her hardship, if approved, can receive a discount or scholarship, depending on the circumstances. To apply for a discount or scholarship, please send your request in writing to Lori Nicoll at: New York State Bar Association, One Elk Street, Albany, New York 12207 or e-mail [lnicoll@nysba.org](mailto:lnicoll@nysba.org).

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**Note:** For information on required travel documentation to/from Canada, please visit the Department of State website at: [http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1082.html#entry\\_requirements](http://travel.state.gov/travel/cis_pa_tw/cis/cis_1082.html#entry_requirements)

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# **EXHIBIT 3**

## Labor and Employment Law Section

I chair the Labor and Employment Law Section of the New York State Bar. We have been asked to provide any comments we have on the report of the NYSBA CLE Committee. I am familiar with the report, as I sit on the NYSBA CLE Committee, in addition to my duties as Chair of the Labor and Employment Law Section.

We circulated the report to our Executive Committee, asking for comments.

While one member was against “legislating social issues” and some balk at the mandatory nature of the requirement, by far and away, the response applauded the focus on diversity. We do feel that it would be helpful to understand what programs would qualify for diversity CLE credit.

The Labor and Employment Law section has made diversity a priority for some time. We have an important diversity fellows program, which selects several fellows, permits them the opportunity to attend our conferences and this year, we also asked them to attend Executive Committee meetings, as non-voting members. Their input has been invaluable and the experience helps them to learn leadership skills. The program started as a one-year program, but we have expanded it to a two year program.

We have also focused several of our plenary sessions and workshops on diversity related issues. Among these was a plenary last January on implicit bias in the workplace. If diversity is significant enough to require CLE credit, it should be significant enough for us to learn about its impact in our own workplaces, our firms and companies.

While historically, CLE has primarily been conducted within the Section, we will need to find new ways to reach out to other Sections in order to educate them about the employment related aspects of diversity. Many of the California programs are similar to programs we have already presented, such as bias in the legal profession, accommodating disabilities in the legal profession, transgender rights, and challenges faced by minorities and women in the legal profession. We may wish to think about ways to make such programs available to all sections, such as at the Annual Meeting or through webinars providing the CLE credit, but which also provide a more in depth opportunity to share best practices.

Please let us know how our input can help in formulating the parameters of the requirement and delivering meaningful programs.

Thank you for the opportunity for input.

Sharon Stiller  
December 5, 2016

# **EXHIBIT 4**

## Antitrust Section

The Antitrust Section supports measures to expand sensitivity and awareness of diversity and inclusion issues, and we support the recommended addition of a diversity and inclusion CLE requirement (particularly since the proposal would not add to the total number of required CLE credit hours, but would fit within it). We also would recommend that the NYSBA's CLE department, in accrediting programs for Diversity and Inclusion credit, take a broad and flexible approach under the provision so as to permit programs that relate directly to attorneys' day-to-day practices. For example, in the antitrust context, such topics might be implicit bias in agency regulatory decision-making or in the exercise of prosecutorial charging or sentence-recommendation discretion.

Thank you for providing the opportunity to comment.

Jay L. Himes  
December 8, 2016



# **EXHIBIT 5**



REPORT  
OF THE  
COMMERCIAL AND FEDERAL LITIGATION SECTION  
OF THE  
NEW YORK STATE BAR ASSOCIATION  
concerning

The Report of the NYSBA Committee on Continuing Legal Education

Proposed Diversity and Inclusion and Elimination of  
Bias CLE Requirement for New York State Attorneys

DECEMBER 6, 2016

**Opinions expressed herein are those of the  
Commercial and Federal Litigation Section.  
They do not represent those of the New York State Bar Association  
unless and until the report has been adopted by the  
Association's House of Delegates or Executive Committee.**

## **Report of the Section as recommended by the Diversity Committee Working Group\***

### **I. Introduction and Summary of the Proposal**

At the November 5, 2016 NYSBA House of Delegates meeting, the Committee on Continuing Legal Education (“CLE Committee”) proposed that the Bar adopt a mandatory diversity and inclusion and elimination of bias (“D&I”) CLE requirement for all attorneys admitted in New York. The CLE Committee’s proposal is not without precedent, and is modeled on the unanimously approved resolution supported by the American Bar Association’s House of Delegates at its mid-year meeting in February 2016. Similarly, California and Minnesota both have adopted mandatory D&I CLE requirements.

The genesis of this proposal in New York – as well as in other jurisdictions – is the fact that issues surrounding race, ethnicity, religion, national origin, gender, sexual orientation, disability discrimination, etc., remain critically important in our society. Similarly, lack of access to legal representation by traditionally disadvantaged groups and the continuing underrepresentation of women and minorities within the highest ranks of the profession continue to present challenges for the legal community as a whole.

As set forth in the attached detailed Report of the NYSBA CLE Committee (“Report”), one of the key drivers of the recommendation is NYSBA’s core belief that increasing diversity and inclusion – as well as the elimination of bias – within the profession is essential for legal practitioners to be able to respond effectively to our society’s rapidly changing demographics. The proposal is also aimed at increasing lawyers’ core competencies by educating them to not

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\* The Diversity Committee Working Group was comprised of the current Diversity Committee Co-Chairs, The Honorable Sylvia Hinds-Radix and Carla M. Miller, Esq., as well as former Committee Chair, The Honorable Barry Cozier and former Section Chair and House of Delegates Alternate Representative Tracee Davis, Esq.

only better serve an increasingly more diverse client base, but also to continue to work on the forefront of the social justice issues for which the profession traditionally has fought for over half a century. (See Report, at 3, describing the four basic values of professional responsibility; including, *inter alia*, “striving to promote justice, fairness and morality”).

Accordingly, the CLE Committee’s specific recommendation is that all accredited CLE providers within the state “be encouraged to create a wide range of programs for all practice areas that incorporate diversity and inclusion, which would include the elimination of bias – whether dealing with other attorneys, clients, courts or anyone else in the legal system.” Moreover, the CLE Committee proposes that “one (1) or two (2) credit hours of D&I CLE be required for the biennial reporting period.” Importantly, the new credit hour requirement would be a standalone or “floating” requirement, **but not add to** the current requirements of thirty-two (32) credit hours for new attorneys, or twenty-four (24) hours for experienced attorneys.

## II. Recommendation to Adopt CLE Committee’s D&I Requirement

The Commercial and Federal Litigation Section recommends the adoption of the CLE Committee’s Report. NYSBA’s adoption of the new CLE requirements would be entirely consistent with the Bar’s longstanding positions on D&I generally, and would align New York with the ABA on the issue, along with the other states that already have adopted such CLE requirements. The Section also emphasizes that support of the CLE Committee’s recommendation would further augment the Section’s stated commitment to increasing diversity within the profession, and the field of litigation in particular, that it started over a decade ago with its annual Smooth Moves CLE program and awards presentation, and the Commercial Division 1L Minority Fellowship.

Other than the fact that it would now become part of each attorney's mandatory CLE requirement, we further note that fulfilling the requirement should not be onerous, since there are currently numerous CLE programs on D&I topics offered by several of the New York-based bar associations, including NYSBA itself, the Bar of the City of New York, and the New York County Bar Association, as well as private CLE providers. (For example, one notable, upcoming CLE course offering by the City Bar that likely would satisfy the proposed D&I requirement, and also enhance competency within the profession is entitled *Assisting Victims of Hate Crimes and Bias and Representing Peaceful Protesters*). In addition, one significant advantage of the proposal is that, while it imposes a mandatory D&I requirement, it does not increase the current biennial hourly CLE requirements and could easily be melded into existing requirements much like the mandatory ethics CLE credits. Accordingly, the actual requirement is nominal, as it presumably would entail completion of only a single CLE course over the biennial period.

We recognize that the proposal is not without some measure of controversy concerning how and in what manner diversity and inclusion would be defined. To address this potential issue, the Section would like to see the CLE Committee provide further clarification in two areas. Specifically, the proposal could be clearer regarding the language within a CLE course description that a provider would need to use in order to determine whether the credit has been satisfied – *i.e.*, currently, there exists a clear understanding of what it means to satisfy the Ethics credit requirement, but unless providers are given clear guidelines of what to include in a course description – as well as substance, of course – to make clear that the D&I requirement is met, then some confusion could ensue. Further, the Section also recommends that the CLE Committee clearly decide the precise requirement, instead of the current statement of “one (1) or two (2) credit hours.”

# **EXHIBIT 6**



# NEW YORK STATE BAR ASSOCIATION

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2015-2017 Executive Committee

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To: Greg Arenson, Rona Shamoon, NYSBA Section Caucus  
From: Michael Kenneally, NYSBA Local and State Government Law Section  
Date: December 13, 2016  
Re: Mandatory CLE for Diversity and Inclusion

The Executive Committee of the Local and State Government Law section (LSGL) has reviewed the attached report on the Proposed Diversity and Inclusion and Elimination of Bias CLE Requirements for New York State Attorneys. After discussing this report, the LSGL Executive Committee opposes mandatory CLE requirements for diversity and inclusion CLE, but supports the effort of the New York State Bar Association to promote awareness among its members of this very important issue.

The report thoroughly identifies the issues that the legal profession faces when addressing this sensitive and important topic. It recommends that "CLE providers should be encouraged to create a wide range of programs for all practice areas that incorporate diversity and inclusion, which would include the elimination of bias – whether dealing with other attorneys, clients, courts, or anyone else in the legal system." Our section agrees with this recommendation – that CLE providers should be encouraged to meet this goal in their programming for all of the reasons stated in the report.

Nevertheless, the report ultimately recommends that the NYSBA CLE Committee propose one or two credit hours of diversity and inclusion continuing legal education be required as part of the biennial reporting required of attorneys in New York State. After careful consideration, it is the mandatory implementation of this goal that our section opposes.

The proposal for mandatory diversity and inclusion credits treats these credits similarly to those for attorney ethics. The aspirational nature of diversity and inclusion in the legal profession, however, distinguishes them from ethical rules that are embodied in the Code of Professional Responsibility codified in the New York Code, Rules and Regulations. To the extent that existing law and the Code of Professional Responsibility address diversity and inclusion by prohibiting forms of discrimination and harassment, and setting forth ethical rules, the current CLE structure allows attorneys to remain educated and up-to-date on existing legal and professional requirements. Education on the elements of diversity and inclusion that are not prohibited by law or ethics rules, while undoubtedly a noble goal, do not align with the purpose and intent of mandatory continued legal education.

The proposal also begs the question: what other types of training and programming are appropriate for "mandatory" biannual re-registration CLE mandates? Various state CLE boards throughout the country have mandated CLE training on access to justice, child/elder abuse, and substance abuse as part of their curriculum. These examples are not intended to undermine the importance of diversity and related issues; rather, they are intended to show that there are many other equally important causes about which attorneys and others should also receive regular, ongoing training.

Upon admission to the Bar, all attorneys take an oath to uphold the law. Our section members, many of whom are elected and appointed officials, take additional oaths to uphold the law. As a section, we have sought, and will continue, to encourage and promote diversity and inclusion CLE credits with respect to our future programs as the report suggests. Nevertheless, we do not believe that this issue warrants a mandatory training and reporting requirement in addition to the legal protections and laws already in place.

The Local and State Government Law section is ready and willing to assist the New York State Bar Association to raise awareness of diversity and inclusion, and promote the elimination of bias, among our members. We do not agree that such training should be mandated on all attorneys in New York State.

The position stated above was adopted by vote of the Executive Committee of LSGL Section taken on December 5, 2016, with one member opposed (Mr. Davies) and one abstaining (Mr. Fisher).

# **EXHIBIT 7**



## **Health Section**

The Health Section voted to approve the diversity proposal at our EC meeting on December 13, 2016. Comments included the fact that attorneys involved in health care representation are faced with the potential that inherent bias will directly and adversely impact the delivery of care (or lack thereof). In addition, our Section has included diversity CLE in prior conferences. Attached is a diversity CLE which qualified for ethics credits which I had given in the Fall of 2013 as the Affordable Care Act was first being implemented. This was enlightening for me in terms of the history I encountered on our professional responsibilities in this area.

Raul A. Tabora, Jr.  
December 17, 2016

**AFFORDABLE CARE ACT & READINESS  
FOR 2014 AND BEYOND**

**NYSBA Health Section Fall Conference  
October 25, 2013**

**Diversity in Health Care & Legal Representation  
Raul A. Tabora, Jr.**

**I. Introduction.**

The diversity committee of the Health Section within the NYSBA has been developing and implementing a “diversity action plan” over the past two years. One goal of the plan involves education and awareness of the importance of diversity across the spectrum of health care representation. Today’s presentation will focus on this goal.

It is said that health care knows no racial boundaries and is not limited by any factor other than the goal of healing. As lawyers representing or advocating for the interests of the many stakeholders in this segment of our society, it is critical to assure that bias of any nature is minimized and eliminated from such representation. This presentation will address the basic rules of professional practice concerning bias, our ethical aspirations and the benefits to society as a whole gained through inclusiveness. Perhaps no other area of health care represents the core values of diversity more than Federally Qualifying Health Centers (FQHCs). These providers are unique in the health care delivery system not only because of the focus on underserved populations but also because of the thought that by having a diverse Board and governance better

outcomes will follow to assure that the needs and voices of the communities are heard and addressed.

Listening to the leaders of Whitney M. Young Jr., Health Services dramatically enhances our awareness in health representation relating to the concept of diversity as part of the ethical obligations of health care attorneys. It also coincides with the goals of the Affordable Care Act to expand coverage and health care access to those who have been traditionally underserved.

As the health care system expands to afford primary care and chronic care management to populations above traditional Medicaid eligibles but below the 400% poverty line, many of the FQHC models of outreach and training will be required for ACA's "Qualified Health Plans" (QHP).

## **II. Overview of FQHC Under Federal Law.**

The FQHC delivery model is a unique creature of Federal law. It is designed to assure that community needs are met by providing for a cost based reimbursement system, availability of Federal grants and a governance structure which is designed to involve, engage and empower those served by the FQHC. Both Medicare and Medicaid assure payment based on meeting reasonable costs. In many cases, the requirements relating to governance makes this structure unappealing for sponsoring organizations that would be providing equity and capital to start up such FQHCs. As a result, Federal policy has allowed for "look-alike" FQHCs which may obtain a waiver of the governance rules.

Under Federal law, (§330 of the Public Health Service Act), the following governance requirements (among others) apply in order for a FQHC to obtain funding: First, the applicant must demonstrate that "...the center has established a governing body which:

1. **is composed of individuals, a majority of whom are being served by the center** and who, as a group, represent the individuals being served by the center;
2. meets at least once a month, selects the services to be provided by the center, schedules the hours during which services will be provided, approves the center's annual budget, approves the selection of a director for the center, and, except in the case of a public center (as defined in the second sentence of this paragraph), establishes general policy for the center; \*\*\*

Secondly, if a truly representative Board cannot be implemented, the FQHC may apply as a "Look-Alike Program". Federal policy guidelines (PIN 2003-21) state as follows with regard to obtaining a waiver of the above standards:

- Organizations Serving Special Populations: Organizations that are requesting designation to serve a special population authorized under section 330 of the PHS Act (i.e., migratory and seasonal agricultural workers, homeless populations, and residents of public housing) are now eligible to apply for FQHC Look-Alike designation. **Upon showing good cause, the following types of organizations are eligible to request a waiver of the 51 percent consumer/patient majority and monthly meeting governance requirements in accordance with section 330(k)(3)(H)(iii) of the PHS Act: (1) any organization serving** a sparsely populated rural area (section 330(p) of the PHS Act); and (2) organizations that receive FQHC Look-Alike designation to serve section 330(g), Migratory and Seasonal Agricultural Workers, section 330(h), **Homeless Populations, or section 330(i), Residents of Public Housing, only but do not serve the general community (section 330(e))**. Refer to Section II.2.B., Program Requirements for Special Populations, for additional information regarding organizations that serve special populations authorized under section 330 of the PHS Act.

These organizations have been on the forefront in providing care to the underserved and minority populations over the past few decades. The ACA

integrates such organizations within the new design as “essential community providers”. Under ACA regulations 45 CFR PART 156, (criteria for Qualified Health Plans or QHPs), FQHCs would be deemed to be “essential community Providers:

**§ 156.235 Essential community providers.**

(a) *General requirement.* (1) A QHP issuer must have a sufficient number and geographic distribution of essential community providers, where available, to ensure reasonable and timely access to a broad range of such providers for low-income, medically underserved individuals in the QHP's service area, in accordance with the Exchange's network adequacy standards.

(2) A QHP issuer that provides a majority of covered professional services through physicians employed by the issuer or through a single contracted medical group may instead comply with the alternate standard described in paragraph (b) of this section. \*\*\*

(b) *Alternate standard.* A QHP issuer described in paragraph (a)(2) of this section must have a sufficient number and geographic distribution of employed providers and hospital facilities, or providers of its contracted medical group and hospital facilities to ensure reasonable and timely access for low-income, medically underserved individuals in the QHP's service area, in accordance with the Exchange's network adequacy standards.

(c) *Definition.* **Essential community providers are providers that serve predominantly low-income, medically underserved individuals, ....**

(e) *Payment of federally-qualified health centers.* If an item or service covered by a QHP is provided by a federally-qualified health center (as defined in section 1905(l)(2)(B) of the Act) to an enrollee of a QHP, **the QHP issuer must pay the federally-qualified health center for the item or service an amount that is not less than the amount of payment that would have been paid to the center under section 1902(bb) of the Act for such item or service.** Nothing in this paragraph (e) would preclude a QHP issuer and federally-qualified health center from mutually agreeing upon payment rates other than those that would have been paid to the center under section 1902(bb) of the Act, as long as such mutually agreed upon rates are at least equal to the generally applicable payment rates of the issuer indicated in paragraph (d) of this section.

Given this integration, it will be expected that FQHCs will expand their levels of service for those populations who are above the Medicaid eligibility level and targeted by the ACA as uninsured or under-insured.

As the speakers will present, the needs of those served by FQHCs require an understanding of cultural background and historical impediments to care which have not been present with regard to those traditionally covered by employer-based plans.

In addition to the awareness raised by FQHCs goals and operations, there are many issues impacting diversity in the delivery of health care, such as enrollment under the Exchange and criteria impacting notice and explanation of options to diverse populations. There are mandates in terms of interpretation of materials and outreach.

This presentation is not the forum for a full analysis of health care disparities. It is designed to simply provide education and awareness of the issue and how it impacts our ethical obligations and aspirations as attorneys.

For example, another issue is the impact of hidden discriminatory criteria created by the disparity of health care access as in the area of liver transplants. The selection criteria for liver organ recipients often may include the ability to pay for the recovery costs – which can be over \$30,000 per month in after care for quite some time. For example, one leading transplant center has set forth as a 12<sup>th</sup> selection criteria:

**“12. Financial considerations:** Transplantation is an expensive treatment option due to the medications and intense monitoring of the recipient’s organ function. **Candidates with an inability to fund transplant care due to lack of adequate insurance coverage may not be eligible for transplant.** The transplant financial coordinator will work with transplant candidates to provide information regarding potential sources of financial support.

Proposed policies surrounding organ procurement under the Federal Health Resources and Services Administration (HRSA) have added the following guideline which has yet to be adopted:

#### **5.4.A Nondiscrimination in Organ Allocation (6.2.1)**

A candidate's citizenship or residency status in the United States must not be considered when allocating deceased donor organs to candidates for transplantation. Allocation of deceased donor organs must not be influenced positively or negatively by political influence, national origin, race, sex, religion, or financial status.

[http://optn.transplant.hrsa.gov/ContentDocuments/OPTN Policies PC 08-2013.pdf#nameddest=Policy09](http://optn.transplant.hrsa.gov/ContentDocuments/OPTN_Policies_PC_08-2013.pdf#nameddest=Policy09)

These issues have been reported in the news media as having the effect of excluding many uninsured or underinsured individuals who fall mainly in disadvantaged and minority groups within our diverse population.

Awareness of the potential for bias is critical in the health field and is just as essential for those representing stakeholders in this field. In an interview on this subject published by Brown University, physician and professor Augustus White III, author of *"Seeing Patients: Unconscious Bias in Health Care"*, noted:

"If you stop any doctor on the street and say, 'Doctor, are you aware of all the racism and all of the disparities in health care?' He or she will say, 'I don't know what you are talking about. I take good care of all my patients,'" White told the audience in the Salomon Center. "The data will suggest that there is some subconscious disparity being practiced."

White, ... identified 13 groups of patients that experience health care discrimination and disparities, including not only racial and religious minorities and immigrants but also women, the obese, the elderly, the disabled, and the imprisoned.

In his suggestions for how doctors can reduce their subconscious contribution to health disparities, White focused on that theme of self-awareness. "For caregivers, first of all believe that biases exist," he said. "It is easy to blow it off and say that it's not really a problem. And believe that they can be corrected."

He offered the website of Harvard psychology colleague Mahzarin Banaji as a tool for personally exploring subconscious bias: [implicit.harvard.edu](http://implicit.harvard.edu).

(See interview at <http://news.brown.edu/features/2011/03/disparities>.)

Applying the same logic to health care legal representation, the advent of ACA implementation is the perfect point to address hidden bias and aspire to the ethics of an inclusive system of access to high quality health care.

### **III Professional Rules of Responsibility.**

The trail head in assessing ethical obligations for lawyers is found within the Rules of Professional Conduct as adopted by the Appellate Divisions of the Supreme Court, effective April 1, 2009. As we know, these rules supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility). Since receiving a pamphlet of such rules distributed by NYSBA as many of us have upon graduation from law school, the very first text to be read is actually a “Preamble, Scope and Comments”. While these additional materials are not enacted as regulation for lawyers, they provide a good guidepost in understanding one’s overall approach for each specific rule of conduct is applied in day-to-day life. (See 22 NYCRR Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

The topic of “diversity” is not mentioned anywhere within the Preamble, Comments or the Rules themselves. Instead, this concept has grown in usage across many professions and society in general as a way of pre-empting bias, discrimination and the ill-effects of naturally occurring segregation across many classifications such as race, religion, gender, sexual preference, age, color, disability, nationality and more.



As such, the concept of “diversity” in legal ethics actually is designed to not only educate attorneys on the benefits of diversity but to prevent the oftentimes hidden biases which adversely impact non-diverse groups. From the legal perspective, such impact goes beyond the traditional employment realm but also impacts the decisions made in advocating a particular point, revising contract terms in health transactions, developing laws and regulations affecting the population and communicating with clients to ensure that all aspects of a particular legal issue are properly addressed.

Of particular note with regard to these inspirational goals of “diversity” as an ethical standard is the following from the Preamble to the Rules:

PREAMBLE: A LAWYER’S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with special responsibility for the quality of justice. As a representative of clients, a lawyer assumes many roles, including advisor, advocate, negotiator, and evaluator. As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice. **In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.**

\*\*\*

[8] The Rules provide a framework for the ethical practice of law. **Compliance** with the Rules, as with all law in an open society, **depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion** and finally, when necessary, upon enforcement through disciplinary proceedings. **The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.**

It is in this last comment that “diversity” finds its place within the ethical trail of the practice of law. Although many groups have argued for a business case in furthering diversity, it may be that the real case for diversity lies in legal ethics.<sup>1</sup>

The black letter Rules of Professional Conduct prohibit clear violations on the part of attorneys as “misconduct”, as follows:

**RULE 8.4. *Misconduct***

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; \*\*\*

(g) **unlawfully discriminate in the practice of law**, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the

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<sup>1</sup> As noted by one organization in this area: “corporate clients apply the “carrot” of continued or increased business and the “stick” of an implied decrease, withdrawal or even loss of business to encourage law firms to become more diverse, or use their economic power to support the economic success and financial independence of diverse lawyers through the growth of minority and women owned law firms. Nevertheless, corporate clients continue to express concern about the lack of diversity among their outside counsel. Similarly, law firm leaders remain disappointed that their diversity efforts have not achieved desired levels of success or translated into noticeable increases in business from corporate clients. And diverse partners are frustrated by the amount of business they receive from corporate clients who express a commitment to diversity. This leads anyone in the legal profession familiar with diversity and inclusion efforts to question whether a business case for diversity truly exists, and, if it does, how it might be improved to the greater satisfaction of all stakeholders.” (Institute for Inclusion in the Legal Profession, “Business Care for Diversity Report - Reality or Wishful Thinking” (c) 2011.) (See also letter of September 14, 2012 of the IILP calling for changes in the Model Code regarding bias and diversity – Attachment “A”.)

lawyer's fitness as a lawyer.

The history of the adoption of these provisions has been described as "long and tortuous" and the result of two separate proposals from State Bar committees:

"The Committee on Minorities in the Profession proposed to prohibit discrimination in hiring, promoting or otherwise determining conditions of employment, on nine bases, including race, color, religion, sex, age and handicap. The Special Committee on Women in the Courts sought a far broader prohibition against discrimination. As a result of a study of discrimination in the courts, the Special Committee on Women in the Courts advocated that the Bar Association provide that a lawyer is prohibited from engaging in any conduct that would discriminate or manifest bias on nine bases, including sex, color, race, religion, disability, age, marital status and sexual preference, in handling a legal matter." The Jones Committee declined to recommend adoption of either an Ethical Consideration or a Disciplinary Rule addressing discrimination because the subject of discrimination was adequately covered by laws, such as the Federal anti-discrimination law and the New York Human Rights Law, and was an inappropriate subject for a code of ethics." "The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility", Fordham Urban Law Journal, Volume 18, Issue 2 1990 Article 5

<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1343&context=ulj>

As such, from a disciplinary perspective, the concept of "diversity" arises out of the need to prevent "unlawful discrimination" in the practice of law. Notably, this goes beyond employment, hiring and promotion. In one interesting opinion of the Association of the Bar of the City of New York (1995-12), the Committee on Professional and Judicial Ethics opined that lawyers must consider the need for the services of an interpreter and take steps to secure the services of a qualified interpreter to insure competent and zealous representation, to preserve client confidences, and to avoid unlawful discrimination. Notably, the opinion reasoned:

Lawyers are increasingly being called upon to advise and represent persons with whom they cannot communicate directly because the lawyer and the client do not share a common language. Often, the only effective method of communication is through a language (foreign or sign) interpreter.

\*\*\*

..... DR 1-102(A)(6) provides that "[a] lawyer shall not . . . [u]nlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, or marital status." Even if failure to consider the need for and to secure the services of an interpreter may not constitute unlawful discrimination, **it may show biased or condescending conduct towards the client**, which should be avoided. See EC 1-7. For example, exclusive reliance on family members, friends or even strangers to interpret, or attempts to communicate solely using a rudimentary personal knowledge of a foreign or sign language **may not only be unwise, but may reflect bias or condescension towards the client because such a practice could tend to minimize the importance of what the client has to say to the lawyer and the client's role in decision making, and to treat the client with less care than other clients because of the language barrier between lawyer and client.** \*\*\*

## CONCLUSION

A lawyer who represents a client with whom direct communications cannot be maintained in a mutually understood language, must evaluate the need for qualified interpreter service and take steps to secure the services of an interpreter, when needed for effective lawyer-client communications, to provide competent and zealous representation, preserve client confidences and avoid unlawful discrimination or prejudice in the practice of law.

[http://www2.nycbar.org/Publications/reports/show\\_html\\_new.php?rid=168](http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=168)

As such, the value of education and promotion of ethics surrounding "diversity" is primarily one of prevention and instilling a temperament within all attorneys which seeks to guard against the hidden effects of both intentional and benign discriminatory behavior.

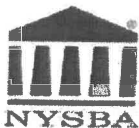
The Health Section's Diversity Challenge seeks to educate attorneys practicing health care law as well as law students and individuals who aspire to become lawyers with regard to the importance of diversity as a goal in all aspects of practice. Diversity

is a good in all professions, however lawyers have special duties and social expectations - It's not enough to know, professionals must be aware of the potential for hidden bias and how it may adversely impact not only our clients but also the status of our legal system and perception of justice.

In the end analysis, diversity in both health care and legal representation spreads both positive ethical practices and good business results. Research has found that groups with diverse backgrounds and a culture of inclusiveness innovate better and enhance an organization's objectives. One recent exposition on this subject surveyed research from McKinsey Reports to the Sloan School at MIT - "It's not just a matter of being fair to have a diverse organization, it's really important in order to get the best business results" *Diversity – It's Not Just About Being Fair*, Beryl Neslon, Googletechtalks March 10, 2013.

Eliminating bias and the onset of potential illegal discrimination are goals which must be seen as reaching the core of a just legal system.

# **EXHIBIT 8**



# New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200 • <http://www.nysba.org>

## DISPUTE RESOLUTION SECTION

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**BARBARA ANTONELLO**

December 20, 2016

Gregory Arenson, Esq.  
Kaplan Fox & Kilsheimer LLP  
850 Third Avenue, 14th fl.  
New York, New York 10022

Re: Proposed Diversity and Inclusion and Elimination of Bias CLE  
Requirement for New York Attorneys

Dear Greg,

I am writing to provide the NYSBA Dispute Resolution Section's comments on the CLE Committee's Report recommending a new CLE requirement covering diversity and inclusion and elimination of bias. We wholeheartedly support the CLE proposal.

Our Section also believes that many attorneys do not appreciate the benefits of choosing minority and female arbitrators and mediators in an increasingly diverse world, but instead often default to the "safe" choice of a white, male neutral with whom they or their colleagues have worked in the past. Accordingly, we recommend that the acceptable course descriptions at Part E. II of the Report be broadened to include lawyers' perceptions of and interactions with arbitrators, mediators, and legal support staff. Part E. II would therefore be amended to read:

"(II) how lawyers perceive and interact with those they come in contact with during the course of practicing law, such as court personnel, legal support staff, witnesses, jurors, judges, arbitrators, mediators, and opposing counsel;"

Thank you for your consideration. Please let me know if you need any additional information.

Very truly yours,



Abigail Pessen, DRS Chair

**NEW YORK STATE BAR ASSOCIATION  
MINUTES OF EXECUTIVE COMMITTEE MEETING  
BAR CENTER, ALBANY, NEW YORK  
NOVEMBER 4, 2016**

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Present: Karina E. Alomar, Alyssa M. Barreiro, Earamichia Brown, Orin J. Cohen, Cheryl Smith Fisher, Michael L. Fox, Michael W. Galligan, Sharon Stern Gerstman, Evan M. Goldberg, Ira S. Goldenberg, Taa R. Grays, Henry M. Greenberg, Claire P. Gutekunst, Scott M. Karson, Elena DeFio Kean, Stuart J. LaRose, Peter H. Levy, Ellen G. Makofsky, Michael Miller, Steven E. Millon, David P. Miranda, Domenick Napoletano, Bruce J. Prager, Sandra Rivera, David H. Tennant, Sherry Levin Wallach.

Guests: T. Andrew Brown, Hermes Fernandez, Thomas J. Maroney, John M. Nonna (by telephone), Mirna M. Santiago, David M. Schraver.

Ms. Gutekunst presided over the meeting as President of the Association.

1. Approval of minutes of meetings. The minutes of the June 16-17, 2016 meeting and the September 9, 2016 telephone conference were approved as distributed.
2. Consent calendar:
  - a) Amendments to operating rules of the Section Delegates Caucus
  - b) Change of name of Committee on Legislative Policy
  - c) Approval of bank account signatories

The consent calendar, consisting of the three above items, was approved by voice vote.

3. Report of Treasurer. In his capacity as Treasurer, Mr. Karson reported that through September 30, 2016, the Association's total revenue was \$20.7 million, an increase of approximately \$250,000 over the previous year, and total expenses were \$17 million, a decrease of approximately \$330,000 over 2015. Mr. Karson also provided a report on the status of the long-term reserve investments. The report was received with thanks.
4. Report of staff leadership. David R. Watson, Executive Director, together with Associate Executive Director Elizabeth Derrico, reviewed staff reorganization over the past two years and provided an analysis of the Association's strengths, weaknesses, opportunities and threats. Jason Nagle was introduced as the new Managing Director of IT Services. The report was received with thanks.
5. Report re staff changes. Ms. Gutekunst reported that David L. Adkins, Chief Technology Officer; Kathleen Heider, Director of Meetings; and Patricia Spataro, Director of the Lawyer Assistance Program had left the Association staff. With the impending departure of Executive Director David R. Watson, the Association has engaged the services of Young Maiden Consultants to assist in hiring a new Executive Director and that she had



appointed a search committee to review candidates for the position. The report was received with thanks.

6. Report of President. Ms. Gutekunst highlighted the items contained in her written report, a copy of which is appended to these minutes.
7. Reports of Vice Presidents and Executive Committee liaisons. Messrs. Fox, Levy, Miller, Napoletano and Ms. Rivera and Ms. Barreiro provided informational reports on section and committee activities as well as county and local bar association events. The reports were received with thanks.
8. Report and recommendations of Committee on the New York State Constitution. In his capacity as chair of the committee, Mr. Greenberg presented the committee's report on issues a constitutional convention might address with respect to Article XIV of the State Constitution, the conservation article. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
9. Discussion re county bar representation in House of Delegates. Ms. Gerstman led a discussion regarding the districts in which county bar associations are grouped together and share a delegate in the House. She asked the Vice Presidents from these districts to discuss this with local bar leaders and develop a plan for rotating the position among the counties.
10. Board development session. Associate Executive Director Elizabeth Derrico led a board development session with respect to members' leadership roles.
11. Reports and recommendations of Committee on Continuing Legal Education.
  - a. Committee Update. In her capacity as chair of the Committee on Continuing Legal Education, Ms. Makofsky, together with Senior Director H. Douglas Guevara, provided an update on the Association's continuing legal education program, including revenue and expenses and new policies and initiatives. The report was received with thanks.
  - b. Diversity CLE credit. Ms. Makofsky, together with committee member Mirna M. Santiago, outlined the committee's report recommending that the rules governing mandatory continuing legal education be amended to provide for one credit hour of diversity CLE credit as part of the 32 credit hours required for new attorneys and as part of the 24 credit hours required of experienced attorneys. After discussion, a motion was adopted to endorse the following resolution to govern consideration and debate at the January 27, 2017 House meeting for favorable action by the House:

**RESOLVED**, that the House of Delegates hereby adopts the following procedures to govern consideration at the January 27, 2017 meeting of the House, and any subsequent meetings as may be necessary, of the report and recommendations of the Committee on Continuing Legal Education:

1. The report and recommendations of the Committee was circulated to members of the House, sections and committees, county and local bar associations, via the Reports Community on October 20, 2016.
  2. **Comments on report and recommendations:** Any comments on or amendments to the Committee’s report or particular recommendations contained therein must be submitted in writing to the Secretary of the Association at the Bar Center by January 6, 2017; otherwise they shall not be considered. All comments complying with this procedure shall be distributed to the members of the House in advance of the January 27, 2017 meeting.
  3. **Consideration of the report and recommendations at the January 27, 2017 meeting and any subsequent meetings:** The report and recommendations will be scheduled for formal debate and vote at the January 27, 2017 meeting and considered in the following manner:
    - a. The Committee shall be given an opportunity to present its report and recommendations.
    - b. All those wishing to speak with regard to the report and recommendations may do so only once for no more than three minutes.
    - c. The Committee may respond to questions and comments as appropriate.
    - d. Procedural motions shall be considered out of order until debate on substantive issues is concluded.
    - e. A vote on the report and recommendations shall be taken at the conclusion of the debate.<sup>1</sup>
12. Report and recommendations of President’s Committee on Access to Justice. In his capacity as a member of the committee, Mr. Miller, together with committee chair William T. Russell, Jr., reviewed the committee’s report recommending Association support for the concept and utilization of limited scope representation for low and moderate income persons. After discussion, a motion was adopted to endorse the following resolution for favorable action by the House:

WHEREAS, the New York State Bar Association has long supported and encouraged access to justice for all, including for low and moderate income persons who are not able to pay for conventional legal services; and

WHEREAS, as the late New York State Chief Judge Judith S. Kaye noted in 1999: “Access to the legal system is an inherent right of citizenship, yet far too many New Yorkers are currently denied this right because they lack economic resources;” and

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<sup>1</sup> The resolution was amended by the House to change the January 6, 2017 date to January 13, 2017.

WHEREAS, over the past several years, the organized bar, academic institutions and courts have been experimenting with models of legal practice that permit attorneys to provide limited scope representation to clients who want or need to limit their expenses, and may be able to effectively handle the other aspects of their cases on their own; and

WHEREAS, although criminal defendants who cannot afford an attorney have a constitutional right to counsel, there is no such right in most civil matters; and

WHEREAS, it is estimated that 1.8 million New Yorkers, including mostly low income persons, appear unrepresented by counsel in family court, housing court, consumer debt matters, foreclosures and other civil matters in New York State Courts;

WHEREAS, a growing number of New Yorkers are falling into the category of the “working poor” or “modest means” and are living from pay check to pay check and cannot afford traditional legal assistance, and

WHEREAS, this lack of counsel can often mean an outcome that is less favorable for the litigants than it might be were there affordable counsel available and can result in greater strains on both our judicial system and social welfare programs; and

WHEREAS, in recent years, the New York State Court system has been confronted with significant budgetary challenges and an influx of self-represented individuals into the judicial system; and

WHEREAS, the President’s Committee on Access to Justice of the New York State Bar Association has submitted a report calling upon the Association to support the concept and encourage the utilization of limited scope representation for low and moderate income persons in civil matters,

NOW THEREFORE, IT IS

RESOLVED, that the New York State Bar Association adopts the report of the President’s Committee on Access to Justice and supports the concept and encourages the utilization of limited scope representation for low and moderate income persons in civil matters; and it is further

RESOLVED, that the officers of the association are authorized to take such actions as may be necessary to further explore, and where appropriate, implement and expand programs of limited scope representation for low and moderate income persons in civil matters.

13. Report and recommendations of Finance Committee re 2016 proposed income and expense budget. T. Andrew Brown, chair of the Finance Committee, reviewed the

proposed budget for 2017, which projects income of \$24,348,950, expenses of \$24,313,075, and a projected surplus of \$35,875. A motion was adopted to endorse the proposed budget for favorable action by the House.

14. Report of Committee on Membership. Thomas J. Maroney, chair of the Membership Committee, reported on recent membership developments, including committee activity and the President's Membership Challenge. The report was received with thanks.
15. Report re legislative activities. John M. Nonna, chair of the Committee on Federal Legislative Priorities, updated the Executive Committee with respect to Federal legislative activities. The report was received with thanks.
16. Report and recommendations of Steering Committee on Legislative Priorities.

- a. Committee on Legislative Policy. Hermes Fernandez, chair of the Committee on Legislative Policy, reported on the committee's recommendations of the following items for inclusion on the list of the Association's state legislative priorities: integrity of New York's justice system; wrongful conviction reform; increase the age of criminal responsibility; support for the legal profession; reform statutory power of attorney; and sealing records of conviction of certain crimes.

After discussion, a motion was adopted to approve these items as the Association's 2017 state legislative priorities.

- b. Committee on Federal Legislative Priorities. John M. Nonna, chair of the Committee on Federal Legislative Priorities, presented the committee's recommendations of the following items for inclusion on the list of the Association's 2017 federal legislative priorities: integrity of the justice system; support criminal justice reform; the Paycheck Fairness Act; support for increased voter participation; support paid family leave; support for legislation to address immigration representation; support for states' authority to regulate the tort system; oppose the Lawsuit Abuse Reduction Act; and support for the legal profession.

After discussion, a motion was adopted to approve these items as the Association's 2017 federal legislative priorities.

17. Report of Nominating Committee. David M. Schraver, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2017-2018 Association year: President Elect: Michael Miller, New York City; Secretary: Sherry Levin Wallach, Mt. Kisco; Treasurer: Scott M. Karson, Melville; Vice Presidents: 1st District – Taa R. Grays, New York; 2nd District – Domenick Napoletano, Brooklyn; 3rd District – Henry M. Greenberg, Albany; 4th District – Matthew R. Coseo, Ballston Spa; 5th District – Stuart J. LaRose, Syracuse; 6th District – Alyssa M. Barreiro, Ithaca; 7th District – David H. Tennant, Rochester; 8th

District – Norman P. Effman, Warsaw; 9th District – Michael L. Fox, Newburgh; 10th District – Peter H. Levy, Jericho; 11th District – Karina E. Alomar, Ridgewood; 12th District – Steven E. Millon, New York; 13th District – Jonathan B. Behrins, Staten Island. The following individuals were nominated to serve as Executive Committee Members-at-Large for a 2-year term beginning June 1, 2017: Richard M. Gutierrez (Diversity Seat); Margaret J. Finerty, New York City; William T. Russell, Jr., New York City. Nominated as Section Member-at-Large was Andre R. Jaglom, New York City. Nominated as Young Lawyer Member-at-Large was Sarah E. Gold, Albany The following individuals were nominated as delegates to the American Bar Association House of Delegates for the 2017-2019 term: Claire P. Gutekunst, Yonkers; Seymour W. James, Jr., New York City; Glenn Lau-Kee, New York City; Stephen P. Younger, New York City; Michael Miller, New York City.

18. New business. Ms. Gutekunst reported that the report and resolution approved for co-sponsorship during the Executive Committee’s May 9, 2016 conference call with respect to sexual and gender-based violence in the Democratic Republic of Congo had been revised and would be considered by the American Bar Association’s House of delegates at its February 2017 meeting. After discussion, a motion was adopted to approve co-sponsorship of the revised report and resolution.
19. Date and place of next meeting.  
Thursday, January 26, 2017  
Hilton Midtown New York, New York City
20. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Ellen G. Makofsky  
Secretary