

JUDICIAL DISPATCH



A publication of the Judicial Section of the New York State Bar Association

Fall 2015 | Vol. 3 No. 1

FORMER PRESIDING MEMBER'S MESSAGE



Ellen Spodek

I am happy to report that we accomplished all three goals I set for my tenure as Presiding Member of the Judicial Section. First, we began dialog with the Office of Court Administration to address issues that are relevant to all members of the judiciary. Second, we increased membership in the NYSBA Judicial Section. Third, we continued the work of Immediate Past Presiding Member, Judge Rachel Kretser, to raise awareness to the need for diversity on the bench statewide.

At our Annual Luncheon in January, the Judicial Section presented its Distinguished Jurist Award to the Hon. Betty Weinberg Ellerin and its first Advancement of Judicial Diversity Award to the Hon. Karen K. Peters.

Justice Ellerin is a lifelong trailblazer. During her legal career, she accomplished many "firsts." Justice Ellerin was the first woman appointed Deputy Chief Administrative Judge for the New York City Courts, the first woman appointed as an Associate Justice of the Appellate Division, First Department, the first woman appointed Presiding Justice of the Appellate Division, First Department, and a founding member and director of the Women's Bar Association of the State of New York.

Like Justice Ellerin, Justice Peters also accomplished many "firsts." She was the first woman elected to the Supreme Court in the Third Judicial District, and the first woman appointed as Presiding Justice of the Third Department. Justice Peters works tirelessly to promote diversity on the bench and in the bar in our state capitol, in the Third Department and throughout our state. She was a natural choice to receive the first Advancement of Judicial Diversity Award.

Thank you for the opportunity to serve as the Presiding Member of the Judicial Section. Please keep your calendar clear for our next Annual Luncheon on January 29, 2016 at the New York Hilton.

"It is well enough to say that we shall be consistent, but consistent with what? . . . The origins of the Rule? The course and tendency of development? With logic or philosophy? With the fundamental conceptions of jurisprudence? All these loyalties are possible. All have sometimes prevailed."

Benjamin N. Cardozo

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The Judicial Dispatch is your newsletter. To receive future complimentary paper editions, you must be a member of NYSBA's Judicial Section.

I welcome submissions on topics of interest to the members of our Section. If you have an article or announcement you would like considered for publication, please send it to me in electronic format. The views expressed in articles in this newsletter are not necessarily the views of NYSBA, the Judicial Section, or its Officers.

IN MEMORIAM

Hon. Richard Bartlett passed away on April 22, 2015 at the age of 89. Justice Bartlett was a Supreme Court Justice in the 4th Judicial District. He also served as Chief Administrative Judge.

Allen Beldock passed away on June 10, 2015 at the age of 96. Justice Beldock was a Supreme Court Justice in the 11th Judicial District. After retiring, Justice Beldock served for more than 20 years as a Judicial Hearing Officer.

Hon. Ronald A. Cicoria passed away on January 7, 2015 at the age of 74. Judge Cicoria was a Livingston County Court Judge.

Hon. Edwin Kassoff (July 15, 1924 - June 10, 2015). Justice Kassoff was a Supreme Court Justice in the 11th Judicial District. During his tenure on the bench, Justice Kassoff served as Presiding Justice of the Appellate Term of the Supreme Court and the Guardianship Part, Queens County. He began his judicial career as a Civil Court Judge.

Hon. Jerald Klein passed away on March 8, 2015 at the age of 66. Judge Klein served on the New York City Housing Court.

Hon. Gabriel S. Kohn passed away on June 1, 2015 at the age of 86. Justice Kohn served on the Supreme Court, 10th Judicial District. Prior to his election to Supreme Court, Justice Kohn was a Court of Claims Judge and a District Court Judge.

Hon. J. Robert Lynch (March 1, 2021 – January 29, 2015). Justice Lynch was elected to Supreme Court, 5th Judicial District. He was appointed to the Supreme Court, Appellate Division, First Department, and he also was appointed temporarily to fill a vacancy on the New York Court of Appeals.

Hon. Thomas P. Phelan passed away on February 12, 2015 at the age of 69. He was a Supreme Court Justice in the 10th Judicial District. Prior to serving on the Supreme Court, Justice Phelan was a District Court Judge.

Hon. Robert M. Quigley (November 7, 1923 – July 3, 2015). Judge Quigley served on the Court of Claims.

Hon. Alvin Schlesinger passed away on January 14, 2015 at the age of 90. Justice Schlesinger was a Supreme Court Justice in New York County serving in the Criminal Part.

Hon. Robert H. Spergel passed away on February 7, 2015 at the age of 55. Judge Spergel was a District Court Judge, Nassau County, and Acting Supreme Court Justice.

Hon. Louis B. York passed away on November 16, 2014 at the age of 76. During his judicial career, Justice York served as a Supreme Court Justice in the 1st Judicial District, and as a New York City Civil Court Judge.

2015 Judicial Section Membership

\$25.00. Membership in the Judicial Section is a tremendous value at only \$25.00. New York State Bar Association Judicial Section membership offers a variety of excellent and practical benefits. Enjoy THREE free on-line CLE educational programs each year; FREE access to Case Prep Plus's entire library of advance sheets and research services, as well as UNLIMITED access to all archives (an annual value of \$160); and a discount on the Judicial Section Annual Meeting luncheon (the savings typically covers the cost of annual section dues).

*To join the section, please visit www.nysba.org or call the State Bar Service Center at 800-582-2452. **Join today!***

SAVE THE DATE

Judicial Section Annual Luncheon

The Judicial Section Annual Luncheon will be held during NYSBA's Annual Meeting on Friday, January 29, 2016.

The final ticket price is yet to be determined.



JUDICIAL NEWS AND UPDATES

Update on Judicial Pay and Benefits Litigation

Larabee v Governor of State, 121 AD3d 162 (1st Dep't 2014) – This case raises the issue of whether the failure of the salary commission and legislature to award a retroactive pay adjustment adequately complied with the Court of Appeals' earlier directive to remedy the State's separation of powers' violation, particularly because the salary commission ignored the damage that occurred during the 13 years judges went without raises and because the salary commission wholly overlooked judges who served – and also retired -- during that 13-year period. On July 10, 2014, in a split decision, the First Department affirmed the motion court's decision granting summary judgment against plaintiffs. Because there were two dissents, the Court of Appeals will hear the case. Stroock & Stroock & Lavan, LLP submitted a Brief of Amici Curiae on behalf of the Association of Justices of the Supreme Court of the State of New York, The Supreme Court Justices Association of the City of New York, Inc., and the New York State Association of City Court Judges.

Bransten v State, 117 AD3d 455 (1st Dep't 2014) – The issue in this case is whether the increase in required judicial healthcare contributions is a decrease in compensation

in violation of the Compensation Clause of the New York Constitution. On May 4, 2014 the First Department unanimously affirmed the motion court's denial of the State's motion to dismiss. Unlike unionized state employees whose contributions were increased as part of collective bargaining agreement negotiations, judges received nothing in exchange for the required increase in healthcare contributions. Following discovery, the parties cross-moved for summary judgment. On March 25, 2015, the trial court granted plaintiffs' motion finding that the challenged statute and regulations were unconstitutional as applied to the judges and justices of the Unified Court System because they diminished judicial compensation. On a joint request of the parties, the Court of Appeals agreed to directly hear the appeal from the summary judgment decision bypassing the Appellate Division, First Department. A briefing schedule has been set.

Loehr v. Administrative Board of the Courts of the State of New York, 2015 NY App. Div. LEXIS 5149 (3d Dep't 2015) – In this case, plaintiffs challenged an administrative order signed by the Chief Administrative Judge that adopted a new policy prohibiting certificated judges from collecting retirement

benefits for prior judicial service. The trial court granted respondent's motion to dismiss the petition for failure to state a cause of action finding that the policy was neither illegal nor unconstitutional. On June 18, 2015, in a unanimous decision, the Appellate Division, Third Department, reversed the trial court. In its decision, the Third Department reasoned that Retirement and Social Security Law §212(a) preempts respondent from implementing the challenged policy. "The language of Retirement and Social Security Law §212 explicitly allows New York public employees – including justices of the Supreme Court – to retire in place and continue to work while collecting their state pension." The Third Department also found that the policy ran afoul of the statute inasmuch as it "effectively created two classes of justices – those who can receive either private retirement benefits or solely nonjudicial public service retirement benefits and those who are eligible for judicial public service retirement benefits but are not allowed to receive them. The Administrative Board's policy was declared violative of Article V, §7 of the New York Constitution, §115(3) of the Judiciary Law and §212 of the Retirement and Social Security Law.

JUDICIAL ETHICS: LETTERS OF RECOMMENDATION AND REFERENCE

By: Mary Rita Dobiel, Esq., Former Chief Counsel, Advisory Committee on Judicial Ethics

One question judges routinely ask is whether they may provide a letter or other form of reference for a family member, friend, or lawyer. According to the Rules Governing Judicial Conduct (Rules), a judge must not lend the prestige of judicial office to advance the private interests of another and is prohibited from testifying voluntarily as a character witness (see 22 NYCRR 100.2[C]). Nevertheless, a judge may provide a reference in certain circumstances without violating this provision of the Rules.

In Opinion 06-156, the Advisory Committee on Judicial Ethics (ACJE) advised that a judge may provide a reference that "reflects the judge's opinion of a person's character or work history if the judge has worked with the person and has a reliable personal knowledge of the person's expertise." In addition, a judge may provide a reference to a prospective employer or licensing entity about an applicant's good character, so long as the reference reflects the judge's opinion of the applicant's character (see *id.*). However, a judge may do so only if the hiring or issuing entity requires such a letter (*id.*).

In the past, the ACJE has issued numerous opinions addressing whether a judge may provide a letter or other form of reference for an individual. For example, the ACJE has advised that a judge may write a letter of reference about the general character of a potential co-op purchaser to the board of the co-operative building (see Opinion 98-103 [Vol. XVII]); a letter of reference on behalf of a law school applicant which reflects the judge's opinion of the applicant's prior history or character (see Opinion 88-10 [Vol. I]); a reference for an attorney

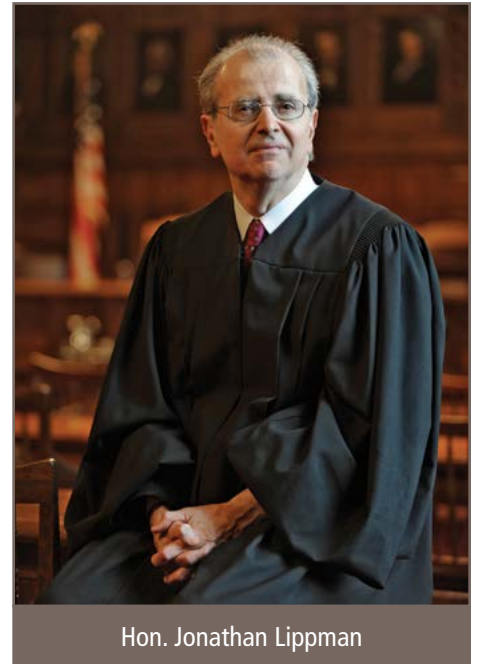
who represented a party during a trial over which the judge presided and who is seeking employment with a law firm located in another community (see Opinion 01-114 [XX]); a letter of reference for an attorney seeking admission to a law guardian panel which is required as part of the application process (see Opinion 05-29); at the request of a local bar association, a letter of recommendation supporting an attorney's nomination for a state bar association award where the judge worked with the attorney on an attorney grievance committee and the attorney appeared before the judge many times (see Opinion 02-118); and a reference for the judges law clerk, to support his/her nomination for an award from a legal publication (see Opinion 15-64). Very early on, the ACJE also advised that a judge may submit an affidavit of good character for an applicant to the New York State bar if it accurately reflects

MESSAGE FROM THE CHIEF JUDGE

I am delighted to send my greetings and to share with you a recent development of interest to New York's judiciary. This summer marks the beginning of the second cycle for the special commission on judicial compensation. As you know, the first commission, in 2011, recommended a 27 percent raise for judges in New York over three years, ending a twelve-year freeze. Now, a new commission will examine and evaluate current judicial compensation and make recommendations for salaries over the next four years. Those recommendations cover judges and justices of the state-paid courts of the unified court system and housing judges in New York City civil court. This commission, unlike the first commission four years ago, also will examine and make recommendations for salaries of the members of the state legislature, statewide elected officials, and executive branch commissioners. However, that new charge for the commission is on a later timetable than judicial salaries.

As of this writing, three of the seven members of the commission have been named. Earlier this summer, I appointed Sheila Birnbaum and Barry Cozier to represent the judiciary on the commission. These two outstanding individuals bring to this role great skill, experience, and judgment. Both are accomplished and esteemed in the profession and have a long history of service on legal and judicial committees. Ms. Birnbaum, a partner at Quinn Emanuel, has acted as a national or lead counsel for numerous Fortune 500 companies in some of the largest, most complex tort cases in the country. Barry Cozier is senior counsel at LeClair Ryan and had a stellar career on the bench in New York, most recently as a justice of the Appellate Division, Second Department. They both understand the critical importance of judicial compensation to the functioning of our justice system, and I am confident they will carry out their vital work on the commission with dedication, energy, and care.

They will be joined by Roman Hedges, a member of the state Dormitory Authority with a long career in government service who was appointed by Assembly Speaker Carl Heastie. The remaining members will be named by the Governor, who appoints three members, and the temporary president of the Senate, who appoints one. The Committee has until December 31 of this year to make its report. I look forward to the full commission embarking its work soon.



Hon. Jonathan Lippman

JUDICIAL ETHICS,

CONTINUED FROM PAGE 4

the judge's opinion of the individual applicant (see Opinion 88-166 [Vol. III]) and a letter of reference on behalf of an attorney seeking admission to the bar of another state on motion, when required as part of the application process (see Opinion 04-31).

Assuming it is permissible for a judge to write a letter of reference, may he/she use judicial stationery when doing so? The answer is yes, with the proviso that the words "Personal and Unofficial" are noted on the stationery (see Opinion 88-10 [Vol. I]).

Of course, the ACJE also has issued many opinions advising that the inquiring judge may not provide the requested reference. Thus, section 100.2(C) of the Rules precludes a judge from providing a letter of good character at the request of an individual applying for employment or some other position or status. Consequently, a judge may not provide a letter of good character on behalf of the judge's dog walker for submission to the

U.S. Embassy in a foreign country to support the dog walkers fiancé's application for a visa (see Opinion 02-123). Nor may a judge submit a letter to the NYS Department of Labor supporting an application for "Alien Labor Certification" by a waiter who works in a neighborhood restaurant (see Opinion 03-47), or a letter to the Immigration Naturalization Service on behalf of a member of the judge's religious institution attesting to the member's good character and requesting an expedited exclusion hearing (see Opinion 03-47).

Most recently, the Committee advised that a judge may not, at the request of the judge's friend who is seeking permission from a government agency to enter a foreign country, provide a letter of recommendation (see Opinion 14-33). In such circumstances, the Committee has consistently advised that providing such a letter is only permissible in response to a direct request from the government agency involved (see e.g. Opinions 03-51; 03-47). When responding to an official request, a judge does not risk the appearance that he/she is voluntarily testifying as a

character witness or improperly lending the prestige of judicial office to advance private interests.

What is readily apparent after this brief review of the ACJE's opinions about references is that the permissibility of each one depends on such factors as the judge's relationship to the person or entity that will receive the reference, and the nature or purpose of the specific reference (see Opinion 06-156). Coupled with the fact that the Commission on Judicial Conduct has stated that a judge who relies on a prior opinion by the ACJE will be afforded the presumption provided in section 212(2)(l) of the Judiciary Law only when the facts involved in a question are identical to those set forth in a prior opinion, we strongly recommend that judges consult with ACJE chair, counsel or one of its members for advice before acting on a particular request for a reference.

Ms. Dobiel retired on June 26, 2015. She is succeeded by Laura Smith, Esq. who can be reached at 866-795-8343.

THE NEW YORK BAR FOUNDATION

Three Members of the Judiciary Elected Fellows of the New York Bar Foundation

Justice Ellen M. Spodek of Brooklyn, Justice Deborah A. Chimes of Buffalo and Judge Peter G. Crummey of Albany were recently elected Fellows of the New York Bar Foundation. The Fellows of The New York Bar Foundation are members of the bench and bar who are recognized for outstanding professional achievement, dedication to the legal profession, and commitment to the organized bar. Fellows represent one percent of the New York State Bar Association membership; being nominated and elected is a notable accomplishment.

The New York Bar Foundation Makes a Difference

In 2015, The New York Bar Foundation awarded over \$530,000 to 94 programs in 11 Judicial Districts across New York State. During this grant cycle, the Grants Committee reviewed 117 applications, an increase of 25% over last year. The committee makes grant recommendations to The Foundation's Board of Directors, which makes the final decisions.

The Foundation works diligently to invest in innovative and impactful projects. Every year, The New York Bar Foundation makes a meaningful difference in the lives of the most vulnerable members of our community: the indigent, youth, and the elderly, focusing on improving their quality of life by affording access to justice, providing basic needs and ensuring safety. The stories and heartfelt gratitude for the legal profession from those whose lives have been improved inspires the Foundation Board to do more — raise more funds, assist more programs and transform more lives.

Cy Pres Awards

Under the legal doctrine of *cy pres*, judges may order that charities receive leftover amounts of money from class-action settlements after all known plaintiffs are compensated. The charitable purpose must be close to the purpose of the settlement fund.

Judges are sometimes at a loss about which charities to select. In making multi-year grants, they may need assistance from a qualified, independent party capable of providing monitoring and accountability. In recent years, members of The Foundation's board have turned the Foundation into the single most prominent *cy pres* provider in our area, multiplying our charitable impact.

The Foundation formed a *cy pres* committee in 2009. Since then, The Foundation has received more than \$4 million in *cy pres* awards — more than doubling the impact of The Foundation's annual grant programs — and redistributed these funds to eligible nonprofit organizations and provided valuable monitoring services to the courts.

Recognition of Foundation Leadership

On March 10, 2015, VCG Governance Matters recognized the New York Bar Foundation as one of five finalists for the 2015 Brooke W. Mahoney Award for Outstanding Board Leadership.

"This prestigious award recognizes exemplary governance practices of a non-profit organization," said The Foundation's Board President, Cristine Cioffi (Cioffi • Slezak • Wildgrube) of Niskayuna.

Lawyers Caring. Lawyers Sharing.

The New York Bar Foundation plays an important role in ensuring access to justice in New York State. Your generous support makes it possible for the New York Bar Foundation to provide support to legal services organizations, nonprofits, bar associations and other charitable initiatives, and offers the bench and the bar an opportunity invest in their own community.

Please join the efforts of the many law firms, individuals and corporations that have generously contributed to The New York Bar Foundation by making a gift online at <http://www.tnybf.org/donation/>.

For further information, please contact Foundation Executive, Deborah A. Auspelmeyer, at (518) 487-5650 or at dauspelmeyer@tnybf.org.



Justice Ellen M. Spodek



Judge Peter G. Crummey



Justice Deborah A. Chimes

JUDICIAL SECTION PROFILES

Hon. Cheryl E. Chambers

Cheryl E. Chambers is an Associate Justice of the Appellate Division, Second Judicial Department. She was first appointed to the Appellate Division by Governor Eliot Spitzer on February 4, 2008.

Justice Chambers has served on the bench for 20 years. She was elected to the Civil Court of the City New York in November 1994. She sat in both the Criminal Court and the Civil Court in New York County. She was elected to the New York Supreme Court in November 1998, and was re-elected in November 2012. Governor Andrew Cuomo reappointed her to the Appellate Division in November 2012.

Justice Chambers began her career in the Kings County District Attorney's Office in 1985, where she was Chief of the Domestic Violence Bureau, after serving as a Deputy Chief in the Trial Division and as an assistant district attorney in the Trial and Appeals Bureaus. During her tenure at the Kings County District Attorney's Office, she served as an instructor in their Criminal Trial Advocacy Program and in the New York County Lawyer's National Institute of Trial Advocacy Program.

Justice Chambers has held leadership positions in a number of professional associations including the New York State Bar Association, the Metropolitan Black Bar Association, the Brooklyn Women's Bar Association, Judicial Friends and the Association of Supreme Court Justices of the State of New York.

On the lighter side, Cheryl enjoys spending time with family and friends, reading on the beach and watching *Law & Order* marathons. Her favorite movie is *The Thomas Crown Affair*.



Hon. Cheryl E. Chambers

Patricia K. Wood

Patricia K. Wood is the staff liaison to the NYSBA Judicial Section and the Council of Judicial Associations. She joined the Association in 1988 as the Director of Membership, and was promoted to Senior Director in 2004. She recently was named a NYSBA Team Leader for Public Interest and Non-resident membership groups, and she will continue to serve as liaison to the Judicial Section and Council.

Pat grew up in Liberty New York, and now resides in Delmar, New York. She received her bachelor's degree from the University at Albany and her Masters from Sage Graduate School in Albany. She is a proud citizen of both the United States and Switzerland.

In her many years in working with NYSBA members, she has been particularly grateful for the opportunity to work with members of the New York judiciary. She has worked with the Section for over a decade, and has assisted with such initiatives as the Judicial Diversity Report, the establishment of the Judicial Section's two awards programs, and last, but not least, the Judicial Dispatch newsletter.

Outside her staff role, Pat has served in leadership capacities for the Empire State Society of Association Executives, the International Association of Business Communicators, Catholic Charities AIDS Services, and presently serves as President of the Pride Center of the Capital Region Board of Directors. She is an avid tennis player, a gardener in training and loves to create French- bistro style meals.



Patricia K. Wood

MAY COUNCIL OF JUDICIAL ASSOCIATIONS MEETING

The 2014-2015 Officers
of the NYSBA Judicial Section.

Hon. Conrad Singer,
Hon. John O' Donnell,
Hon. Marsha Steinhardt,
Hon. Ellen Spodek



Hon. John O'Donnell presents
a leadership appreciation plaque to
outgoing chair Hon. Ellen Spodek



Past Judicial Section chair, and Judicial
Dispatch Editor Hon. Deborah Karalunas,
Hon. John O' Donnell, Hon. Ellen Spodek



GREETINGS FROM NYSBA PRESIDENT



David P. Miranda

The Judiciary serves a critical role in our state and within the New York State Bar Association. Every day our state and federal jurists work to ensure the fair administration of justice. To the public, judges are the face of justice. The work you do as jurists is challenging; your work also is critically important to the integrity of and the public confidence in our justice system.

Within the New York State Bar Association, the Judicial Section is a valued and essential stakeholder. Nearly every issue we consider – all of our reports, recommendations and policy priorities – have some relationship to judges and the Judiciary. Therefore, it is imperative that the Association has your invaluable input to make sure that our work is well-informed by your unique judicial perspective.

The integrity of New York's justice system is an ongoing Association legislative priority. At the state level, this budget season, the Association continued our advocacy for proper funding for our courts, civil legal service providers and the Office of Indigent Legal Services. Additionally, the Association continues to monitor developments with respect to judicial compensation, particularly the work of the Special Quadrennial Commission on Judicial Compensation.

At the federal level, following Congress' passage of appropriation bills for FY2015, the Association lobbied members on the possible re-implementation of sequestration and its impact on the federal court system. As you may recall, in 2013 sequestration cut nearly \$350 million in funding for the courts – cuts that resulted in extensive delays, reduced security, and inadequate personnel. Should Congress fail to enact required appropriation bills, another sequester will begin on Oct. 1, 2015. An additional period of severe underfunding would have a particularly heavy impact on New York since all four of New York's district courts are categorized as "congested courts."

Looking ahead, I have appointed the Committee on the New York State Constitution. I named Henry M. Greenberg, a shareholder with the law firm Greenberg Traurig who previously served as counsel to then-state Attorney General Andrew M. Cuomo, to chair the committee. In November 2017, voters will decide whether to hold a Constitutional Convention to amend, revise or replace the current Constitution. Our Constitution was designed with this provision so our state residents can make changes to how our government is run. The Association's new committee begins its work with no preconceived agenda, and its members will reach out to State Bar members with diverse backgrounds, expertise and views, including those in the Judicial Section.

Thank you for your support of the New York State Bar Association. We look forward to continued work with the Judicial Section as we work to improve the law and facilitate the administration of justice.

NYSBA JUDICIAL SECTION 2015 ANNUAL LUNCHEON

January 30th was the date of the 2015 Judicial Section Annual Meeting. The Section recognized the Honorable Karen K. Peters with the Advancement of Judicial Diversity Award, and the Honorable Betty Weinberg Ellerin with the Distinguished Jurist Award.



Hon. Judith Kaye



Hon. Judith Kaye speaking with
Hon. Karen Peters' son, Avanti Peters



Hon. Gail Prudenti and Hon. Rachel Kretser



Chief Judge Jonathan Lippman administering the Presiding
Member's Oath to Hon. John O'Donnell



Hon. Rachel Kretser, Hon. Karen Peters, Hon. Luis Gonzalez and
Hon. Michael Coccoma



Chief Judge Jonathan Lippman



Hon. John O'Donnell and
Avanti Peters



Hon. Rachel Kretser and Hon. Karen Peters



Hon. Rachel Kretser presenting the Advancement of Judicial Diversity Award to Hon. Karen Peters



Hon. Karen Peters



Hon. Ellen Spodek and Hon. Rachel Kretser



Hon. Ellen Spodek



Hon. Ellen Spodek presenting the Distinguished Jurist Award to Hon. Betty Weinberg Ellerin



Hon. Betty Weinberg Ellerin and Chief Judge Jonathan Lippman



Hon. Betty Weinberg Ellerin



Hon. Betty Weinberg Ellerin, Chief Judge Jonathan Lippman, Hon. Sol Wachtler and Hon. Joseph W. Bellacosa



Hon. Marsha Steinhardt, Hon. Cheryl Chambers, and Hon. Conrad Singer being sworn in.



Patricia K. Wood, NYSBA Senior Director and Judicial Section Staff Liaison



Former NYSBA President Glenn Lau-Kee

COERCIVE CONDUCT BY THE CRIMINAL DEFENDANT: WHAT'S A JUDGE TO DO?

By: Hon. David S. Zuckerman, Westchester County Court

In People v. Geraci, 85 NY2d 359 (1995), the Court of Appeals held that a criminal defendant who, through coercive conduct, compels a witness not to testify at trial, waives his or her right to confront that witness. Following the reasoning of U.S. v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982), the Court held the appropriate remedy in such circumstance is to permit the prosecution to present the absent witness's Grand Jury testimony during its direct case.

Before a court can consider the remedy, a prosecutor must prove by clear and convincing evidence that the defendant wrongfully procured the witness's unavailability by coercion. People v. Smart, 23 NY3d 213 (2014) (applying clear and convincing standard). But see Mastrangelo, 693 F.2d at 273 (applying less onerous preponderance of the evidence standard). Commonly known as a Sirois hearing, the procedure was first addressed by the Second Department in Matter of Hotzman v. Hellerbrand, 92 AD2d 405 (2d Dep't 1983). It is error for a trial court to fashion a remedy for a defendant's coercive conduct without first holding a "Sirois" hearing. See People v. Johnson, 93 NY2d 254 (1999).

Imagine, however, a trial where the defendant's coercive conduct does not completely prevent a witness from testifying. For example, consider a scenario where, after direct examination, threats emanate from the defendant which cause the witness not to return for

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David S. Zuckerman

COERCIVE CONDUCT,

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cross-examination. What is the remedy?

This very question was presented to this court during a recent trial. The defendant was charged with, *inter alia*, Rape in the First Degree. For the most part, the case turned on the complainant's testimony. Prior to trial, during a Sandoval hearing, the prosecutor apprised the court that the complainant had received numerous threats of harm to herself and her family. The threats were made subsequent to the defendant's arrest and were in connection with her upcoming trial testimony. Despite this, the complainant testified for two days on direct examination. At the conclusion of her direct testimony, the trial was adjourned for the weekend. On Monday, the complainant reported that she had received three new telephone threats over the weekend. There was no doubt that the threats were actually made since they were left as voice mail messages on the complainant's phone. As a result, the complainant initially refused to return to the courtroom for cross-examination. Thus, the court was compelled to consider what action, if any, to take in connection with the coercive conduct.

Generally, if a witness does not return for cross-examination, the prior testimony is stricken. In this case, the complainant's testimony on direct examination was particularly graphic and compelling. The court questioned whether the jurors could possibly follow a directive to disregard it. Rather than striking the direct examination testimony and applying the traditional remedy of permitting introduction of the witness's Grand Jury testimony, the court considered whether it would be more appropriate to permit the direct testimony to stand without any cross-examination. This author did not find any reported New York decisions directly addressing this issue.

Permitting introduction of Grand Jury testimony in response to a defendant's coercive behavior is an exception to two distinct evidentiary rules: the right of confrontation and traditional hearsay. In Crawford v. Washington, 541 U.S. 36 (2004), the Court held that the Sixth Amendment guarantees an accused the right to cross-examine any witness called by the prosecution to establish an element of a charged crime. Since Grand Jury testimony of prosecution witnesses is given without cross-examination, its admission at trial would be an exception to the Crawford confrontation rule.

Permitting introduction of a witness's Grand Jury testimony also is an exception to the hearsay rule. Generally, hearsay exceptions are

created where the evidence is deemed to be inherently reliable. That is not the case here. Rather, it could be argued that Grand Jury testimony is inherently unreliable because there is no cross examination of the Grand Jury witness, the testimony is given in a secret proceeding, and usually the witness receives immunity for the subject of the testimony. Notwithstanding this inherent potential unreliability, courts have permitted introduction of Grand Jury testimony to address policy concerns. As the Court explained in Geraci, the remedy was deemed appropriate not by the inherent reliability of the evidence but by the policy of reducing the incentive to tamper with witnesses. Geraci, 85 NY2d at 367-68. Thus, the Court held the coercive defendant's two objections to introduction of Grand Jury testimony, abrogation of the Sixth Amendment right of confrontation and violation of hearsay rules, must yield to the policy imperative of addressing witness tampering. While, under certain circumstances, the Criminal Procedure Law authorizes introduction of a witness's out of court testimony (see CPL §670.10), the statute has not been extended to include Grand Jury testimony. This is true whether the prior testimony is offered by the prosecution (see People v. Green, 78 NY2d 1029 (1991)) or the defense (see People v. Gonzalez, 54 NY2d 729 (1981)).

The remedy for a defendant's coercive conduct is not limited to permitting introduction of a witness's Grand Jury testimony. In People v. Cotto, 92 NY2d 68 (1998), the court found coercive conduct by the defendant caused an eyewitness to refuse to testify. The witness, however, had never testified before the Grand Jury. In fact, there was no transcript of any prior testimony from this witness. The trial court fashioned a remedy whereby the prosecution was permitted to present law enforcement officers to testify as to what the absent witness had stated to them when interviewed. As with introduction of a missing witness's Grand Jury testimony, the rationale for permitting introduction of otherwise objectionable hearsay testimony was that by his coercive conduct the defendant waived his right to challenge the evidence. See U.S. v. Aguiar, 975 F.2d 45 (2d Cir. 1992) (remedy not limited to admission of prior sworn statements); Rice v. Marshall, 709 F.2d 1100 (6th Cir. 1982), *cert denied*, 465 U.S. 1034 (1984) (witness's prior signed statement admitted).

While Cotto holds that a trial court's remedy for a defendant's coercive conduct is not limited to introduction of Grand Jury testimony, it does not delineate specific reme-

dial boundaries. Cotto merely instructs that "statements admitted pursuant to Geraci cannot be so devoid of reliability as to offend due process." Cotto, 92 NY2d at 78. Does this standard permit the trial court to allow the complainant's direct examination rape testimony to stand without the traditional challenges of cross-examination?

Additional guidance can be gleaned from the First Department's decision in Cotto. The trial court, after finding that the People had satisfied its burden at the Sirois hearing, ruled that if the witness nonetheless testified at the trial, the defendant would not be permitted to cross-examine him. The Court of Appeals noted this in its opinion, but found that any objection to this portion of the trial court's ruling was not preserved. While the Appellate Division also found the issue unpreserved, it nonetheless opined, under the circumstances of the case, that the remedial determination precluding cross-examination was appropriate. People v. Cotto, 240 AD2d 193 (1st Dep't 1997). That portion of the First Department's decision, however, was *dicta* as the witness never appeared at trial.

One decision limiting a trial court's remedial power is People v. Maher, 89 NY2d 456 (1997). In Maher, the trial court exceeded the limits for addressing a defendant's coercive conduct by admitting the murder victim's three out-of-court statements that the defendant had threatened her. The Court held this remedy converted a narrow departure from the hearsay rule into a categorical authority for the admissibility of victim's statements in all homicide cases. *Id.* at 461.

With that limitation in mind, this court returns to the Cotto mandate that statements admitted after a Sirois hearing cannot be "so devoid of reliability as to offend due process." Cotto, 92 NY2d at 78. A traditional indicator of reliability is when the declarant is sworn. Thus, in People v. Brown, 166 Misc2d 539 (Kings Co. 1995), the court held it was an appropriate Sirois remedy to admit a witness's sworn audiotaped statement.

In this court's rape trial, the complainant's direct examination testimony satisfied this reliability requirement. Not only was it given under oath, it was presented in open court where the jury was able to view the witness during direct examination. Thus, the jury was able to apply the traditional tests for credibility based upon the witness's demeanor while testifying. In sum, the complainant's direct testimony satisfied the Cotto reliability standard.

INFORMATION FROM YOUR ASSOCIATIONS

Association of Justices of the Supreme Court of the State of New York

The Association of Justices of the Supreme Court of the State of New York will hold its Annual Meeting at the Gideon Putnam Hotel and Resort in Saratoga Springs, New York from Sunday, October 18, 2015 through Wednesday, October 21, 2015. There will be a full complement of CLE programs on Monday and Wednesday. The Executive Committee of the Association will meet Monday afternoon, and Tuesday is set aside for the Annual Meeting of the Association and leisure activities. The President's dinner is scheduled for Monday evening.

New York State Association of City Court Judges

The New York State Association of City Court Judges will hold its annual meeting at the Mirror Lake Inn in Lake Placid from Sunday, September 27, 2015 through Tuesday, September 29, 2015.

New York State Family Court Judges Association

The annual meeting of The New York State Family Court Judges Association will be held between October 14, 2015 and October 16, 2015 at the Otesaga Resort Hotel in Cooperstown, New York.

New York State Association of City Court Judges

The New York State Association of City Court Judges will hold its Annual Meeting at the Mirror Lake Inn in Lake Placid from Sunday, September 27, 2015 through Tuesday, September 29, 2015. The Hon. Leslie Stein, Associate Judge, New York State Court of Appeals (and former Albany City Court Judge) will be the special guest speaker at the Annual Dinner on Monday, September 28, 2015. She also will administer the Oath of Office to the new slate of officers.

Judicial Friends

The Judicial Friends celebrated its 37th Annual Law Sermon on May 17, 2015 at St. Peter's Episcopal Church, Rosedale, New York. The Annual Law Sermon is that special time of year when we come together to worship with our community and remind them of how much we appreciate their support. The newly elected officers of the Judicial Friends are: La Tia W. Martin – President, Sylvia Hinds Radix – Vice President, Ruth Shillingford - Vice President, Erika Edwards–Secretary and Craig Walker – Treasurer.

Judicial Council

The Judicial Council will meet on September 18, 2015, November 19, 2015, January 29, 2016, March 18, 2016 and May 13, 2016. If there are any issues you would like the Council to address, please email Hon. John F. O'Donnell, Presiding Member of the Judicial Section at jodonnell@nycourts.gov.

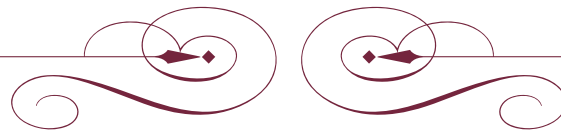
MEMBER HIGHLIGHTS

A reflection by the Hon. Michael R. Sonberg:

In March 1986, New York City Mayor Ed Koch appointed Mary E. Bednar to the Family Court, making her the first open lesbian appointed or elected to an Article VI court in New York State. She was the second open lesbian holding a constitutional judgeship in the United States. Prior to Judge Bednar's appointment, in 1984 Mayor Koch appointed Bill Thom to an interim vacancy on the NYC Civil Court, and in 1985 he appointed the late Richard C. Failla to the NYC Criminal Court.

Judge Bednar's appointment marked another first. In 1985, her then partner (now spouse), New York County Supreme Court Justice Joan Lobis, was appointed a judge of the New York City Housing Court, making them the first (and, for the next decade, the only) same-sex judicial couple in the United States.

After more than 29 years of service, on May 29, 2015, Judge Bednar retired. We congratulate her for her trailblazing career; it was not easy being out on the bench in the 1980's, and the more than fifty lesbians and gay men who have followed her surely stand on her shoulders.



In addition to Judge Bednar, the following judges retired since the last edition of the Judicial Dispatch:

- Hon. Andrew P. Bivona**, Supreme Court, 9th Judicial District
- Hon. Edmund A. Calvaruso**, Monroe County Surrogate's Court
- Hon. Karen A. Drago**, Schenectady County Court
- Hon. Richard C. Giardino**, Multi-bench, Fulton County
- Hon. Victoria A. Graffeo**, New York Court of Appeals
- Hon. Fred J. Hirsh**, Nassau County District Court
- Hon. Richard V. Hunt**, Jefferson County Family Court
- Hon. William J. Kent**, Supreme Court, 10th Judicial District
- Hon. William H. Mountain**, Olean City Court
- Hon. William K. Nelson**, Supreme Court, 9th Judicial District
- Hon. William P. Polito**, Supreme Court, 7th Judicial District
- Hon. A. Gail Prudenti**, Chief Administrative Judge
- Hon. Susan P. Read**, New York Court of Appeals
- Hon. Jerry J. Scarano**, Saratoga County Court
- Hon. Anthony A. Scarpino**, Westchester County Surrogates Court
- Hon. Gigi A. Spelman**, Suffolk County District Court
- Hon. Richard P. Tarantino**, Glens Falls City Court
- Hon. Roy Pepper**, Long Beach City Court

Congratulations and best wishes to all!



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