



NEW YORK STATE BAR ASSOCIATION State Bar News

NOVEMBER/DECEMBER 2017 | VOLUME 59, NO. 6 | WWW.NYSBA.ORG

Women's courtroom equality report headed to the ABA



Lady in red—Center, New York Bar Foundation President John H. Gross and State Bar President Sharon Stern Gerstman unveil a portrait of the late Chief Judge Judith S. Kaye following the Executive Committee meeting on Nov. 3 in Albany. Lesley Rosenthal, vice president of The New York Bar Foundation, is at left, and Immediate Past President Claire P. Gutekunst is at right. [Photo by Christina Couto]

By Christian Nolan

State Bar President Sharon Stern Gerstman plans to present a report that determined women attorneys remain considerably underrepresented in courtrooms across the state as well as in Alternative Dispute Resolution (ADR) to the American Bar Association's House of Delegates at its next meeting in February. She will urge adoption as the ABA's official policy.

The State Bar's House of Delegates approved the report, entitled "If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR,"

at its Nov. 4 meeting in Albany. It was compiled by the Commercial & Federal Litigation Section's Task Force on Women's Initiatives.

The report, which was featured in the September/October 2017 State Bar News following its August 3 release and which drew national attention, is based on the first-ever observational study of women attorneys in the courtroom. It reveals that female attorneys comprise about 25 percent of attorneys in lead counsel roles in courtrooms statewide

"We recognize that more can and should be done to ensure that

women and diverse voices are heard and are taking an active part in the judicial and dispute resolution process," Past President of the State Bar Association Bernice K. Leber of New York City (Arent Fox), a co-chair of the Task Force, told delegates.

"All lawyers and especially women lawyers should have the same chance to speak in court, conduct arbitrations, mediations, and serve as neutrals, as others have enjoyed," continued Leber. "These are issues of fundamental fairness in our profession."

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Making sense of NY cannabis laws

By Christian Nolan

More than 30 states including New York allow for some use of cannabis, whether medically or recreationally, and the laws are continuously evolving.

For example, in November, Gov. Andrew Cuomo signed legislation that adds post-traumatic stress disorder to the list of qualifying conditions for New York's medical marijuana program under the Compassionate Care Act.

But under federal law, marijuana is still very much illegal.

The federal Controlled Substances Act currently lists marijuana in the same category as heroin and LSD—which could be interpreted to mean that attorneys who work with clients in the medical marijuana business are violating federal law.

Believing there was a void for lawyers to share developments in cannabis law with their peers, a proposal was made to the State Bar's Executive Committee to establish a Committee on Cannabis Law, and was approved at the June meeting.

State Bar President Sharon Stern Gerstman appointed Brian J. Malkin of Washington, D.C. (Arent Fox) and Aleece Burgio of Buffalo (McGuire Development) to lead the committee.

"This is a developing area of the law, a very intellectually stimulating area for lawyers to work in," said Malkin, who is also the chair of the Food, Drug and Cosmetic Law Section and drafted the proposal for the new committee along with support from a group of individuals led by Robert L. Greenberg

of New York City (Robert L. Greenberg P.C.), a member of the committee.

"And the committee would provide a great way for practitioners to get together, talk, and learn about best practices, helping the industry develop under an evolv-

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The State Bar's Committee on Professional Ethics stated in its September 2014 "Ethics Opinion 1024" that "[i]n light of current federal enforcement policy, the New York Rules permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana."



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Henry M. Greenberg nominated State Bar's president-elect



Greenberg

At the House of Delegates meeting on November 4 in Albany, the Nominating Committee announced the following nominations of officers with terms commencing on June 1, 2018. The nominees will be voted on at the Jan. 26, 2018 House of Delegates meeting in New York City.

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Aimee L. Richter, *Brooklyn*

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Twelfth District:

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Thirteenth District:

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Mark Berman, *New York City*

Erica Hines, *Albany*

Tucker Stanclift, *Queensbury*

Evan Goldberg, *New York City*

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Stewart D. Aaron, *New York City*

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Andrew M. Fallek, *Brooklyn*

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Thirteenth District:

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Edwina Frances Martin, *Staten Island*

Claire C. Miller, *Staten Island*

Delegates to ABA House of Delegates (2018–2020 term)

Sharon Stern Gerstman, *Buffalo*

Kenneth G. Standard, *New York City*

Kathryn Grant Madigan, *Binghamton*

David P. Miranda, *Albany*

Alena Shautsova, *Brooklyn* (Young Lawyer Delegate)

Henry M. Greenberg, *Albany* (President-elect designee)

Section Delegate to the Executive Committee:

Rona Shamoon, *Scarsdale*

Nominating Committee Members-at-Large:

Glenn Lau-Kee, *New York City*

David P. Miranda, *Albany*

Claire P. Gutekunst, *Yonkers*

Nominating Committee Chair:

David P. Miranda, *Albany*



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WWW.NYSBA.ORG

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The State Bar News (ISSN 0363-0331) is published six times annually by the New York State Bar Association, 1 Elk St., Albany, NY, 12207, to inform its members of Association activities and other matters of interest to the legal profession.

Address all communications to the editor at 1 Elk St., Albany, NY, 12207.

Periodical postage paid at Albany, NY, and other mailing stations. Postmaster: Send form 3579 to: *State Bar News*, 1 Elk St., Albany, NY, 12207.

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The *State Bar News* welcomes articles from members of the legal profession on subjects of interest to New York state lawyers. Views expressed in published articles or letters are the authors' alone and are not to be attributed to the *State Bar News*, its editors, or the Association, unless expressly so stated. Article/letter authors are responsible for the correctness of all information, citations and quotations.

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House of Delegates approves groundbreaking reports regarding online legal providers, NY Trust Code

By Christina Couto

The State Bar's House of Delegates approved two groundbreaking reports with recommendations that, if adopted by the Legislature, "will help protect consumers who use online legal documents and will simplify, modernize and update New York's trust law," announced Association President Sharon Stern Gerstman of Buffalo (Magavern, Magavern and Grimm LLP).

Regulation of online legal forms

The State Bar approved a report at its Nov. 4 meeting in Albany by the New York County Lawyers Association (NYCLA) that seeks to regulate online legal documents, an industry that generates approximately \$5 billion

per year and is often used by those who cannot afford—or do not wish to seek—traditional legal access to justice methods.

"We want to turn toward the problem, we don't want to back away from it," said Sarah Jo Hamilton of Scarsdale (Scalise Hamilton & Sheridan LLP), who presented the report with Ronald C. Minkoff of New York City (Frankfurt Kurnit Klein + Selz PC). "It is an ongoing entity and business and we should get on board to make sure the public is protected."

NYCLA's report is the first time that regulation of online legal providers has been proposed in New York, recommending that a set of regulatory standards for protection of the public be adopted and, in the



Protect consumers—Ronald C. Minkoff and Sarah Jo Hamilton present the report of the New York County Lawyers Association, which recommends regulating online legal documents, at the House of Delegates meeting in Albany on November 4. The House of Delegates adopted the report. [Photo by Marty Kerins, Jr.]

absence of such standards, proposes the voluntary practices as an interim measure.

Because online providers of forms are often neither lawyers nor law firms, the attorney-client privilege does not apply and this is not always

adequately conveyed to consumers.

New York Trust Code

Also approved was a report by its Trusts and Estates Law Section recommending enactment of a new New York Trust

Code for trusts. New York trust law has not been comprehensively reviewed since 1966, and in the past 50 years, trust practices have dramatically changed.

The report recommends adding new article 7-A to the Estates, Powers and Trust Law that would enable changed practices and case law to be codified, making it simpler for lawyers practicing in the trusts and estates field, which will benefit the public.

"Fundamentally, the proposed New York Trust Code law codifies current New York case law relating to gratuitous trusts, and the case law today is voluminous," said Sharon L. Wick of Buffalo (Phillips Lytle LLP), chair of the section, who, along with Professor Ira Mark

Bloom of Albany (Albany Law School), presented the report to the House of Delegates.

"The proposal also improves upon existing statutory law, which results in a more modern law for New York, making it more competitive in the trust business. By codifying the case law in one comprehensive statute, we are also bringing efficiencies to practitioners and the courts, which will ultimately better serve our clients."

Link to Trusts and Estates Law Section report: <https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=77143> ♦

Couto is NYSBA's State Bar News editor.

Women's courtroom equality report headed to ABA

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The study took place from Sept. 1, 2016 to Dec. 31, 2016. The New York Court of Appeals, the Second Circuit Court of Appeals, two of the four federal district courts, all four appellate divisions as well as commercial divisions in supreme courts in counties from Suffolk to Onondaga and Erie participated. Three of the leading ADR providers in the state also participated. Approximately 2,800 questionnaires were completed and returned by judges in participating courts.

In addition to Leber, other task force co-chairs are: retired U.S. District Court Judge Shira A. Scheindlin of New York City (Stroock & Stroock & Lavan and JAMS); former Assistant U.S. Attorney Carrie H. Cohen of New York City (Morrison & Foerster); Tracee E. Davis

of New York City (Zeichner Ellman & Krause); Sharon M. Porcellio of

"All lawyers and especially women lawyers should have the same chance to speak in court . . ."

— **Bernice Leber**

Buffalo (Bond, Schoeneck & King); Lesley F. Rosenthal of New York City (Lincoln Center for the Performing Arts); and Lauren J. Wachtler of New York City (Mitchell Silberberg & Knupp). All are former chairs of the Commercial & Federal Litigation Section.

Suffrage, Kaye portrait unveiling

The adoption of the report came as New York celebrated its suffrage centennial when women won the right to vote Nov. 6, 1917. In honor of

the centennial, the Association's Committee on Women in the Law

unveiled its exhibition at the State Bar Center entitled "A Centennial Commemoration of Women's Suffrage and the Achievement of Legal Rights."

Additionally, the New York Bar Foundation, the charitable arm of the State Bar Association, unveiled a portrait by Laurel Stern Boeck of the late Chief Judge Judith S. Kaye. In 1983, Kaye became the first woman to serve on the state's Court of Appeals. A decade later, she was named chief judge. The

portrait will hang prominently in the State Bar Center's Great Hall.

"We are so grateful to so many for the tremendous honor of making our mother's the first portrait of a woman to grace the walls of the Great Hall in this prestigious institution, an institution that was very dear to our mother," said Kaye's daughter, Luisa M. Kaye, in a message read by Lesley Rosenthal, vice president of The Foundation. "Our heartfelt thanks go to Claire Gutekunst . . . for conceiving of the portrait and raising funds to make it possible."

For a link to the report, suffrage exhibition and Kaye portrait, www.nysba.org/womeninthelawny/. ♦

Nolan is NYSBA's senior writer.

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Vote fails, but hope for improved court system continues

By Christina Couto

Although the vote to hold a Constitutional Convention in 2019 failed miserably—83 percent of New Yorkers who voted opposed it—the State Bar successfully raised awareness about key issues that could benefit New Yorkers, including improving the court system, modernizing the voting process and updating the Constitution.

In New York, there are two ways to propose amendments to the state Constitution, either by the Legislature or by a Constitutional Convention. In either case, the voters get the last word: all amendments must be approved by a statewide referendum.

Campaign

The State Bar launched its Constitutional Convention campaign on Sept. 19 in Albany with a press conference encouraging a “yes” vote on Election Day. The event was live-streamed on Facebook and had been viewed 5,000 times by Election Day.

Its advocacy for a Constitutional Convention in 2019 followed a 111–28



Vote!—Members of the State Bar’s Executive Committee gathered on the front steps of the State Bar Center in Albany on Nov. 3 to encourage a “yes” vote on the Constitutional Convention referendum on Election Day. [Photo by Christina Couto]

vote in favor of a convention by the House of Delegates in June, 2017.

The State Bar’s Committee on the New York State Constitution heard presentations from 29 experts, issued five substantive reports, and participated in educational symposiums, webinars

and continuing legal education programs before recommending that the State Bar support a Constitutional Convention.

The decision to support a convention was largely based on the belief that restructuring and reorganizing the

state court system—a concern of the State Bar for nearly five decades—could only be achieved via a convention.

Court system task force

Following the election, New York State Chief Judge Janet DiFiore

announced a plan to explore legislative avenues to fix the court system.

A task force created in July 2016 to study the potential benefits to the courts of a Constitutional Convention will reconvene to examine ways to make the courts more efficient. It will

work to identify potential reforms the Legislature might consider to streamline the state’s court system.

The next vote whether to hold a constitutional convention in New York state will be in 2037. ♦

Couto is NYSBA’s State Bar News editor.



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New committee tasked with making sense of New York, federal cannabis laws

Continued from page 1

ing federal and state regulatory system, while at the same time ensuring that we represent our clients effectively and responsibly," he added.

Conflicting laws

Malkin said attorneys need to be mindful of the intersecting state and federal laws pertaining to cannabis use, as well as the ethics rules lawyers must follow.

In an effort to curb potential conflicts between federal and state laws, the U.S. Department of Justice (DOJ) has issued memoranda, most recently in 2013, directing U.S. attorneys to use their resources wisely and show discretion when prosecuting marijuana cases when a defendant is in compliance with state laws.

Further, President Donald Trump renewed the Rohrabacher-Farr Amendment, which states that the DOJ may not use any federal funds to prevent the implementation of medical marijuana laws by various states and territories.

While federal authorities appear to be looking the other way, these conflicts of laws still leave

clients and their lawyers feeling uncomfortable. The intersection of laws can get even more confusing for those looking to open marijuana dispensaries in states that have legalized the drug for some medical uses.

However, because some attorneys and their firms may be unwilling to walk that fine line of potentially violating federal law or the Rules of Professional Conduct, cannabis entrepreneurs may have trouble obtaining legal counsel to assist them.

Malkin explained that cannabis law touches on a number of areas of law, so there was no individual section that would have been a natural home to a cannabis law subcommittee. He said the Health Law, Criminal Justice, Real Property, Environmental, Intellectual Property, and Labor and Employment law sections were just some of the sections that included cannabis law topics.

For instance, Malkin said the conflicts of federal versus state marijuana laws pose many potential problems for the developing cannabis industry. Since cannabis

Group to study issues related to ride-sharing services app

By Christian Nolan

A Committee on Cannabis Law was not the only proposal approved by the New York State Bar Association's Executive Committee in June. The Committee on Transportation Law has also been formed to address legal issues associated with the rise of cell phone app ride-sharing services like Uber or Lyft and the advent of driverless cars and trucks.

The proposal was submitted to the State Bar's Executive Committee by Frank V. Carone, of Abrams Fensterman in Brooklyn. He has since been named chair of the committee.

Carone provided numerous examples of the kinds of legal issues that the Transportation Committee would review. For instance, are the drivers for app companies considered employees, independent contractors or something else? Are algorithms that set prices and determine response times being used in a discriminatory manner and if so, which entity has the authority to investigate?

Are newly set insurance standards for these ride-hailing services adequate? What should a state department of motor vehicles' role be in regulating new forms of transportation?

How should insurance cover driverless cars and who is liable when the inevitable accident occurs? What is the ideal balance between regulation and promoting innovation?

"While sections of the New York State Bar Association separately touch on these subjects, no group provides a cohesive approach to how these legal challenges affect the daily movement of New Yorkers, their industries, and the laws and lawyers serving them," wrote Carone in the proposal. "The combination of rapid growth and large public and private investments requires well thought out resolutions that a committee dedicated to transportation could provide."

State Bar President Sharon Stern Gerstman reached out to all of the section chairs asking them to notify their members of the new cannabis and transportation committees and made appointments to the committee based upon their responses. Additional members may be added during the regular committee appointment process commencing in February. ♦

is not legal as a selling entity, you cannot get a trademark on a cannabis-containing product. The illegal status of cannabis also impacts a cannabis company's ability to buy land, obtain the necessary growing permits, open a bank account or obtain loans.

'A headache' for businesses

The medical marijuana growing and dispensary application process is also a headache for potential businesses, which often causes them to hire a lawyer for help with it. Malkin said each state limits the number of dispensaries and that each state has its own application process to obtain such a license.

The illegality of marijuana prevents a dispensary business to open a bank account, so most cannabis-selling companies must operate only with cash instruments.

Not only does that pose problems and security and reporting concerns for the businesses themselves, it also triggers issues for their lawyers to collect legal fees. That's because when legal entities such as a law firm receives more than \$10,000 in cash, you have to report it to federal authorities.

Environmental issues also come into play, Malkin said. Under what conditions is cannabis grown and does it meet the standard for "organic" or not a genetically-modified organism ("no GMO's")? How do you

label the product and its ingredients when there are few or no legal standards that apply, and what kinds of pesticides or other growth products may be safely used?

Other issues can also arise. For example, discrimination and other employment issues could arise for employees who face drug testing at their jobs and have legal permission from a doctor for medical marijuana use. ♦

Nolan is NYSBA's senior writer.

The ABCs of cannabis law

The State Bar is not the only entity recognizing the growing and complex area of cannabis law.

Law schools in New York and around the country have started offering cannabis law courses and a formal textbook by Vanderbilt University School of Law Professor Robert A. Mikos was published this year. Mikos plans to be a non-voting member of the State Bar's new committee to aid in the development of academic rigor with the committee's efforts.

Cannabis law also figures to be a ripe topic for future State Bar-sponsored Continuing Legal Education programs. Previously, the Food, Drug and Cosmetic Law Section held a panel discussion at the State Bar's 2015 Annual Meeting in New York City entitled, "Through the Smoke: Attorney Ethics in Representing Clients in the Medical Marijuana Industry."

That same year at Annual Meeting, the Labor & Employment Law Section also hosted a program called, "One Toke Over the Line: Medical Marijuana and Other Drug-Related Issues in the Workplace." Last year, the Health Law Section sponsored a program called "Medical Marijuana in New York in 2016."

And at the 2017 Annual Meeting, the Environmental Law Section held a panel discussion entitled "Legal Conundrums Presented by the Use of Pesticides in the Cultivation of Marijuana." ♦

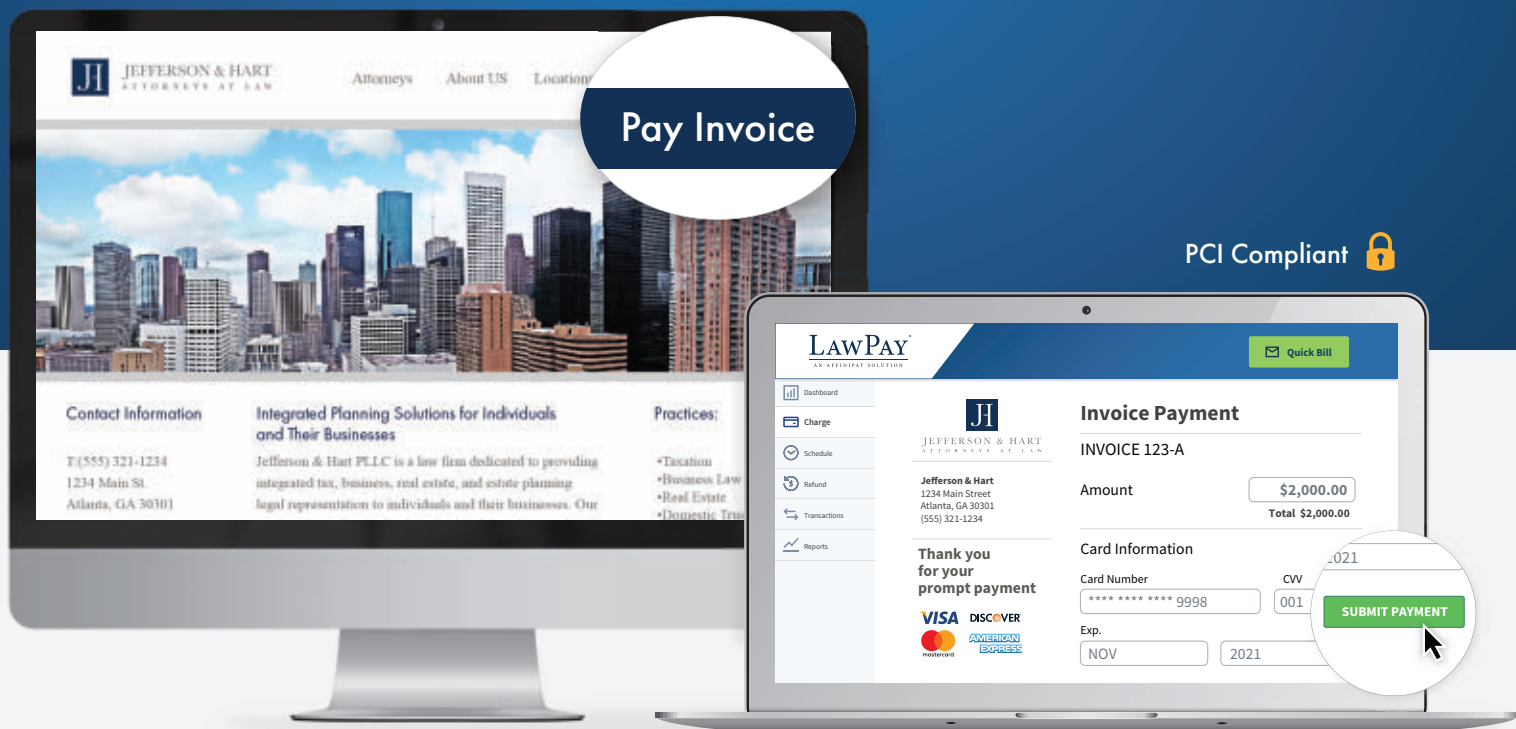
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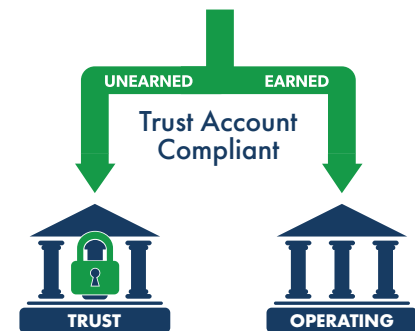
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Antitrust Law Section Profile

By Michael L. Weiner, Section Chair

Collaborative Antitrust Law Section brings out the best in its members, programming



Weiner

American radio and television pioneer David Sarnoff once said: "Competition brings out the best in products and the worst in people."

The Antitrust Law Section agrees that competition brings out the best in products, but Sarnoff's second statement could not be further from the truth. Our

section blends the talents of both the plaintiff and defense bars, including young attorneys, law students, and more senior members of the bar, to offer diverse perspectives while collaborating to help advance the practice of antitrust law, from merger clearance to cartel and criminal practice, and class actions and other civil litigation.

Programming

Continuing education is a central tenet of this section, and our committees actively pursue programming on major current topics in antitrust law. Some recent panels have addressed antitrust issues surrounding big data, the use of social media in class

actions, and whether the use of computer pricing algorithms can be viewed as an antitrust violation.

In addition to the regular committee programs, we also offer a slate of annual programs put on with the support of our active membership.

Our Annual Meeting each January draws private practitioners, government enforcers, and judges from around the world for a day of panels and discussion on the most current issues in antitrust.

We also offer an annual fall symposium where a group of panelists respond to a fact pattern simulating a hot topic in competition law.

This past May, the section hosted its first annual Antitrust Trial Training Academy, an intense three-day hands-on program geared toward younger antitrust lawyers seeking to improve their litigation and trial advocacy skills. Participants applied what they learned from lectures by examining live fact witnesses and economic experts, and making opening and closing arguments.

Law students, diversity, and outreach

To promote both diversity and continued antitrust scholarship, the section offers diversity fellowships that allow several law students to spend the summer working on antitrust matters at state and federal antitrust agency offices in New York. For law stu-

dents, we also sponsor an annual antitrust writing contest with a \$5,000 cash prize, and an annual summer associate program entitled "Why Antitrust?" Our mentorship program pairs young lawyers with seasoned veterans.

All work and no play?

NO! Throughout the year our section hosts a number of social events, including our annual Spring Fling, to encourage networking and camaraderie among our members.

We welcome new members and strongly encourage law students and new lawyers to take advantage of our broad range of offerings.

After all, our active programming and collaborative atmosphere ensures that competition brings out the best in products and our people as well! ♦

Michael L. Weiner is chair of the Antitrust Law Section. Co-leader of Dechert LLP's Antitrust/Competition Practice Group, he provides strategic advice, resolves government investigations into mergers and challenged conduct, and effectively litigates private and government antitrust cases for clients across a broad range of industries.

#classaction: Social media being used as a litigation tool

by Kerin E. Coughlin

Social media has become ubiquitous in our daily lives: a recent study shows that more than a third of the world's population actively uses it to keep in touch, learn about news and express opinions. Increasingly, social media has played a role in antitrust and other litigation.

For example, social media has provided evi-

largely based on quotes of social media posts by eye care professionals indicating collusion.

Social media also is a uniquely candid source of the consumer perceptions that are necessary in trademark, deceptive advertising and other commercial claims. Such data has traditionally been sought through consumer surveys, but as at least one court has noted, social media may be more reliable, because

"... there is no reason to believe that technological change will cease..."

— Committee on Rules of Practice and Procedure of the Judicial Conference

dence of potentially illegal conduct. In a consumer class action alleging a conspiracy to fix contact lens prices, the complaint survived the motion to dismiss

it captures consumers' raw, contemporaneous thoughts as they naturally occur.

In addition, social media has proven effective for providing notice

in class action cases. One court praised it as the "lynchpin" of the supplemental notice plan, as it resulted in a significantly higher claims rate than the original plan which consisted primarily of U.S. Mail and print ads.

The Federal Rules will soon be amended to reflect this revelation. The Committee on Rules of Practice and Procedure of the Judicial Conference has approved amending Rule 23(c)(2)(B) to clarify that the notice required for a Rule 23(b)(3) class "may be by . . . electronic means[.]"

In its note explaining the amendment, the Committee acknowledges that "courts and counsel have begun to employ technology to make notice more effective [and] there is no reason to expect that technological change will cease..."

Supplement, not replace

Counsel using social media in litigation should keep several issues in mind. First, social media should supplement, rather than replace, more traditional methods, at least until courts gain more comfort with it. This is confirmed by the Committee's Note to the Rule 23 amendment, which cautions: "a significant portion of class members in certain cases may have limited or no access to . . . the Internet. [Thus,] the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective[.]"

Authenticity

Second, counsel should be especially vigilant in establishing authenticity of social media evidence. Possibly due to the relative novelty of social media in commercial litigation,

courts have been hesitant to accept its authentication. In criminal contexts, courts have been more willing to find social media evidence properly authenticated, but such openness has not yet spread to the civil arena.

Care and efficacy

Which brings us to the third consideration, that social media evidence must be collected and used with the utmost care and efficacy.

For example, posts must be captured and stored in a manner that provides a clear chain of custody and other indicia of authenticity. In addition, the pool of evidence must be "clean," excluding irrelevant and unauthentic posts such as bot and commercial posts.

Accuracy

Finally, authors' naturally substantive intent must be accurately deter-

mined, because social media tends to take a casual, conversational tone. To ensure maximum integrity and reliability, these processes should be conducted under the guidance of an experienced social media expert.

Social media is here to stay, including in litigation. Its potential uses are endless, and so are the legal issues it raises. Courts and parties should ensure that all available steps are taken to use social media as responsibly and reliably as possible. ♦

Kerin E. Coughlin is an assistant professor at CUNY-NYC College of Technology, and a senior consultant with Voluble Insights, the social media analyst division of Global Business Experts Group.

A LEAGUE OF THEIR OWN.

Congratulations to our winning Mediators & Arbitrators



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George Freitag, Esq.
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Specialties Include:
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Former NYC Chief Settlement Negotiator
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 ✓ Best Individual Mediator



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Former Assoc. Justice, Appellate Division, 2nd Dept.
Specialties Include:
 Commercial, Construction, Labor Law, Insurance Coverage, Professional Malpractice, Catastrophic Injury
 ✓ Best Individual Arbitrator



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Young Lawyers sponsor first advanced trial academy

By Christian Nolan

The Young Lawyers Section's Trial Academy is a popular New York State Bar Association event held each spring at Cornell Law School in Ithaca.

So popular, in fact, attendees have been asking for additional advanced trial prep. That feedback came to fruition on the last weekend in October as the State Bar Association Young Lawyers Section co-hosted the first-ever Advanced Trial Academy at Syracuse University College of Law.

"All of our evaluations signaled to us that this was a need," explained Erin Flynn, of

New Rochelle (McCabe, Weisberg, and Conway), who is immediate past chair of the Young Lawyers Section and served as a program co-chair of the Advanced Trial

"The difference between a good lawyer and a great lawyer—preparation, preparation, preparation,"

— Stephen P. Younger

Academy with Allan Ahearne Jr. of Warwick (Ahearne Law Firm) and Rebecca Smithwick of New York City (Lupkin & Associates).

Flynn said that suggestions of having this

kind of event would come in at the conclusion of the Trial Academy each year. The challenge, however, was finding a place to hold it.

Cornell Law School

has donated the space each year during their spring break. Finding another location for the advanced program was a challenge, Flynn said. Megan O'Toole, associate director of member out-

reach & development at the State Bar, reached an agreement with Syracuse Law School to hold the event there.

Annual event?

Flynn is hopeful that, like the Trial Academy each spring at Cornell, the Advanced Trial Academy will become an annual event in the fall at Syracuse.

"We tried to keep it as reasonably priced as possible," said Flynn. "We're not trying to make a profit. There are expensive (trial academies) out there, but

many young lawyers cannot afford that."

The Friday-through-Sunday event at Syracuse cost the 17 attendees \$600 to participate. The three-day workshop was geared toward those who have already completed the Young Lawyers Section's Trial Academy. The participants were taken through a full trial, from *voir dire* to closing arguments; including fact witness and expert witness testimony.

The participants choose to take part in a civil or a criminal trial

and were assigned to either the plaintiffs/prosecution side or the defense. They were not allowed to switch their roles and were told to prepare as if it were a real trial.

The impressive group of volunteer critique faculty provided nearly a one-to-one ratio for the participants. The critique faculty, including the team leaders, aimed to bring out the lawyers' untapped potential, which often times could be critical.

Continued on page 11

Advanced trial academy: a 3L perspective

By Chris Matcovich

The State Bar's inaugural Advanced Trial Academy geared itself toward the young lawyer looking to strengthen advocacy skills through lecture and practical exercises.

Vishal C. Gupta, partner at Steptoe and Johnson LLP, emphasized the need to keep bringing back jurors to the theme of the case, explaining that it all starts during jury selection and continues through openings, examinations and culminates during closings.

This is so important, he said, because it helps to reiterate key points that you want the jury to take with them when they decide the case.

Past State Bar President Stephen P. Younger and Judge Kate Hogan spoke about how to decide whether there is a need for an expert in a case, suggesting, that in many cases, an attorney can call a "non-expert expert" to elicit the testimony they need to help prove their case.

This strategy can be helpful in many ways, especially in limiting cost to the client. Both Younger and Hogan also provided ways for attorneys to vet prospective experts. They suggested investigating these experts by asking other lawyers, finding prior testimony from the individual and performing general internet searches.

Michael A. Bottar of Bottar Leone, PLLC discussed elements of a hearsay statement and the exceptions a lawyer can use to confront an objection. He incorporated New York State court decisions into his lecture, which helped to simplify the complicated aspects of hearsay by providing real-world examples of its application.

Peter Gerstenzang of Gerstenzang, Sills, Cohn & Gerstenzang, spoke about the art of cross examination. His overriding message was that to be effective, one must control the witness. Using simple, unambiguous questions can help condition the witness to agree with the statements that one makes during cross.

Additionally, Gerstenzang highlighted the effective use of looping. The purpose for looping, he said, is to reinforce pertinent facts that you want members of the jury to remember.

Following the lecture series, students were split into groups to work on their trial skills. Each was given the opportunity to pick a criminal or civil fact pattern to work with and then present different parts of the case in front of seasoned attorneys.

Each student received extensive and detailed feedback about their performance and the intimate setting allowed students to present their cases thoroughly and to receive the feedback they needed to apply it in practice. ♦

Chris Matcovich is a 3L at Pace Law School with a concentration in criminal law. He is active with the State Bar as a campus fellow and volunteers during the Young Lawyers Section Trial Academy.



Sharpening their skills—From left, Marco Emanuele Fava, George Hadid and Florian Bruno were among about 35 attorneys who attended the three-day Advanced Trial Academy at Syracuse University College of Law Oct. 27–29. [Photo by Megan O'Toole]



Expert litigators—Carrie H. Cohen, left, a member of the volunteer critique faculty, discusses strategies with Program Co-Chair Allan Ahearne Jr. and faculty members Tucker Stanclift and Karen Gerstenzang. [Photo by Megan O'Toole]

By popular demand: the first advanced trial academy deemed a success

Continued from page 10

“Please don’t get offended when you are critiqued,” Judge Deborah Karalunas, a Supreme Court justice in Onondaga County and active State Bar member, told the participants. “That is why you are here.”

Other team leaders over the course of the weekend were Timothy Fennell of Oswego (Amdursky, Pelky, Fennell & Wallen), Tucker Stanclift of Queensbury (Stanclift Law) who serves as chair of the Criminal Justice Section, Eric Sills of Albany (Gerstenzang, Sills, Davis, Cohn & Gerstenzang), and Lisa Peebles, of Syracuse (federal public defender for the Northern District of New York).

Strategy, expert witnesses

The inaugural event kicked off Friday Oct. 27

with several expert lecturers. The first featured Vishal Gupta, a partner in Steptoe & Johnson’s New York office. Gupta spoke about trial strategy. He urged the attorneys in attendance to tell a persuasive story efficiently. He said judges and juries are best engaged and persuaded by facts presented in story form.

The next lecture about expert witnesses was presented by Stephen Younger of New York City (Patterson Belknap), a past president of the Association and Judge Kathleen Hogan, an acting Supreme Court justice in Schenectady.

The pair provided advice about choosing expert witnesses. They said to consider how a potential witness can hurt your case before thinking about how they can help it. They also

advised speaking to someone who has previously watched a witness to get a better sense of what to expect and whether they would be right for your case. Also, given the high cost of experts, to factor in how much “bang for the buck” you will get.

“The difference between a good lawyer and a great lawyer—preparation, preparation, preparation,” said Younger.

Other expert lecturers were Michael Bottar, of Syracuse (Bottar Leone) who spoke about hearsay evidence and the case law guiding it, as well as Peter Gerstenzang of Albany (Gerstenzang, Sills, Davis, Cohn & Gerstenzang) who discussed cross examination techniques. ♦

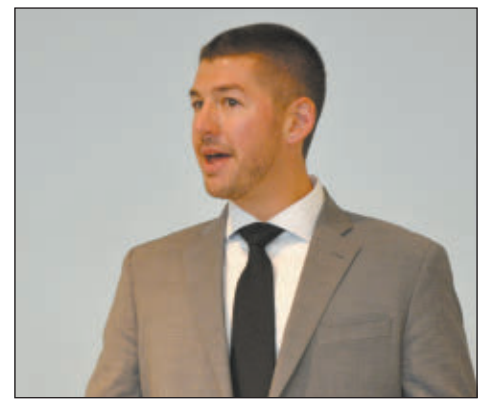
Nolan is NYSBA’s senior writer.



Expert witnesses—Judge Kathleen Hogan and Past President Stephen P. Younger offer tips on choosing expert witnesses. [Photo by Megan O’Toole]



Program Co-Chair Rebecca Smithwick [Photo by Megan O’Toole]



Young Lawyers Section Chair John P. Christopher [Photo by Megan O’Toole]

Young Lawyers

By Alexandra Scoville

Firsts in providing advice directly to clients: trust your instincts and follow up with them



Scoville

For three years in law school, we are largely tied to books and a classroom setting. We may be lucky enough to garner direct experience counseling clients through clinics, field placements, and internships, but there is nothing like the first time you directly counsel a client and provide advice about a legal problem, as an attorney. In this moment, you are truly practicing law.

Depending on your work environment, you may have these types of communications every day. On the other hand, if you are at a firm with many large corporate clients, it may be a few years before you are taking the reins on a matter yourself.

Either way, being the point person on a client matter for the first time can be daunting. You want to provide the best service, the best advice, and you want to make your firm or organization proud. It is natural to feel anxious.

Do you really know the law? Are you qualified to be advising someone? Will you have all the answers? Having been a practicing attorney for a year now, I have found two pieces of advice invaluable when speaking directly with clients.

Trust your instincts

First, remain calm, professional and trust your instincts, even if you do not know something, or do not have an immediate answer. As an attorney starting out, you cannot know everything. If you have a call or meeting with a client, you should be fully prepared regarding the client’s matter. But talking with a client is also an organic process.

A client will have follow-up questions, and may ask about additional matters you did not prepare to discuss. In this situation, continue to be confident. If you do not know an answer, confidently let the client know that you do not know the answer off the top of your mind but will provide them with an answer later that day.

It is okay to tell a client you want to confer with your supervising partner, the managing partner, or an attorney in another practice group on an issue, to ensure you are giving the best advice.

A client would prefer a solid and sound piece of legal advice from you in an hour or two, rather than an uncertain or unclear answer immediately. Telling the client you are taking steps like conducting additional research, or having a quick discussion with a partner or supervisor lets the client know that you know the boundaries of your knowledge, and that you can make a quick and calculated assessment of how to build off of those limits and give them the best advice.

Follow up

Second, follow up. The more information you have, the more efficiently you will be able to assess what your next action items are. Do not limit yourself to being reactive on a call or during a meeting by only answering questions or taking notes.

Ask the client what outcome he/she wants. In addition, when a client is explaining the issue at hand, either during an initial consultation or down the road during an update call, ask follow-up questions so that you can determine what the facts are, but also assess the goals of the client.

The client could be presenting facts that paint an adversarial picture between the client and another person, when in fact the client wants to reach an amicable resolution of an issue. The client’s only goal may be to maintain a business partnership in spite of facts that would support an adversarial reaction.

Understanding what the client wants is key to developing your action plan. If you are working with a partner or supervising attorney on a matter, you will be more valuable if you are able to present a holistic understanding of and insight to the client’s ultimate goals while also providing the facts of the client’s legal issue. ♦

Scoville is an associate intellectual property attorney at Schmeiser, Olsen & Watts, LLP. Her practice includes complex intellectual property litigation, intellectual property licensing and patent and trademark prosecution.

State Bar objects to Paris Agreement withdrawal



Gerstman

Environmental & Energy Law Section practicing in the public and private sector, who have devoted their careers to the field of environmental law. We are acutely aware that climate change has evolved from an issue that initially merited further study to an outright crisis demanding prompt and effective action.

Citing climate change as “an outright crisis,” State Bar President Sharon Stern Gerstman recently wrote to U.S. President Donald Trump to express the Association’s objection to his decision to withdraw the United States from the Paris Agreement.

The letter is in its entirety, below:

Dear President Trump:

I am writing on behalf of the New York State Bar Association to register the Association’s objection to your decision to have the United States withdraw from the Paris Agreement. The Association’s membership of 72,000 attorneys includes approximately 1,000 attorneys in our

We have examined carefully the facts and circumstances set forth in the endangerment finding on greenhouse gas emissions issued by the Environmental Protection Agency. It makes a clear and compelling case for national action on climate change. The symptoms of climate change predicted by scientists—in the form of prolonged droughts, extraordinary heat waves and storm events, wildfires, widespread retreat of glaciers and arctic ice cover, range shifts of plants, animals and insects, ocean acidification, and readily measurable sea level rise—are now unmistakable.

Significantly, numerous studies warn of the devastating impact of cli-

mate change in the U.S. in a few decades if effective measures are not soon taken to reduce carbon emissions. Such predictions led the 2016 report of the World Economic Forum to identify the “failure of climate change mitigation and adaptation” to be the *top risk* facing society—ahead of weapons of mass destruction, terrorism and the increasing scarcity of potable water. The Paris Agreement aims to mitigate such risks by holding the increase in global average temperatures to a level that “would significantly reduce the ... impacts of climate change.”

We still have the chance to achieve the goals of the Paris Agreement, but doing so will require society-wide mobilization on a scale not seen since World War II. Such a massive undertaking would require that *all* levels of government, and all sectors of society do their part in reducing our nation’s greenhouse gas emissions. It also would require the U.S. to engage with other

nations to ensure that they meet the commitments they already have made in the Paris Agreement.

With regard to activity at the state level, herewith for your consideration is a link to our Association’s report, *Taking Action on Climate Change in New York: 2017 Update Report*, approved by our House of Delegates in June 2017. <http://www.nysba.org/ClimateChangeReport>

We respectfully urge you to reconsider the decision to withdraw the United States from this landmark international accord, and that you reverse the course your administration has followed thus far on climate change. In doing so, we note that until recently bipartisan efforts have devised common solutions to critical environmental problems. Indeed, many of our bedrock environmental laws—such as the National Environmental Policy Act, the Clean Air Act (“CAA”) and the 1990 CAA amendments—were enacted into law during Republican administra-



tions, with bipartisan support from Congress. We also note that new industries providing hundreds of thousands of well-paying jobs could be fostered by a national program aimed at reducing greenhouse gas emissions. The explosive employment growth experienced over the last few years in the wind and solar industries well illustrates the employment opportunities that result from clean energy initiative, as pointed out in the U.S. Department of Energy’s *U.S. Energy*

and Employment Report, January, 2017.

We hope that upon reflection you will realize that your legacy would be far better served if history recorded you as the President who finally broke the partisan logjam that has prevented meaningful action on climate change mitigation.

Respectfully,
Sharon Stern Gerstman
President, New York State Bar Association ♦



[Photo by Christina Couto]

Fair Trial/Free Press

Sandra Baron, chair of the Committee on Media Law, makes welcoming remarks at the continuing legal education Fair Trial/Free Press program, held Oct. 23 at New York University School of Law.



[Photo by Tom Sullivan Photography]

Participation in government

Kathleen DeCataldo discusses tactics for keeping children in school and out of court at the Law, Youth and Citizenship’s 41st annual civics and law-related education conference, held Oct. 27 at the Sagamore Resort in Bolton Landing, NY.

HOUSE OF DELEGATES IN ACTION



Dollars and sense—Oliver C. Young of Buffalo asks T. Andrew Brown, chair of the Finance Committee, a question following Brown’s budget presentation. [Photo by Marty Kerins, Jr.]



Down to business—Above and left, attendees listen as the Association’s business is conducted. Below, Constitutional Convention “YES” buttons adorn the registration table. [Photos by Marty Kerins, Jr.]



Equality in the courtroom—Judge Helen E. Freedman comments following approval of the Commercial and Federal Litigation Section’s report on women’s equality in the courtroom, while Judge Karla Moskowitz of New York City waits to speak. [Photo by Marty Kerins, Jr.]

NYSBA 141st Annual Meeting Calendar



ANNUAL MEETING | **2018**
JANUARY 22 – 26

CONNECT ► INSPIRE ◀ LEARN

FREE PROGRAMS HELD AT ANNUAL MEETING

Career Development Program | Monday, January 22nd
Program 2:00 p.m. – 5:00 p.m. | Reception 5:00 p.m. – 6:00 p.m.

Celebrate Diversity in the Bar | Monday, January 22nd
6:30 p.m. – 8:00 p.m.

SOCIALIZE

President's Reception | Wednesday, January 24th
5:00 p.m. – 6:30 p.m.

Young Lawyers Section Craft Beer & Conversation | Thursday, January 25th
5:15 p.m. – 6:30 p.m. | Clio Cloud Cafe

VISIT

Exhibitors | Monday–Friday
8:00 a.m. – 5:00 p.m. (1:00 p.m. on Friday)

Clio LawPay CSR LexisNexis Fastcase USI Affinity Insurance

RELAX

Clio Cloud Café | Monday–Friday
8:00 a.m. – 5:00 p.m. (1:00 p.m. on Friday)

Plan to take a break, enjoy some refreshments, access your email, take advantage of our free Wi-fi and recharge your mobile devices. We've got you covered!

MONDAY

JANUARY 22, 2018

Career Development Conference

Program 2:00 p.m. – 5:00 p.m.
Reception 5:00 p.m. – 6:00 p.m.

SECTION MEETINGS

International Section

Awards Luncheon 12:00 p.m. – 2:00 p.m.
Meeting 2:00 p.m. – 5:00 p.m.

TUESDAY

JANUARY 23, 2018

SECTION MEETINGS

Elder Law and Special Needs Section

Meeting 1:30 p.m. – 5:45 p.m.
Reception follows program off-site: Warwick New York, 65 West 54th Street

Entertainment, Arts and Sports Law Section

Meeting 1:00 p.m. – 5:30 p.m.
EASL & IP Joint Reception follows off-site: Bill's Bar & Burger Rockefeller Center

General Practice Section and the Committee on Professional Discipline

Meeting 9:00 a.m. – 1:00 p.m.

Intellectual Property Law Section

Meeting 8:45 a.m. – 5:30 p.m.
Luncheon 12:35 p.m. – 2:00 p.m.
IP & EASL Joint Reception follows off-site: Bill's Bar & Burger Rockefeller Center

Tax Section

Meeting 8:45 a.m. – 4:00 p.m.
Luncheon 12:30 p.m. – 2:00 p.m.

COMMITTEE PROGRAMS

Committee on Women in the Law

Program 9:00 a.m. – 4:15 p.m.
Kay Crawford Murray Luncheon 1:15 p.m. – 2:15 p.m.
Networking Reception 4:15 p.m. – 5:30 p.m.

WEDNESDAY

JANUARY 24, 2018

PRESIDENTIAL SUMMIT

Program 2:00 p.m. – 5:00 p.m.

President's Reception

Complimentary Reception for all Annual Meeting registrants.
5:00 p.m. – 6:30 p.m.

SECTION MEETINGS

Business Law and Corporate Counsel Sections

Meeting 9:00 a.m. – 12:30 p.m.
Reception/Luncheon 12:30 p.m. – 1:45 p.m.

Commercial and Federal Litigation Section

Meeting 9:00 a.m. – 12:00 p.m.
Reception/Luncheon 12:00 p.m. – 2:00 p.m.

Criminal Justice Section

Meeting 8:45 a.m. – 12:00 p.m.
Awards Luncheon 12:15 p.m. – 2:00 p.m.

Health Law Section

Meeting 9:00 a.m. – 12:30 p.m.
Luncheon 12:45 p.m. – 2:00 p.m.
Meeting resumes 2:00 p.m. – 5:00 p.m.

Torts, Insurance & Compensation Law and Trial Lawyers Sections

NEW LOCATION
Reception/Dinner 6:30 p.m. off-site: The Edison Ballroom, 240 West 47th Street

Trusts and Estates Law Section

Meeting 9:00 a.m. – 12:00 p.m.
Reception/Luncheon 12:00 p.m. – 2:15 p.m.
Reception 6:00 p.m. – 8:00 p.m. off-site: The University Club, One West 54th Street at 5th Avenue

Young Lawyers Section

Meeting 8:45 a.m. – 12:15 p.m.
Executive Committee Meeting & Awards Luncheon 12:30 p.m. – 3:00 p.m.

COMMITTEE PROGRAMS

Committee on Animals and the Law

Program 1:30 p.m. – 5:00 p.m.

Register Early and Save
www.nysba.org/am2018

General Registration Fees

	Early Bird* By 1/12/2018	Regular* As of 1/13/2018
New York State Bar Association Members	\$90	\$190
Non-Members	\$290	\$390
Newly Admitted Attorneys of 3 years or less (admitted after January 1, 2015)	\$50	\$150

Committee on Law, Youth and Citizenship

Program 9:00 a.m. – 12:00 p.m.

THURSDAY

JANUARY 25, 2018

SECTION MEETINGS

Antitrust Law Section

Meeting 8:30 a.m. – 5:00 p.m.

Antitrust Associates & Young Lawyers

Reception 5:00 p.m. – 6:00 p.m.

Reception/Dinner off-site: University Club, One West 54th Street at 5th Avenue

Dispute Resolution Section

Networking Luncheon 12:30 – 1:30 p.m.

off-site: Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas

Meeting 2:00 p.m. – 6:00 p.m.

Reception follows program off-site:

Dorsey & Whitney LLP, 51 West 52nd Street

Family Law Section

Reception/Awards Luncheon

12:00 p.m. – 2:00 p.m.

Meeting 2:00 p.m. – 4:30 p.m.

Chair's Reception 5:30 p.m. – 7:30 p.m.

off-site: Warwick New York, 65 West 54th Street

Environmental and Energy Law Section

Reception 6:00 p.m. – 7:30 p.m.

Food, Drug & Cosmetic Law Section **NEW TIME**

8:30 a.m. – 5:00 p.m.

Reception follows program off-site:

Arent Fox LLP, 1675 Broadway

Local and State Government Law Section

Meeting 9:00 a.m. – 4:35 p.m.

Real Property Law Section

Program 8:00 a.m. – 12:15 p.m.

Reception/Luncheon 12:30 p.m. – 2:00 p.m.

off-site: **NEW LOCATION**

54 Below, 254 West 54th Street

Senior Lawyers Section

Meeting 9:00 a.m. – 1:00 p.m.

Torts, Insurance & Compensation Law and Trial Lawyers Sections

Meeting 8:45 a.m. – 4:00 p.m.

Lunch on your own.

Young Lawyers Section Leadership Academy

Meeting 9:00 a.m. – 5:00 p.m.

Lunch on your own.

COMMITTEE PROGRAMS

Committee on Condominiums and Cooperatives of the Real Property Law Section

Program 2:30 p.m. – 5:30 p.m.

Committee on Disability Rights

Program 9:15 a.m. – 12:00 p.m.

Justice for All Luncheon

12:30 p.m. – 2:00 p.m.

"LPM Day": Hot Topics in Law Practice Management

co-sponsored by Committee

on Law Practice Management,

the Committees on Attorney

Professionalism, CLE and Lawyer

Assistance

Program 9:00 a.m. – 5:00 p.m.

Lunch will be included.

FRIDAY

JANUARY 26, 2018

SECTION MEETINGS

Environmental and Energy Law Section **NEW TIME & LUNCH LOCATION**

Meeting 8:45 a.m. – 12:45 p.m.

Reception/Luncheon 1:15 – 3:00 p.m.

off site: Mastro's Restaurant, 1285 6th Avenue

Judicial Section/Council of Judicial Associations

Reception/Luncheon 12:30 p.m. – 3:00 p.m.

Labor and Employment Law Section

Meeting 8:30 a.m. – 12:30 p.m.

Luncheon 12:30 p.m. – 2:00 p.m.

Young Lawyers Section Leadership Academy

Meeting 9:00 a.m. – 5:00 p.m.

Lunch on your own.

COMMITTEE PROGRAMS

Committee on Children and the Law

Program 9:00 a.m. – 12:15 p.m.

Committee on Not-For-Profit Entities and Concerns of the Real Property Law Section

Program 9:00 a.m. – 12:00 p.m.

MCLE PLENARY SESSION: PRESIDENTIAL SUMMIT

Wednesday, January 24, 2018

2:00 p.m. – 5:00 p.m.

Race, Slavery and Mass Incarceration

We all know that the 13th Amendment to the US Constitution abolished slavery, but few of us have really concentrated on the language employed. Section 1 reads: "Neither slavery nor involuntary servitude, except in the punishment for a crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The exception for punishment for a crime began a second institution of slavery, and is acknowledged as a basis for the mass incarceration of people of color within our country. The award winning film, "13th" by Ava DuVernay, will be shown in its entirety. The film will be followed by a panel discussion, moderated by ABA President Hilarie Bass, exploring the issues of mass incarceration, implicit bias, wrongful conviction, fines and fees, and systemic litigation to counteract all of the factors which have resulted in the incarceration of so many men and women of color.

The showing of the movie is free to all. In order to attend the substantive CLE portion of the program, you must pay the General Registration Fee.

Viewing of the movie is complimentary, however pre-registration is still required. You may register online at www.nysba.org/am2018



NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING
2018
JANUARY 22 - 26

THE NEW
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Attorneys, organizations recognized for pro bono work

In recognition of National Pro Bono Celebration Week, the State Bar joined the New York State court system's Office for Justice Initiatives and the New York County Lawyers' Association to host an awards ceremony and reception honoring attorneys and organizations for their volunteer efforts on October 26 in Manhattan.

Speakers included Edwina G. Mendelson, deputy chief administrative judge for justice initiatives; Edwina Martin, NYSBA's co-chair of the President's Committee on Access to Justice; and Michael J. McNamara, president of the New York County Lawyers' Association. State Bar honorees included the following:

Janet Connolly

Janet Connolly of Locust Valley may have retired from the active practice of law nearly a decade ago, but her passion to help others led her to get involved in Nassau County Bar Association's Mortgage Foreclosure Pro Bono Project.

Connolly has worked with this project since its inception in 2008, demonstrating her commitment by providing pro bono help to homeowners facing foreclosure. Every week, Con-

nolly provides pro bono representation to homeowners who come to Nassau Supreme Court in Mineola to meet with bank attorneys. Without the pro bono assistance of Connolly and other NCBA attorneys who volunteer their services, these homeowners would be at a disadvantage.

Jim Gormley – Neighborhood Legal Services

Jim Gormley works eight hours a week with Neighborhood Legal Services, Inc. (NLS) on its Disability Advocate Team in Buffalo, helping clients obtain Social Security benefits. He regularly assists attorneys and advocates in analyzing and summarizing mental health records and has helped the team better understand clients who suffer from mental illness.

Gormley has also helped draft memorandums of law that have helped NLS win numerous Social Security hearings. He recently helped a client win a Social Security case without the need for a hearing, based on his draft memorandum of law. This particular client had already lost several hearings and appeals and he had been waiting for more than eight years for benefits.

Law Office of Peter Spino, Esq.

Peter Spino heard about the opportunity to assist Regeneron with pro se litigants in a foreclosure settlement conference and was the first private practitioner to volunteer for the Westchester County Pro Bono Foreclosure program.

Spino serves as the program's resident expert who draws from his expertise in foreclosure defense, loan modifications, short sales and debt settlement to address more complex consultations. He attends regularly, assists in the preparation of responsive pleadings and has shared research and motion templates with other volunteers.

Pepper Hamilton LLP

Since 1890, Pepper lawyers have accepted challenging and frequently unpopular cases, participating in pro bono activities ranging from death penalty litigation to civil rights class actions to civil matters for low-income, disabled and other disadvantaged individuals.

Attorneys from the firm have represented hundreds of nonprofit organizations, enabling the entities to fulfill their own public service mission. The firm devotes

thousands of hours of professional time to pro bono matters every year.

Regeneron Pharmaceuticals

Regeneron partners with Pepper Hamilton LLP to offer the time and talents of its legal department and supporting staff. Volunteers have assisted with intake and the preparation of responsive pleadings and motions.

Regeneron, a biotechnology company that invents life-transforming medicines for people with serious diseases, engages in active recruitment and training for continued participation in the Westchester County Pro Bono Foreclosure program, as well as in other planned pro bono initiatives for the county.

James Slattery

James Slattery volunteers at Brooklyn VLP several times a week, embracing an area of law that is the most helpful to Brooklyn VLP—bankruptcy law. He has a full docket of bankruptcy cases, connects well with clients and possesses much patience.

The clients Slattery assists are low-income residents of Brooklyn with busy lives. He handles them with respect and patience and explains the process well



Accomplishments—Po-Wang Yuen was one of several attorneys and organizations honored for pro bono work during National Pro Bono Celebration Week at a ceremony on October 26 at the New York County Lawyers Association. Edwina Martin, NYSBA's co-chair of the President's Committee on Access to Justice, is at right. [Photo by Cathleen McDonald]

from the beginning. During the year, Slattery completed 443 hours of pro bono service.

Po-Wang Yuen

Po-Wang Yuen, a member of the board of directors of Renaissance Economic Development Corporation (REDC) and vice president of the board of directors of its affiliate Asian Americans for Equality (AAFE), was honored for his 10-plus years of service to low-income residents, immigrants and small businesses of New York City through REDC and AAFE. He is also a volunteer attorney in the New York State Attorney Emeritus Program and of counsel to the law firm of Yuen Rocanova & Seltzer.

Yuen provides clients with legal advice on housing matters, immigration issues, and corporate formation for local entrepreneurs, who would not be able to afford to hire a private attorney on their own. He has helped numerous low-income, minority, women and immigrant entrepreneurs grow successful businesses.

David Zube

Since retiring from private practice, David Zube spends several hours each week at the Legal Aid office in Binghamton, assisting clients with bankruptcy issues. He recently met on an emergency basis with a client whose income was garnished by a former landlord and had to move before the end of the lease term.

Each day was a struggle as the client tried to provide for her family of seven on a modest paycheck, with the garnishment making it impossible to cover her expenses. The bankruptcy provided the relief she needed.

Zube also spends time training Legal Aid staff on filing bankruptcies and is a regular volunteer in Legal Aid's consumer legal clinic and senior legal clinics. He has always been committed to civil legal services for the low-income, having served as Legal Aid's director several years before entering private practice. ♦

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Pro Bono Services

By Kristen Wagner, Director

Survey results provide valuable insight into pro bono service in New York state



Wagner

In July 2017, the American Bar Association's Standing Committee on Pro Bono and Public Service published "Supporting Justice in New York: A Report on the Pro Bono Work of New York's Lawyers," based on a survey that was conducted as part of a nationwide project in the spring.

While not every attorney in the state of New York completed the survey, the results provide valuable insight into the pro bono work being done by attorneys around the state.

The survey results indicated that 22.6 percent of the responding attorneys have never provided pro bono service. While this may very well be an improvement upon years past, we still have a long way to go in having all New York attorneys fulfill their aspirational goals of completing at least 50 hours of pro bono service every year.

Unsurprisingly, private attorneys were significantly more likely to have engaged in pro bono service than those in other settings, such as corporate, government and nonprofit settings. Many private attorneys, especially those at larger law firms, often are actively encouraged by their firms to do pro bono work and may even have staff within their firm to assist them in securing appropriate pro bono assignments.

Attorneys from other sectors often have more barriers to overcome in order to do pro bono service, like conflicts of interest and resource limitations, among others.

71.6 percent of attorneys indicated that their recent pro bono experience was within their areas of

expertise. Attorneys who practice primarily in poverty, public benefits, disability rights, civil rights, housing, nonprofit organization, consumer, education, juvenile, elder, and immigration were more likely to do pro bono work.

This is not surprising, given the fact that these particular areas of the law are those that directly align with the types of legal services that are most often needed by low-income individuals. It makes sense that attorneys are more comfortable providing pro bono services within their fields of expertise; however there are fewer attorneys with these particular skill-sets and knowledge base than the overwhelming number of low-income individuals who require services in these practice areas.

Pro bono gaps

These are examples of why there are gaps in the levels of pro bono services rendered by attorneys statewide. The survey respondents indicated that some of the top ways in which pro bono programs can more successfully engage them include offering CLE credit for doing pro bono work, offering limited scope representation opportunities, offering malpractice insurance coverage to pro bono attorneys, and offering free or reduced cost CLE programming, among others.

There are many organizations with pro bono programs across the state that are already offering these things. They not only provide pro bono attorneys with the training they need to do the pro bono work that is so greatly needed, but they will also provide them with CLE credit for those trainings as well as malpractice insurance coverage for the pro bono work they do. If you are ever in need of assistance in getting connected with one of these organizations, contact NYSBA's Pro Bono Services Department at 518-487-5640 or probono@nysba.org.

The New York State Bar Association continues to provide continuing legal education programs geared towards attorneys seeking to do pro bono work and continues to do more to make doing pro bono work more accessible to all kinds of attorneys. For instance, NYSBA recently held a free CLE program on pro bono ethics for government attorneys. Government attorneys are under many restrictions that make it particularly difficult for them to do pro bono work. However, it is possible for government attorneys to do pro bono work as long as they work within the restrictions placed upon them. There are organizations across the state that can work with all kinds of attorneys in finding the right pro bono volunteer opportunities.

Free Legal Answers

One pro bono program designed to enable attorneys to do pro bono who might not otherwise be able to is New York Free Legal Answers (ny.freelegalanswers.org). Launched in 2016, New York Free Legal Answers continues to be a valuable resource for low income New Yorkers to receive brief legal advice from volunteer lawyers across the state.

The number of questions submitted continues to grow each month. These questions cover a variety of topics ranging from family law to housing and property law issues, as well as legal questions related to benefits, employment law, and others. More volunteer attorneys are always needed, and NYSBA is currently offering free access to introductory programs and materials within these subject matters for those who sign up to volunteer for New York Free Legal Answers.

I encourage you all to visit ny.freelegalanswers.org and sign up to be a volunteer attorney today! If you have any questions about the program, contact NYSBA's Pro Bono Services Department at 518-487-5640 or probono@nysba.org. ♦

Governmental Relations

By Ronald F. Kennedy, Director

NYSBA leaders continue work to reform statutory power of attorney document



Kennedy

This column is intended to provide an update on one of the State Bar Association's legislative proposals that is of great interest to practitioners across many substantive areas of the law—a bill to improve the statutory power of attorney.

As practitioners know, power of attorney is an important document because it helps people, often the elderly or disabled, manage their affairs, especially their finances and health care planning. It is also often used in connection with real estate and other business dealings. Having a valid power of attorney often avoids costly and time-consuming court proceedings.

Under current law, a power of attorney form is too complex, too costly, and unreasonably difficult for individuals to use.

The State Bar created a task force to review and make recommendations regarding the current statute covering power of attorney. The task force, chaired by Ellen Makofsky, was comprised of members of the Association's sections on Elder Law and Special Needs; Trusts & Estates; Business Law; Real Property Law; and Health Law. Goldfarb and Makofsky, along with Richard Weinblatt and Tara Ann Pleat have provided assistance throughout the advocacy process.

The legislation developed by the task force, to address the current problems with the power of attorney form, would:

- Simplify the current power of attorney form;
- Prevent third parties from improperly refusing to accept a consumer's valid power of attorney;
- Provide protection for third parties who follow the process for accepting a power of attorney; and
- Authorize language in the power of attorney form that substantially conforms with the statutory language, in order to prevent the harsh consequence of the form being invalidated because of harmless error in the form.

In short, the bill would ease the burden on families, especially at a time when they need simple and effective solutions. State Bar leaders President Sharon Stern Gerstman and President-elect Michael Miller argued to policymakers that good public policy should ensure that individuals are able to create and use an effective power of attorney when they need it, and therefore the NYSBA proposal, which was one of the Association's 2017 legislative priorities, should be enacted into law.

Our bill, Assembly bill, A.8120-B (Weinstein, et al) passed the Assembly by a vote of 142 in favor, 0 against. The Senate bill, S.6501-A (Hannon) was favorably reported out of the Senate Judiciary Committee, but was not acted on by the full Senate.

As we approach the 2018 regular session of the New York State Legislature, this important legislation has been the subject of continued advocacy efforts by NYSBA leaders and staff. More work is required in order to reach our goal of reforming the law in this area, and that work will continue into the New Year. ♦

The New York Bar Foundation

By John H. Gross, The New York Bar Foundation President

Partnerships and passion push New York Bar Foundation forward in 2017, into 2018



Gross

As I write this column, The Foundation's 24-hour online campaign for veterans legal services projects is winding down. Attorneys, their families, and friends participated to make this 24-hour effort a success.

More than \$8,000 has been raised for this effort. The goal of the campaign, spearheaded by the Young Lawyers Section and the Young Lawyer Friends of The Foundation giving group, was \$7,500.

For two consecutive years, the commitment of these two groups drove the success of the campaign in raising more than their stated goal. This year's campaign introduced a new opportunity for firms to participate as Matching Firm Partners.

Thank you to Criscione Ravala LLP and Sahn Ward Coschignano, PLLC for being the inaugural

partners and to everyone involved in this wonderful campaign to assist Veterans in need of legal services.

Developing new partnerships and spearheading fundraising events such as this have contributed to The Foundation's success in 2017.

As president, it is gratifying to observe the legal community joining in so many passionate ways to assist with the growth of the Foundation's grant program. Your support provides opportunities for non-profit organizations throughout New York State that help those in desperate need of legal services.

Immigration, foster care, homelessness, veterans' benefits, re-entry, domestic violence and elder abuse are some of the many quality-of-life issues those in need face, but who often can't afford an attorney to assist in obtaining a positive life-changing outcome.

These efforts highlight so much of what we are—we are a helping profession dedicated to the rule of law. Attorneys are caring and compassionate, striving to make a difference in their communities every day; The Foundation is a bridge, connecting the gifts of our donors to those in need of services.

Thanks to each of you who has helped this year. We couldn't do it without you. ♦



Thank you—The Defense Association of New York (DANY) used its past presidents' dinner as a fundraiser for The Foundation's Disaster Relief Fund. From left, Heather Wiltshire Clement of Sovereign Claims LLC, DANY president; Tom Liptak of Kenney Shelton Liptak Nowak LLP, board member and officer/assistant treasurer; Tom Maroney of Maroney & O'Connor LLP, board member and DANY past president; Vincent P. Pozzuto of Cozen O'Connor, chairman of the board and DANY immediate past president; and The New York Bar Foundation Treasurer Martin Minkowitz of Stroock & Stroock & Lavan LLP.

The New York Bar Foundation ends 2017 on a financial high note

While there were several notable New York Bar Foundation projects that were successfully implemented in 2017, some of the year's highlights include:

- Beginning the year by announcing that The Foundation was administering the Catalyst Public Service Fellowship program. The program was created in 2016 by a donation of unused campaign funds from the Janet DiFiore for District Attorney Committee before she became the Chief Judge.
- The program was developed to encourage and enable first-year law students to gain practical legal experience in public service. For many of them, this would not be possible without the assistance of the program. Fellowships totaling \$100,000 were earmarked for 13 New York law schools this year. The goal for 2018 is for each of the 15 law schools to have at least three students participate.
- Recognizing the vital need to provide legal assistance for immigrants, The Foundation partnered with the NYSBA to financially support its new online portal that connects pro bono volunteer attorneys to organizations that provide assistance to immigrants in New York state.
- Coordinating disaster relief fundraising efforts to assist those in need of legal services after the devastating impacts of Hurricanes Harvey, Irma and Maria.
- Working with sections of the NYSBA to establish two new restricted funds that will be allocated to the grant program. The Business Law Section Small Business Support Fund will support organizations through the grant program to assist underserved New York residents seeking to establish their own small business enterprises within the state of New York. The Family Law Section Fund will support organizations through the grant program to assist organizations with Family Law-related programs. ♦

—John Gross, president, The New York Bar Foundation



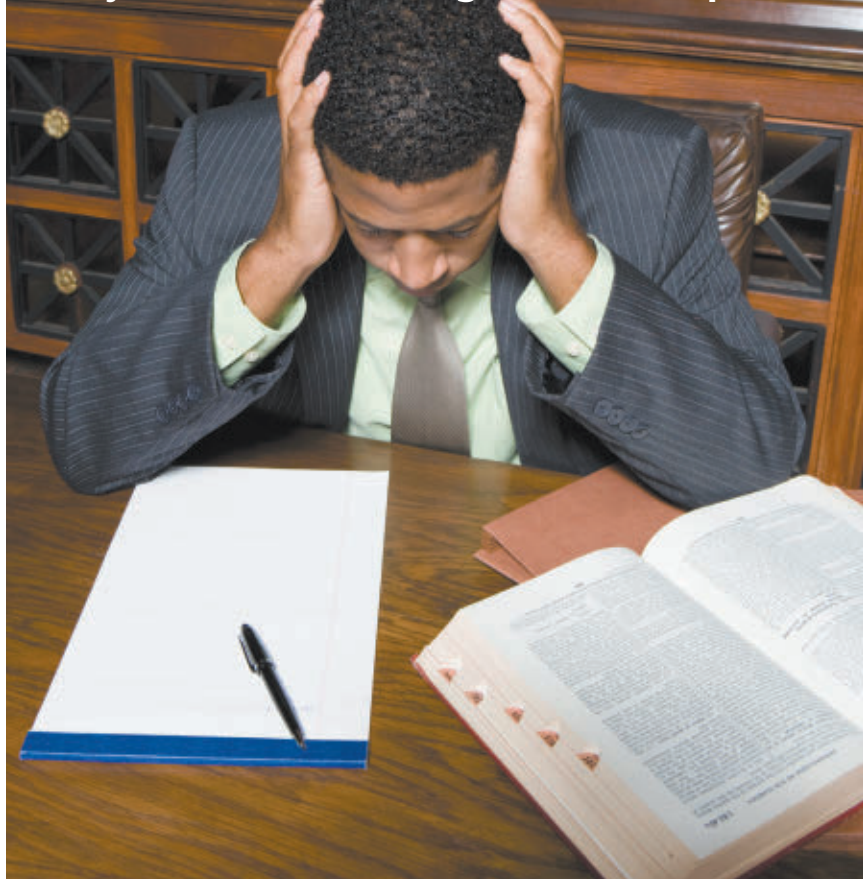
[Photos by Donna Cain]

Habitat for Humanity

Members of the Real Property Section's 9th District participated in a Habitat for Humanity Team Build Day on Sept. 16 in Rockland County. The section made a donation to Habitat for Humanity of Rockland County for each volunteer.

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November/December 2017

Bestsellers

Attorney Escrow Accounts – Rules, Regulations and Related Topics, 4th Ed.

This is the go-to guide on escrow funds and agreements, IOLA accounts and the Lawyers' Fund for Client Protection. With CD of forms, ethics opinions, regulations and statutes.

PN: 40264 / Member \$60 / List \$75 / 436 pages

Criminal and Civil Contempt, 2nd Ed.

This second edition explores a number of aspects of criminal and civil contempt under New York's Judiciary and Penal Laws, focusing on contempt arising out of grand jury and trial proceedings.

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Written by some of the most successful entertainment law practitioners in the country, this edition covers the principal areas of entertainment law.

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Estate Planning & Will Drafting in New York, 2017 Revision Available December 2017

A valuable resource for novice as well as experienced practitioners. Includes downloadable forms.

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Evidentiary Privileges, 6th Ed.

The 6th edition covers the privileges that may be asserted at the grand jury and at trial.

PN: 40996 / Member \$55 / List \$75 / 450 pages

Foundation Evidence, Questions and Courtroom Protocols, 5th Ed.

This edition of this classic text has been completely reorganized to better follow the process of a trial; the sections on Direct, Re-direct and Cross Examination have been greatly expanded.

PN: 41074 / Member \$65 / List \$80 / 344 pages

New York Contract Law: A Guide for Non-New York Attorneys

A practical, authoritative reference for questions and answers about New York contract law.

PN: 4172 / Member \$95 / List \$130 / 622 pages

N.Y. Lawyers' Practical Skills Series (2017–2018) Available December 2017

An essential reference, guiding the practitioner through a common case or transaction in 25 areas of practice. Nineteen titles; 16 include downloadable forms.

PN: 40018PS | Member \$695 | List \$895

FEATURED

Contract Doctrine & Marital Agreements in New York, 3rd ed.

This unique work addresses virtually every potential issue that might arise in a matrimonial contract and analyzes both settled and unsettled law.

PN: 41596 / Member \$185 / List \$245 / 2,280 pages

Municipal Ethics in New York State: A Primer for Attorneys and Public Officials

A must-have for anyone looking for help navigating the difficult intersection of ethics regulations and local law, including conflicts of interest restrictions, misuse of public office, disclosure, and more.

PN: 4142 / Member \$60 / List \$75 / 463 pages

NYSBA Estate Planning System

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PN: 6270 / Member \$1,104 / List \$1,351 (CD)

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The Legal Writer: Drafting New York Civil-Litigation Documents

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PN: 4073 / Member \$95 / List \$125 / 518 pages

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RECENT DECISIONS & CASE LAW DEVELOPMENTS

The New York State Bar Association provides members with case summaries as part of NYSBA's CasePrepPlus service. CasePrepPlus is an online service highlighting and summarizing the most recent and significant New York appellate cases (with access to the full opinions). The case summaries, prepared by Bruce Freeman, Esq., of Rochester, New York, save the practitioner valuable time by including only the most relevant cases, sorted by court and topic. This service is part of the ongoing initiative to continually provide relevant benefits to NYSBA members.

COURT OF APPEALS

CRIMINAL LAW

TOW TRUCK WAS "EQUIPPED" WITH A POLICE SCANNER, EVEN THOUGH THE SCANNER WAS IN DEFENDANT'S POCKET, NOT ATTACHED TO THE TRUCK. The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissenting opinion, determined defendant was properly convicted of "equipping" his tow truck with a police scanner without a permit. The scanner was not attached to the vehicle. It was in the defendant's pocket: "Our analysis begins with the language of the statute. Neither the VTL [Vehicle and Traffic Law] nor the Penal Law defines 'equips' or any derivation of that word. Absent a statutory definition 'we must give the term its 'ordinary' and 'commonly understood' meaning To that end, '[i]n determining the meaning of statutory language, we 'have regarded dictionary definitions as useful guideposts' A review of recent sources and those available at the time the statute was enacted in 1933 indicates that 'equips' does not necessitate physical attachment or a special adaptation. * * * Under these definitions 'equip' means to provide something with a particular feature or ability. None states or implies any need for the object's physical attachment to the thing equipped. ... Giving 'equip' its commonly understood meaning, VTL 397 applies regardless of whether the prohibited device is physically attached to the motor vehicle, so long as the device is ready for efficient service." *People v. Andujar*, 2017 N.Y. Slip Op. 07383, CtApp 10-24-17

WORKERS' COMPENSATION LAW, INSURANCE LAW AMENDMENT TO WORKERS' COMPENSATION LAW WHICH CLOSED THE SPECIAL FUND FOR REOPENED CASES IS CONSTITUTIONAL.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the appellate division, determined the amendment to Workers' Compensation Law § 25-a, which closed the special fund for reopened cases, is constitutional, despite some retroactive effect on insurers. Plaintiffs are insurance

companies that write workers' compensation insurance policies. They challenged the legislature's 2013 amendment ... which closed the special fund for reopened cases. The special fund was designed to relieve insurers of unexpected reopened claims in cases that had been closed seven or more years before: "We conclude that, assuming the amendment has a retroactive impact by imposing unfunded costs upon plaintiffs for policies finalized before the amendment's effective date, that retroactive impact is constitutionally permissible. * * * ...

'[T]he constitutional impediments to retroactive civil legislation are now modest' 'Absent a violation' of a specific constitutional provision, 'the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope' * * * ... [T]he legislative amendment does not impair any term of plaintiffs' contracts with their insureds * * * Plaintiffs cannot identify any vested property interest impaired by the legislative amendment * * *

Assuming that the 2013 amendment to section 25-a has some retroactive impact, we conclude that the retroactive impact is justified by a rational legislative purpose [T]he closure of the Fund was intended to 'save New York businesses hundreds of millions of dollars in assessments per year' ...". *American Economy Ins. Co. v. State of New York*, 2017 N.Y. Slip Op. 07385, CtApp 10-24-17

FIRST DEPARTMENT

FAMILY LAW

FAMILY COURT SHOULD HAVE FOUND FOUR MONTH OLD CHILD TO HAVE BEEN NEGLECTED, FATHER CHOKED MOTHER WITH CHILD IN THE ROOM.

The First Department, reversing Family Court, determined that the four-month-old child's (Jace's) presence in the room when father choked mother supported a finding Jace was neglected: "The mother testified that the father choked her in the presence of six-year-old Isabella and only a couple of feet away from where then four-month-old Jace was sleeping in his crib. The mother's testimony was supported by shelter records; the father did not testify. Family Court found the mother's testimony was credible and

supported a finding that the father neglected Isabella. The same evidence also supports a finding that the father neglected Jace. Even a single instance of domestic violence may be a proper basis for a finding of neglect, so long as it 'occurred in the child's presence and resulted in physical, mental or emotional impairment or imminent danger thereof' Jace was in imminent danger of physical impairment due to his close proximity to the violence The father's assertion that Jace was in 'another part of' or 'somewhere else in' the one-room residence at the time of the attack is unsupported by the record." *Matter of Isabella S. (Robert T.)*, 2017 N.Y. Slip Op. 07533, First Dept 10-26-17

PERSONAL INJURY

BUS DRIVER ACTED REASONABLY IN RESPONSE TO AN EMERGENCY SITUATION (AN ASSAULT ON THE DRIVER), PLAINTIFF PASSENGER'S NEGLIGENCE AND FALSE IMPRISONMENT ACTION SHOULD HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined the NYC Transit Authority's motion for summary judgment should have been granted. Plaintiff was on a bus when a man attempted to get on the bus without paying and assaulted the driver. Plaintiff and others moved to the back of the bus and demanded that the driver, Hamblin, open the rear door (the door was not opened). Plaintiff allegedly suffered a panic attack which created a condition requiring that a defibrillation device be implanted in her chest. The court held that Hamblin was faced with an emergency situation to which he reacted appropriately: "Defendant established entitlement to judgment as a matter of law as to plaintiff's negligence claim by submitting evidence showing that the incident was the result of an emergency situation that was not of Hamblin's own making and that afforded him little or no time to consider an alternate course of action... . The record demonstrates that Hamblin reasonably and prudently responded to the emergency by making sure that the bus's emergency brake was activated and pressing the silent alarm to summon the police In opposition, plaintiff failed to raise a triable issue of fact. She only presented unsubstantiated assertions and speculation that Hamblin may

have breached a duty of care by not making sure that the rear exit door was unlocked and that her injuries might have been avoided if he had acquiesced to the assailant's demand that he be permitted to board the bus without paying the fare Dismissal of the false imprisonment claim is also warranted, since there is no evidence that Hamblin intended to confine plaintiff ...". *Savinon v. New York City Tr. Auth.*, 2017 N.Y. Slip Op. 07390, First Dept 10-24-17

SECOND DEPARTMENT

DEBTOR-CREDITOR

DEBTOR CAN SIMPLY REFUSE TO REPAY THE CRIMINALLY USURIOUS LOAN.

The Second Department determined a loan with a 50% per year interest rate was criminally usurious and the debtor could simply refuse to repay it: "A borrower bears the burden of proving each element of usury by clear and convincing evidence, and usury 'will not be presumed' Here, the plaintiff admits that the interest on the loan was excessive, criminally so, at 50% per annum, or 100% over the two-year term of the loan. Further, where a loan agreement is usurious on its face, usurious intent will be implied and usury will be found as a matter of law Thus, the defendants met their burden of establishing the elements of criminal usury. Moreover, there was no evidence of a 'special relationship' between the parties ... , and no evidence that the defendants set a rate they knew to be usurious for the purpose of avoiding repayment of the loan Accordingly, there is no triable issue of fact as to whether the defendants may be estopped from raising usury as a defense to the plaintiffs' action. Because an action by a lender on a usurious loan is impermissible ... , the plaintiff's motion was properly denied and that branch of the defendants' cross motion which was for summary judgment dismissing the action on the ground that the loan was usurious was properly granted ...". *Roopchand v. Mohammed*, 2017 N.Y. Slip Op. 07476, Second Dept 10-25-17

Continued on page 22

CLE Seminar Schedule

To register or for more information, call toll-free 1/800/582-2452. For Albany and surrounding areas call 518/463-3724 or fax your request to 518/487-5618. Check www.nysba.org/cle for New York MCLE credit hours for courses. *(This schedule is subject to change)*

December

DEPOSITION BOOT CAMP 2017

(9:00 a.m. – 12:45p.m.)

(F) December 8 | New York City
New York Society of Security Analysts

FUNDAMENTALS OF HEALTH LAW

(W) December 6 | New York City
New York Society of Security Analysts

CRITICAL AREAS IN MATRIMONIAL LAW: ETHICS, EVIDENCE, SEPARATE PROPERTY/ COMMINGLING

Rochester

R.I.T Inn & Conference Center
(Th) December 7 | New York City
New York Society of Security Analysts (WC)

(F) December 8 | Albany
New York State Bar Association

REPRESENTING THE STARTUP BUSINESS IN NEW YORK 2017 – PART 2

Live & Webcast

(M) December 4 | New York City
CUNY Graduate Center (WC)

ADVANCED REAL ESTATE TOPICS 2017

Live & Webcast

(T) December 5 | New York City
New York Society of Security Analysts (WC)

BUYING OR SELLING A SMALL BUSINESS

(9:00 a.m. – 1:00 p.m.) Live & Webcast
(T) December 6 | Albany
New York State Bar Association (WC)

ETHICS IN LEGAL PRACTICE: AN UPDATE AND REVIEW OF RECENT ETHICS OPINIONS

(2:00 p.m. – 5:00 p.m.) Live & Webcast
(T) December 6 | Albany
New York State Bar Association (WC)

TAME THE DIGITAL CHAOS: DISTRACTION, TIME, TASK & EMAIL MANAGEMENT FOR LAWYERS

(9:00 a.m. – 12:00 p.m.) – Live & Webcast
(F) December 8 | New York City
Executive Conference Center (WC)

FIGHT THE PAPER! PAPER REDUCTION STRATEGIES

(1:00 p.m. – 4:00 p.m.) – Live & Webcast
(F) December 8 | New York City
Executive Conference Center (WC)

RESOLVING E-DISCOVERY DISPUTES EFFICIENTLY IN ARBITRATION AND IN COURT

(6:00 p.m. – 7:40 p.m.)
(M) December 11 | New York City
JAMS

GAIN THE EDGE! NEGOTIATION STRATEGIES FOR LAWYERS

(M) December 11 | New York City
New York Society of Security Analysts
(T) December 12 | Long Island
Melville Marriott

BRIDGING THE GAP – WINTER 2017

(T-W) December 12-13 | Albany (Video Conf.)
New York State Bar Association
Buffalo (Video Conf.)
Hyatt Place Buffalo/Amherst
New York City (Live)
New York Hotel Pennsylvania (WC)

DEMENTIA, SCIENCE & THE LAW

(8:30 a.m. – 1:00 p.m.) Live & Webcast
(Th) December 14 | New York City
The Core Club (WC)

ADVANCED LEGAL RESEARCH WITH FASTCASE

(1:00 p.m. – 2:00 p.m.) Webcast Only
(F) December 15 | Webcast

January

CRIMINAL ESI: ELECTRONIC INFORMATION IN CRIMINAL INVESTIGATIONS & PROCEEDINGS

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(Th) January 18 | Webcast



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2. Publication Number: 0363-0331

3. Filing Date: 09/13/17

4. Issue Frequency: Bi-monthly

5. Number of Issues Published Annually: 2

6. Annual Subscription Price: None; member benefit

7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®):
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8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer):
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Recent Decisions & Case Law Updates

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FAMILY LAW

GARNISHMENT OF HUSBAND'S INCOME FOR CHILD SUPPORT ARREARS AT 65% DID NOT STRIKE A FAIR BALANCE BETWEEN THE NEEDS OF THE CREDITOR WIFE AND THE NEEDS OF THE DEBTOR HUSBAND, REDUCED TO 40%.

The Second Department, reversing Supreme Court, determined the plaintiff husband was entitled to a reduction in his wage garnishment for child support arrears from 65% to 40%: "Here, the Supreme Court determined that the 65% income execution was appropriate in light of the plaintiff's 'history of substantial arrears.' However, notwithstanding his history of arrears, the plaintiff demonstrated that, at the time of his motion, a 65% income execution was unduly prejudicial. Since the 2013 order, the defendant has received the sum of at least \$511,000 toward the arrears, both of the parties' children have become adults and attended college, and only one of the adult children lives in the defendant's home. The plaintiff demonstrated that the 65% income execution provided the defendant with a monthly payment of approximately \$7,500, that the plaintiff received only about \$3,000 per month after garnishment and other deductions, and that his monthly expenses were approxi-

mately \$5,000. Significantly, the plaintiff's expenses included the sum of \$575 per month for student loan payments on behalf of one of the parties' adult children. Additionally, the defendant has not disputed the plaintiff's assertion that she has other sources of income apart from the monies that she receives from the income execution. Under all the circumstances present here, it cannot be said that, at the time of the instant motion, the 65% income execution struck 'a fair balance between the needs of a creditor holding a valid money judgment and the needs of a debtor managing competing financial obligations' To the contrary, the record reflects that the 65% income execution created a tremendous disparity between the plaintiff's expenses and his actual income after garnishment and deductions, and that the defendant did not have any particular need for the maximum garnishment percentage." *Fishler v. Fishler*, 2017 N.Y. Slip Op. 07429, Second Dept 10-25-17

THIRD DEPARTMENT

CRIMINAL LAW

DEFENDANT'S SENTENCE FOR ROBBING A PHARMACY OF OXYCODONE REDUCED BASED IN PART ON HIS STATUS AS A WOUNDED VETERAN AND HIS OPIOID ADDICTION.

The Third Department, over a

dissent, reduced defendant's sentence for robbery of a pharmacy to procure oxycodone. The dissent argued the mitigating circumstances, including defendant's status as a wounded veteran, were not extraordinary: "In light of defendant's admission from the outset that he perpetrated the robbery, albeit without a knife, the correlation between the illness that he contracted while serving in Afghanistan and an opioid addiction that precipitated this event, his duly expressed remorse and his lack of any prior criminal record, we find that his sentence for the criminal possession of a controlled substance conviction was unduly severe and should be reduced to three years, with five years of postrelease supervision, to run concurrently with the sentences for his other convictions. Correspondingly, we vacate the \$5,000 fine." *People v. Wyrick*, 2017 N.Y. Slip Op. 07488, Third Dept 10-26-17

PERSONAL INJURY, EMPLOYMENT LAW

RESIDENTIAL CARE FACILITY NOT LIABLE FOR ASSAULT ON PLAINTIFF EMPLOYEE BY A RESIDENT, ASSAULT WAS NOT FORESEEABLE.

The Third Department determined the residential care facility's motion for summary judgment was properly granted in this action by an employee of the facility stemming

from an assault by a resident. The court held that there was no evidence demonstrating the facility was aware of the danger posed by the resident, i.e., no evidence the assault was foreseeable from the standpoint of the employer: "Defendant, 'like any other property owner, has a duty to protect persons lawfully present on its premises, including patients and visitors, from the reasonably foreseeable criminal or tortious acts of third persons' Accordingly, since 'liability require[s] a showing that the wrongdoer's conduct was foreseeable to the defendant'... , defendant may 'establish[] its entitlement to judgment as a matter of law by showing that it had no notice of any prior similar incidents or similar aggressive behavior by the patient such that it should have anticipated the alleged incident and protected the plaintiff from it' Here, while plaintiff and her coworkers may have been aware of the resident's history of assaultive conduct, there is nothing beyond the speculation of plaintiff and a coworker (her daughter) to suggest that anyone employed by defendant had a similar awareness. * * * ... [D]efendant satisfied its ... burden of showing that it could not have reasonably anticipated the attack on plaintiff ...". *Boudreaux v. Columbia Mem. Hosp.*, 2017 N.Y. Slip Op. 07513, Third Dept 10-26-17 ♦

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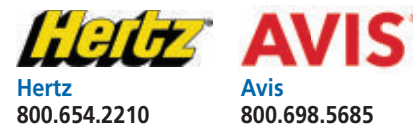


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