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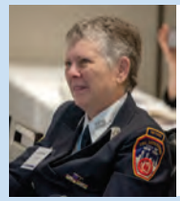

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NYSBA Honors Supreme Court Justice Elena Kagan at Gala Dinner

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State AG Letitia James: Moral Leadership Needed to Combat Hate

By Christian Nolan

New York Attorney General Letitia James says the country needs "moral leadership" again to help combat the recent rise in white nationalism and domestic terrorism.

The president of the United States, she says, denigrates women, Mexicans, the disabled, Muslims and others but "refuses to denounce white nationalism." The nation, she said, hasn't been this divided since the Civil War.

"What we need is decency back to 1600 Pennsylvania Avenue," said James. "And to make changes to the law to hold these individuals responsible so they will go back to covering themselves under the sheets."

James' strong remarks were part of the extraordinary Presidential Summit panel event on Jan. 29 regarding white nationalism and domestic terrorism in America. It took place during NYSBA's weeklong 143rd Annual Meeting at the New York Hilton Midtown in Manhattan.

The event, witnessed live by over 500 people and livestreamed to members across the state and worldwide, was moderated by Craig M. Boise, dean and professor of law at the Syracuse University College of Law.

Other panelists were David D. Cole, national legal director, American Civil Liberties Union; Frank Figliuzzi, Jr., former FBI assistant director for counterintelligence, NBC News/MSNBC national security analyst; Nan Whaley, mayor of Dayton, Ohio; and Leonard Zeskind, founder & president, Institute for Research and Education of Human Rights and author of "Blood and Politics: The History of the White Nationalist Movement from the Margins to the Mainstream."

Law enforcement is paying increased attention to home-grown extremists, including radicalized white nationalists, who have been responsible for the rising number of hate incidents and mass shootings in the United States.

New York Attorney General Letitia James (right) said the country needs "moral leadership" during the Presidential Summit panel event on white nationalism and domestic terrorism. Also pictured is Leonard Zeskind, author (center), and Craig M. Boise, dean of Syracuse University College of Law (left).

Last year, hate crimes reached a 16-year high. Specifically, white nationalist groups surged nearly 50 percent, growing from 100 chapters in 2017 to 148 in 2018, according to the Southern Poverty Law Center.

James said in New York, 45 hate groups have been tracked and most recently, the state has seen a 20 percent increase in anti-Semitic attacks.

"We're working with law enforcement to monitor hate groups," said James. "It has to be a priority. We can't sit idly by and do nothing," said James.

Figliuzzi lamented the fact that law enforcement does not have a law that spells out domestic terrorism. He said FBI agents and other law enforcement need more tools at their disposal, as currently they lack the same techniques used in the fight against international terrorism in order to prevent attacks before they happen.

His "code name" for the phenomenon is "thoughts and prayers."

"Thoughts to figure out who the next mass shooter is," said Figliuzzi. "And prayers for the inevitable victims of the next mass shooting."

Whaley is familiar with dealing with tragedy after a man shot and killed seven people in Dayton, Ohio in August 2019. She recently attended a conference of mayors and discussed best practices following a mass shooting. When it comes to mass shootings, "we now recognize it's not a matter of if but when," said Whaley.

Whaley is particularly uncomfortable with protests where the participants are so heavily armed, as was the case in Richmond, Va. recently. She'd prefer protests were unarmed.

"When people are armed to the teeth, the conversation stops," Whaley said.

Stand Up

Zeskind predicts that the worst of the violence in the white nationalism movement is yet to come. He believes the key factor behind the actions of white nationalists is that the Census Bureau has projected that white people will officially become a minority in a nation of minorities by the middle part of this century.

"I've been doing this 40 years. I've seen a lot close up and this is the worst I've seen it," said Zeskind. "And we're not seeing the worst that's going to come."

In order to combat it, Zeskind believes local communities have to stand up and speak out against it.

"Educate yourself, learn how to stand up," said Zeskind. "Community organization will defeat this movement."

Civil Liberties

However, the desire to keep the public safe also has another side that isn't often discussed – concerns about potential civil liberties violations when law enforcement agencies conduct surveillance of groups and individuals based on their political beliefs and orientations.

Cole said we need to learn from history and not overreact, such as with the treatment of Muslims post-9/11.

"Condemnation is critical to send white nationalists back in their basements and chatrooms," said Cole.

But Cole said everyone, including lawyers should be skeptical of the need for a new domestic terrorism law. He said groups advocating violence isn't a crime, nor is joining the group.

"Our history shows that when you give the government the power to do that, it gets abused," said Cole. "Do not succumb to the temptation… that is to engage in guilt by association or ideological criminalization."

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NYSBA Supports Legalization of Adult Recreational Cannabis in New York

Aleece Burgio, co-chair of the Committee on Cannabis Law, addresses NYSBA's House of Delegates in support of the committee's report.

By Christian Nolan

The New York State Bar Association has adopted a report from the NYSBA Committee on Cannabis Law that supports the legalization of adult recreational marijuana use in New York.

The report outlines suggested strategies for the implementation of legalized cannabis in New York state, and was adopted at NYSBA's House of Delegates meeting in New York City Jan. 31 as part of the association's Annual Meeting.

"With the full support of the New York State Bar Association, we are hopeful our report will offer the necessary guidance to New York's governing bodies as they consider the legalization of adult–use cannabis," said Aleece Burgio (Barclay Damon), who co-chairs the committee with Brian J. Malkin (Arent Fox) and presented the report to the House of Delegates.

"The report provides the necessary details surrounding safety, research, social equity, taxation, and other principles critical to the success of a legalized adult use program in this state," continued Burgio. "While policy continues to evolve at the federal level, the committee also believes the most effective way to navigate this complex issue is for any comprehensive cannabis proposal to include hemp, medical marijuana and adult use."

The approval was not unanimous, as some members of the House of Delegates expressed their concerns during the meeting.

"I think we're making a fundamental mistake here by turning around and endorsing the legalization of marijuana," said Michael Markowitz, of the Nassau County Bar Association. "What message are we sending out to the youth of our country by saying that this is OK, that it's OK to take this drug?"

Andre R. "Drew" Jaglom, a member of NYSBA's Executive Committee and chair of the Business Law Section, commented in support of the measure, though noting his remarks were his own and not on behalf of either group.

"Do we want to have a regulated controlled distribution of marijuana where it is more difficult for minors to get access to it but where there is testing and regulation, or do we want to continue with a black market unregulated criminal enterprise controlling the industry?" said Jaglom. "I think we're better off regulating it than leaving it the way it is."

In its detailed 23-page report, the committee said it was not aware of a single jurisdiction that has passed model cannabis regulation and legalized adult-use that would be appropriate for New York to adopt in total.

However, the committee noted that the nonprofit, nonpartisan RAND Corporation has been commissioned by several state legislatures for comprehensive advice and analysis prior to developing their legalized cannabis use legislation and believes New York would similarly benefit by commissioning RAND or a similar organization to conduct such a study or analysis.

The report also recommends that any New York legalized marijuana–use legislation include:

- USDA mandated cannabis testing
- A comprehensive state Office of Cannabis Management
- Provisions for local municipality "opt-out"
- Social equity provisions
- State tax
- Advertising and marketing guidelines
- State environmental protections

The committee also endorses an American Bar Association resolution that would resolve a conflict between federal and state law by exempting marijuana from the federal Controlled Substances Act for production, distribution, possession, or use of marijuana carried out in compliance with state laws.

Under the Compassionate Care Act of 2014, only New Yorkers with prescriptions from qualified medical providers to treat a limited number of ailments may legally use marijuana.

During the last legislative session, state lawmakers proposed various bills that would have legalized adult recreational marijuana use in New York. No such legislation passed, but lawmakers will again consider such proposals over the next couple months.

Last session, legislators did decriminalize marijuana, as possession of up to two ounces or less is now merely a violation.

Cannabis Regulation and Taxation Act

Axel Bernabe, assistant counsel to Gov. Andrew Cuomo for Health, was the keynote speaker Jan. 28 during the Committee on Cannabis Law's program at Annual Meeting.

The governor's proposal would create a state Office of Cannabis Management that would oversee all aspects of the marijuana industry including hemp, medical and adult use. He described the plan as a "bit innovative." Currently, marijuana is regulated by various divisions of state government.

"What we're really doing is shifting enforcement of marijuana from a criminal law framework to a public health framework," said Bernabe.

The Committee on Cannabis Law was not the only NYSBA committee to review the state of cannabis law during Annual Meeting. On Jan. 29, the Commercial and Federal Litigation Section presented the program "Budding Cannabis and CBD Litigation – Are you ready for the green wave heading towards New York?"

Panelists for the discussion were Sara E. Payne of Jushi Holdings; James K. Landau of McCarthy Fingar; and Elinor C. Sutton of Quinn Emmanuel Urquhart & Sullivan.

During Payne's cannabis background and overview presentation, she noted that 34 states and Washington D.C. have comprehensive medical marijuana programs; 11 states and Washington D.C. have legalized adult use recreational marijuana; and the 2020 cannabis industry market projections total approximately $17 billion – $7.7 billion for medical marijuana and $9.3 billion for adult use.

Lastly, the Local and State Government Law Section similarly looked at the regulation of marijuana during a presentation Jan. 30 by Patrick J. Hines of Hodgson Russ in Buffalo.

Axel Bernabe

U.S. Supreme Court Justice Elena Kagan Honored at NYSBA's Sold-Out Gala Dinner

During NYSBA's gala dinner, U.S. Supreme Court Associate Justice Elena Kagan (right) held a half-hour long question and answer session with her former law school classmate, Professor John Q. Barrett, of St. John's University School of Law (left).

By Christian Nolan

Nearly 1,000 members of the New York State Bar Association honored United States Supreme Court Associate Justice Elena Kagan, who shared fascinating insights about Supreme Court deliberations, her presence on social media and her relationship with the other members of the court at a gala dinner in New York City.

The event was held Thursday, Jan. 30 at the American Museum of Natural History, which Kagan said was just five blocks away from where she grew up. She said she visited the museum often with her brother.

"It feels like a homecoming so thank you very much for inviting me home," said Kagan.

Kagan, who said she felt as though she just won at the Olympics, was awarded the Gold Medal, the highest honor bestowed by NYSBA. The Gold Medal is awarded each year to a lawyer whose qualifications include outstanding legal accomplishments, an active interest in and positive influence upon the profession, and constructive contributions in civic and community matters.

Rather than simply give an acceptance speech, Kagan chose to have a half-hour long question and answer session with her 1986 Harvard Law School classmate, Professor John Q. Barrett of St. John's University School of Law.

Kagan was first asked about the challenges associated with being gender firsts – she was the first female solicitor general of the United States and the first female dean at Harvard Law School. She gave all the credit to those who paved the way before her – Justices Ruth Bader Ginsburg and Sandra Day O'Connor, as well as New York Solicitor General Barbara Underwood, who attended the dinner.

She said they were the ones in law school classes with about 10 females, whereas it was "a different world" by the time she and Justice Sonia Sotomayor left law school and classes were around 40 percent female.

In 1987, Kagan clerked for Justice Thurgood Marshall. She returned to the court after her nomination to the Supreme Court in 2010. She described it as a "time capsule" as staff there still remembered her from 23 years earlier and many of the processes hadn't changed. For instance, they still manually hand out paper memos to each other.

"People don't really do this anymore," joked Kagan. "I'm making fun of it, but people don't change what works, I guess."

The Promise

Through the conversation, the audience was able to see a side of Kagan they wouldn't ordinarily see and get to connect with Kagan's personality. Fun fact – she never uses Facebook but is a self-admitted "lurker" on Twitter who uses a different name and never tweets as herself.

In particular detail, Kagan described the time she went hunting with Justice Antonin Scalia.

When going through the confirmation process to become a justice, Kagan made 82 office visits with lawmakers, one of whom was a senator from Idaho. Hunting was important to the senator, who had concerns she wouldn't understand his constituents. She promised that if she got confirmed she'd ask Scalia to take her hunting.

When she told Scalia the story after joining the bench, "he laughed and laughed and laughed." From there she went to his gun club, learned to shoot and eventually went hunting with him.

"I did a lot of fun things with Justice Scalia, I miss it and miss him," Kagan said.

Kagan also noted she's been to a hockey game with Chief Justice John Roberts and to the opera with Justice Ginsburg.

Behind the Black Box

She provided further insight into the justices' work in the "black box" where they discuss their cases. She said the justices, despite their disagreements, are always acting in good faith and they have "a ton of respect for each other."

She said they go around the room and everyone speaks once before someone else can speak a second time. From there, some-

times it's a quick vote count, other times it's a "very engaged back and forth."

"I continue to think that, if people could see it, they would be really proud of the institution, that the institution works really well, that people engage with each other on a very high plane, that there is really good and substantive conversation, that there is never voices raised, there's never any anger," Kagan said. "People are trying to convince other people, and that's how a court should work."

Back to the Future

Kagan is the tenth Supreme Court justice to receive NYSBA's Gold Medal award. NYSBA has deep ties to the U.S. Supreme Court as an institution. Chief Justice Charles Evans Hughes was the State Bar's 29th President from 1917 to 1918 and Associate Justice Robert H. Jackson served as a vice president in 1932.

Other high court recipients of the Gold Medal include: Sandra Day O'Connor (2008), Ruth Bader Ginsburg (1995), William J. Brennan, Jr. (1993), Lewis F. Powell, Jr. (1989), Potter Stewart (1984), Thurgood Marshall (1976), John Marshall Harlan (1966), Felix Frankfurter (1961) and Robert H. Jackson (1954).

Also at the gala dinner, NYSBA honored the judges of the New York Court of Appeals and a large group of current and former judges were in attendance. Other attendees included state Attorney General Letitia James and former U.S. Attorney General Loretta Lynch. Chief Judge Janet DiFiore provided remarks and NYSBA President Hank Greenberg, who described Kagan as a "born judge" and "consensus builder," introduced Kagan.

NYSBA went back to the future with the return of the gala dinner, which had been an annual NYSBA tradition since 1877 but was discontinued in 1995. The gala dinner, part of NYSBA's Annual Meeting in New York City Jan. 27 through 31 was a rousing success and the grand tradition may once again be here to stay.

President Greenberg presided over the NYSBA Gala Dinner, attended by nearly 1,000 members.

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Times They Are A-Changing: Discussing NY's New Bail Reform and Discovery Law

Robert J. Masters, chair of NYSBA's Criminal Justice Section, said more meaningful data on the impact of the new bail and discovery reform laws will be available soon and will show if the law is working as intended.

By Brendan Kennedy

The sky is not falling. That's the conclusion of a panel of experts at the New York State Bar Association's Criminal Justice Section meeting, held on Jan. 29 at NYSBA's 143rd Annual Meeting. Despite recent headlines in print and online media, the changes to bail and discovery laws have not spurred an uptick in crime, they have simply increased fairness in the New York criminal justice system.

The discussion on the recently enacted bail and discovery reform law was moderated by Hon. Barry Kamins, retired New York Supreme Court Justice, and featured Hon. Paul McDonnell, a New York County criminal court judge, John Schoeffel, Esq., Legal Aid Society, and Robert J. Masters, Esq., Criminal Justice Section chair.

Each spoke at length about where the old system was flawed, how the new system reflects laws in most other states, where the legislation falls short and how the singular way this piece legislation became the law is impacting the court.

Fundamental Change

"The arrest process in New York has changed," said McDonnell. "With an E felony or less, an appearance ticket is now mandatory, this is a massive change." Anyone arrested on a crime within the guidelines will be given a ticket and told to come back on a certain date in the future.

Judges must also consider the least restrictive conditions necessary to ensure that defendants will return, including release on their own recognizance with no conditions. If a defendant is determined to be flight risk, a judge can order pre-trial services, which may include phone call and text message reminders for upcoming court dates. Judges still can set curfews, take away passports and firearms and at some point, in the future order electronic monitoring. That service is not yet available in New York, however.

According to Schoeffel, the laws enacted on January 1, 2020 are the most widely–and–longest tested changes in terms of scope and timing. "New York is now just becoming normal," he said. "We're entering the mainstream and going to a basic, fair criminal justice system."

The panel agreed that the legislation did produce some unintended consequences that could be mainly chalked up to drafting errors. However, as McDonnell noted to his fellow judges in attendance, "This is where as judges, you can lend your expertise, make rulings to see how this law is working."

Entering the Mainstream

In terms of the change to discovery laws, New York has now joined 46 other states in allowing witness names and addresses to be handed over, the nationwide norm. The data from states that made this change indicates that this will lead to more protective orders, which will hopefully lead to cooperation.

Schoeffel noted that systems are needed to put up barriers for defense lawyers from talking to witnesses, but it should be the norm, as it has been in other states, for lawyers to be gatekeepers of contact information.

Schoeffel praised Presiding Justice of the Appellate Division, Second Judicial Department, Hon. Alan D. Scheinkman for a recent ruling where he called on the defense and prosecution to resolve such disputes and reach a reasonable accommodation, prior to seeking a ruling from the court.

Changes in pre-plea discovery are some of the most impactful changes enacted by this legislation. Defendants will now have the knowledge of the evidence against them at least seven days prior to the expiration of a plea offer. The hope is to rid the system of pressure on defendants to accept an offer before knowing the full picture of the evidence against them or risk having a plea offer retracted before the discovery process is complete.

> *"New York is now just becoming normal. We're entering the mainstream and going to a basic, fair criminal justice system."*
>
> — John Schoeffel

Impact on the Court

The panelists agreed that it is too early to determine the impact on the court, although early anecdotal signs point to a sea change that the court might not be ready for. Masters noted that based on his career in the Queens District Attorney's Office, setting policy by anecdote is not a good thing.

While holding up a salacious cover of a tabloid newspaper, Masters cautioned that more meaningful data on the impact of the new laws will be available soon and will show if the law is working as intended.

Being one of the biggest criminal justice reforms in more than a generation, the panel also agreed it would be foolish to not acknowledge how this legislation came to be because doing so can muddy how much progress is being made.

"These set of reforms were part of a massive popular movement, which has been understated by law," Schoeffel said. "This was driven by more than the bar associations," he said. "More than 60 groups of clergy, union workers and community groups supported the repeal and that must be recognized."

NYSBA Recommends Changes in Attorney Rules of Professional Conduct

Roy Simon, co-chair of NYSBA's Committee on Standards of Attorney Conduct discusses recommended changes in attorney rules of professional conduct at the House of Delegates meeting Jan. 31.

Lawyers should not be allowed to use nondisclosure agreements to avoid their obligation to report serious misconduct – such as sexual harassment – by other attorneys, under a proposal recently approved by the New York State Bar Association House of Delegates.

The proposal involves Rule 8.3, which requires that lawyers in certain circumstances report other lawyers' professional misconduct. The amendment was unanimously approved by the delegates at NYSBA's 2020 annual meeting, and now goes to the Appellate Division for final action.

"The Committee on Standards of Attorney Conduct believes you should not be allowed to use a nondisclosure agreement to avoid mandatory reporting to disciplinary authorities," said Roy Simon, co-chair of the bar association's Committee on Standards of Attorney Conduct (COSAC). Simon is a professor emeritus of legal ethics at Hofstra Law School and author of Simon's New York Rules of Professional Conduct Annotated.

In a comment on the proposal, the committee on conduct wrote, "For example, if a lawyer is accused of sexual harassment, and if other lawyers in the firm know that such misconduct occurred and raises a substantial question about the alleged harasser's fitness as a lawyer, the other lawyers in the firm cannot avoid their reporting obligations …. by signing a confidential settlement agreement with the accuser."

The issue came to the committee's attention in March 2018, after legal regulators in the United Kingdom reminded lawyers that nondisclosure agreements don't relieve them of their reporting obligations. The British regulators noted that there were relatively few reports of sexual harassment and raised the possibility that some incidents were papered over as a result of nondisclosure agreements.

Nondisclosure agreements in sexual misconduct cases have come under scrutiny in the United States as well, most notably the case of film producer Harvey Weinstein. He was accused of sexually assaulting a number of women over decades, but allegedly reached financial settlements with many of them, in return for insisting on nondisclosures. As a result, his actions were kept largely hidden.

In another proposed change to the standards of conduct, the House of Delegates voted to allow certain attorneys to give financial assistance to indigent clients for urgent needs like food, rent and medicine. The aid can only come from not-for-profit legal services or public interest organizations, law school clinical or pro bono programs, or a lawyer who is providing legal services without a fee.

The lawyer or organization can't advertise or promise in advance that such help might be available. Similar humanitarian provisions have been adopted by 10 other states and the District of Columbia, according to COSAC.

This proposal was developed by the New York City Bar Association, which produced an extensive report on the issue.

"COSAC believes that payments of such expenses may sometimes be necessary to enable potentially meritorious litigation to proceed," the committee wrote in a report. COSAC also encouraged lawyers to educate themselves and their clients on other charitable resources that could help the clients.

The House of Delegates also approved a proposed amendment that would prohibit a lawyer from asking any person, except a client, not to speak with or provide information to another party, unless the person is the client's relative, employee or other agent and the advice would not harm the person's interest. However, under the amendment, a lawyer could inform any person they have the right not to talk to another party.

Also approved was a comment making clear that a lawyer's conversion or theft of a client's or third party's funds presumptively raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer.

The delegates also approved language stating that policies supporting discipline for false statements in bar admission applications also apply to applications for reinstatement. Also approved was a proposal saying that the rules do not require the disclosure of information about lawyers that is gained through a bona fide lawyer assistance program.

All the proposals will be sent to the Appellate Division, which, under New York law, has the authority to adopt rules governing lawyer conduct. Once the court considers them, it will decide whether the proposals should be adopted as rules of the court. Until that happens, the proposals are simply the bar association's recommendations to the court and are not binding on attorneys, noted NYSBA General Counsel Kathleen R. Mulligan Baxter.

Panel Examines Vaping Dangers, Response

Kimberly Anne Kessler, assistant health commissioner for the Bureau of Chronic Disease Prevention at the state Department of Mental Health and Hygiene, speaks to a panel of the Food, Drug and Cosmetic Law Section at Annual Meeting.

"One of the most baffling regulatory failures we've ever seen, or will see."

That's how David Dobbins, chief operating officer of the anti-tobacco Truth Initiative, views the federal Food and Drug Administration's hands-off approach to e-cigarettes, at a time when the number of teens using them is skyrocketing.

Dobbins spoke to a panel of the Food, Drug and Cosmetic Law Section at the 2020 Annual Meeting of the New York State Bar Association (NYSBA).

A recent survey found that 11 percent of middle schoolers and 28 percent of high schoolers have vaped, statistics that Dobbins called "terrifying."

Truth Initiative, the largest anti-tobacco nonprofit, and other public health groups have sued the FDA over its lack of oversight of e-cigarette marketing. The FDA has had the power to regulate cigarettes since 2009, and in August 2016, said it would start regulating e-cigarettes as well. But after President Trump took office, the FDA said it would delay oversight on e-cigarettes until 2022.

There has been some federal action related to vaping. The Trump administration recently announced limits on the use of e-cigarette flavors, which tend to appeal to teens. And federal health officials are investigating recent cases of lung injuries – some fatal – tied to vaping.

In the meantime, state and local governments are stepping up their efforts against vaping, panelists told the session. Several, including New York City, have already banned flavored e-cigarettes.

Morenike Fajana, special counsel at the New York attorney general's office, said that New York State has sued Juul, which introduced e-cigarettes in 2015 with a wave of advertising and flavors like creme brulee, mango and peach. The advertising campaign featured bright colors and young models, and was clearly "geared toward children," Fajana said.

The attorney general's office filed a lawsuit in November 2019 that accused the company of deceptive advertising, marketing and selling to young people, and misrepresenting e-cigarettes as safer than regular cigarettes.

New York State has also banned the sale of e-cigarettes to anyone under 21, and prohibited vaping indoors and at playgrounds, Fajana said. In addition, two bills have been introduced to entirely ban e-cigarettes in the state, she said.

Kimberly Anne Kessler, assistant health commissioner for the Bureau of Chronic Disease Prevention at the state Department of Mental Health and Hygiene, said that New York City has a number of initiatives that "make it harder to smoke and easier to quit." For example, a 2018 city law sets a minimum price of $13 a pack for cigarettes, making them too costly for many teens and adults.

Adult use of cigarettes in the city has declined from about 21.5 percent in 2002 to about 13 percent now, Kessler said.

But she called the growth of e-cigarette use among young people "an emerging public health crisis." While traditional cigarette use has plummeted to about 5 percent of public high school students in 2017, the growth of vaping has wiped out all those public health gains, with about 21 percent of teens using tobacco in some form, she said.

Kessler said her department has recommended that pediatricians start screening patients for e-cigarette use starting at age 10. In addition, the department has a digital media campaign aimed at kids, emphasizing the risk of addiction.

Without federal regulation, it's not clear what exactly is in vape smoke, although it's believed that it includes dangerous chemicals, Kessler said.

"We really don't know what's in these products," Kessler said, "but there are a number of reasons to be quite concerned."

Police Transparency in a Digital Age

Rachel Strom, partner at Davis Wright Tremaine, speaks at NYSBA's Task Force on Free Expression in the Digital Age panel discussion at Annual Meeting. At left is New York County Criminal Court Judge Paul McDonnell.

By Christian Nolan

Police, the public and the media all agree that greater access and transparency is beneficial to all. But according to lawyers representing both the media and law enforcement, there is still a long way to go.

Saul Shapiro, a partner at Patterson Belknap Webb & Tyler where he chairs the firm's litigation department, said despite the enormous publicity and stated goals of transparency regarding the NYPD's use of body cams, the public is seeing far less of the footage than expected.

Shapiro, who has represented NY1 in ongoing litigation against the NYPD over the release of body cam footage, said the NYPD discloses what "looks helpful" to the police department, who then put forth "every exception under the sun" for why they cannot release requested footage, and then the two sides engage in costly litigation.

Shapiro's comments were part of a fascinating discussion, "From Body Cam Footage to Sealed Court Records: Rethinking Access Law in a Digital Age," presented Monday, Jan. 27 at Annual Meeting by the New York State Bar Association's Task Force on Free Expression in the Digital Age.

The roundtable panel was moderated by Lynn Oberlander, senior vice president and associate general counsel at Univision. Other panelists were recently appointed New York County Criminal Court Judge Paul McDonnell; Ernest Hart, the deputy commissioner of legal matters with the New York Police Department; Rachel Strom, partner at Davis Wright Tremaine; and Al-Amyn Sumar, an associate at Ballard Spahr who previously worked as a First Amendment fellow at The New York Times.

Hart, a former state Supreme Court judge, sees it differently than Shapiro. He oversees various transparency issues, including those arising from body cam footage and the NYPD's efforts to repeal state Civil Rights Law 50A, which protect police officers' personnel files from the public.

"It's definitely challenging to work on these transparency issues," Hart said.

Hart claims the department receives over 25,000 Freedom of Information requests a year and released body cam footage in 6,000 of those cases. The department freely uploads thousands of other police body camera videos every week. If ten police officers arrive to the scene of an incident, that's ten officers' body cam footage that needs to be reviewed and uploaded.

In terms of 50A, Hart said unsubstantiated allegations should not leave an officer subject to "ridicule."

"We're making a strong effort to be a bit more accommodating," said Hart. "I certainly do not have a problem with the press trying to get everything they can, but they have to understand that sometimes we have to push back a bit. They don't always win. We don't always win."

Oberlander was quick to defend the public's right to access in response to Hart. She likened unsubstantiated claims to what goes on the internet all the time, such as with Yelp reviews, allowing the public to make up their own mind about a matter.

Oberlander said if one police officer has four times as many unsubstantiated complaints as his or her colleagues "maybe there's something to look at there."

The task force, which is chaired by David McCraw, deputy general counsel for The New York Times, and Cynthia Arato, partner at Shapiro Arato Bach, is looking at possible reforms in the state Freedom of Information Law and the legal rules that determine the rights of journalists and other citizens to get access to court records.

This event was one in a continuing series of forums that the task force has hosted as part of a project investigating the crisis in local journalism and what the law and lawyers can do to help assure that citizens have access to the vital information they need.

For more information about the task force, including video of prior panel discussions, please visit nysba.org/freeexpression/.

Atari 2600 to Esports: EASL Section Examines Evolution of Video Game Industry

By Christian Nolan

For law firms thinking about introducing video game law to their practice, consider this – in 2019, the U.S. video game industry generated $35.4 billion in revenue.

"Whatever sense you had about video games … wipe that slate clean," said Ben Golant, chief counsel for intellectual property policy at the Entertainment Software Association in Washington, D.C.

Golant represents the video game industry before U.S. Congress, courts, the executive branch, and government agencies involved in IP policy and enforcement.

Gone are the days of video games being mainly played by teenaged boys in their basement while eating Doritos. Commonly referred to as "gamers," Golant said 75 percent of Americans have at least one gamer in their household.

The average age of a gamer is now 33 years old. The 18–35 demographic is still the largest segment at 40 percent. Women now make up 46 percent of gamers.

"Even if you play Candy Crush on your mobile device, you are a gamer," said Golant, noting that Pokémon Go has now been downloaded a billion times. "Don't think because you don't play a console game that you're not a gamer because that's not the case anymore."

Video games have also provided lawyers with plenty of other work, as the industry has branched out to movies, soundtracks and even fashion.

> *"Even if you play Candy Crush on your mobile device, you are a gamer"*
>
> — Ben Golant

Golant's comments were from a panel discussion "Video Games and ESports," as part of the New York State Bar Association's Entertainment, Arts and Sports Law Section events Jan. 28 at Annual Meeting.

The panel was moderated by Jeffrey R. Cadwell, a partner at Dorsey & Whitney. The other panelists were Gerald Wang, vice president of business affairs at Take-Two Interactive Software; Leo Wan, senior legal counsel at theScore; and Stuart Goldfarb, general counsel and chief operating officer at the Electronic Gaming Federation.

Esports

Wang explained the industry shift in the way people consume video game content.

"People are actually watching video games as spectators," said Wang. "… That impacts the way we market games."

Wang said 10 years ago video games were still marketed in traditional ways such as advertisements, television commercials, and partnerships with retailers. Now, he said "social media influences how we push out games."

Wang said one of his employer's big titles is NBA 2K. The NBA 2K League is an esports league joint venture between the National Basketball Association and Take-Two Interactive. The league brings together the most talented gamers in the world. Games are livestreamed on Twitch.

He said in late January, YouTube also announced a partnership with a competitor in the industry to stream esports.

"It gives you a sense of how important this space is for us developers," said Wang.

Opioid Crisis Requires New Approach to Handling Addicts

Bridget G. Brennan, New York City's top narcotics prosecutor, speaks at a panel discussion about the opioid crisis at NYSBA's Annual Meeting.

By Brendan Kennedy

New York City's top narcotics prosecutor and two innovative judges from Buffalo and the Bronx agree that the opioid epidemic requires a re-thinking of how to handle cases involving those addicted to opioids.

A panel discussion at the New York State Bar Association's Annual Meeting titled, 'Opioids; Availability, Physician Involvement, Enforcement Issue and Treatment Courts,' brought together experts that have dealt first-hand with the damage that can be done to communities and individuals.

Bridget G. Brennan, special narcotics prosecutor for the City of New York, Hon. Craig D. Hannah, supervising judge, Buffalo City Court and Hon. George Grasso, supervising judge, Bronx County, each spoke about the difficulties dealing with an epidemic that saw a 200% increase in overdose deaths in New York between 2010 and 2017.

Brennan described the different waves of this epidemic, how it has evolved over time and its impact, which is becoming even more deadly with the introduction of synthetic opioids like fentanyl and fentanyl analogs.

The number of overdose deaths nationwide was more than 64,000 in 2016, which is more than the total deaths in the Vietnam, Iraq and Afghanistan Wars combined. In New York State alone the number of overdose deaths was over 2,300.

"Overdose deaths have eclipsed the combined deaths of homicide and traffic fatalities," Brennan said. "This is a crisis of despair, not just of oversupply. These drugs have a significant impact on the brain, causing dependence on them. It's an insidious addiction, that we cannot arrest our way out of."

The opioid epidemic has gone through numerous phases according to Brennan, who has served in her current role since 1998. She described how it began as rogue doctors overprescribing dangerous and addictive pills like Oxycodone, but prosecutors were able to put a stop to that through arrests and prosecutions. Oxycodone prescriptions have been steadily decreasing since 2015, peaking that year with 1.3 million. Current data shows that there are just over 1 million prescriptions.

The cost of the drug was also a big factor in precipitating the decline.

"The cost of these pills could reach as high as $30 per pill, which drove addicts to the streets to find a cheaper alternative," Judge Hannah said. "When it costs $30 for Oxy and $5 for heroin, it became an economic choice."

Both Judge Hannah and Judge Grasso are working with the Office of Court Administration to look at these cases in a new light. Finding a way to treat these cases with innovative pre-trial services is imperative for success.

In the Buffalo Opioid Intervention Court, Hannah can see clients, as he refers to them, within hours of their arrest and after it's established that they have an opioid addiction. If enrolled, participants are released from custody if they agree to follow the established treatment protocol, which is developed by Hannah and his staff for each individual enrolled.

"This model became necessary because people were not making it to their next court appearances," he said. "They would be arrested and as can be the case with many addicts, the next hit could likely be their last."

On the opposite side of the state, Bronx County Criminal Court established two specialized courts that targeted low-level offenders at high risk of overdose, a first for New York City. Under the direction of Judge Grasso, the Overdose Avoidance and Recovery (OAR) court offers treatment as an alternative to incarceration. Those that complete the OAR program will have their cases dismissed and sealed.

"Meaningful engagement with these offenders, like linking them with community service organizations, is the goal," he said. "The OAR court was created with a group of like-minded agencies that share a common goal in saving lives."

The 'Gig Economy' and Why it Matters

By Joan Fucillo

Jonathan Ben-Asher started with a lesson in semantics.

"Some call it the 'sharing economy' or the 'on-demand economy," he said, "but 'gig economy' is more reality-based."

Ben-Asher (Ritz Clark & Ben-Asher) was part of a panel discussion on "The Gig Economy" at the New York State Bar Association's Labor and Employment Law program during NYSBA's 2020 Annual Meeting. He was joined by Terri Gerstein (Harvard Labor and Worklife Program), Lisa Lupion (Orrick Herrington & Sutcliffe) and Patricia Smith (National Employment Law Project).

Lisa Lupion of Orrick Herrington & Sutcliff discusses the Gig Economy at a Labor and Employment Law Section panel. Also, from left to right: Jonathan Ben-Asher of Ritz Clark & Ben-Asher, Terri Gerstein, director of the State and Local Enforcement Project, Harvard Law School, and M. Patricia Smith, senior counsel, National Employment Law Project.

Gig workers take on temporary or project-based jobs of different durations performing personal services to consumers or contract work for companies. Workers connect with contractors or consumers via online digital platforms or apps.

This type of work comes without income stability, job continuity, health insurance, retirement plans, unemployment insurance, disability, severance or collective bargaining rights. It also offers no safety net and requires no contributions to Social Security or Medicare. What does it offer? Flexibility – most particularly the ability to say 'no.'

For people who want to pick up extra cash, gigging can be convenient. But the unreliability of gig work makes it a very difficult way to make a living. There is a wide range of gig workers and a wide range of reasons for taking on gig work, which has made it almost impossible to accurately measure or define its effect on the economy.

People who take on temporary jobs of any sort can be considered gig workers. The Federal Reserve (2018) estimates that 31% of all adults are part of the gig economy while the Bureau of Labor Statistics (2017) estimates they are about one percent of the workforce. Yet, the Bureau of Labor Statistics' contingent work survey (2018) estimated that 10.1% of workers were in "alternative work arrangements."

The gig workers that concerned the panel are those trying to make a living. According to Upwork/Freelancers (2019) younger workers 'freelance' (gig) the most. Almost 60% live paycheck to paycheck and only 43% have enough saved to get through two weeks without a gig.

Let's say the worker is providing a cleaning service to consumers through an app-based platform and essentially working fulltime. Yet the company classifies that worker as an independent contractor, because it just helps people find each other. But if that worker is injured on the job the worker pays the costs – or the public does.

So, is a worker an independent contractor or an employee? It is a question of control. Gerstein noted that recently California established a strict test as to whether a gig worker is an independent contractor or an employee. Known as the "ABC" test, it was included in Assembly Bill 5, which became law in December. Uber, Lyft and DoorDash have pledged to spend $90 million on efforts to repeal the law.

According to the "ABC" test, workers are independent contractors, if a business must prove that they (a) are free from the company's control and direction, (b) perform work that is outside the hiring entity's business, and (c) customarily engage in an independent established trade in that industry. If they don't meet all three criteria, they are employees.

Smith pointed out that even as these companies are challenging the law, they are looking for ways to retool their practices in order to avoid the law, as that ultimately might be a better for business decision.

Other tactics, said Lupion, include requesting opinion letters from the Department of Labor to bolster their case. However, she added. these do not always hold up in state court. State and local law can override the federal opinions, Lupion noted, so don't be afraid to challenge them.

State agencies, Gerstein added, such as the Division of Human Rights and the attorney general's office have a powerful arsenal.

New York City's Freelance Isn't Free Act took effect in 2017. It gives the city's Corporation Counsel the power to file suit. Specifically, freelancers have the right to a written contract, timely and full payment and protection from retaliation.

In response to growing concerns, Governor Andrew Cuomo created the Digital Marketplace Worker Classification Task Force to study California's ABC test and to see what could be done in New York

Legislation to give New York State's gig workers some form of collective bargaining rights was proposed last year and has been reintroduced in the state Legislature's current session.

As in California, expect pushback from the digital platform industry. In her program materials, Lupion noted that "employment laws written in the 1930s simply haven't kept up with the pace of innovation and trying to apply them to the way services are delivered today can be like trying to fit a square peg into a round hole."

And yet, although the new technologies present challenges, in her 2017 testimony before Congress, Sharon Block, executive director of the Harvard Labor and Worklife Program, argued that basic labor and employment protections have never undermined the dynamism of the American economy.

Smith saw an underlying issue that can be corrected with education. "Young startups are clueless when it comes to labor and employment law," she observed. "Every business school in the country needs to have labor law in its curriculum."

Attorneys Provide Advice on How to Prevent Animal Shelters from Getting into Trouble

As part of the events for NYSBA's Committee on Animals and the Law at Annual Meeting was a Pet-A-Puppy adoption event on Jan. 29 co-sponsored with Bedford's RESCUE RIGHT.

A cat owner moves out of her apartment, leaving the pets behind. Her former roommate's family brings the cats to the animal shelter, and they are adopted. Then the original owner shows up at the shelter, demanding the cats back.

A rescue group gives a dog to a foster guardian for temporary care, but when it's time to return the dog, the foster guardian says she doesn't have it.

A dog is adopted, and becomes ill. The new owner claims that the shelter should be liable for the veterinary bills.

When it comes to animals, people can sometimes fight like cats and dogs. The Committee on Animals and the Law discussed some of these legal issues at a recent program during the 2020 annual meeting of the New York State Bar Association titled "From Theory to Practice: The Legalities of Animal Shelter and Rescue Operations."

Elinor Molbegott, a practitioner in East Williston who represents a number of shelters, told the audience that shelters and rescue organizations need sound legal documents to deal with incidents like the real cases listed above. Shelters need adoption, foster and surrender agreements, as well as waivers and releases. And they should require proof of ownership and proof of identity of the person surrendering the animal.

"How do you know the person is the animal's owner?" asked Molbegott, who said she has seen animals euthanized after being turned over to shelters by landlords, neighbors or relatives of the owner.

Sometimes, pet owners surrender an animal and then change their minds. "If you have a good surrender form, you make it clear they are relinquishing all rights," Molbegott said.

Along with the right documents, Molbegott urged "common sense and a sense of humanity" on the part of animal organizations. And she recommended good insurance, saying that lawsuits are inevitable.

Judith L. Siegel, senior staff attorney of the Pro Bono Partnership in White Plains, laid out what people need to know to set up a nonprofit shelter or rescue operation in New York State. She warned that establishing and running an organization can be complicated, and funding can be scarce, and recommended that advocates first look to see if another group is pursuing the same mission.

"People think every good idea deserves a nonprofit; that is not the case," Siegel said.

She also cautioned nonprofit organizations about pitfalls. "Can you engage in political activity? Absolutely not," she said. That will get your nonprofit status yanked.

How about a loan to a board member? "That's a hard no."

Jack Fein, president of the Dutchess County Society for the Prevention of Cruelty to Animals, traced the history of animal protection efforts, and the laws governing them, back to Colonial times. Animals generally are protected by three types of organizations – government-run shelters, private shelters and rescue groups.

Regulation of private shelters and rescue groups has been on the rise. As of 2017, 35 states had laws requiring them to be licensed or registered, up from 20 in 2012, he said.

Some shelters have an open adoption policy, on the theory that any adoption is better than life in a shelter, Fein said. Others screen adoptive owners more carefully; they tend to have fewer animals returned, he said.

The panel also featured a visit by two dogs, Tangy and Hechi, rescued from China, where they were destined for the dog meat market. Their rescuer, Penelope Smith-Berk, owner of Northwind Kennels in Bedford, also brought the dogs to the main reception hall of the NYSBA annual meeting, where they gave lawyers a bit of puppy love.

Being an Ally for Diversity & Inclusion

Karen Gray, of A+E Networks Group, discusses diversity and inclusion during the 2020 Constance Motley Baker Symposium at Annual Meeting.

By Brendan Kennedy

The statistics about pay equity among the sexes remain stark and eye-opening: black women earn 61 cents for every dollar earned by their white male counterparts. Native American women earn 58 cents to every dollar and Latina women earn 53 cents. Meanwhile white women and Asian women earn 77 and 85 cents, respectively. A recent study found 85% of women of color quit big law within seven years citing reasons feeling a sense of not belonging and lack of access to equal opportunity.

Pay equity is one aspect of equal opportunity, which was the topic explored at the 2020 Constance Motley Baker Symposium, on Monday Jan. 28 at the New York State Bar Association Annual Meeting.

Panelists at the event discussed 'How to Increase Equality at Work for Women of Color.' Panelists Karen Gray (A+E Networks Group), Betty Ng, (Inspiring Diversity LLC) and Mirna M. Santiago (Girls Rule the Law!), each shared personal experiences of microaggressions and unconscious biases occurring in the workplace, while also discussing how workplaces can continue to improve in the areas of diversity and inclusion.

Despite woefully inadequate pay equity and retention statistics regarding women of color in the law, hope is not lost. As noted by Rawia Ashraf in her opening remarks, "Just the mere existence of a panel like this, talking about this subject is proof that progress is indeed being made."

Being An Ally

Recent studies have found that in the legal profession 90% of equity partners are white males, so when opportunities present themselves, men should play the role of ally.

"Making a conscious push to elevate women of color, it's a matter of people saying 'we're going to do this,'" said Santiago who also serves as co-chair of the Committee on Diversity & Inclusion.

She then gave State Bar President Hank Greenberg a shoutout for his announcement from this past June that all 59 NYSBA committees, task forces and working groups will be chaired, co-chaired or vice-chaired by women, people of color or other individuals who represent diversity.

Acts like this are the exact types of steps allies should be taking, according to Santiago and borrowing the popular Nike slogan, she implored attendees to 'just do it.'

Light Bulb Moments

Creating alliances, giving people opportunities to be a part of meetings and seeking their counsel in areas where they have expertise are all realistic steps that can be taken in workplaces in every business sector to foster a more inclusive environment.

"Create light bulb moments," said Ng. "Simply by showing how diversity with inclusion impacted your team positively is enough. Share the success stories of diversity within your community, they will help influence positive biases."

Gray puts it plain terms to potential clients telling them, "It's just smart business to hire diverse teams, putting it in business language that diversity is important to you can go a long way."

Staring Down the Profession's Implicit Biases

By Joan Fucillo

Women outnumber men in law school and comprise nearly half of law firm associates. Yet for almost two decades, the percentage of female partners at law firms has hovered around 20% for both equity and non-equity partners, and women leave the legal profession in significantly greater numbers than men. Studies show that a primary reason for this attrition is the harassment and gender bias experienced by many women in the legal profession.

These facts and they issues they point to are the backdrop for the New York State Bar Association Women in Law Section's (WILS) 16th Annual Edith I. Spivack Symposium, a full-day program held on January 28 at NYSBA's Annual Meeting.

Captain Brenda Berkman, Esq., a retired FDNY firefighter and attorney from New York City, was a panelist at the Women in Law Section's "Strategies to Combat Implicit Bias" event.

Speaking Out and Stepping Up

Confronting implicit bias is a journey that requires us to develop a "growth mindset" and "stumble upwards," New York Public Library Vice President, General Counsel and Secretary of Michele Coleman Mayes said in her keynote address at the program. Use "light" and "heat" to stare down bias, she added, explaining that we use "light" when we educate others about bias and advocate for diversity and inclusion, and "heat" when we confront and interrupt biases.

Mayes has been a trailblazer in her own career and a powerful voice for diversity and inclusion. She outlined the four common patterns of gender bias that exist in the workplace, including the legal workplace. Mayes encouraged attendees not to fall into the traps set by those biases – don't apologize, doubt your own worth, accept "housework" assignments or undervalue your time. Rather, said Mayes, interrupt the patterns of gender bias – promote your own accomplishments, ask for constructive feedback, convey your value, develop allies and help others up the ladder.

Taking Charge

A panel on strategies to confront implicit bias was moderated by Program Co-Chair Laura Sulem, Esq., Thomson Reuters, and Leona A. Krasner, Esq., Krasner Law PLLC. Sulem and Krasner were joined by Captain Brenda Berkman, Esq. (ret.), Fire Department of New York City(FDNY); Caitlin Halligan, Esq., Selendy & Gay PLLC; Ynesse Abdul-Malak, RN, MPH, Ph.D., Colgate University; and Hon. Karla Moskowitz (ret.), hearing officer, National Arbitration and Mediation.

Berkman described her move from practicing law to making law as the named plaintiff in a class-action lawsuit that opened the doors of the FDNY training academy. She continued to face the biases of her fellow firefighters as well as members of the public for whom "firefighters equal men." Even today, she added, women in the FDNY "are under the microscope."

Abdul-Malak detailed the barriers and stereotypes faced by attorneys with disabilities, and by attorneys based on their sexual orientation or transgender status. Halligan observed that the pay gap between women and men in the law has been growing wider.

Moskowitz noted that the 2017 Commercial and Federal Litigation Section's report on women in the courtroom revealed that women are given fewer opportunities to argue cases. "It is huge for senior partners to see [women] argue in court," Moskowitz said. If they see only men arguing in court, then that's what is expected, she added, calling it a self-perpetuating cycle. Moskowitz described her first implicit bias training as part of a judges' retreat: "The men walked out," she recalled, because they felt "they didn't need it."

Moskowitz noted that, as a result of the Commercial and Federal Litigation Section's report, some judges are now trying to be proactive, encouraging female and other junior attorneys to argue motions and cases.

Halligan pointed out that her firm, Selendy & Gay, is owned mostly by female partners. The firm's strategy includes making sure that everyone has challenging work and undergoes "training in business development skills and how to network – even if you don't play golf." The senior lawyers in her firm conduct mock arguments with associates to give them specific feedback and help build their confidence.

Abdul-Malak agreed that one-to-one coaching and mentoring are effective tools.

Berkman pointed out that relying on hiring quotas to bring parity in a workplace will not change implicit biases. "You must step it up – by promoting yourself and challenging biased behavior," she said. "And once you are there, you must be supportive of others" such as by confronting biased behavior that junior colleagues might encounter.

Sometimes, "you have to just do it," said Moskowitz. She noted that Judge Judith Kaye, the first woman judge of the New York Court of Appeals and its first woman chief judge, "changed the entire court system. She created the commercial division of the state Supreme Court; she changed family law to focus on children. She just did it."

Berkman noted that best argument for diversity is that different perspectives help everyone. In her line of work, for example, having people with even a slightly different take on a situation "can save

your life." But fighting for diversity can be hard, she acknowledged. If you are "the token" in your workplace you might be reluctant to take a stand – it's too risky. "We need you – women attorneys – as allies," she said.

Legislating Diversity and Inclusion

Another panel reviewed recent legislation, including paid family leave, mandatory harassment prevention training, pay equity and anti-discrimination laws intended to interrupt biases and achieve workplace equality.

WILS Chair-Elect Sheryl B. Galler, Esq., Law Office of Sheryl B. Galler, and Renata Neeser, Esq., Littler Mendelson, moderated the discussion. Other panelists were Alnisa Bell, Esq., Seyfarth Shaw; Karen DeMeola, Esq., University of Connecticut School of Law; and John W. Hamlin, Esq., Marsh & McLennan.

Paid Family Leave

Galler summarized the recently enacted New York State Paid Family Leave Act. Compared to other states' first year implementing paid family leave, New York's first year, 2018, had the highest overall participation rate and the highest percentage of men using leave in states that offer parental leave.

Hamlin said that, from the perspective of many employees, "women take family leave, men do not." Galler recounted being confronted with a hypothetical question: Why should a female colleague, who took maternity leave, have the same seniority as a male colleague? DeMeola added that, in her experience conducting firmwide trainings on family leave, "half the room is crying, and half the room is angry." She noted that firms fret about losing money, employees want to be able to take leave without harming their careers, and co-workers are concerned about having to cover for their absent colleagues.

The panelists agreed that employers need to encourage all employees to take family leave. "When more men also take advantage of family leave, it becomes normalized and expected," Hamlin noted. "If a male manager urges male employees to take it that makes a big difference." Neeser added that "it helps men see women differently."

Bell described her firm's plan, which removes the expectations for billable hours as a barrier to attorneys taking family leave. The firm "gives hours before leave and has a transition plan" for building up hours when the attorney returns, she added.

Sexual Harassment Prevention

Bell summarized the New York State requirements for sexual harassment prevention training. Galler mentioned that, while it is still very new, some training programs use virtual reality headsets to put people in other people's shoes.

Bell explained the advantages of a strong anti-harassment policy. Complaints can cost companies a lot of money, and it is in their interest, she said, "to get rid of the harasser." If the company doesn't act, she advised being blunt: "Are you prepared to deal with the consequences?"

In the advent of #MeToo, Hamlin's company developed a small-group training program. Still, he said, some men do not want to work with women for fear of #MeToo. The panelists agreed that such attitudes are never acceptable.

"We have to teach our sons to wake up to bias," Neeser responded, "and to bring up examples" that show the complexities of bias – "and not rely on tropes."

What if staff is reluctant to report incidents of bias or harassment to human resources because it is seen as the arm of the company?

What's needed, said DeMeola, is a standalone entity for receiving reports. She also emphasized the importance of having allies in senior staff – especially for those who might feel powerless in an awkward situation and need a strong voice.

Galler said that companies also need "very robust anti-retaliation policies."

Hamlin agreed, adding that lawyers who are bystanders to such incidents can be part of the problem. "We are trained in 'it depends,'" he said.

"The laws provide that you can't retaliate, but the truth is, it's easier to prove retaliation than it is to prove bias," said Neeser.

Anti-Discrimination Laws

Corporate culture is slow to change, said Bell, and companies risk losing employees that bring different viewpoints to the table – perspectives that companies need.

DeMeola noted that "professionalism" in corporate culture is based on a Euro-centric definition and disproportionately affects people of color, particularly in terms of their hair, and transgender/gender nonconforming individuals whose dress is not the defined norm. Bias is a factor even in resume review – "'John' gets called back more often than 'Jamal,'" she said.

Hair is a huge issue for black people, said Bell, and she applauded New York's Crown Act, which disallows discrimination based on hair.

Bell noted that when a firm or corporate culture fails to support diversity, "some people just opt out – although not everyone has that luxury," Bell said. "I am hopeful that change will accelerate as the younger generation of attorneys moves up" into positions of authority.

Pay Equity

New York requires pay equity and no longer allows questions about salary history, said Neeser, which are steps forward. Hamlin pointed out that companies do not need to know an employee's salary history to make an appropriate offer. He added that most corporations have a way of figuring out how much a job is worth, so "transparency would take care of the issue."

"Still, when men have children, they get paid more. When women have children, they get paid less, and the pay gap is growing," Neeser acknowledged. "We need equal pay for substantially similar work and to get there we need a federal baseline," adding that the current patchwork of laws and regulations isn't working.

All of the panelists agreed that recently enacted laws are moving us closer to workplace equality. But the laws are not enough without change on the ground. Galler noted that, incredibly, someone who heard about New York's pay equity law asked her why a company would hire a woman, who will use family leave and childcare, if the company cannot pay her less than a man. Galler and the panelists agreed that such questions are an indication that we, as attorneys and business leaders, need to respond not only with laws but with education and efforts to change culture and attitudes.

Employers and employees, firms and clients all benefit when there is workplace diversity. Bell pointed to her own experience as an example. Because her firm "built in hours for me before and after [family] leave," she stayed on partnership track and became a partner at her firm this year.

The Ethical Ramifications of Implicit Bias

How bias can impact the representation of clients and the handling of employment issues in the legal workplace was the focus of a panel moderated by WILS members Kathleen Lyons, Esq., AXIS Reinsurance, and Rosary Morelli, Esq., Raskin Morelli LLP, with panelists Laurie A. Kamaiko, Esq., Saul Ewing Arnstein & Lehr, LLP; Rachel H. Kim, Esq., Sompo International Holding Ltd.; Pery D. Krinsky, Esq., Krinsky PLLC; and Loren L. Pani, Esq. and Elliott J. Zucker, Esq., Aaronson Rappaport Feinstein & Deutsch, LLP.

The panel presented live enactments of situations involving implicit bias in the legal workplace and during depositions. Through these vignettes, Krinsky engaged the audience in a lively discussion of which conduct is ethically acceptable and which crosses the line.

SU Law Dean Prepares Students for a 21st Century Law Practice

Craig M. Boise, dean and professor of law at the Syracuse University College of Law delivers the keynote speech at the NYSBA's Judicial Section luncheon Jan. 31 at Annual Meeting.

By Christian Nolan

Craig M. Boise, dean and professor of law at the Syracuse University College of Law, predicts continued flat or declining law school enrollments across the country for the next decade.

"We're now in the 126th month of the longest economic expansion in the history of the country, and yet fewer law grads are being hired now than were being hired in 2007," said Boise. "Employment rates among recent graduating law classes are higher, but only because there are so many fewer law graduates than in previous years. If ten years of economic expansion can't drive growth in enrollment, then it's hard to imagine what will."

The trend of declining and now flat law school enrollment began because of weakness in the legal job market that resulted from the 2007–2009 Great Recession. According to the American Bar Association, first-year law school enrollment across the country was just over 52,000 students in 2010. In 2019, just over 38,000 students were enrolled – a 27% drop.

Boise explained that undergraduate enrollments have now fallen for seven consecutive years, according to the Chronicle of Higher Education, and in a few years that will be exacerbated by a 15 percent decline in the Northeast of the population of 18-year-olds.

"So even if the legal job market somehow defies gravity and improves dramatically, there will simply be fewer college graduates available to pursue a legal education," said Boise.

Boise's remarks came as he delivered the keynote speech at the New York State Bar Association's Judicial Section luncheon Jan. 31 during Annual Meeting.

"The upshot" of all this data, according to Boise, is that law schools must "evolve" to attract different kinds of students going forward. For instance, last year Syracuse launched the nation's first ABA-approved online JD program that combines live interactive class sessions with self-paced classes, in-person residencies in Syracuse, and externships.

Boise said these types of programs have the potential to address the rural lawyer crisis by allowing students to earn their law degrees from the communities in which they plan to practice and live. He said they have students from rural towns in Texas, Arizona, Wisconsin and Alaska.

Adapting the Law Curriculum

Another challenge law schools face today, Boise said, is adapting the law school curriculum to the future of law practice.

"Let me just say that I welcome the recent national interest in rethinking the bar exam," said Boise. "The dominance of traditional bar subjects makes it difficult to expand our curriculum into current critical legal topics, including subjects like compliance, data privacy and cybersecurity, smart contracts and the blockchain, healthcare, the legal implications of climate change and others.

"In addition, courses in technology and the law will be absolutely essential," continued Boise. "Already, artificial intelligence is being applied to the tricky problem of flight risk, and arbitrations and settlements are on the rise, thanks in part to increased use of risk analysis and predictive analytics software."

Boise said technology will not totally replace the need for human critical thinking, judgment, and decision-making but that it is already helping lawyers and judges work smarter, more efficiently, and more accurately.

At Syracuse, Boise said they are developing a number of new courses to prepare students for a 21st Century law practice including the collaboration with NYSBA last fall for a one-credit "Technology and the Law" course.

The class, developed closely with Mark Berman, chair of NYSBA's Committee on Technology and the Legal Profession, provides students an understanding of the fundamentals of how technology impacts their practice, the legal system and legal ethics.

Boise said Syracuse's innovations like its new technology classes, expanding externship program and online JD program "aren't being developed in a vacuum."

"Nor are those that are being developed and implemented by other New York law schools," said Boise. "They are the result of consultation with lawyers on the front lines of practice. They are also inspired by changes we see implemented by you, the judges in our courts."

NYSBA ANNUAL MEETING

The New York State Bar Association's Annual Meeting was held Jan. 27-31 at the New York Hilton Midtown.

NYSBA and officers of the Seoul bar Association after signing a memorandum of understanding between the two organizations. Left to right: T. Andrew Brown, NYSBA president-elect designee; Hyun Suk Choi, co-chair of the Membership Committee; Scott Karson, NYSBA president-elect ; SeungMin Lee, director of international affairs of the Seoul Bar Association; Hank Greenberg, NYSBA president; JongWoo Park, president, Seoul Bar Association; Diane O'Connell, chair, NYSBA International Section; and Jay Himes, chair-elect, International Section.

Participants in the 2020 Constance Motley Baker Symposium on diversity and inclusion. From left to right: Karen Gray, Betty Ng, Mirna M. Santiago, Rawia Ashraf, and Yahaira Jacquez.

Nan Whaley, mayor of Dayton, Ohio, talks during the Presidential Summit on white nationalism and domestic terrorism in America.

NYSBA President Hank Greenberg and Kotaro Yamamoto, director of the International Exchange Committee of the Dai-Ichi Tokyo Bar Association sign a memorandum of understanding between the two organizations.

How to Keep You & Your Client's Info Safe

By Brandon Vogel

Using the public wifi at your nearby coffee shop might get your client's personal information into the wrong hands.

According to panelist Mike Mooney, senior vice president at USI Affinity, attorneys should use their own device and turn it into a personal hotspot to protect themselves and client data, however good the public wifi is.

This was one of several actionable items the panelists at the Career Development Conference program, "Skills Lawyers Need to Know When It Comes to Cyber Insurance and the New York Shield ACT" advised the audience on during Annual Meeting on January 27.

Why Lawyers?

On July 26, New York's governor signed the "Stop Hacks and Improve Electronic Data Security" (SHIELD) Act, requiring businesses to implement safeguards for the "private information" of New York residents and broadening New York's security breach notification requirements. The security requirements take effect on March 21, 2020. The Attorney General can sue for data breaches of failure to comply with cybersecurity requirements.

Likewise, the American Bar Association Formal Ethics Opinion 477R (May 22, 2017) declared that lawyers are required to make reasonable efforts to ensure their communications are secure and not subject to inadvertent or unauthorized cyber security breaches.

Small businesses, particularly small law firms, are at risk for cyberattacks, comprising more than 60 percent of cyberattacks. Mooney said there are two reasons for this: rich collections of confidential information and law firms aren't always known for being tech savvy.

According to Greg Cooke (USI Affinity), it has been estimated that half of the small businesses that suffer a cyberattack go out of business within six months as a result. "It can take up to six months to realize that you have been attacked," added Mooney. "Small business are targeted for cyberattacks because they lack sufficient resources and in-house knowledge to address cyberattacks."

What To Do

Having an extra layer of protection beyond a username and password "(two-factor authentication) is effective. You'll get used to it quickly," said Marian Rice of Garden City (L'Abbate Balkan Colavita & Contini), who co-chairs the Law Practice Management Committee. Rice also suggested that attorneys always do your Windows Security Updates, no matter how busy you are. "It's an easy way to stay up to date and compliant."

Daniel Connolly of Berkeley Heights, NJ (JDL Group, Inc.) said that lawyers need to encrypt any data involving financial information. "If you are not, you are exposing yourself to risk," said Connolly. "It's not just your data; it's your clients' data."

Clients increasingly demand cyberinsurance, according to Cooke. It does not cover theft of corporate intellectual property or trade secrets, nor does it cover brand damage and loss of future revenue.

Lastly, don't overlook what your fellow lawyers are doing to stay safe. "This is why bar associations are so important because you have a network of people to talk about what you are doing and what steps to take," said Rice.

To keep up with the changing law as ethics require it, visit www.nysba.org/cle.

Do I Know Where My Data Is?

Panelists examined data privacy issues across the world at a Business Law Section program at Annual Meeting. Left to right: Taa Grays of MetLife, Laura Jehl of McDermott Will & Emery, Emma Maconick of Shearman & Sterling, and Michael Riela of Tannenbaum Helpern Syracuse & Hirschtritt.

By Brandon Vogel

Controlling data is akin to putting a genie back in its bottle.

With the rise of the Internet, so too came the corresponding rise of big data. If not controlled or managed properly, it can unravel quickly. In an expanding web-based world, protecting both a company's information and that of its investors, clients and employees is an increasingly high priority.

Panelists at Business Law Section's program, "Cyber, Information and Data Security: Protecting Confidential Information" examined current cyber, privacy and information security issues, including recently enacted or expanded regulations and laws (i.e. General Data Protection Regulation (GDPR), California Consumer Privacy Act, NY's SHIELD Law), their implementation and associated challenges.

Taa Grays of New York (MetLife) said, "We have more regulations that are coming from different jurisdictions. This is not a drip in the pan; this is a shift." She advised attendees to ask themselves what information do I have and why do I have it?

"Companies must understand how they use and store data," said Grays. She provided a data checklist to use including: what is your data; where does it live? For how long? Who controls and touches the data? Who are the stakeholders who should be involved?

GDPR

It was General Data Protection Regulation (GDPR), the EU's data protection law, that got the ball rolling on data privacy, said Laura Jehl, global head of McDermott Will & Emery's Privacy and Cybersecurity Practice.

"Europeans view privacy as a fundamental right," said Jehl. "They were pretty disturbed by the Snowden allegations." Edward Snowden infamously revealed confidential information from the National Security Agency in 2013.

GDPR was adopted on April 14, 2016, but took effect on May 25, 2018 to give companies adequate time to prepare. Under GDPR, data breaches must be reported within 72 hours of discovery. The maximum fines under GDPR is the greater of €20 million, or up to 4% of the annual worldwide turnover of the preceding financial year. Companies have cited outdated technology and costly upgrades as significant challenges with GDPR Compliance.

Jehl said that businesses not established in the EU are only subject if they "offer goods and services" to EU data subjects and in so doing process their personal data, or if they engage in monitoring the behavior of individuals in the EU. "GDPR draws distinct roles that businesses play with data. It effectuates the rights of data subjects to access, correct or delete data. Companies must have procedures in place to do so."

There were a number of businesses that had no idea what data they held, according to Jehl. "It gets unmanageable really quickly, but you have to find all of it. It's really hard." She recommended that companies not keep data just to have it and only keep what you need for as long as you need it. Attorneys should tell clients what data they have and its intended purpose.

CCPA

Upon visiting a website, you have likely noticed a pop-up window asking you to accept cookies on the site. This is the direct result of GDPR and the California Consumer Privacy Act (CCPA), that became effective on January 1, 2020.

Emma Maconick of Menlo Park, CA (Shearman & Sterling) detailed the new law, which differs slightly from GDPR. Under CCPA, consumers have certain rights regarding their personal information. Businesses may not discriminate against consumers who exercise their rights. They also must implement "reasonable" data security. The law is intended to protect California "consumers."

Consumers have the right to obtain their data in a portable format, opt out of the sale of their information, and request deletion of their information. The CCPA does not give the right to correct data, unlike GDPR. Fines under CCPA are $7,500 per violation.

New York SHIELD Act

The Stop Hacks and Improve Electronic Data Security Act (SHIELD Act) expands New York State's existing data breach notification laws and imposes prescriptive data security program requirements. It applies to all business that possess the private information of New York State residents, regardless of whether the businesses have any physical presence within New York.

Michael Riela of New York (Tannenbaum Helpern Syracuse & Hirschtritt) discussed the administrative, technical and physical safeguards that must be implemented by March 21, 2020. For example, companies must designate one or more employees to coordinate the data security program; regularly test and monitor the effectiveness of systems; and dispose of private information after it is no longer needed.

The SHIELD Act provides a limited "small business" modification to these rules for businesses with fewer than 50 employees; less than $3 million in gross annual revenue in each of the last three fiscal years; or less than $5 million in year-end total assets.

‘Hot Bench’ Star Talks New Life as TV Judge

Longtime NYC lawyer and judge Michael Corriero, star of the CBS syndicated court series “Hot Bench,” talks about his new life as a TV judge.

By Christian Nolan

Judge Michael Corriero, star of the CBS syndicated court series “Hot Bench,” recalled the time in 1973 that he defended an innocent young boy in New York City accused of a shooting.

Corriero went to the prosecutor and explained that the boy was “taking the heat” for a 16-year-old teen, that his client knew who the real shooter was and was willing to take a lie detector test.

“Together we worked to avoid a miscarriage of justice,” said Corriero.

And who was the prosecutor? Judy Sheindlin, aka “Judge Judy.”

Sheindlin apparently never forgot that case either. In 2015, she reached out to Corriero and asked him to be a judge on “Hot Bench,” a show she created after the success of her own.

“I said, ‘I’m not you. I don’t have the personality for it,’” recalled Corriero. “She said, ‘Be yourself.’ We talked about it and she made me an offer I couldn’t refuse.”

Corriero’s remarks came as he delivered the keynote speech during the New York State Bar Association’s Criminal Justice Section luncheon Jan. 29 as part of Annual Meeting.

Instead of the hustle and bustle as a New York City lawyer, Corriero has a home in the Hollywood Hills. On days “Hot Bench” has tapings, he puts on his sunglasses, drives Sunset Boulevard, arrives at the studio and is met at the gate by a security guard where parking is for “talent” not judges.

“I don’t have a chambers anymore, I have a dressing room,” said Corriero, a former Court of Claims judge in New York County. “Instead of reading the Law Journal, I go to makeup. Then before I button up my robe, I’m given a microphone and an earpiece. The producer reminds me this is entertainment and gives me a gavel to punctuate my verdict. No longer am I concerned with dispositions, I’m concerned with ratings.”

Altogether, Corriero served as a prosecutor, a criminal defense attorney and a judge for 28 years in the criminal courts of New York state. He spent 16 years presiding over Manhattan’s Youth Part, a special court he created in New York Supreme Court that focused attention and resources on offenders prosecuted as adults per New York’s Juvenile Offender Law.

In 1999, he was honored with NYSBA’s Howard A. Levine Award for Outstanding Work in the area of children and the law.

In 2008, he retired from the courts and become executive director of Big Brothers Big Sisters of New York City. Two years later he left to establish the New York Center for Juvenile Justice where he promoted a comprehensive model of justice for minors that treats children as children and responds to their misconduct with strategies designed to improve their chances of becoming constructive members of society.

Corriero said the Center’s advocacy was crucial to the enactment of New York’s Raise the Age legislation in 2017.

Three-Judge Panel

On “Hot Bench,” Corriero is one of a three-judge panel. The other judges are civil litigator and television commentator Tanya Acker and New York State Supreme Court Justice Patricia DiMango.

Last fall, the show returned for its sixth season and during its 2018-2019 fifth season, it was the number three first-run daytime television program with 3.1 million daily viewers.

Despite the show’s success, there’s still a part of Corriero that misses his previous life.

“I miss the majesty, the solemnity and gravitas of the criminal court, the real court,” said Corriero. “There’s something ennobling about it. You are dealing with probably the most precious commodity there is – freedom. You’re dealing with it in such a way that you are approximating justice for those who encounter the courts.”

Edward Kleinbard Delivers Tax Keynote

A supporter of universal healthcare, Edward Kleinbard, a well-known tax expert, was not afraid to get political in his speech "From Tax Policy to Social Insurance."

By Christian Nolan

Tax expert Edward Kleinbard is not afraid to get political.

He openly supports a universal health care plan, believing there is a reason all other developed countries rely on a national single-payer system.

"We impose a viciously regressive tax on ourselves in the form of private insurance," said Kleinbard.

Kleinbard's remarks came as he delivered the keynote speech "From Tax Policy to Social Insurance" at the New York State Bar Association's Tax Section luncheon on Tuesday, Jan. 28 as part of Annual Meeting.

Kleinbard is the Robert C. Packard Trustee Chair in Law at the University of Southern California's Gould School of Law and a fellow at the Century Foundation. He was one of four individuals honored as 2016 International Tax Person of the Year by the nonpartisan policy organization Tax Analysts. He is also the author of the book, "We Are Better Than This: How Government Should Spend Our Money."

Previously, Kleinbard served as chief of staff of the U.S. Congress' Joint Committee on Taxation – the nonpartisan tax resource to Congress. Before that, he was a partner in the New York office of Cleary Gottlieb Steen & Hamilton for over 20 years.

During his speech, he promoted his next book "What's Luck Got to Do With It?" He said the book is likely due out next year. He then began to discuss some of the insight he provides in the book, joking that he was "doing a John Bolton here."

"Like gravity, bad brute luck is a universal force that cannot be turned off," Kleinbard said. "We do not choose the lives into which we are born – not our parents, not our personal attributes, nor our health.

"Our public policies underestimate the handprint of these existential adverse fortuities," continued Kleinbard. "By relying too much on private resources to fund education and health, we dishonor equality of opportunity because those born to comfort are overendowed with human capital relative to other kids."

Kleinbard said social insurance is the way to mitigate these existential adverse fortuities, as private insurance does for auto accidents. Social insurance as a product, like healthcare, responds to adverse selection that private markets cannot absorb. Further, he said social insurance as a metaphoric response to the adverse fortuities "justifies much more vigorous public investment in education, the gateway to equality of opportunity."

The luncheon is typically the largest single event at Annual Meeting. However, this year, despite over 930 attendees, it was surpassed by the return of NYSBA's gala dinner on Jan. 30 where nearly 1,000 members attended.

New Tax Chair

In other business, the 2,000-plus member Tax Section named Hughes Hubbard partner Andrew Braiterman as its new chair.

Braiterman is chair of the firm's tax practice and has been advising clients for nearly 40 years. His practice emphasizes the tax aspects of domestic and international mergers, acquisitions, joint ventures, and aviation finance. He also represents clients on international tax planning, tax issues relating to bankruptcy and debt restructuring, and disputes with federal and state taxing authorities.

He previously served as vice chair, second vice chair and secretary of the Tax Section. He has been a member of the section's executive committee since 2006.

Deborah L. Paul, a partner in the Tax Department at Wachtell, Lipton, Rosen & Katz in New York, spent the past year as chair of the Tax Section.

It's Brexit – Now What?

Jonathan Armstrong, of Cordery in London, was among a group of international lawyers discussing the impact of Brexit on commercial transactions, litigation and privacy regulations at Annual Meeting.

By Joan Fucillo

"I'm sort of depressed," said Jonathan Armstrong, Cordery, London. "There's a long list of questions but we can't answer any of them."

Armstrong was among a group of international lawyers discussing the impact of Brexit on commercial transactions, litigation and privacy regulations. Their conclusion? A high level of uncertainty.

Led by moderator Gonzalo Zeballos, BakerHostetler, New York City, panelists Armstrong; Peter Utterström, Peter Utterström Advocat, Sweden; Robert Leo, Meeks, Sheppard, Leo & Pillsbury, New York City; and Philip Shepherd, Taylor Wessing, London scratched their collective heads.

Their discussion was part of the International Section's programming on Brexit and cross-border issues held during New York State Bar Association's Annual Meeting in New York City.

The United Kingdom will officially leave the European Union on Jan. 31. But that opens 11 months of negotiations, during which the UK effectively will remain in the EU. During this period, other countries will treat the UK as if it were in the EU for purposes of trade, other business interactions and movement of people.

Philip Shepherd noted that now that the tumultuous Brexit process was – likely – over, he believed things would stabilize: A decision has been made. The Brexit campaign promise to "take back control" would be fulfilled.

Shepherd also pointed out an unintended effect of three years of Brexit – a lower pound has made the UK more attractive for some investors. Venture capital investment reached an all-time high in 2019.

This new Brexit process, however, lives on. And an extension of up to two years, after the Jan. 1, 2021, deadline can be granted if the parties cannot reach agreement on their future partnership. But Prime Minister Boris Johnson ruled out an extension. The next "cliff edge" for Brexit is this June, when the UK must decide whether to ask for that extension.

Ergo, more uncertainty.

Jonathan Armstrong talked about the difficulties of advising clients involved in merger and acquisition deals with companies in the UK. They want solid answers; he has none. Depending on the outcome of the trade and security negotiations with the EU, a deal made today may look very different 11 months from now.

The panelists also discussed the impact on the EU's General Data Protection Regulations. Would a deal negotiated in the UK under auspices of its EU membership be different if negotiations continue into 2021? The UK has its own strong privacy laws, but the EU's may become stricter in the near future.

And what if a breach of the GDPR takes place in the UK and is litigated there in an EU court? Who would hear the appeal in 2021? Or would no one have jurisdiction?

Robert Leo pointed out other wild cards that are exacerbating Brexit issues: trade sanctions and trade penalties, and the roller coaster stock market. Business owners and investors considering moving factories or changing their supply chains can't plan ahead.

"You can't even plan for right now," Leo said, adding that a tweet from the U.S president on Jan. 24, upended certain markets by imposing tariffs on derivative steel and aluminum products.

There was discussion as to whether a separate trade deal between the UK and the United States would hinder a deal with the EU or bring more countries to the table. "Eleven months to negotiate a trade deal is not a lot of time," said Shepherd.

Currently all UK-based lawyers have privilege to practice in the EU courts. That might change. More than 3,700 UK lawyers re-registered in Ireland in 2019, to maintain privilege. That number, Armstrong noted, is 31 times the number in 2018.

Armstrong admitted that he is one of them.

New York Looking for Sites for More Than 50 Renewable Power Plants

Benjamin E. Wisniewski, a partner with the Zoghlin Group in Rochester, speaks before a panel on local government issues at NYSBA's Annual Meeting.

New York State wants to get 70 percent of its energy from renewable sources by 2030, up from about 30 percent now, and that means a lot of wind and solar energy plants will have to be built over the next few years.

But where to put those plants, especially when not all towns love the idea?

That's where the state power plant siting board comes in, Benjamin E. Wisniewski, a partner with the Zoghlin Group in Rochester, told a panel on local government issues at the 2020 annual meeting of the New York State Bar Association (NYSBA).

The board – formally, the Board on Electric Generation Siting and the Environment – has sweeping powers to expedite siting of power plants, and can override local laws and regulations to do it.

"New York State and local governments are overseeing a major change in rural land use around the state," Wisniewski said to an audience that included many attorneys doing work for municipalities.

"We have to build a lot of power plants and have to do it very quickly if we want to meet the state's renewable energy goals," said Wisniewski, whose firm represents towns, public interest groups and individual intervenors in plant siting cases. "The siting board's first goal is to expedite siting of power plants, and they're taking decision-making authority from local governments."

It takes five to 10 years to construct a new energy project, a timeline that Governor Andrew Cuomo recently said is too slow if the state is to meet its energy goals.

More than 50 renewable power plant projects are in the pipeline, mostly in sparsely populated areas of upstate and Western New York; Steuben County is a hotbed of activity, Wisniewski said.

Five wind plants have been approved in the last two years. In those cases, Wisniewski said, the state siting board waived local laws to get the plants sited. Sometimes the towns were in favor of the plants, but other times the siting board overrode objections.

"They have done it with the consent of the towns, and without consent," Wisniewski said.

The municipal laws and regulations in question involve matters such as the size of turbines and the hours that construction can take place. In one case, the siting board sided with the town, rather than the power plant, on the town's requirement for well testing near the turbines. In another case, a town passed a moratorium on wind power plants, but the siting board overrode that, Wisniewski said.

Under the state law, known as Article 10, the siting process automatically overrides local laws that are considered procedural; but substantive laws, such as zoning and flood zone regulations, still apply. However, if any local law is considered unreasonably burdensome, it can be waived in furtherance of the state's energy goals, Wisniewski said.

So far, none of the disputes over waivers of local laws have made their way into court, Wisniewski said.

He said that it's possible that two of the five cases decided so far by the siting board could be appealed – Number Three Wind in Lewis County and Bluestone Wind in Broome County. Both were approved in late 2019.

"As more cases are approved, I anticipate more final decisions will be appealed to the court. The court, in turn, may further refine the siting board's powers relating to local laws," Wisniewski said.

Wisniewski expects the pace of renewable power development to pick up over the next couple of years; he anticipates four projects could be approved this year, with more in 2021 and 2022.

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Lawyers Resource Directory

Young Lawyer Career Advice

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NYSBA ANNUAL MEETING

Highlights from the awards given at the New York State Bar Association's Annual Meeting.

Kenneth Chin, partner at Kramer Levin Naftalis & Frankel, received the John E. Higgins, Esq. Diversity Trailblazer Award from the Committee on Diversity and Inclusion. Also, from left to right: Violet Samuels, committee vice chair, Mirna Santiago, committee chair, and Hank Greenberg, NYSBA president.

Christopher Riano, newly-named chair of the Committee on LGBT People and the Law and assistant counsel to Governor Cuomo, attends the Celebrating Diversity program during Annual Meeting.

Justice Rosalyn H. Richter, Appellate Division, First Department, received the Women in Law Section's Ruth Schapiro Award and the Judicial Section's Judicial Diversity Award.

Committee on Legislative Policy Co-Chairs Hilary F. Jochmans (Jochmans Consulting) and Sandra D. Rivera (Rivera Law PLLC) present to the Executive Committee on legislative activities.

Task Force on Free Expression in the Digital Co-Chair David McCraw, deputy general counsel to the New York Times, listens intently to the discussion on access law in a digital age.

Lee Redeye (left) recipient of an Outstanding Pro Bono Attorney Award from the President's Committee on Access to Justice with Committee Vice Chair Tiffany Liston (center) and Committee Co-chair Edwina Martin (right).

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