

NEW YORK STATE BAR ASSOCIATION



NEW YORK STATE BAR ASSOCIATION
FOR A CONSTITUTIONAL CONVENTION

PRESS KIT



#VOTEYESNY

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WHY VOTE “YES” FOR A CONSTITUTIONAL CONVENTION?

- A Constitutional Convention is the best opportunity to update and modernize New York’s outdated Constitution, according to the New York State Bar Association, which is urging its members and voters to vote “Yes” on the November 7 referendum.
- The Association has long supported reorganizing and streamlining the state’s confusing court system and simplifying the voter registration process—improvements for which a convention provides the opportunity and from which New Yorkers would benefit.
- And now is the time, to update the Constitution to meet current times.
- Support for a Constitutional Convention “Yes” vote follows a thorough examination of the existing state Constitution and recommendation by the Association’s House of Delegates.
- 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.

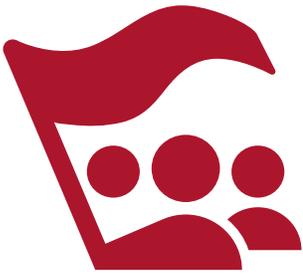
Vote “Yes” on November 7.





FIX THE STATE COURT SYSTEM

- Reorganizing and simplifying the state court system would make New York courts more accessible, cost-effective and efficient, the State Bar says.
- The court system, which operates under Article VI of the State Constitution—the Judiciary Article—contains many outdated or obsolete provisions, the State Bar says. Issues central to the functioning of a statewide court system “are not adequately addressed by the existing Judiciary Article.”
- Calling it a “costly and byzantine system,” the State Bar says that, “despite the best efforts of reformers, the Legislature has shown little interest in consolidating trial courts or taking other steps that would significantly improve the delivery of justice.”
- The Judiciary Article dictates that New York have 11 trial-level courts, while, in contrast, California has one. That means that it is possible a litigant may have to appear in multiple New York courts to handle a case.
- The court system’s inefficiencies cost the state, litigants, employers and municipalities approximately \$600 million in unnecessary spending annually.



UPDATE AND MODERNIZE THE CONSTITUTION

- Many of the provisions in the New York State Constitution are outdated or obsolete; unconstitutional in the wake of subsequent decisions by the U.S. Supreme Court; legislative in character; and/or inconsistent with the demands of the modern state, the State Bar says.
- The current Constitution was adopted in 1894 and amended more than 200 times since—including substantial changes as a result of the 1938 Constitutional Convention.
- The current Constitution does not include some rights that have been recognized by the U.S. Supreme Court (e.g., right to marriage for same-sex couples and reproductive rights) or potential new rights (e.g., environmental bill of rights, Equal Rights Amendment, expanded privacy rights).
- A convention would provide the opportunity to add rights, if delegates so choose, and then be voted on by the public.





MAKE VOTING EASIER

- Just more than 57 percent of New Yorkers voted in the 2016 general election. Simplifying the voting process would increase overall voter participation in New York, which remains at historically low levels, the State Bar says.
- Difficulty in voter registration is often cited as a reason for this low voter turnout and enrollment.
- The State Bar has identified “much-needed” changes to modernize New York’s voter registration process, including improvements, such as early voting, online voter registration and Election-Day registration to encourage participation and enhance democracy while maintaining the integrity of the process.





RESTORE HOME RULE

- The “eroded” Home Rule provision of the State Constitution is “ripe for consideration and debate for all concerned,” the State Bar says. “There is a need to weigh the benefits and costs of amendments to Article IX that would restore local autonomy through greater certainty and clarity.”
- Home Rule, in theory, grants local governments the authority to decide how best to govern their communities in matters of local concern, according to the State Bar’s Report and Recommendations Concerning Constitutional Home Rule.
- In 1963, voters amended the provision to expand and secure the powers of local governments. But since then, those powers have been limited by judicial decisions and legislative mandates.
- These protections have become so eroded that the Legislature regulates such local concerns as taxi cabs in New York City and the salaries of district attorneys, for example.
- Unlike other states, the Constitution does not protect municipalities from unfunded mandates.





KEEP THE “AID TO THE NEEDY” CLAUSE INTACT

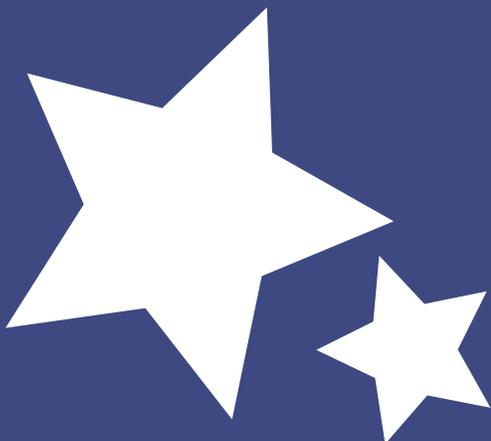
- Article XVII of the state Constitution regarding social welfare, the “Aid to the Needy” clause, was created in 1938 to allow programs that aid poor children and provide low-income housing, requiring the state to assume a major role in social welfare.
- The Court of Appeals later interpreted this provision as a Constitutional mandate imposing a duty to aid the needy. It does not require the state to meet every need of each public assistance recipient and the provision also makes clear that the Legislature has the discretion to define need and establish programs that help the poor.
- Some opponents have expressed concerns that the mandate could come under attack during a Constitutional Convention. However, “there is no empirical basis for believing that the 204 delegates . . . would undermine the State’s core principles,” according to the State Bar. And, voters have the final say.





KEEP THE “FOREVER WILD” CLAUSE INTACT

- In 1997, when New York held its last mandatory referendum on whether to call a Constitutional Convention, concern that a convention might consider ill-advised changes to Article XIV prompted opposition from some.
- After more than 120 years, the forever wild clause remains intact.
- “Throughout its history, there has never been broad-based public support for repealing or diluting the forever wild protections, and nothing in the lengthy record of past Conventions and amendments to Article XIV suggest that delegates to a 2019 convention would seek to do so,” according to the Report and Recommendations on the Conservation Article in the State Constitution (Article XIV), by the State Bar.



MODERNIZE NEW YORK'S COURT SYSTEM

- New York has the most byzantine, complicated court system in the nation. Although called the “Unified Court System,” it is anything but.
- New York has 11 different trial courts with some having overlapping jurisdictions and others with unique jurisdictions. Many have their own rules and procedures. (California manages with a single level of trial courts.)
- The complexity of our court system affects every New Yorker whether they are individual litigants, attorneys, judges, business owners, jurors or taxpayers.
- Due to the complexity of our court system, it is possible that cases where the family structure has broken down will be heard in three separate courts. Divorce can only be granted by the Supreme Court; issues related to children must, in some cases, be heard in Family Court; and domestic violence can bring one of the parties into criminal court. Separate court actions, resulting from our state’s court structure, result in a waste of time and expense for all involved.
- The inefficiencies of the court structure also add to the cost of bringing a personal injury lawsuit against a private party and the State of New York. An individual, who is seeking monetary damages for an automobile accident on a state highway— or for medical malpractice at a state hospital—would have to file separate cases in Supreme Court and the Court of Claims. A further complication: the decisions of the two courts, such as the size of monetary awards, need not be consistent.
- In 2007, a report, commissioned by former Chief Judge Judith Kaye, calculated that simplifying the court structure would save \$500 million a year. Adjusted for inflation, 2017 savings would be \$600 million.
- A number of provisions of the Constitution freeze in place outdated court structures. For example, a provision added in 1894 established four Appellate Departments and the geographic areas covered by each. Because of shifting populations, in 2015, there were 11,600 appeals filed in the Appellate Division for the Second Department, compared to the 6,340 appeals in the three other Departments combined.
- The Legislature has had chances to fix the obvious flaws in the court structure during the past 50 years, but has not done so. A Constitutional Convention offers an opportunity to make our courts more accessible, cost-effective and efficient.

WHAT HAPPENS NEXT?

"Shall there be a Convention to revise the Constitution and amend the same?"

YES



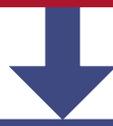
November 7, 2017
New Yorkers vote whether to convene a Constitutional Convention



November 6, 2018
New Yorkers elect delegates to a Constitutional Convention



April 2, 2019
Convention convenes in Albany and amendments are proposed by delegates on which New Yorkers will decide



November 5, 2019
New Yorkers vote on amendments proposed by delegates during the Convention

NO



No Convention



NEW YORK STATE CONSTITUTIONAL TIMELINE

July 9, 1776

New York's first Constitutional Convention begins in White Plains. New York delegates ratify the Declaration of Independence. They begin planning a new government.

Fall/Winter of 1776

Convention delegates, meeting in secret to avoid attack and capture by British troops, convene in White Plains, Harlem, King's Bridge, Odell's in Phillip's Manor, Fishkill, Poughkeepsie and Kingston.

April 20, 1777

New York's first Constitution is approved in Kingston.

October 13–27, 1801

New York's only "limited" Constitutional Convention is held to address the increasing size of the Legislature and the powers of the Council of Appointment.

August 28, 1821

The Constitutional Convention of 1821 is held in Albany. For the first time, a formal procedure to amend the Constitution is proposed, authorizing amendment by a majority of the Legislature in one session and a two-thirds vote of the Legislature—and ratification by state voters.

January 15–17, 1822

Voters approve a new Constitution, which addresses growth in the west and north of the state, gives the governor veto power subject to a legislative override and grants voters the final say over all constitutional amendments.

1826

The first legislatively initiated—and voter ratified—amendments to the state Constitution take effect, making justices of the peace elective offices and establishing universal white male suffrage.

1833, 1839 and 1845

Constitutional amendments in 1833, 1839 and 1845 make city mayors elective officers and abolish property qualifications for holding public office.

June 1, 1846–October 9, 1846

The fourth Constitutional Convention is held in Albany, creating the “People’s Constitution,” which proposes making most state and local offices elective, limiting the power of the Legislature, requiring voter approval for long-term debt and protecting against excessive bail.

November 3, 1846

Voters approve the proposed Constitution, which mandates that every 20 years voters be asked the question, “Shall there be a Convention to revise the Constitution and amend the same?”

1866

Voters say “Yes” to calling a constitutional convention.

June 4, 1867–February 28, 1868

A convention proposes a new Judiciary article, enhancing the governor’s power and further restricting legislative power and calling for free common schools. Voters reject this new constitution, but some proposals were later adopted.

1869–1894

Eight amendments are put to a vote between 1869 and 1894, including a successful 1872 revision relating to the Commission of Appeals and an 1882 amendment creating a Fifth Judicial Department.

May 8, 1894–September 29, 1894

Much of New York’s current Constitution is drafted by delegates at the 1894 Constitutional Convention.

November, 1894

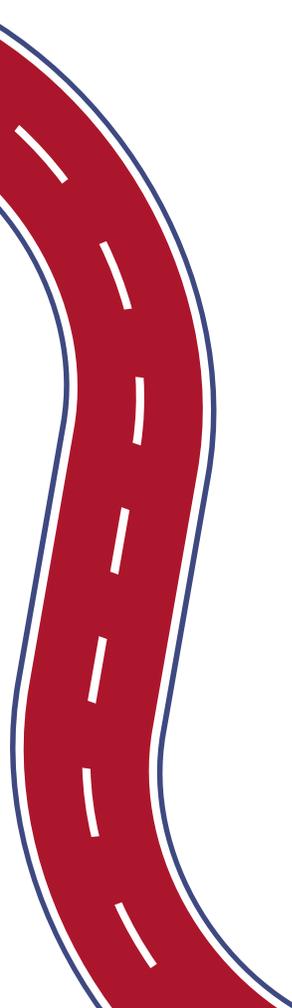
Voters approve the new Constitution, which restructures the judiciary, creates a merit-based civil service system, bans state aid to religious schools, regulates the election process and mandates state-owned forest lands in the Catskills and Adirondacks be kept “forever wild.”

April 7, 1914—September 10, 1915

Although voters reject the new constitution, its provisions affecting the Judiciary Article are largely incorporated in a new Article VI, approved by voters in 1925.

April 5, 1938–August 26, 1938

During the Depression, delegates propose an entirely new constitution, but voters accept only six of the nine packages of amendments, including a labor bill of rights and recognizing the state’s obligation to “aid, care and support the needy.”





November, 1957

Voters reject a Constitutional Convention, but in the following 10 years, demand for another convention to fix and simplify the Constitution grows.

November, 1961

New York's electorate votes whether to revamp the Judiciary Article and court structure. Passing by an overwhelming margin, this new Judiciary Article ushers in the era of the "unified court system."

April 4, 1967—September 26, 1967

Delegates meet for the last Constitutional Convention in state history, with the goal of eliminating obsolete and confusing provisions.

November 7, 1967

In an all-or-nothing referendum, voters reject the convention proposals.

November, 1997

Voters reject a Constitutional Convention, amid fears of threats to labor union rights, obligations to care for the poor and protect the environment, as well as restrictions on reproductive rights.

November 7, 2017

"Shall there be a convention to revise the constitution and amend the same?"

November 6, 2018

If voters approve a Constitutional Convention, nomination and election of delegates will occur during the general election.

April 2, 2019

If voters approve a Constitutional Convention, it will convene in Albany.

Sources:

New York State Bar Association: www.nysba.org/nyconstitution/

Rockefeller Institute for Government: www.rockinst.org/nys_concon2017/

N.Y.S. Library: www.nysl.nysed.gov/collections/nysconstitution/timeline.htm

League of Women Voters: www.lwvny.org/advocacy/concon/2016/Presentations/Galie-Bopst-A-very-Short-History-of-New-Yorks-Constitutional-Conventions.pdf



STATE BAR REPORTS

The State Bar has issued a series of nonpartisan, informational reports about issues that might be considered at a Constitutional Convention. The reports, approved by its House of Delegates, were drafted by the Committee on the New York State Constitution. They include:

Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention (June 17, 2017)

The report offers a primer of the pros and cons of a Constitutional Convention. In its conclusion, the committee “recommends that the State Bar support the convention call, primarily because a convention presents the one practical opportunity this generation will likely have to modernize and restructure New York’s court system.” The House of Delegates voted 111 to 28 (with one abstention) to endorse a convention. A day earlier, the Executive Committee voted unanimously to support one.

Link: www.nysba.org/constitutionreport0617.

The Judiciary Article of the New York State Constitution—Opportunities to Restructure and Modernize the New York Courts (January 27, 2017)

New York’s Unified Court System was established in the early 1960s. “Despite its name,” the report observes, “the Unified Court System is anything but—with its patchwork quilt of 11 different trial-level courts and multiple levels of appellate courts.” It is the nation’s most complex court system, resulting in added costs and delays for those who use the courts. The report identifies multiple issues “ripe” for consideration at a convention. **Link: www.nysba.org/judiciaryreport2017.**

The Conservation Article in the State Constitution (Article XIV) (November 5, 2016)

In 1894, delegates to a Constitutional Convention, alarmed by the illegal destruction of protected woodlands and the impact on the state’s waterways, proposed a measure mandating that the state Forest Preserve in the Adirondacks and Catskills be kept “forever wild.” That November, New York voters ratified the two-sentence constitutional amendment. Since then, there has been no broad-based support to repeal it. In 1969, voters approved what was intended to be a “Conservation Bill of Rights,” which is largely unenforceable. The report also points to obsolete aspects of Article XIV.

Link: www.nysba.org/ArticleXIVreport.

Constitutional Home Rule (State-local government relationships) (April 2, 2016)

In theory, Constitutional Home Rule grants authority to local governments to decide how to best govern their communities in matters of local concern. However, over the years, those protections have been eroded by actions of the Legislature (such as imposing unfunded mandates on localities) and judicial decisions. Without taking sides in the debate, the report says Home Rule is an issue “ripe for consideration and debate for all concerned.”

Link: www.nysba.org/homerulereport.

The Establishment of a Preparatory State Commission on a Constitutional Convention (November 7, 2015)

The New York State Constitution, about six times longer than the U.S. Constitution, establishes the structure of state government, enumerates rights of individuals, and governs our courts, schools, local governments, public finance and the daily lives on New Yorkers. It requires that voters be asked every 20 years whether to hold a convention to examine if the state Constitution should be revised. Prior to November 7, 2017 vote, the report urges state officials to create a nonpartisan preparatory commission to educate the public about the complex issues involved. **Link: www.nysba.org/nysconstitutionreport.**

IN THE NEWS



NYSBA News Release

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NYS BAR ASSOCIATION SUPPORTS A CONSTITUTIONAL CONVENTION TO RESTRUCTURE THE NYS JUDICIARY, ENHANCE VOTER PARTICIPATION AND MODERNIZE AND STREAMLINE THE NYS CONSTITUTION

The New York State Bar Association is calling for a state Constitutional Convention, because New York “should not forfeit this rare, generational opportunity to modernize and significantly improve the Constitution that forms the foundation of state government.”

On November 7, New Yorkers will vote on whether to authorize a Constitutional Convention which, if approved, would be the state's 10th Constitutional Convention since 1777.

At its June 17, 2017 meeting in Cooperstown, the Association's House of Delegates voted 111 to 28 (with one member abstaining) to endorse a Constitutional Convention, or “ConCon.” A day earlier, its Executive Committee voted unanimously to support a convention.

“As an association of attorneys, we are acutely aware of the shortcomings of the state Constitution, which touches on the lives of every New Yorker. A convention would focus public attention on ways to modernize and improve the operations of state government, especially our court system,” said State Bar President Sharon Stern Gerstman of Buffalo.

“As a working legal document, our state Constitution is broken in significant respects. Virtually all commentators agree it needs an overhaul,” said Henry Greenberg of Albany, who chairs the Committee on the New York State Constitution. “It is a 52,500-word behemoth, filled with minutia and obsolete provisions, and even sections that the U.S. Supreme Court has declared unconstitutional.” The committee drafted the report approved by the Association.

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.

Report Findings

The State Bar's “Report and Recommendations Concerning Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention” sharply criticizes the Article VI of the Constitution, known as the Judiciary Article, which totals 16,000 words. In contrast, the Judiciary Article of the U.S. Constitution is only 375 words.

The report calls for the restructuring of the state's massive court system. “For too long lawyers and their clients have had to accept and endure a costly and byzantine system that few understand, and no one can justify,” it says. “Despite the best efforts of reformers, the Legislature has shown little interest in consolidating trial courts or taking other steps that would significantly improve the delivery of justice.”

New York has 11 trial-level courts. In contrast, California has one. In New York, a mother who was beaten by her husband and seeks a divorce, may be required to appear in three different courts before three separate judges to resolve her legal matters.

Noting the Legislature has failed to address structural problems with the court system for 50 years, the State Bar report concludes: "A convention presents the one practical opportunity this generation will likely have to modernize and restructure New York's court system."

A convention, the report said also should address constitutional obstacles to greater voter participation, among other reforms.

Examining Pros and Cons

Nearly half of the 33-page report is devoted to examining the pros and cons of a Constitutional Convention. While acknowledging "thoughtful arguments against a Convention," the report concluded they "do not outweigh the promise and possibility of a convention."

"In the end," the committee concluded that the state "should not forfeit this rare, generational opportunity to modernize and significantly improve the Constitution that forms the foundation of state government. Accordingly, the committee recommends that the State Bar support the convention call, primarily because a convention presents the one practical opportunity this generation will likely have to modernize and restructure New York's court system."

In the report, the State Bar renewed its 2015 call for a Con Con preparatory commission to deal with issues concerning the delegate selection process, the Federal Voting Rights Act, campaign finance and double-dipping by delegates who draw dual salaries as state legislators or sitting judges.

Background

Since August 2015, the Association's Committee on the New York State Constitution committee has conducted a thorough examination of the state Constitution. It has heard presentations from 29 experts, issued five substantive reports, and participated in educational symposiums, webinars and continuing legal education programs that have contributed to public discourse about a Constitutional Convention.

The diverse 29-member committee, created by past President David Miranda of Albany, includes four past presidents of the State Bar, two former Court of Appeals judges, sitting and retired judges, former elected officials from state and local government, former high-level executive and legislative branch officials, scholars and other prominent attorneys.

The State Bar's recent 33-page report is available at: www.nysba.org/constitutionreport0617.

The four previous reports addressed: creating a preparatory commission; the "Home Rule" provision governing the relative powers of state and local governments; the "forever wild" provision and Conservation Article; and the structure of the state Judiciary. Copies of those reports are available at: www.nysba.org/nyconstitution/.

The 72,000-member New York State Bar Association is the largest voluntary state bar association in the nation. It was founded in 1876.

State Bar calls for ‘yes’ vote on Constitutional Convention

By Christina Couto

Focusing on key issues that would benefit the everyday lives of New Yorkers—improving the court system, modernizing the voting process and updating the Constitution—the State Bar is urging its in-state members and New York State voters to say “yes” to a Constitutional Convention when they go to the polls on November 7.

“A Constitutional Convention is the best hope to fix the state’s broken court system and make voting and access to justice easier for all New Yorkers,” said State Bar President Sharon Stern Gerstman.

If approved, a Constitutional Convention will be held in Albany in 2019.

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.

Yet, although the Legislature can and does propose amendments—and has done so about 200 times over the years—the amendments generally address narrow issues, not long-festering problems, such as the complexity and expense of New York’s court structure.

The State Bar’s advocacy for a Constitutional Convention in 2019 follows an affirmative vote by the House of Delegates in June, 2017.

The decision 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.

Fix the court system

Although it is called the “Unified Court System,” it is anything but. Instead, its byzantine structure is the most complicated in the nation. It baffles litigants, jurors—and even attorneys.

New York has 11 different levels of trial courts with different jurisdictions,



Convention campaign—the New York State Bar Association, its headquarters pictured above, is urging its in-state members and New York voters to say “yes” to a Constitutional Convention on November 7. [Photo by Christina Couto]

rules, procedures and structures. In contrast, California has only one level of trial courts.

A complex system

Getting a divorce can require appearing before three different judges in three courts if allegations of domestic violence are involved.

A lawsuit against a business and the State of New York requires filing in

two separate courts.

The very structure of the courts takes a toll on New Yorkers, adding to the time, and financial and emotional costs of resolving legal disputes.

In 2007, a committee, appointed by then-Chief Judge Judith Kaye, said that simplifying the court structure would save individual litigants, employers, taxpayers and others \$500 million a year (in 2007 dollars, or \$600

million today, adjusted for inflation).

Although aware of such problems for 50 years, the state Legislature has not acted, Gerstman said, explaining that a convention is the best opportunity to consolidate and reorganize trial courts and take other steps to simplify and streamline the court system.

And, the Judiciary Article includes many outdated or obsolete provisions, yet does not adequately address issues crucial to the functioning of a statewide court system, Gerstman added.

Other possible topics related to the court system that a convention might examine include creation of a Fifth Department of the Appellate Division, appointment or election of judges, judicial retirement age and Family Court jurisdiction, according to the State Bar's report, *The Judiciary Article of the New York State Constitution: Opportunities to Restructure and Modernize the New York Courts*.

Link: www.nysba.org/judiciaryreport2017.

Make voting easier

The State Bar has identified "much-needed" changes to modernize New York's voter registration process, including improvements, such as early voting, online voter registration and Election Day registration, to encourage participation and enhance democracy while maintaining "the integrity of the process," according to its report, *Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention*.

Link: www.nysba.org/constitution-report0617.

The current state Constitution contains provisions that prevent adoption of same-day registration and absentee voting without limits, both of which have been successfully adopted in other states.

Although these reforms have been

proposed in concept to promote increased participation by voters, the current Constitution is a stumbling block preventing those improvements, Gerstman said.

New York has one of the lowest voter participation rates in the nation. In 2016, an estimated 57 percent of eligible voters cast ballots.

Difficulty in voter registration is often cited as a reason for low voter turnout and enrollment and by simplifying the voting process, overall voter participation in New York would likely increase.

Update the Constitution

"Modernization isn't just about eliminating obsolete or unconstitutional provisions," Gerstman said. "We need to ensure that our Constitution meets the challenges of a rapidly changing world."

New York's current Constitution, adopted in 1894 and amended more than 200 times since—including substantial changes by the 1938 Constitutional Convention—contains many provisions that are outdated, obsolete, redundant or found to be unconstitutional by the U.S. Supreme Court.

Even some amendments are outdated. The current Constitution authorizes the issuance of bonds to pay bonuses to veterans of World War II, yet these bonds were retired in 1958.

Other possible improvements

In addition to fixing the court system, making voting easier and modernizing the Constitution, other areas of government could also be considered at a convention, including the state's power to place unfunded mandates on local governments.

Broader issues related to the balance between state and local governments could also be considered.

For example, after New York City recently tried to limit plastic grocery

bags, the state stepped in, citing "Home Rule" and ended the city's effort.

Constitutional Home Rule was established to grant affirmative law-making powers to local governments, while carving out a sphere of local autonomy free from state interference.

However, in practice, Article IX has produced only modest local autonomy.

New Yorkers would benefit from a thorough consideration of Home Rule and potential reforms that would strengthen and clarify it, Gerstman said.

If the environment is addressed, rights to clean air and water, in addition to protecting parks and forests could be added.

Risk vs. benefit

While acknowledging arguments opposed to a convention, State Bar leaders say the potential benefits of a convention outweigh the risks.

Voters will hear much about the risks of convening a convention—cries that valuable provisions or rights could be eliminated or unfavorable provisions could be added.

"While this risk is technically possible, it is highly unlikely considering the electorate who will be choosing the delegates in 2018. In addition, it is important to remember that, whatever is proposed during the convention cannot become part of the Constitution unless and until it is approved by the voters," Gerstman said.

"A convention would focus on ways to modernize and improve the operations of state government—particularly our court system and voting processes—and ultimately, benefit the everyday lives of New Yorkers." ♦

Couto is NYSBA's State Bar News editor.

What to know about the Constitutional Convention vote

By Christina Couto

On the fence about how to vote on New York's November 7 Constitutional Convention referendum? The State Bar's report may help provide the answer.

Pros and cons. Double-dipping by state legislators and the judiciary. Environmental protections.

That's just a taste of the items included in the 33-page report that examines a potential New York State Constitutional Convention.

Although it recommends supporting a Constitutional Convention, reasons both in favor and against holding one are included in the "Report and Recommendations Concerning Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention," which was presented by Henry M. Greenberg (Greenberg Traurig LLP) of Albany, chair of the State Bar's Committee on the New York State Constitution, in Cooperstown on June 17.

The report was approved following discussion by House of Delegates members (see article on page 1).

Among its findings, the report cites the opportunity to overhaul the "byzantine" structure of the state courts (a longtime Association goal), enhance voter participation and streamline and modernize the state Constitution.

"In the end," the committee concluded that the state "should not forfeit this rare, generational opportunity to modernize and significantly improve the Constitution that forms the foundation of state government. Accordingly, the committee recommends that the State Bar support the convention call, primarily because a convention presents the one practical opportunity this generation will likely have to modernize and restructure New York's court system."

Opposition in '97

The State Constitution mandates that every 20 years, New York voters be asked whether there should be a



Query—Delegate Mira B. Weiss poses a question during the discussion over whether to support a Constitutional Convention, during the House of Delegates meeting on June 17 in Cooperstown. [Photo by Marty Kerins, Jr.]

convention to revise and amend the New York State Constitution.

The last time voters considered one was in 1997. The answer was "no."

Prior to that vote, the State Bar's Executive Committee expressed its opposition to a Convention over concerns about delegate selection.

According to the report, other issues included worries that multi-member district elections of delegates would violate the Federal Voting Rights Act, concerns about interest groups and legislators dominating the convention and dual compensation for legislators and judges (double-dipping).

Although the same issues could plague a potential 2019 convention, which would be comprised of 204 delegates (three per Senate district and 15 at-large delegates), the report notes that "these concerns do not outweigh the potential benefits from holding a convention, although they should nevertheless be addressed."

Delegate selection

To improve the delegate selection process, following a convention call, "consideration should be given to favoring or requiring reform of voting procedures to ensure Voting Rights Act compliance and avoid undue partisanship prior to any convention delegate elections in 2018," according to the report.

It also recommends avoidance of "undue partisanship" prior to any convention delegate elections and suggests that campaign finance proposals are worth "serious study and consideration."

Dual compensation by delegates

The state Constitution provides that a convention delegate receive the same compensation as members of the Assembly. However, legislators and sitting judges have salary guarantees that prevent any reduction of their pay

during their time in office, and receive pension credit based on their highest salary. The report suggests that the State Bar support measures that prohibit or provide “disincentives for double-dipping” by public officials.

Preparatory commission

The State Bar should urge policymakers to establish a preparatory commission as soon as possible, the report states. If a convention is approved by voters in November and there is not yet a preparatory commission, there will be “relatively little time to undertake the preparations necessary for an effective convention in the spring of 2019.”

The State Bar first urged state leaders in November, 2015, to create a non-partisan preparatory commission to educate the public about the state Constitution and the process for changing it. It also recommended a comprehensive study of the Constitution and proposals for change and simplification; research on how past conventions were conducted; and preparation of impartial background materials for the 2017 voters—and delegates, if a convention is held.

New York voters have approved a total of nine Constitutional Conventions, including three in the 20th Century—1915, 1938 and 1967—which have “accounted for almost every single right—individual and collective” in today’s Constitution, the report notes.

The State Bar report also offers a primer of arguments for and against a convention.

Pros and cons: Arguments in favor

Proponents in favor of a Constitutional Convention say that it could “streamline and modernize” the state Constitution, which includes provisions that are outdated or obsolete. Bonds, for such things as removal of railroad crossings at a grade retired during the 1987–1988 fiscal year and bonuses for World War II veterans (the debt of which expired in 1958), for example, have long been retired, the report notes.

Fix court structure

Basic structural problems with state

government—particularly New York’s court structure—could be fixed, through a Constitutional Convention, the report suggests.

“New York’s byzantine court system is not merely a matter of academic concern . . . inefficiencies cost the state, litigants, employers and municipalities approximately \$502 million in unnecessary spending annually,” according to the report, which cites a 2007 report by the New York State Special Commission on the Future of the New York State Courts, “A Court System For The Future: the Promise of Court Restructuring in New York State.”

Unlike other states, New York’s Constitution contains no provision to protect municipalities from unfunded mandates. The Local Government Article, added in 1963, was intended to give local governments autonomy over their own affairs and limit the state’s power to pass special laws on matters of local concern without the consent of the impacted municipality, but it “has not realized its potential,” the report notes.

Rights

A convention could also allow for the inclusion of same-sex marriage and reproductive rights, which have been recognized by the U.S. Supreme Court. And although the state Constitution safeguards certain voting rights, the State Bar has long called for the modernization of voting registration procedures, which, according to the report, would increase voter participation.

“A convention would provide an opportunity to enhance existing positive rights or propose new ones that the Constitution’s framers did not envision.”

Alternatives?

The report suggests that a Constitutional Convention is the best answer to enact needed reforms. Although the Legislature could propose Constitutional amendments, “there is no reason to believe the Legislature is willing to address the State’s Constitutional deficiencies in a comprehensive way, or will be able to resolve in the next 20 years, the problems not fixed over the past several decades.”

Pros and cons: Arguments against

Those opposed to a Constitutional Convention say there is the potential to put established protections and provisions at risk, “by opening up the entire Constitution, without limitation, for extensive modifications,” the report states. If rights with no equivalent in the U.S. Constitution, such as the mandate to aid the needy, are weakened or removed, they could be lost for “at least the next 20 years, if not longer.”

On the flip side, provisions could be added to the Constitution that are controversial and divisive or harmful to responsible government, and there is no way to control or limit the delegates’ ability to propose changes, according to the report. Amendments could lead to unintended and “deteriorous” consequences for the state, it adds.

Political hurdles

Others argue that a convention would face the same political hurdles that hinders the Legislative process and a convention’s outcome would be constrained by a partisan and possibly even unlawful delegate selection process under New York state and federal campaign and election laws.

In addition, the financial influence of special interests could “undermine the ability of delegates to serve the public interest,” allowing special interests to command “excessive influence” over a convention, which antagonists say happens in the Legislature.

‘Double-dipping’

The report says that legislators and judges serving as delegates would receive double salaries due to the constitutional provision preventing a reduction in legislators’ and judges’ salaries.

Citing a New York City Bar Report from 1997, the report notes that double-dipping “would significantly undermine the public confidence in the integrity of the process.”

In addition, it “is wrong for an elected official or any person to be paid two annual salaries for public service in the same year.”

Finally, dual compensation would give sitting legislators and judges an

“inappropriate financial incentive and motivation to serve as delegates.”

Unnecessary/ cost-prohibitive

Saying that the risks associated with a convention cannot be justified, opponents argue that the Constitution can be amended by the Legislature, which has been done more than 200 times in the past 100 years, according

to the report.

The 1967 Constitutional Convention cost taxpayers nearly \$15 million (about \$108 million in 2017 dollars), according to the report. “The cost of a convention in 2019 would likely “dwarf” that figure, with the largest expense being salaries for delegates and staff, the report says.

The committee, in the report, agrees that “[T]his is a significant amount of

money, but even at \$108 million . . . represents less than one-tenth of 1 percent of the State’s 2017–2018 budget . . . [t]his is a good investment if it leads to a better functioning State government.”

The report is available at: www.nysba.org/constitutionreport0617. ♦

Couto is NYSBA’s State Bar News editor.

With state vote in sight, Bar aims to inform the public

House of Delegates says 'yes' to Constitutional Convention

By Christina Couto

After a 111–28 House of Delegates vote (with one abstention) June 17 in favor of supporting a Constitutional Convention, the State Bar plans to educate New York voters about the current Constitution and inform them of ways a potential convention could affect everything from the Adirondack and Catskill “forever-wild” provisions to the structure of the state’s judiciary.

A Constitutional Convention “is a once-in-a-generation opportunity—a rare chance for direct democracy—that our Constitution gives the voters to potentially re-invent their state government, if they so choose,” said Henry M. Greenberg of Albany (Greenberg Traurig LLP), who presented a report calling for support of a convention, prior to the House vote.

“We have had, in our history, four Constitutions over our 240 years [as a state],” said Greenberg, who is chair of the State Bar’s Committee on the New York State Constitution, which was established under Past President David P. Miranda of Albany (Heslin Rothenberg Farley & Mesiti P.C.) in 2015.

“And what is notable about the Constitution, among other things, and is baked into it, are some of the most cherished, sacred rights imaginable—rights you will not find in the federal Constitution, rights you will not find in any other state constitution.”

Yet, the document “is sometimes followed, it is sometimes ignored and I think, clearly in need of an overhaul,” Greenberg said.

Calling it a 52,500-word “behe-moth,” he explained that the New York State Constitution was not designed to last through the ages. “Don’t confuse it with the federal Constitution—that svelte document you can put in your pocket.”

“The New York State Constitution was designed to be amended by every generation.”



111 to 28—Delegates, including Sandra Rivera of Albany, front, line up to comment on whether the State Bar should support a 2019 Constitutional Convention, which New Yorkers will vote on November 7. House of Delegates members overwhelmingly approved the measure. [Photo by Marty Kerins, Jr.]

Bar endorsement

As noted in the report, presented by Greenberg, the state Constitution mandates that every 20 years, New York voters be asked: “Shall there be a convention to revise the Constitution and amend the same?”

That question will be on the November 7 ballot.

The “Report and Recommendations Concerning Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention” recommends New Yorkers vote “yes.”

The split House endorsement of the report followed a unanimous vote by the Association’s Executive Committee in favor of a Constitutional Convention a day earlier. Both groups met in at the Otesaga Hotel in Cooperstown for the Association’s quarterly meeting.

“As an association of attorneys, we are acutely aware of the shortcomings of the state Constitution, which touches on the lives of every New Yorker,” State Bar President Sharon Stern Gerstman of Buffalo said of the vote to endorse a Constitutional Convention. “A convention would focus public

attention on ways to modernize and improve the operations of state government, especially our court system.”

The report cites the opportunity to overhaul the “byzantine,” structure of the state courts and describes its composition of 11 trial-level courts—the most in the nation (California, a state with approximately double the population of New York, has one trial level court).

A convention could also provide opportunities to enhance voter participation and streamline and modernize the state Constitution, the report says.

How it works

By approving the report, the State Bar effectively puts its support behind the November 7 Constitutional Convention referendum and provides an opportunity to inform voters about it before they go to the polls this fall (see related article on page 3).

If approved by voters, New Yorkers would elect delegates in 2018 to the convention, which would occur in 2019. At the convention, delegates could propose amendments to the Constitution, which likely would be voted on by the electorate in November, 2019.

In New York, there are only 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, because all amendments must be approved by a statewide referendum.

"At the end of the day, all they [delegates] can do is propose. They can't make changes to the Constitution themselves. Their work product goes before the voters for final approval," Greenberg explained.

Historically, the primary mechanism for Constitutional amendment has been Constitutional Conventions (there have been nine), Greenberg said.

All four of New York's Constitutions were written via Constitutional Convention, he said, explaining that "virtually every right that all of us hold dear was written and proposed by a Constitutional Convention. And that represented the primary means of reforming and effecting fundamental change in New York State government for the first 200 years of statehood."

Yet, since the last convention in 1967, "the state has had what some people have referred to as 'convention phobia,'" he said. "Many New Yorkers, over the last 50 years, have been more comfortable with the devils they knew than risk the devils they don't know."

Debate

Five past State Bar presidents, including David P. Miranda, and a dozen others spoke in favor of a Constitutional Convention.

"Some say this issue is a political one that we should stay away from, but our Association does not shy away from political issues when our cause is just and when we can be a productive voice on the issue," Miranda said.

Michael L. Fox, vice-president for

the Ninth Judicial District, said that he was initially opposed to a convention—and then, later, on the fence—but, after studying the report and hearing Greenberg's presentation to the Executive Committee the day before, moved to support a convention.

"I do so because we are part of the Association's leadership and I believe it is important we make it possible for the Association to take a position, to educate, to inform and to advocate," Fox said.

A handful expressed opposition to a convention, including Past President Seymour W. James, Jr. of New York City (Legal Aid Society).

Saying that the risk of an adverse impact on low-income clients around the state "is simply too great not to take the prudent path in voting no," James asked delegates to oppose a convention, saying it would threaten Article 17, the aid to the needy clause of the Constitution.

"We need Article 17 . . . to maintain important rights for low-income New Yorkers, such as the right to shelter, which keeps nearly 60,000 homeless New Yorkers off the streets each night, including 22,000 children, and the right of low-income immigrants to health care," James said.

"Outside the courtroom, we need Article 17 to prevent punitive policies from ever being adopted."

James said that there have been "successive attempts" to weaken Article 17 since it was adopted in 1938—in 1967, 1993 and every year since 2005. "We haven't heard a plan to actually defend that article."

Speaking on behalf of the Environmental and Energy Law Section, Chair Kevin M. Bernstein of Syracuse (Bond, Schoeneck & King) said that his section does not support a Constitutional Convention and the view of many section members is that "the dangers of efforts to weaken Article 14 [the forev-

er-wild clause] far outweigh any benefits that may be attained from an environmental bill of rights."

Bernstein said that his section colleagues do see a need for overhaul of the state Constitution, but believe potential downsides outweigh potential benefits. "Sometimes progress is less measured in what you gain than what it is in what you protect," Bernstein said, quoting from the section's online Communities discussion about the referendum.

The Committee on Legal Aid and the President's Committee on Access to Justice joined forces to oppose a Constitutional Convention prior to the House meeting.

"Based on a number of premises that are so clearly incorrect that—even aside from other significant problems, we oppose the resolution," the committees conveyed in a two-page memo to delegates, authored by Ronald Tabak of New York City (Skadden, Arps, Slate, Meagher & Flom LLP).

Two committee members in favor of supporting a Constitutional Convention—Lillian Moy of Albany (Legal Aid Society of Northeastern New York) and Saima Akhtar of Albany (Empire Justice Center)—officially dissented from the committees' opinion.

In addition, the Health Law and Commercial and Federation Litigation sections expressed their support, as did other groups, including the New York City Bar Association and the New York County Lawyers Association.

Yes or no?

What do you think? Email the State Bar News at sbn@nysba.org or ccouto@nysba.org and tell us if you support a Constitutional Convention and why, or why not. ♦

Couto is NYSBA's State Bar News editor.

Convention delegates wrote 1777 Constitution on the run

By Christian Nolan

As advocates and opponents try to sway New York voters on the pros and cons of a 2019 Constitutional Convention, the framers of the state Constitution in 1777 had more to contend with than just political issues.

They were in the midst of a revolutionary war.

Called the Convention of Representatives of the State of New York, an ad hoc revolutionary group selected in 1776, they did most of their work on the run, from White Plains to Fishkill to Kingston to stay one step ahead of advancing British military forces.

The prospects of completing a constitution looked grim at times. In the summer of 1776, the British forces seized downstate areas, including Long Island and New York City, with plans to work their way north and west.

New York had declared its independence and the convention served as its only functioning government despite handling other problems, including dealing with loyalists and controlling the militia. As a result, the drafting committee was moving at a slow pace.

"I am very apprehensive that much Evil will arise if a Government is not soon established for this State," General Philip Schuyler wrote on Dec. 6, 1776. "The longer it is delayed, the more difficult it will be to bring the unprincipled and licentious to a proper Sense of their Duty and we have too many such amongst us."

Drafting the Constitution

Drafting of the Constitution intensified in early 1777. Three delegates in particular did the majority of the work—John Jay, Gouverneur Morris and Robert R. Livingston. Each were highly educated lawyers who graduated from Kings College, which later became Columbia University.

All three men went on to other leadership positions in the state and federal government and played key

roles at the U.S. Constitutional Convention 10 years later in Philadelphia.

Jay, who was later governor of New York and the first U.S. Supreme Court chief justice, did most of the Constitution's writing. The three men did a lot of work behind the scenes to get delegates to come together and reach compromises on issues. The committee wrote five drafts before finalizing the Constitution.

The convention met above Kingston's local jail, as they smoked heavily to drown out the odors from the prison below. Debates, sometimes heated, ranged from government principles to word choice.

The end result called for a two-house legislature, an independently elected governor and a Council of Appointment with extensive powers. It was also one of the first constitutions in the world granting freedom of religion.

Voting rights were rather restrictive, however, as voters in state Senate races had to own at least \$250 worth of property. Just 29 percent of voters voted in those and governor races.

Although there was no formal Bill of Rights in the original Constitution, it granted rights to trial by jury, due process, right to counsel, and the continuation of the common law.

Rushed compromises?

The final version was approved April 20, 1777 by a 33-1 vote and was read in its entirety from the steps of the Ulster County Courthouse in Kingston.

The Constitution spanned 42 sections, despite being fewer than 7,000 words. The preamble included the Declaration of Independence.

Peter Livingston, a distant relative to Robert Livingston, was the lone dissenter because he felt it was too radical. The Convention declared the Constitution official two days later.

The document was considered to be full of rushed compromises. Morris



Hear ye—A drawing depicts Vice-President Van Cortlandt with members of the first New York convention appearing in front of the courthouse as Secretary Robert Benson, standing on a barrel, reads the first Constitution. [Photo courtesy of the Art and Picture Collection, The New York Public Library, Astor, Lenox and Tilden Foundations]

admitted this when stating, "That there are faults in it is not to be wondered at." Jay, meanwhile, bemoaned the fact that there was no clause barring slavery, no mention of education and nothing about how to amend the Constitution.

Regardless, it turned out crucial that the convention proceeded with the aforementioned compromises. By October 1777, British troops burned Kingston to the ground for supporting the patriots and their new Constitution.

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Nolan is NYSBA's senior writer.

ABOUT THE NEW YORK STATE BAR ASSOCIATION

For more than 140 years, the New York State Bar Association has shaped the development of the law, educated and informed the profession and the public, and responded to the demands of a changing society. Today, with a membership of more than 72,000 lawyers, representing every town, city and county in the state, the New York State Bar Association is the largest voluntary state bar organization in the nation.

U.S. Presidents Grover Cleveland and Chester A. Arthur were two prominent members of the State Bar Association. In addition, U.S. Supreme Court Chief Justice Charles Evans Hughes served as a president of the State Bar. These and other notable Americans have contributed much to the State Bar's history. Its membership has included ranking members of the nation's judicial and legislative bodies who have formulated and endorsed policies which have achieved national and international significance.

The Association's objectives, originally stated in its constitution adopted in 1877, are the same today. They are: to cultivate the science of jurisprudence, promote reform in the law, facilitate the administration of justice, and elevate the standards of integrity, honor, professional skill and courtesy in the legal profession. As a link between the state and the individual lawyer, as a force for constructive change, and as a chief exponent of the rights and liberties of the public, the New York State Bar Association stands proud and capable, ready to serve. Through the years the Association has:

- Sought legislation to simplify and update court procedures.
- Been instrumental in raising judicial standards.
- Established machinery for maintaining the integrity of the profession.
- Advocated providing enhanced, voluntary pro bono legal services to the poor.
- Been in the vanguard of efforts to elevate the standards of practice.
- Achieved national recognition for its continuing program of public education.





SHARON STERN GERSTMAN PRESIDENT, NEW YORK STATE BAR ASSOCIATION

Sharon Stern Gerstman, of Buffalo, New York, is president of the 72,000-member New York State Bar Association.

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

A 35-year member of the State Bar, Gerstman previously served as treasurer and on the Executive Committee as an Eighth Judicial District vice-president. She is a member of the House of Delegates, Finance Committee, CPLR Committee, Dispute Resolution Section, and Torts, Insurance and Compensation Law Section.

She was chair of the Committee on Civil Practice Law and Rules and the Special Committee on Lawyer Advertising and Lawyer Referral Services. She previously co-chaired the Task Force on E-Filing and the Special Committees on Lawyer Advertising and Strategic Planning. She also served on the American Bar Association's Board of Governors for three years and is a member of the ABA's House of Delegates.

A resident of Amherst, Gerstman graduated from Brown University and earned her law degree from the University of Pittsburgh School of Law. She received a master's degree from Yale Law School.





MICHAEL MILLER, PRESIDENT-ELECT, NEW YORK STATE BAR ASSOCIATION

Michael Miller of New York City (Law Office of Michael Miller), who became president-elect of the Association on June 1, 2017, was previously vice-president of the 1st Judicial District. Miller, a solo practitioner for more than 30 years in Manhattan, focuses primarily on estates and trusts.

He is a past president of the New York County Lawyers Association, a past chair of the NYS Conference of Bar Leaders (NYSCBL), and has been a member of the House of Delegates of both NYSBA and the ABA.

Among many NYSBA activities, Miller was a founding member of the Elder Law Section, serving as its first newsletter editor, executive committee member and chair of multiple committees.

Over the years, Miller developed award-winning pro bono programs recognized by NYSBA, NYSCBL and the ABA.

Among his many awards, Miller received the ABA's Pro Bono Publico Award, its highest award for pro bono service, for his leading role in the legal relief efforts in the aftermath of the 9/11 attacks.

Beyond bar activities, Miller served as an election supervisor in war-torn Bosnia and interviewed Kosovo refugees for evidence of war crimes.





HENRY M. GREENBERG, CHAIR, NEW YORK STATE BAR ASSOCIATION COMMITTEE ON THE NEW YORK STATE CONSTITUTION AND VICE-PRESIDENT, 3RD JUDICIAL DISTRICT

Henry M. Greenberg of Albany, a shareholder at Greenberg Traurig, LLP, is chair of the State Bar's Committee on the New York State Constitution and vice-president of the 3rd Judicial District.

Greenberg concentrates his practice on civil litigation, criminal and civil investigations, health law, and regulatory and administrative law.

Greenberg previously served in the House of Delegates, was co-chair of the Committee on Court Structure and Operations, and chair of the Legislative Policy Committee, Steven C. Krane Special Committee on Law School Loan Assistance for Public Interest (SLAP), and Committee on Attorneys in Public Service.

He is chair of the New York State Third Department Judicial Screening Committee, a member of the Statewide Judicial Screening Committee, and counsel to the New York State Commission on Judicial Nomination. He is a vice chair of The Historical Society of New York's Courts, a fellow of the New York Bar Foundation, and a member of the New York State Judicial Institute on Professionalism in the Law and the Advisory Group of the New York State and Federal Judicial Council.

He is a frequent lecturer and has written articles and book chapters on a range of legal subjects.

Greenberg obtained degrees from the University of Chicago, with honors, and Syracuse University College of Law, cum laude.



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