NYSBA Annual Meeting

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In Pursuit of Fair Compensation For New York's Judges

Lawrence K. Marks
Chief Administrative Judge
New York State
Unified Court System

Last month, the Commission on Legislative, Judicial and Executive Compensation released its report on judicial compensation, recommending salary increases over the next four years for New York state judges. The Commission's recommendations have the force and effect of law and will take effect on April 1, 2016, unless abrogated by the Legislature. The adoption of these recommendations builds upon the recommendations of the predecessor commission in 2011 in finally ending a decades-long period in which the process for fixing judicial compensation in New York has lacked fairness, regularity and objectivity. This result should be applauded not just by judges but by all who care about our state's justice system.

The Commission was established by statute to determine judicial salaries in a way that is independent and removed from the political process. Four years ago, the first quadrennial commission created by the Legislature broke what had been a staggering 12-year freeze on judicial salaries. Prior to 2012, judges' salaries had been stagnant, without a single adjustment for inflation or cost of living since 1999. New York had sunk to dead last in the nation in judicial compensation adjusted for cost of living. The financial pressures that situation created drove some of our best judges from the bench, and it surely dissuaded numerous highly qualified candidates from considering judicial service in the first place.

It is no overstatement to say that an independent, impartial and highly qualified judiciary is essential to a well-ordered and prosperous society and to our very way of life. Nowhere is this more true than in New York state. The great demands of the work of our courts require excellence from our judges. We are the commercial capital of the world, and a national hub for entertainment, the arts, news media and other fields. Our Commercial Division routinely handles complex disputes in which millions, and sometimes billions, of dollars are at stake, and it shapes the body of law that helps to attract economic activity to our state. New York is also extraordinarily culturally and ethnically diverse, ranging from rural areas to the densest urban centers with communities from around the world. Hundreds of languages are spoken in New York, and we are home to a multiplicity of religions. Our judges must be keenly sensitive to the distinct circumstances of those who come before them and able to understand and evaluate diverse perspectives. Our courts are a cradle of innovation, a national leader in court reform. We could not continue to improve the quality of justice we deliver through innovation without visionary and open-minded judges at the helm. Moreover, with roughly two million litigants entering our courts each year without the help of a lawyer, New York's

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Membership Is More Important Than Ever

David P. Miranda
President
New York State Bar Association

Change is coming to our profession. Under the guise of providing "access to legal services," we see profiteering entrepreneurs, unencumbered by rules of ethical conduct and responsibility, offering low-cost "legal services." These companies purport to enhance exposure on promoted attorney websites, where a lawyer's performance and expertise is assigned a numerical value; and legal form services, where the law is reduced to a form that just needs to be completed.

The organized bar must prepare to adjust to—and to influence—the new legal marketplace. We must encourage a thoughtful focus on the future of our profession, addressing online services that promise to find potential clients using questionable methodologies; or worse, standing by while websites promise to do all the legal work for consumers, without sharing the credentials of their so-called legal practitioners.

We see privately financed companies that purport to rank attorneys based on an algorithm that only the service is aware of, where attorneys can pay the service to help them "master" the system. These services proudly boast that their rankings are not "pay to play" when, if you pay the services, they will "advise" you on how to "play" their system. Bar associations, including ours, are increasingly receiving complaints from the public and attorneys about those methods..

Venture capital is going to these companies, seeking to make money on the backs of lawyers desperate for work and a public starving for easy answers. The burden of discovering which ratings are legitimate and which ones are inflated, or paid for, unfairly falls on the shoulders of unsuspecting consumers. While these services refer to themselves as innovators, they may end up subverting the very premise of the profession they claim to be promoting.

For our system of law to maintain its integrity, and its authority, the organized bar must be a part of the solution. We cannot leave the job of informing the public and addressing its legal problems to companies, staffed and funded by nonlawyers, that have only a financial stake in the transaction. When we reduce the law to nothing more than an easy download with no guidance, it is not just the profession that loses. It is the consuming public—people with real problems who need real help—that stands to lose the most of all.

David P. Miranda is a partner at Heslin Rothenberg Farley & Mesiti.

Don't Overlook ADR For Resolving Disputes

Randall T. Eng
Presiding Justice
Appellate Division,
Second Department

The New York state court system is dedicated to resolving the legal disputes of its residents, whether large or small. Our courts stand ready to hear an endless variety of cases, ranging from multi-million dollar breach of contract claims to slip-and-fall accidents, from mortgage foreclosure to heartbreaking child custody disputes. However, the sheer volume of the court system's caseload, in both the trial courts and the Appellate Divisions, can make litigation a time consuming process. As attorneys are well aware, litigation can also be prohibitively expensive, particularly when clients are people of limited means. For these reasons, it is important for the courts themselves to remind attorneys and litigants that we are not the only game in town.

In some cases, depending on the nature of the dispute and the circumstances with which the parties are presented, it may be appropriate for attorneys to explore one or more methods of alternative dispute resolution (ADR). Arbitration, for example, has long been supported by the judiciary as a useful method for resolving controversies. The arbitrator, whose decision may be binding or non-binding, plays a role similar to that of a judge, and the proceeding remains adversarial in nature, but the governing rules and procedures are simplified. Mediation, in which the parties play a more active role in working out their differences, can be another viable alternative. The mediator does not act as a decision-maker, but instead seeks to facilitate discussion and cooperation between the parties in resolving their differences.

Other types of ADR, like neutral evaluation and summary jury trials, allow parties to test or preview their cases, thereby facilitating settlement. Neutral evaluation involves a person with subject-matter expertise hearing arguments from both sides, reviewing the strength and weaknesses of both parties' cases, and evaluating likely court outcomes. In a summary jury trial, each side presents its case to a jury, which then renders a decision, thus providing a preview of a possible verdict should the case go to trial.

Additional forms of ADR include collaborative family law, in which specially trained lawyers guide divorcing couples through negotiations in an effort to reach a settlement without going to court, as well as parenting coordination, in which a mental health or legal professional assists parents in resolving conflicts involving their children and in carrying out a parenting plan.

Moreover, some courts offer case conferencing, in which a judge or judge's representative meets with the parties and their attorneys in an effort to settle the case, or narrow the issues in dispute, before trial. A comparable program has been in place for more than 40 years here at the Appellate Division, Second Department. Our Civil Appeals Management Program (CAMP) is designed to benefit both the court and the parties who appear before it by settling cases at the beginning of the appellate process. The CAMP Administrator selects appeals for settlement conferences, which are conducted with the parties and their attorneys by former Appellate Division justices who serve as Special Referees. CAMP conferences may also be initiated by the parties, through a

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Inside

Increasing Diversity in the Profession Is Everyone's Business

Claire P. Gutekunst
President-Elect
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Tonight, the New York State Bar Association proudly presents its Diversity Trailblazer Award and 13th annual Celebrating Diversity in the Profession Reception, co-sponsored by numerous minority bar associations, law firms and NYSBA practice sections.

Why should every bar association and every attorney care about and work to increase diversity in the profession? In our increasingly diverse nation and our increasingly interconnected world, having diverse lawyers and judges enhances public confidence in the fairness of our legal system and the rule of law. People of diverse backgrounds bring diverse perspectives and experiences to bear on legal and societal issues, enriching the discussion for everyone. And recent research (highlighted in The New York Times on Dec. 9, 2015[1]) has confirmed that including diverse members in a group improves the way everyone in the group thinks—by disrupting conformity and enhancing deliberations—and results in objectively better decisions. So increasing diversity is not only the right thing to do, it is the smart thing to do.

NYSBA has made strides in promoting and increasing diversity since we hosted our first Celebrating Diversity Reception. We have adopted a diversity policy; established seats for racially and ethnically diverse attorneys on our governing House of Delegates and our Executive Committee; and created Committees on Diversity & Inclusion and LGBT People & the Law; conducted and published studies of diversity in the legal profession in New York and in our Association; increased the number of diverse leaders of our Association and its sections and committees; and instituted pipeline projects to encourage minority middle and high school students to aspire to a legal career and to assist minority law school students to succeed in the profession.

The number of minorities and women in many legal workplaces in New York, including the bench, also has grown during this period. Challenges remain, however: The number of minority attorneys and women leaving law firms remains disturbingly high and the percentages achieving equity partnership and leadership roles in firms and corporate law departments remain well below the percentages entering the profession over the past 20 years.

A principal reason for these leaks in the pipeline to leadership is the too-frequent failure of individual members of the dominant group within most law firms—white men—personally to grapple with and address the challenges of retaining and promoting diverse attorneys, by mentoring and supporting them, including them in informal networks and assisting them in developing business.

Encouraged by corporations' increasing demands that diverse attorneys handle their work, law firms hire women and minority attorneys in significant numbers. However, although sympathetic to the cause of diversity, too many within firms rely on a diversity director and formal diversity programs and do not personally take the important day-to-day actions needed to combat unconscious bias and make their practices and firms truly inclusive.

Please join us tonight in celebrating diversity in the profession. Tomorrow, please renew your personal commitment to hire and support diverse attorneys in your own workplace, every day. All of us will benefit by making increasing diversity everyone's business.

1. Sheen S. Levine & David Stark, "Diversity Makes You Brighter," The New York Times (Dec. 9, 2015).

Claire P. Gutekunst is an independent mediator and arbitrator for commercial and other disputes.

Advances in Guardianship Law in New York

JulieAnn Calareso
Chair
Elder Law and Special Needs Section

New York has taken great strides to advocate and protect the rights of vulnerable adults and the elderly in need of the protection of the court by its adoption of the Uniform Guardianship and Protective Proceedings Jurisdiction Act. The Act, codified in Mental Hygiene Law Article 83, became effective as of April 21, 2014 and has been adopted in 42 states and Puerto Rico. It has been introduced in three additional states in 2015, and only five states have not yet introduced or adopted the law.

This important Act assists courts in clarifying jurisdictional issues regarding those persons subject to a guardianship proceeding. It clearly identifies which state is most appropriate to adjudicate a guardianship proceeding for a person, and includes a multi-faceted test to ensure the proceeding in conducted in the location most conducive to protecting the rights of the allegedly incapacitated person. Courts in any of the adopting states now have the ability to work together in situations where a person subject to a guardianship proceeding is brought across state lines. Whether two jurisdictions are working together because of nefarious behavior of a person, or because, as is common in our society, adult caretaking children live out of state and frequently move persons across state lines for convenience, this Act provides mechanisms for taking testimony, gathering evidence, and compelling participation by others in the various states.

Article 83 has been in effect for almost two years. Case law is growing, and judges and practitioners are becoming more familiar with its application and implementation. On Nov. 21, 2015, Gov. Andrew Cuomo signed legislation amending §83.39 of the Mental Hygiene Law. This statute, Chapter 458 of the Laws of 2015, is effective immediately. The statute does four things to clarify Article 83, including making it clear that *all* protective orders, not just orders appointing a guardian of the person, can be registered in New York. Another key component is a clarification that a guardian of the property appointed in another state can appear in New York courts if so authorized by the appointing order and it requires any guardian of the property appointed in another state who wants to sell real property in New York to obtain authority from the appointing court and then proceed as a New York guardian would under Article 17 of the Real Property Actions and Proceedings Law.

As always, the Elder Law and Special Needs Section of the Bar Association joined the numerous organizations who advocated on behalf of the adopting of the original law. The amending bill was originally drafted by the Section's Legislation Committee under the direction of Ira Salzman, and ultimately approved by the New York State Bar Association's Executive Committee. We are proud to see New York utilizing this powerful tool to protect the interests and well-being of vulnerable adults.

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When Is a Deal a Deal?

T. Andrew Brown
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Trial Lawyers Section

The vast majority of civil actions settle before going to trial. As trial lawyers, we spend a lot more time negotiating the terms of settlement than in the courtroom trying cases. After we've agreed on the terms we think of the case as being over, resolved. But, not so fast.

When is a settlement truly final and binding? To legal practitioners who deal with disputes every day, this can seem like an obvious question. A settlement occurs when the parties to a dispute have a meeting of the minds over the resolution of their case. However, what happens if one party to the dispute attempts to back out of the settlement due to "buyer's remorse?" Does the other party have any recourse? Is it possible to enforce the settlement against the party who's trying to rescind the deal? The answer is a resounding "It depends." This article will set forth the basic rules regarding when a settlement is enforceable, and is intended to help practitioners avoid some common traps in the law.

The starting point in making any determination of whether a settlement agreement is enforceable is N.Y.C.P.L.R. §2104, which states in pertinent part: "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." The clear words of the statute provide that stipulations placed upon the record in open court are binding. This is true even where the terms of the stipulation have not been reduced to a signed order. See *Jackson v. Valvo*, 179 A.D.2d 1038 (4th Dept. 1992).

However, what counts as being "in open court?" Is the situation limited to the parties and their attorneys sitting in the courtroom, with the judge on the bench and a stenographer present? In other words, is a settlement reached during an in-chambers conference with the judge enforceable? The general rule appears to be that, absent a stenographic record of the agreement, such a settlement is not binding. See *Nasru v. Polsinelli*, 74 A.D.2d 952 (3d Dept. 1980). While an occasional exception has been made to this rule (See *Golden Arrow Films v. Standard Club of California*, 38 A.D.2d 813 (1st Dept. 1972), in which a settlement made at 6:00 p.m. on the day that both parties had rested at trial, which was memorialized in detailed notes by the judge because the stenographer had gone home for the day, was held to be enforceable), the careful practitioner would be advised not to be placed in a position whereupon she must throw herself on the mercy of the court to enforce a settlement agreement. When in doubt, ask that a stenographer be called in to place the agreement on the record in the judge's presence. If the judge or opposing counsel indicate that it's not necessary, insist upon it.

The second part of CPLR §2104 deals with situations in which a settlement is reached between the parties or their attorneys without court involvement. The general rule is that any such agreement must be in writing, and must be subscribed by the party against whom enforcement is sought. Practitioners take heed—oral settlement agreements ("I've known Charlie Brown, Esq. for years, and he TOLD me we had a deal!") will not be accepted by the courts. Settlement agreements confirmed in letters have long been held to meet the requirements of §2104, since they are writings that are subscribed by someone with authority or apparent authority to enter into the agreement. See *Davidson v. Metropolitan Transit Authority*, 44 A.D.3d 819 (2d Dept. 2007). But what about emails? A few courts that have recently looked at this issue have held that emails meet the requirements of §2104, since they are written communications and are subscribed by the attorney or agent typing his or her name at the end. See *Williamson v. Delsener*, 59 A.D.3d 291 (1st Dept. 2009), *Forcelli v. Gelco*, 109 A.D.3d 244 (2d Dept. 2013).

In conclusion, the general rule the wary practitioner should abide by when entering into settlement agreements should be: *Always get it in writing*.

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written request directed to the CAMP Administrator. The conferences are confidential and not transcribed; only the fact that a settlement has or has not been reached, and not the content of the discussions, is revealed to the court's justices and staff. CAMP conferences essentially provide the parties an opportunity to mediate their dispute without incurring the cost of private mediation. Of course, if the negotiations are successful, the parties are also spared the costs associated with pursuing an appeal.

The Unified Court System offers court-based programs, both within New York City[1] and outside the city,[2] that provide access to free or reduced-fee mediation in disputes involving family law, commercial law, general civil law, and other matters. The court system also supports ADR services through partnerships with a network of local, non-profit organizations known as Community Dispute Resolution Centers (CDRC). The CDRCs offer arbitration, mediation, and other ADR options to resolve disputes involving landlord-tenant law, consumer law, elder law, and family law, among other matters. According to the Unified Court System's website, the CDRC Program handled 28,262 cases in fiscal year 2014-2015, and served 70,275 individuals.[3]

ADR processes will often have advantages over traditional litigation conducted in the courts. Depending on the nature of the case, ADR may prove to be quicker and more streamlined. For example, the most recent annual report of the CDRC Program indicates that, of all the cases conciliated, mediated, or arbitrated at CDRCs during fiscal year 2014-2015, 74 percent resulted in mutual agreement or final decision, and the average time from intake by CDRC staff to completion of arbitration or mediation was less than 25 days.[4] A related advantage is that ADR processes may be less costly, which is especially important to many middle-class parties whose income is too high to qualify for assigned counsel, but not high enough to afford the legal fees that may be incurred in pursuing traditional litigation. In addition, some arbitrators and mediators specialize in certain subjects or areas of law, and that helps to make the process more efficient. A further advantage of ADR is that parties have more control over the process and the results than they do in litigation. This will often result in "creative solutions, longer-lasting outcomes, [and] greater satisfaction."[5] Moreover, processes like mediation can "preserve and strengthen important relationships,"[6] which will often make such processes more constructive than adversarial confrontation. Parties who use ADR might also agree to solutions that cannot be obtained in court, and which are tailored to the individual needs and interests of the parties.

While our court system has served the people of New York well, and continues to do so, the evolving structure of societal relationships and conflicts, along with limitations on the courts' resources, should prompt the Bench and Bar to consider, in appropriate cases, utilizing, or guiding parties toward, alternative methods of resolving disputes. In some cases, such methods may prove to be more efficient and cost-effective, and produce greater satisfaction, than traditional litigation.

1. See http://www.nycourts.gov/ip/adr/court_annexed_NYC.shtml.
2. See http://www.nycourts.gov/ip/adr/court_annexed_OutsideNYC.shtml.
3. See http://www.nycourts.gov/ip/adr/Publications/Annual_Reports/2014-15_CDRCP_AR.pdf.
4. See id.
5. http://www.nycourts.gov/ip/adr/What_Is_ADR.shtml.
6. http://www.nycourts.gov/ip/adr/faq.shtml.

New Horizons On the Frontier Of Family Law?

Alton L. Abramowitz
Chair
Family Law Section

The evolution of Family Law over the past half a century has been the result of "inspiration" that has found its source in the ever evolving patterns of family development amidst the angst that accompanies discord, disharmony and disputes among spouses, co-parents, life partners, non-related caregivers, governmental and non-profit social service agencies, public interest organizations, etc. One of the definitions of "inspiration" and perhaps the oldest is "a divine influence directly and immediately exerted upon the mind or soul." Dictionary.com. The past few decades have seen boldly inspired initiatives in the world of New York family lawyers such as child support guidelines, rules governing the conduct of attorneys for children and training for those attorneys, no fault divorce, Integrated Domestic Violence Parts in the Courts, spousal maintenance guidelines, the establishment of lists of qualified forensic custody evaluators, etc.

Each new development in the family law field, combined with changes in our society's views of the rights of parents, spouses, non-custodial caregivers, life partners, etc., has been the springboard of inspiration for the next step in the evolution of the ever expanding and changing methods of addressing and, hopefully, solving the myriad of issues confronted by combatants locked in litigation. Witness, for example, the legislative adoption of spousal maintenance guidelines as an outgrowth of the battles over the passage of no fault divorce, which, itself, found its origin in the Women's Rights Movement of the 1960s that led to the passage of equitable distribution of marital property laws in New York and other jurisdictions.

The inspiration for this article finds its roots in a recent opinion authored by Associate Judge of the Court of Appeals, the Hon. Leslie Stein, herself a former practicing family lawyer and a Fellow of the American Academy of Matrimonial Lawyers, who will be addressing the Family Law Section at its Annual Luncheon on January 28th. In the Dec. 16, 2015 decision in *Suarez v. Williams*, Stein, writing for a unanimous court, revisited the issue of the standing of grandparents to seek custody of a child based on extraordinary circumstances as enunciated in the seminal case of *Bennett v. Jeffreys* decided nearly 40 years ago. This new look found its source in amendments made to Domestic Relations Law (DRL) §72 (2)(a), adopted by the Legislature in 2003. A discussion of that decision will await another day, for the importance of it to this article is the demonstration that it provides of the hypothesis that change in family law leads to more change in family law.

This being my final Annual Meeting Article as Chair of the Family Law Section provides the opportunity to try to offer less than divine "inspiration" to family law attorneys who are members of the Section, the Legislature, the Governor, the Judiciary and the Office of Court Administration, and the various public interest groups and public spirited individuals who care and think deeply about issues that are vital to the undertaking of initiatives that: (1) compile empirical data that will provide reliable statistics about the details of family and matrimonial law cases that wind their way through the courts in order to better enable us to provide justice for families; (2) address the need for the development of laws affording non-biological parents and caretaker rights akin to parents in order to foster the best interests of children; (3) enact laws permitting the employment of surrogates in the state of New York in order to take advantage of alternative reproductive technologies, rather than forcing our citizens to travel to other states where they can undertake the extraordinary opportunities that modern science has provided us; (4) adopt legislation providing specific, listed factors and standards for the determination of child custody disputes; (5) provide developmentally appropriate child residential guidelines for parental access schedules in custody cases; (6) monitor awards of durational maintenance to ensure that non-moneyed spouses are provided with the ability to maintain the marital standard of living to the same extent and for the same period of time as the moneyed spouse; (7) make available to "middle income" families representation by lawyers that is equal to that afforded by the affluent in our society or *sometimes* provided to the poor; (8) make available and, perhaps, mandatory court annexed mediation of matrimonial cases; (9) adopt amendments to the automatic orders in matrimonial cases that mandate the surrender of guns and assault rifles during the pendency of those cases in order to ensure the safety of spouses, children and, yes, lawyers and judges while those cases are proceeding through the courts; and (10) fully fund our courts to make their functioning as effective as possible in order to ensure that every family law litigant has his or her full day in court in front of a appropriately compensated jurist who is not bending beneath the weight of an unbearable caseload engendered by the lack of staff and other resources, rather than deny complete justice to those who have sought the assistance of our judicial system.

Although the above "wish list" is not exhaustive, the fulfillment of it could and should provide our stakeholders—the families of New York—with the kind of legal system they have a right to expect and experience.

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Applying the Rule of Reason In Antitrust Cases

Elai Katz
Chair
Antitrust Law Section

Among many topics explored by the Antitrust Section this past year, we devoted several programs to courts' interpretation and application of the "rule of reason," the presumptive mode of analysis for determining whether restraints of trade violate antitrust law. Although it varies from circuit to circuit, rule of reason analysis typically involves a burden-shifting approach designed to evaluate whether the restraint's anticompetitive effect outweighs the procompetitive effect for which the restraint is reasonably necessary. We examined how two courts—*O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) and *U.S. v. American Express*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015)—applied the rule of reason.

O'Bannon involved a challenge to the National Collegiate Athletic Association's (NCAA's) rules prohibiting universities from compensating student athletes for the use of their names and likenesses in video games. Applying the rule of reason burden-shifting structure, the U.S. Court of Appeals for the Ninth Circuit found that the NCAA's rules caused anticompetitive effects, but also valid procompetitive purposes: preserving the NCAA's brand by promoting amateurism, and integrating athletics with academics. 802 F.3d at 1070-74. Turning to the necessity of the restraint, the court conducted a probing inquiry of potentially less restrictive alternatives to the NCAA's rules. Id. at 1074-79. The court found that one alternative, permitting schools to give athletes grants covering the cost of their attendance, was a viable less restrictive alternative, as the grants would not undermine amateurism or hamper the integration of athletic and academic life. Id. at 1074-76. However, the court found that the other alternative—allowing athletes to receive cash compensation—did not promote amateurism as effectively as the current NCAA rules. Id. at 1076-79. Accordingly, the court held that the NCAA rules violated the antitrust laws, and that although the schools could give athletes grants to cover the cost of attendance, they could not pay athletes cash compensation. Id. at 1079.

By contrast, the analysis in *United States v. American Express*, where the district court found that American Express' (Amex's) anti-steering rules violated the antitrust laws, did not dive as deeply into the "less restrictive alternatives" inquiry. The court first found that the anti-steering rules adversely affected competition, and then recognized one viable procompetitive justification: The anti-steering rules could prevent parties from "freeriding" on Amex's investments in data analytics and cardholder benefits. 88 F. Supp. 3d at 187-238. Notably, the court did not analyze alternatives as an independent part of its decision, instead collapsing that inquiry into its discussion of procompetitive purposes. On the data analytics freeriding issue, the court found that charging merchants for analytics services was a less restrictive alternative. However, on the cardholder benefits issue, the court did not conduct a less restrictive alternatives analysis. Id. at 234-38. The Court of Appeals for the Second Circuit heard oral argument on Amex's appeal on Dec. 17, 2015, when Amex argued that the lower court improperly neglected to properly account for procompetitive benefits to cardholders in its rule of reason analysis.

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Handling Your First Deposition As a New Lawyer

Mirna Martinez Santiago
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Torts, Insurance and Compensation Law Section

Nothing strikes more fear into the heart of a young/new litigator than handling his or her first deposition.

The purpose of a deposition is myriad: to assess the witness (i.e., are they likable, credible, articulate, how do they hold up under pressure, etc …); lock in witness testimony to use in support of a summary judgment motion or at the time of trial; preserve testimony of a witness who may be potentially unavailable at the time of trial; and identify information not learned through other discovery devices (e.g., physical limitations). Accordingly, almost every case in suit will require the taking or defending of a deposition. Here are some tips for doing so.

Create a theme for your case. In all cases, there is the plaintiff's side, the defendant's side and the truth. The theme is the story that—given a chance—you would tell the jury so they will see things from your side. As such, you should begin thinking about the theme of your case from the outset. A theme should definitely be in place prior to the deposition.

Know what you will need to prove to prevail on your case. The best way to get a grasp on what you will need to prove in order to win is to read the relevant Pattern Jury Instructions for your case. The elements of your case and the things you have to prove serve as the launching pad for your questions at the deposition.

Prepare your witnesses. The need to meet with the witnesses early and often cannot be overstated. You should meet with the witnesses as early in the case as possible to cement their version of the events and discuss all facts relevant to the claim(s), as well as to obtain a list of all witnesses and any relevant documents they may be in possession of. You should also meet with the witness closer to the deposition, so that they know what to expect.

Role playing is an excellent way to get a witness ready. Remember that what you speak of to the client/witness will likely be covered by the attorney/client privilege, but any documents you show them to prepare them or refresh their recollection probably would not be.

Research, Research, Research. Since we live in the Information Age, there is no excuse for walking into a deposition blind. What is the witness saying about the case on social media? Are they as injured as they claim to be? Is his/her lifestyle inconsistent with what they are claiming? Even if you are defending the deposition, you should still look up your client. You must be prepared for anything that opposing counsel may choose to lob at your client at the deposition.

Be aware that there are ethical rules for utilizing social media for attorney research; make sure you are familiar with them. For instance, a lawyer who represents a client in a pending litigation may ethically view and access the public portions of an adverse party's Facebook and MySpace profiles so long as the lawyer neither "friends" the other party nor directs someone else to do so. See New York State Bar Association Opinion 843 (2010).

Accordingly, in order to access postings on the private portion of a party's social media account, you must utilize the formal discovery process. Many courts employ a two-part test to determine if discovery of the contents of a social media account should be compelled: Is it material and necessary; and would the production violate the account holder's privacy rights? Access to a social media account should not be granted to conduct a "fishing expedition." *Tapp v. New York State Urban Development*, 102 A.D.3d 620 (1st Dept. 2013) and *McCann v. Harleysville Insurance Co.*, 78 A.D.3d 1524 (4th Dept. 2010).

Know the Rules of Evidence and Privileges that may be invoked. Although the Rules of Evidence do not apply at a deposition, if you intend to use that witness's testimony at trial, you must know what the Rules are and why/how they apply. In addition, do you know what privileges may be invoked? The most common privileges are: attorney/client; attorney work product; and materials prepared for litigation. Upon objection by a person entitled to assert a privilege, privileged matter shall not be obtainable. The party seeking to assert the privilege has the burden of proving the applicability.

Have your exhibits ready. This seems axiomatic, but many attorneys fail to prepare exhibits prior to the deposition and, as a result, waste precious time searching for documents. Prepare your exhibits the day before. Know the order you will use them. Highlight or mark up your copy, so you know what questions to ask. Most importantly, have extra copies ready for the witness, the court reporter and opposing counsel.

Ease the witness into the testimony. Most people have no experience in giving testimony. Use the housekeeping details to get the witness to relax. Remind the witness that all answers must be verbal. Find out if the witness has taken any medication and/or drug (prescribed or otherwise) that would impair his/her ability to tell the truth or to recall information.

Be an active listener. Use an outline, instead of scripted questions, so you can be an active listener. Be prepared to follow up on questions, even if the new line of questioning is not on your outline.

Make a clean record. You must assume that the deposition testimony will be read to a jury someday. Make your questions clear and concise; do not use compound questions. Objections as to form must be interposed or they will be considered waived. But if there is an objection as to "form," or for pretty much any other reason, the witness can still answer.

If an attorney or witness becomes angry, abusive or disruptive, it is okay to ask for a break. It is also acceptable to put on the record questionable non-verbal behavior: "Let the record reflect that counsel just pounded his fist on the table." "Let the record show that Attorney X just wrote some words on a piece of paper and passed it to the witness."

When in doubt, you can call the judge; especially if you believe opposing counsel is being obstructionist.

Extend professional courtesy. Like Disney, the legal world is a small one; odds are that you will run into the same people over and over again the longer you practice. Be courteous to everyone, from the court reporter, to the witness, to opposing counsel.

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Marks

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judges must possess the skills to navigate the ethical and practical challenges of presiding in cases with self-represented parties. While our judges are public servants and will never be drawn to their jobs to become wealthy, judicial compensation must be adequate to make a career on the bench a viable choice for talented women and men who are smart, fair, highly capable and unbiased. New Yorkers should expect no less.

Fortunately, our partners in government have recognized the vital importance of judicial compensation by creating a structure, removed from the political process, that allows for compensation to be examined and increased where warranted every four years. The Commission's recent recommendations would place our state's Supreme Court justices on a par with federal district court judges. Historically, the federal trial judge salary has been a benchmark for setting compensation for New York's judges, as is entirely appropriate given the myriad challenges and complexities regularly confronted by judges in this state.

Pursuant to the Commission's recommendations, judicial salary increases would be phased in over the next several years. This April 1st, state Supreme Court justices would receive 95 percent of the compensation of a federal district court judge. On April 1, 2017, compensation would be adjusted, if necessary, to maintain that 95 percent level. On April 1, 2018, state Supreme Court justices' compensation would be raised to full parity with federal district court judges, and on April 1, 2019, compensation would again be adjusted, if necessary, to maintain that parity. The other categories of state trial judges, as well as state appellate judges, would receive proportionate adjustments over the next four years. Importantly, the Commission also recommended changes to the judicial pay relationships among and within categories of judgeships, to correct longstanding inequities. This will lead to far greater statewide parity in judicial salaries, so that judges in the same court type would be paid equally across the state regardless of their geographical jurisdiction—a reform long overdue.

In developing these recommendations, the Commission took into account the economic climate in New York; rates of inflation; changes in public-sector spending; compensation for others in government, academic, private and nonprofit sectors; and the state's ability to fund increases in compensation. It held public meetings and heard testimony and reviewed submissions from 39 organizations and individuals. After considering all this information, the majority of the Commission recommended the increases outlined in the report, available at http://www.nyscommissiononcompensation.org/index.shtml. A minority of the Commission dissented, agreeing with the need for adequate judicial compensation but dissenting from the Commission's specific recommendations.

Along the way, the support of the organized bar, legal service providers, civic organizations and others has been indispensable. These strong voices speaking out in favor of fair salaries for judges have made clear that judicial compensation is not simply a personal concern for individual judges but a matter of grave public interest. During State Bar Week, the New York State Bar Association in particular deserves recognition for its vigorous advocacy on this issue. With the strong support of those who practice in our courts, we can look forward to appropriate compensation for judges in our state in the years to come.

VW Fraud and N.Y.'s Antiquated Air Pollution Crimes

Michael J. Lesser
Chair
Environmental Law Section

Since September 2015, the Volkswagen (VW) diesel vehicle emissions fraud has grown into one of the largest worldwide environmental air pollution violations. But despite the alleged egregious nature of the violations possibly perpetrated by VW, New York state air pollution laws do not currently provide a modern felony crime to address the situation if necessary.

On Sept. 18, 2015, the U.S. Environmental Protection Agency (EPA) issued a Clean Air Act (CAA) notice of violation to the German based automaker. By most accounts, VW had installed computer software into its diesel vehicles that produced false results when the vehicles were subjected to standard emissions testing. The false results in turn indicated that these vehicles were meeting the air pollution emission standards promised to consumers by VW and mandated by federal and state emission standards.[1] In reality, the vehicles emitted up to 40 times more air pollution on the road than in the test mode. VW allegedly installed this bogus system in approximately 11 million cars worldwide and more specifically 500,000 in the United States for model years 2009-2015.[2]

The deliberate configuration of the diesel emissions software to produce false positive air emission testing results would seem to be a massive consumer fraud and environmental transgression. The full story will eventually unfold and reveal the individual and corporate parties responsible for this conduct. However, it is likely that at some level VW and its employees were aware and complicit in this unlawful conduct.[3] VW has already started to repair their products and pay some form of restitution under the watchful eye of government regulators.[4]

Given the circumstances, federal and state regulators and private parties are already pursuing or preparing legal action against VW under various theories of law.[5] In this regard, the New York Attorney General has already joined with 47 other states in the investigation of VW and its questionable diesel emissions practices.[6] But, unlike New York, federal prosecutors also have the legal option of the investigation and prosecution of certain felony air pollution crimes.[7]

The New York Attorney General does have many state civil and non-ECL criminal options at hand to address VW's spectacular perfidy.[8] Theoretically, the state may also utilize certain federal remedies using the CAA.[9] But, New York criminal prosecutors (the Attorney General and local district attorneys) do not have a felony air pollution crime as an option due to the current provisions of the New York State Environmental Conservation Law (ECL). With minor exceptions, the ECL only provides in part that "any person who shall wilfully violate any of the provisions of ECL article 19 or any code, rule or regulation promulgated thereto or any final determination or order of the commissioner made pursuant to article 19 shall be guilty of a misdemeanor."[10] This law is a glaring exception to other New York environmental laws because the ECL does provide for felony level criminal prosecutions for comparable hazardous substance and water pollution crimes depending on the circumstances and culpable mental states involved.[11]

The primary reason for this outdated language is that the current air crime law derives with few changes from the archaic New York Public Health Law (PHL) of 1953.[12] Another sign of this law's vintage is the use of "wilfully" as a culpable mental state. Currently, New York penal law provides only four modern culpable mental states: intentional; knowing; reckless and criminal negligence.[13] Case law often defines the term "wilfully"as possessing a culpable mental state equivalent to that required by the term "knowingly."[14] But, the reliance of criminal prosecutions on case law rather than legislative intent further lessens the practical value of this law for state prosecutors.

In conclusion, New York officials need to revisit this anomaly and propose legislative revisions to modernize the state's criminal air laws to conform to contemporary state and federal environmental standards. Otherwise, future violators like Volkswagen will continue to escape the full measure of criminal environmental justice under New York's air pollution laws.

1. Lawrence, Elgin and Silver, "How Could Volkswagen's Top Engineers Not Have Known," Bloomberg Business Week, Oct. 26-Nov. 1, 2015, at 52-55.
2. Id.
3. Henning, "The Potential Criminal Consequences for Volkswagen," New York Times, Sept. 24, 2015, available at http://www.nytimes.com/2015/09/25/business/dealbook/thepotential-criminal-consequences-for-volkswagen.html?_r=0 (accessed Dec. 19, 2015).
4. Isadore, "Volkswagen Gives Owners $500 Amid Scandal," CNN Money, Nov. 9, 2015, available at http://money.cnn.com/2015/11/09/news/companies/volkswagen-pay-owners/ (accessed Dec. 18, 2015), and Krisher, "VW Hires Kenneth Feinberg to Handle Emission-Cheating Claims," Albany Times Union, Dec. 17, 2015, available at http://www.timesunion.com/business/energy/article/VW-hires-Kenneth-Feinberg-to-handle-6705397.php (accessed Dec. 18, 2015).
5. "United States Files Complaint Against Volkswagen, Audi and Porche for Alleged Clean Air Act Violations," U.S. Department of Justice Press Release, Office of Public Affairs, Jan. 4, 2016; "Why Lawyers Love Volkswagen," Bloomberg Business Week, Oct. 12-18, 2015, at 23.
6. New York Attorney General Eric T. Schneiderman, Press Releases, Nov. 9, 2015 and Sept. 22, 2015.
7. CAA §§113(c) (1), (2).
8. Among the state law possibilities raised by the VW scenario are the powerful financial fraud provisions of the Martin Act, N.Y. General Business Law article 23-A, §§352-353, and the felonious, Scheme to defraud in the first degree, New York Penal Law §190.65.
9. In general, see CAA citizen suit provisions at CAA §304.
10. ECL §71-2105; see also ECL Article 19, New York's air pollution control law.
11. For example, see N.Y. environmental felony sanctions at ECL §§71-2712, 2713 (hazardous substances) and ECL §§71-1933(4), (5), (7) (water pollution).
12. See ECL §71-2105, McKinney's Statutory Derivation. Public Health Law of 1953, c. 879, §1286-a.
13. See New York Penal Law §§1505(1),(2),(3),(4).
14. In general, see *People v. Einaugler*, 208 A.D.2d 946, 948 (1994) and *People v. Coe*, 71 N.Y.2d 853, 855 (1988).

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Section Embarks on a New Venture

Carol L. Van Scoyoc

Chair
Local and State Government Law Section

The Municipal Law Section is now officially known as the new Local and State Government Law Section, after approval of bylaw amendments by the State Bar's Executive Committee and by Section members. In order to promote, diversify, broaden and enhance membership, our Section is now expanded to embrace state attorneys, including those associated with the former Committee on Attorneys in Public Service (CAPS), as well as in-house and outside counsel to municipalities and attorneys who appear before and against governmental entities. The mission statement of our Section now states as follows:

> The purpose of the Local and State Government Law Section shall be to serve, educate and provide a common meeting ground and impartial forum for those attorneys, whether in the public or private sector, engaged in dealing in any capacity with issues in local or state government law.

The Section's union with state attorneys will provide new and additional benefits, at an annual cost of only $30 (in addition to basic NYSBA dues), including programs and publications to elevate the Section's outreach to state and local government lawyers and private practitioners who interact with government law offices. The *Government Law and Policy Journal* will soon become an exclusive benefit of membership of the Local and State Government Law Section—only our Section members will receive this highly renowned publication established by the former CAPS. The revered annual Excellence in Public Service Award for outstanding attorneys involved in governmental practice will be bestowed by the Section. There will also be an integration of programs and articles on a vast array of topics of state and local government concern, i.e., environmental, open government, ethics and green development, just to name a few. New committees will be established by the Section, such as State Counsel, Administrative Law Judiciary, Awards, Publications, Public Contracts and Bidding.

The Section will also continue to provide its members benefits such as the *Municipal Lawyer*, a quarterly publication, which features peer-written, substantive articles on the practice of municipal law; CLE programs providing invaluable training in areas relevant to our Section members, e.g., zoning, environmental law, municipal financing, and public sector labor law; updates on new and proposed federal and state legislation; networking and information-sharing venues; and a private, secure, online community affording a convenient channel to connect with Section colleagues, obtain advice and disseminate information.

I enthusiastically recommend all lawyers engaged in government law to consider joining our newly heightened Section. This year's program at the Annual Meeting will showcase topics of interest such as electronic surveillance in the workplace, local ethics laws, recent revisions to the State Lobbying Law, tax certiorari, in rem tax foreclosures, and a land use law update highlighting the U.S. Supreme Court decision on sign ordinances in *Reed v. Town of Gilbert* and the New York Court of Appeals decision on parkland dedication in *Glick v. Harvey*. To learn more about our Section visit www.nysba.org/LocalandStateGovernment.

Carol L. Van Scoyoc is chief deputy corporation counsel of the City of White Plains.

Senior Lawyers: Focusing on Law and Life

Carole A. Burns

Chair
Senior Lawyers Section

Rosemary C. Byrne

Vice Chair
Senior Lawyers Section

The Senior Lawyers Section counts among its members over 3,100 seasoned members of the New York State Bar Association. Not only are we one of the largest sections of the NYSBA, but we are unique among them. Unlike most other sections, our members are not generally bound by a specific area of practice. Rather, we are united by our age (55+) and a keen and continued interest in the law and in issues that affect the lives of senior lawyers, a substantial community within the NYSBA, as it is within the profession generally.

Senior lawyers are as diverse as the Bar itself. We are litigators, corporate counsel, elder and family law practitioners, real property attorneys, general practitioners, law clerks and judges, government attorneys, trusts and estate attorneys, arbitrators and mediators, business and community leaders, and more. We are partners, associates, special and general counsel, mentors, entrepreneurs and more. We work in firms of all sizes, solo practices, and a wide array of other settings. While many of us continue to practice full time, others have opted to reduce our work load or to cease working in a legal setting or as a lawyer altogether. Some of us are retired in the conventional sense; others may be in the process of selling or scaling back a practice, transitioning to new positions, or pursuing pro bono or alternative career opportunities. No matter what their background, area of practice or current employment status, the Section seeks to serve the needs of the scores of NYSBA members aged 55 and older, addressing the unique issues they may face, helping them plan for their future whatever its form, and acting as their voice within the Association and the legal community as a whole.

The scope of the Section's activities and educational programs expand well beyond issues affecting only the 55+ set. We strive to assist our members in staying current in their areas of practice. The Section's publication, The Senior Lawyer, and our CLE programs address diverse topics and subject areas that are relevant to members of the bar of all ages. At our Annual Meeting this year, the Section will be presenting a CLE program that provides an update and primer on real property law, an area of practice of many of our members. Last fall we offered "Retirement Planning for Clients and the Senior Lawyer," discussing legal, financial, estate tax and long term care planning issues impacting clients and prospective retirees. A recording of the program is available at no cost to Section members at our website www.NYSBA.org/SLS. Prior programs have covered technology issues, updates in elder law, trusts and estates, civil practice, systemization of a law practice, and Medicaid, Medicare and Social Security issues facing attorneys and their clients.

The Section's dedication to conveying information extends beyond programs addressing strictly *legal* issues. The importance of planning for senior *life* issues and "what's next" cannot be overlooked. These topics are of particular import to our baby boomer and beyond membership whose lives and careers may be impacted by mandatory retirement policies, illness or disability, increased family obligations due to illness of loved ones, or simply a desire to retire and "try something new before it's too late." We focus on the "life" issues of our members with programs addressing the various aspects of aging, as well as financial planning and senior and retirement life planning.

The State Bar, through its Law Practice Management Committee, has stressed the importance of planning in its recently updated "Planning Ahead Guide: Establishing an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death." This invaluable planning tool, created to help attorneys of all ages establish an advance exit plan in the event of disability, retirement or death, is available free at www.nysba.org/PlanningAhead. It provides checklists, sample letters, forms and guidelines covering death, incapacity and other aspects of closing a law firm or selling a practice.

In sum, the Senior Lawyers Section strives to give its members what they need most—the ability to stay current and expand their knowledge in their chosen practice area and a forum for addressing questions and issues unique to their seniority.

In retirement, Carole A. Burns volunteers as a pro bono attorney at Nassau/Suffolk Law Services. Rosemary Byrne is an attorney and founder of Step-By-Step Coaching, which specializes in retirement and senior life planning.

Task Force Develops Mediation Program Proposal

David C. Singer

Chair
Dispute Resolution Section

At its meeting on Nov. 6, 2015, the Executive Committee of NYSBA adopted a proposal mandating that a voluntary court-annexed mediation program be adopted by each New York State court (civil). The proposal states:

> Each civil court in New York State that does not have a court-annexed mediation program shall create and adopt a court-annexed mediation program that enables parties to participate in mediation on a voluntary basis.

The proposal will be forwarded to the New York State Office of Court Administration with a recommendation that it be adopted as a new court rule. The proposed rule change is intended to provide litigants with the opportunity to avail themselves of court-annexed mediation on a voluntary basis in courts throughout the New York state system.

The proposal originated from a task force formed by the mediation committee of the Dispute Resolution Section. The Proposal was adopted by the mediation committee and, thereafter, the Executive Committee of the Section.

Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. Litigation can become a lengthy, stressful and expensive proposition. As some disputes will invariably arise, lawyers seeking to best serve their clients must consider other forms of dispute resolution as an alternative to traditional litigation. Mediation is often responsive to party needs in ways that are not possible in a court proceeding.

Mediation has applicability in a variety of substantive practice areas of law. It has become common in the resolution of commercial and non-commercial disputes between and among business entities and/or individuals. Mediation is routinely incorporated into contract dispute resolution clauses as a method of choice for resolving disputes that may arise in the future. Even in the absence of such clauses, mediation is routinely used after disputes arise and the parties are seeking an appropriate resolution.

Some judges already have the authority to order the parties to mediation, for example in the Matrimonial Parts and Commercial Divisions of the Supreme Court of New York County. In addition, many judges who recognize how parties can benefit from the early settlement of cases will suggest that they try mediation even in the absence of a court rule authorizing the judges to order mediation.

A court-annexed mediation program provides an invaluable resource for courts, helping to alleviate the burden of reduced resources and backlog of cases. Some courts in New York state have already adopted court-annexed mediation programs, which are listed in the New York State Court System website.

The proposal provides that each civil court in New York state that does not have a court-annexed mediation program shall create and adopt one that at least enables parties to participate in court-sponsored mediation on a voluntary basis. Each program can be tailored so that it is best suited to the needs of the particular court, with or without the need of additional court funding. Although this proposal is addressed to programs directed to voluntary mediation, the proposal is not intended to suggest any changes to existing programs or preclude any new programs that may provide for mandatory (or automatic) mediation.

The Dispute Resolution Section of the New York State Bar Association is available to assist with the development of court-annexed mediation programs. The Dispute Resolution Section is also available to provide training and other support regarding court-annexed mediation.

> *"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, and expenses, and waste of time."*
> —Abraham Lincoln
> (circa 1850)

David C. Singer is a partner in the trial department of Dorsey & Whitney, and an independent arbitrator and mediator.

'Zombie Houses' Pose A Persistent Problem

Leon T. Sawyko

Chair
Real Property Law Section

There is an epidemic affecting cities and towns from Buffalo to Montauk: zombie houses. These are abandoned properties most often owned by borrowers who have become delinquent on their mortgages and/or real property taxes and then abandoned their homes. These have gradually, and sometimes dramatically, deteriorated to the point that the only reasonable solution is the wrecking ball. Between the time when the property is vacated until the arrival of the bulldozer, the abandoned house steadily diminishes the livability and property values of the neighborhood affected.

This is not a problem limited to inner cities or poor rural areas. This blight is occurring throughout the state in lower, middle and even higher income neighborhoods.

The downward spiral begins when the taxes or mortgage payments can no longer be made. Thereafter, the lender or the municipality sends a delinquency notice to the owner. Depending on how aggressive the lender becomes, and how knowledgeable the owner may be, the owner may respond, ignore the notice, try to negotiate a better payment or simply give up, leaving the premises rather than trying to find a solution.

These problems can be caused by irresponsible/naïve borrowers, unscrupulous mortgage brokers, predatory lenders, incompetent appraisers, job loss, poor economic times, or a combination of any of these factors. The cause is irrelevant and the problem is real.

This is a problem that we as lawyers should be concerned about and we should be ready to lend our expertise to find a solution. In response to this issue, legislation has been introduced over the past few years, none of which has been adopted in New York, attempting to address the issue. The legislation most actively pursued currently is the Abandoned Property Neighborhood Relief Act of 2015. This legislation is strongly supported by the New York State Attorney General Eric Schneiderman and by many municipalities.

Gov. Andrew Cuomo, in response to the crisis, through the State Department of Financial Services, negotiated with 11 of the most active New York state lenders and in May 2015 produced a guide titled "Industry Best Practices: Inspecting, Securing and Maintaining Vacant and Abandoned Properties in New York." These best practices were to be implemented in August 2015.

The best practices include procedures to be followed by lenders commencing within 60 days after a borrower delinquency. From that time forward, the lender or servicer is supposed to inspect the property from the exterior to determine whether the property is vacant or abandoned. If the property appears to have been abandoned, it is the lender's or servicer's duty, following attempted notice to the owner, to secure the property, remediate any hazardous conditions and maintain it until such time as it is reoccupied. The lender/servicer's obligation to maintain the property continues until occupancy is restored, the Borrower files in bankruptcy, a court order is issued, access is denied by a homeowners' association or co-op board, the premises are sold or the lender releases its lien.

Within 30 days after securing the property, the lender is to notify the Department of Financial Services that the property is vacant and abandoned. This information is to be made available in an online portal available to local authorities.

The skeptical among us might say that the procedure set forth would address many of the issues, but without some enforcement mechanism, probably most lenders will not voluntarily assume the additional expense and potential risk of liability under this procedure. The current proposed legislation referenced above incorporates many of the practices set forth in the governor's litany of best practices, makes them mandatory and starts the obligation to secure and maintain the property earlier in the process. To offset some of this additional liability, the legislation provides for some streamlining of the foreclosure process provided the property remains vacant and there is no objection raised by the vacating owner during the process.

Under the proposal, in the event a lender or servicing agent fails to secure and maintain an abandoned property upon which it holds a lien, there are significant fines (up to $1,000 per day) and injunctive relief available to the municipality and the Attorney General.

An important part of the legislation is that a state-provided database, similar to that under the best practices, is to be created containing a list of abandoned properties and the names of the lender/servicers who hold the lien. This information is to be provided by the lender/servicers as soon as they determine that their lien is on a vacant or abandoned property.

While the legislation remains in committee and may or may not emerge to become law, the government's best practices are in place. It remains to be seen to what extent the lender/servicers follow these practices and whether in fact the problem of zombie houses is reduced to any extent.

If the best practices are not followed or, if followed, not successful in reducing or even containing the problem, the pressure will increase to adopt the proposed legislation or something akin to it.

The Division of Financial Services statement of best practices can be found on the New York State Department of Financial Services website. The proposed legislation referenced above is Senate Bill 4781 or Assembly Bill 6932.

Leon T. Sawyko is counsel to Harris Beach.

Collective Bargaining Law in the Firing Line at the Supreme Court

William A. Herbert

Chair
Labor and Employment Law Section

By the end of the current term, the U.S. Supreme Court will render a decision with the potential for destabilizing important aspects of collective bargaining law. In *Friedrichs v. California Teachers Association*,[1] plaintiffs have raised a First Amendment challenge to a California statute on the grounds that it requires an employee who is not a union member to a pay an "agency fee" to the union that is the exclusive representative of the employee's bargaining unit.

Under an agency fee arrangement, a non-union member must contribute to the cost of negotiations, contract administration, and representation. The individual, however, does not have to financially support the union's partisan or ideological agenda. The basic principle behind an agency fee is that the non-member cannot be permitted to be a "free rider" by enjoying the benefits of union representation, including the negotiated terms of a contract, without sharing in the financial costs.

An agency fee is also premised on the union's obligation, as the exclusive bargaining representative of a bargaining unit, to fairly represent all unit employees regardless of union membership. Exclusive representation is a core element of public and private sector collective bargaining law. It is administratively convenient for employers by insuring a single collective voice to negotiate with, and to administer the negotiated agreement.

Agency fee mandates, like the one in California, exist or are negotiable under New York's Taylor Law and other state public sector collective bargaining laws. They are also negotiable in the private sector under the National Labor Relations Act (NLRA),[2] with the exception of workplaces located in "right to work" states, and under the Railway Labor Act (RLA).[3]

Close to 40 years ago, the U.S. Supreme Court ruled in *Abood v. Detroit Board of Education*[4] that a negotiated agency fee system did not violate the First Amendment. The court has also upheld negotiated agency fee obligations under the RLA[5] and the NLRA[6] to the extent that the fees are necessary for a union's representation about labor-management issues. Under both public and private sector collective bargaining law, a non-member has a right to object to fees to pay for non-chargeable union activities.

This may all change if the court in *Friedrichs* follows the dicta from majority opinions authored by U.S. Supreme Court Justice Samuel A. Alito Jr. in 2012[7] and 2014.[8] In those decisions, Alito, joined by Chief Justice John G. Roberts and Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas, expressed sharp criticisms of the holding in *Abood* and the private sector precedent it was based on. In contrast, the same court majority ruled in *Citizen United v. FEC*[9] that a corporation's free speech rights outweigh shareholders' interests in not being compelled to fund corporate political and ideological causes.

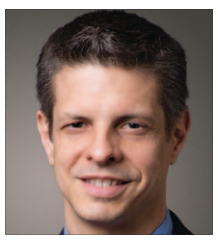
The final outcome in *Friedrichs* is uncertain. Scalia's observation in a 1991 concurring opinion in an agency fee case suggests that he views such fees as being constitutional under the First Amendment: "Where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost."[10]

What is certain is that there is no such thing as free union representation, to paraphrase Milton Friedman. The overturning of *Abood* will lead to cost-shifting in the workplace, requiring unions and their members to subsidize the representation of non-members. It would result in financially incentivizing non-membership, and it might cause the fracturing of the exclusive representation model. The sustaining of the challenge in *Friedrichs* will also set the stage for similar constitutional challenges to negotiated private sector agency fee arrangements under the NLRA or RLA. Lastly, the possible judicial imposition of a newly discovered constitutional "right to work" would contradict the Supreme Court's prior dictum that the First Amendment "is not a substitute for the national labor relations laws."[11]

1. Docket No. 14-915.
2. 29 U.S.C. §151, et seq.
3. 45 U.S.C. §151, et seq.
4. 431 U.S. 209 (1977).
5. *Railway Employees' Dep't. v. Hanson*, 351 U.S. 225 (1956).
6. *Communications Workers of America v. Beck*, 487 U.S. 735 (1988).
7. *Knox v. SEIU*, 132 S. Ct. 2277 (2012).
8. *Harris v. Quinn*, 134 S. Ct. 2618 (2014).
9. 558 U.S. 310 (2010).
10. *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 556 (1991).
11. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464 (1979).

William A. Herbert is distinguished lecturer and executive director, National Center for the Study of Collective Bargaining in Higher Education and the Professions, Hunter College, City University of New York.

Committees Comment on FDA Guidance and Legislation



Brian Malkin

Chair
Food, Drug and Cosmetic Law Section

Bethany Hills

Member
Section Executive Committee

New York State Bar Association's Food, Drug and Cosmetic (FDC) Law Section offers both experienced and novice practitioners excellent opportunities to enhance their professional skills and knowledge. Section activities provide members with valuable opportunities to meet and network with in-house, law firm, federal and state regulatory agency, industry self-regulatory body, and trade association attorneys from around the country. Each year the Section features a robust Annual Meeting, which brings together national and regional experts in the food and drug arena. In addition to our Annual Meeting, the FDA Law Section features year-long opportunities to get involved in our product-specific committees and continuing legal education to comment on and advance regulatory law in the food and drug law space. As the country's premier (since 1945) and only state bar association with such a Section, membership has many advantages highlighted below.

Educational Programs. Take advantage of NYSBA's CLE programs at reduced member rates. In 2015, the FDC Law Section partnered with the NYSBA Sports and Entertainment Law Section for the first time to put on a first-of-its-kind CLE program regarding celebrity chefs, restaurants, and food sales on restaurant premises with an emphasis on bringing such businesses to New York.

Leadership Opportunities. All members are encouraged to become involved as a participant in Section leadership, including Section committees that focus on particular areas of food and drug law. Just this year, new members of FDC Law Section's committees worked together to comment on three separate FDA guidances concerning: (1) laboratory developed tests, (2) animal drug compounding from bulk active ingredients, and (3) nonproprietary naming for biological products. The Biologics Law Committee also developed the Section's first state legislative proposal to amend New York's pharmacy laws regarding biosimilars, which will be supported by NYSBA's leadership in 2016. The FDC Law Section also partners with the Food and Drug Law Institute, as well as other conference providers in the food and drug law space.

FDC Section's Upcoming Annual Meeting—Committee and Industry Reports:

- Case Updates featuring speakers from New York Attorney General's Antitrust Bureau and Assistant General Counsel, Purdue Pharma
- Biosimilar Substitutions—NY Pharmacy Laws Proposal Drawing the Line—At what point is similar no longer similar? Featuring speaker Director, Policy Global Regulatory Affairs and Safety, Amgen.
- Next Generation Sequencing Update featuring former New York State Laboratory Diagnostic Regulator.
- Animal Health—Animal Drug Compounding/FDC Section Comments/Generics v. Homemade Drugs: FDA attempting to strike a balance with new draft guidance on compounding animal drugs from bulk substances featuring speaker General Counsel, Elanco.
- Caring for Cosmetics—How the proposed Personal Care Products Safety Act May change cosmetics compliance Featuring speakers from the Personal Care Products Council and Avon.

Brian Malkin is senior counsel at McGuireWoods. Bethany Hills is a member of Epstein Becker & Green.

Working Toward Equal Justice for All

Sherry Levin Wallach

Chair
Criminal Justice Section

As a great song writer wrote, "the times they are a-changin'," and like anything else we must change with them. The change discussed in this article has, like most, been occurring over a period of several years. I am referring to the practice of law and administration of justice in the town and village justice courts of our state. These courts are in desperate need of reform and support. The town and village justice courts are the backbone of the criminal justice system in the geographic majority of our state. Most criminal cases outside of the cities come before them.

For those of us who practice in the criminal justice system in the cities, particularly the five boroughs of the City of New York, the practice of law is quite different; for example, defendants are never arraigned without counsel and defendants are held in centralized holding facilities pending arraignment. Although the majority of the criminal cases pending in our state are in the cities, the laws and protections afforded defendants in a criminal case are no different in the towns and villages; at least they should not be.

In the wake of the *Hurrell Harring* settlement, which, among other things, mandates that defendants be represented by counsel at arraignment, and on the cusp of possible major bail reform in our state, the town and village justice courts are now required to operate differently than many of them have in the past. Therefore, it is imperative that the town and village justice courts be provided the necessary structure and resources to ensure that all defendants brought before them are afforded equal justice under the law.

The requirement of counsel at arraignment/first appearance seems to be posing the most immediate concerns across the state. Many of the towns and villages do not have police forces that handle overnight shifts, or maintain holding facilities available to house individuals arrested for a crime and awaiting arraignment. This requires judges and attorneys to arrange arraignments at all hours of the night to avoid having those charged with crimes held unnecessarily or for extended periods of time. Also, defendants must be arraigned so that the arresting officers are then available to respond to other calls. Reforms should be adopted to accommodate and help facilitate the process of counsel at arraignment. For instance, each county could provide for a system that would be responsible for providing attorneys with notification of off-hour arraignments rather than require that each town and village court judge be responsible for contacting attorneys each time an arraignment must be scheduled. Alternatively, we may once again visit the issue of court consolidation or at least creating a centralized arraignment system in counties where holding facilities are available to accommodate the needs of the county. Understandably, these suggestions have been historically frowned upon. The towns and villages do not want to lose their autonomy and independence. Yet, without adequate court and police department resources and with insufficient funding to support mandated legal representation, it is becoming increasingly difficult for the court systems and judiciary to properly function.

This article only focuses on one of the many issues affecting the operation of our town and village justice courts. It is by no means exhaustive of the matters that should be considered and/or reconsidered regarding their structure. Hopefully, this article will encourage further discussion about and support for this challenging and complicated issue that affects the administration of criminal justice in our state.

Sherry Levin Wallach is a principal and partner with the law firm of Wallach & Rendo in Mount Kisco.

Talking With Clients About Philanthropy

Marion Hancock Fish

Chair
Trusts and Estates Law Section

The recent news about Facebook CEO Mark Zuckerberg's announcement of a multiple billion dollar charitable gift made the headlines and caught the attention of trusts and estates attorneys. Reading through the details, it seems that the Facebook shares have been retitled to a limited liability company owned by Zuckerberg. So just how was this deal structured, and was there any charitable gift at all? One might imagine the discussion between Mark and his planning attorney—perhaps something like this conversation with his fictional attorney, Ms. Smith:

Mark Z.: Ms. Smith, we've decided to make a major gift.

Ms. Smith: Along the lines of the educational support you've done over the last few years?

Mark Z.: No, not really. I mean, you know, something HUGE. But just not sure what we want to support. We have lots of ideas.

Ms. Smith: Ah. So, no specific charities in mind at this point?

Mark Z.: Well no … that's one of the problems. We don't know what charities. Not even sure the right charities exist. We are thinking global and looking out to the future—way out. In honor of our child's birth. And the gift is so huge—most of my stock

Ms. Smith: Oh, well that is HUGE. But if it's your stock, you have to think about your voting rights.

Mark Z.: That is the other big issue. And I am not ready to give up my voting control.

Ms. Smith: Hmmm …

Mark Z.: Maybe I am not really ready to decide. What about just parking it somewhere?

Ms. Smith: So maybe not even make the gift now? What about putting the stock in an LLC? You would still control it and when the time is right, do with it what you'd like, next year or 20 years from now. I like this because it will give us time to make a solid tax plan and you time to plan how to share this wealth with the world.

Mark Z.: That's really all we want right now. Thanks for talking it through with me.

Ms. Smith: Great! We will get started on drafts.

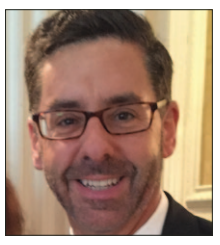
Who knows exactly how the discussion (or more likely several discussions) actually played out? Joking aside, Zuckerberg is extraordinarily generous and his new commitment could be transformative for the needs he decides to address.

The story does highlight the challenges of client/advisor conversations about planning, and in particular about charitable planning. Understanding clients' objectives is not always easy, and clients themselves are often uncertain about their wishes. Typically, a significant charitable gift is the result of several conversations between a client and her team of advisors considering the overall estate plan, estate and income tax implications, and charitable objectives. Flexibility can be critically important especially with major gifts and evolving philanthropic goals. The story also highlights how philanthropy is changing with donors of all types challenging their advisors and charities with different ways to give support.

This topic will be a significant part of the continuing legal education program of the New York State Bar Association Trusts and Estates Section Annual Meeting to be held on Wednesday, Jan. 27, 2016 at the Hilton Hotel in New York City. More details are available through the NYSBA website.

Marion Hancock Fish is a partner at Hancock Estabrook in Syracuse. Susan Miller King, principal of Miller King in Tully, N.Y. and co-chair of the Section's Charitable Planning Committee, assisted with the preparation of this article.

Exploring New Rule Changes in Commercial Disputes



James M. Wicks

Chair
Commercial and Federal Litigation Section

The Commercial and Federal Litigation Section continues to play a leadership role in the many facets of commercial disputes. Through programming, initiatives and our Section reports, we are working hard toward making litigating commercial disputes more efficient here in New York, to maintain the reputation of our courts, both federal and state, as leaders in the commercial and business world.

We have conducted statewide Bench and Bar programs—Long Island, Westchester, Queens, Rochester, Syracuse, Buffalo and Albany—to help better educate commercial litigators on the many new rule changes in the Commercial Division. With the help of the Commercial Division Justices throughout the state, we have had successful interactive panel discussions between the bench and bar to explore these new rule changes. Not only have these programs helped educate, but they continue to foster cooperation and collegiality among the judges and practitioners, all of which helps more efficient litigation of commercial cases.

But that's not all! As most know, there are also new and significant rule changes this year to the Federal Rules of Civil Procedure. Our Federal Practice Committee is busily planning a similar program to highlight those changes as they apply to business litigation.

This year, the Section also developed Social Media Guidelines, through our Social Media Committee led by Mark Berman and Ignatius Grande, which have gained national attention. We continue to devote much attention to these Guidelines and recently our Section issued a report on social media jury instructions which we hope will help guide the courts. As a result, our State Bar has become a leader in this area.

For the Section's Annual Meeting, we are proud to bestow the Stanley H. Fuld Award on the Hon. Sheila Abdus-Salaam, Associate Judge of the Court of Appeals for the State of New York, for her outstanding contributions to commercial law and litigation. Judge Abdus-Salaam, having served on trial and appellate courts, has made important rulings on key commercial issues involving insurance, contract and fiduciary duty issues, and epitomizes what the Award stands for.

We have planned three diverse, and exciting programs for the Annual Meeting. We start the morning off with a program on the "psychology of perception," which will explore the question, "What do arbitrators, judges and jurors hear?" Our Vice Chair Mitch Katz has assembled leading experts in psychology and trial advocacy—Richard Waites, J.D. Ph.D., Attorney & Chief Trial Psychologist, The Advocates; Valerie P. Hans, Ph.D., Professor of Law, Cornell Law School; Julie E. Howe, Ph.D. of J. Howe Consulting—to discuss the psychological factors at play in winning arguments, and how to develop a powerful story for your case. The panel will be moderated by James McGuire of Dechert.

The second program follows up on one of our key initiatives this year—exploring the imbalance of gender diversity at the trial counsel table in commercial cases.

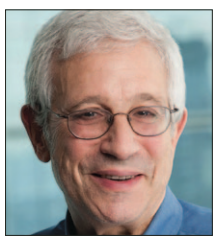
A group of former women chairs of the Section will discuss how men and women can work together to achieve equal opportunities and visibility for women among their peers and in the courtroom and boardroom. The discussion, moderated by Carla M. Miller, will focus on providing practical advice, insight and diverse perspectives. The All-Star line-up includes: Hon. Shira A. Scheindlin, U.S. District Judge, Southern District of New York; Lauren J. Wachtler of Mitchell, Silberberg & Knupp; Lesley Rosenthal, VP General Counsel & Secretary of Lincoln Center for the Performing Arts in New York; Tracee E. Davis of Zeichner, Ellman & Krause; Bernice K. Leber of Arent Fox; Sharon M. Porcellio of Bond, Schoeneck & King; and Carrie H. Cohen, Assistant U.S. Attorney, Southern District of New York, Criminal Division.

Our final program is on choosing the right venue: state or federal court. Although there have been many programs in the past on choosing your venue, this is a "must see" in light of the significant rule changes in both state and federal court that appear to make practice in both very similar. What are the remaining differences? The panel will be moderated by Robert L. Haig of Kelley, Drye & Warren and will include the Hon. Deborah H. Karalunas, Onondaga County Supreme Court; Hon. Timothy S. Driscoll, Nassau County Supreme Court; Hon. Jeffrey K. Oing, New York County Supreme Court; Hon. Mae A. D'Agostino, U.S. District Judge, Northern District of New York; Hon. Margo K. Brodie, U.S. District Judge, Eastern District of New York; and Hon. P. Kevin Castel, U.S. District Judge, Southern District of New York.

Keep an eye out for announcements for our Spring Meeting, which this year will be held in Cooperstown May 13-15, 2016!

James M. Wicks is a partner of Farrell Fritz, P.C.

Reflections on an Interesting Year in Entertainment Law



Stephen B. Rodner

Chair
Entertainment, Arts and Sports Law Section

As I write this, the end of the year is approaching and I am reading all of the top favorite lists of the year. I thought that, for this special Annual Meeting report, I would list my favorite cases of 2015. My choice was based on what I found interesting, not necessarily on what were the most consequential or legally significant cases. Since I can't go into much detail in the space allotted, I recommend that anyone who finds them as interesting as I did do further research into the rulings and case histories.

Throughout my career, I have always derived a great deal of pleasure in telling clients, to their disbelief, that the song "Happy Birthday to You" was still under copyright and had to be cleared and royalties had to be paid. So, to my delight, this became the subject of a plethora of rulings and legal machinations resulting in a settlement in *Good Morning to You Productions v. Warner Chappell Music* (U.S. District Court for the Central District of California). The bottom line of all this seems to be that the song definitely is still under copyright and that there are two (or three) co-owners. The history of this case makes fascinating r eading.

Other cases with broader implications involve the copyright ownership of motion pictures. It started with a strange (in my opinion, and in the opinion of most experts) ruling by the Ninth Circuit in *Garcia v. Google* that an actress in what turned out to be an anti-Muslim film had a copyrightable interest in the film and could enjoin its distribution—in this case, requiring Google to remove the film from its website. The full Ninth Circuit finally saw the error of its ways and, on rehearing, ruled that it was not possible for an actor, or any contributor to a film, to have a separate copyrightable interest because a film is a collaborative effort and not a joint work. Another case this year that dealt with and upheld this ruling was the Second Circuit case *16 Casa Duse v. Merkin*. It ruled that a director of a film ("Heads Up") could not have a separate copyrightable interest irrespective of whether he/she signed a work for hire agreement. I could almost hear the sigh of relief from independent filmmakers who, not infrequently, proceed to production without signed agreements from all of the cast and crew.

Fair use is an issue in which I have always had great interest, largely because it constitutes a significant percentage of questions from clients. It also is one of the most frustrating subjects for lawyers practicing entertainment law because very rarely can we give clients definitive answers. I have watched the evolution of cases over the last few years that have, for reasons I have yet to fathom, made the test of "transformativeness" the main test for fair use—clearly not one of the factors set forth in the Copyright Act. The latest example is *TCA Television v. Kevin McCollum* (U.S. District Court for the Southern District of New York). It ruled that a one-minute excerpt of the classic Abbot and Costello routine "Who's on First" in the Broadway play "Hand to God," performed by a human and a puppet, was sufficiently transformative to constitute fair use (in addition to a couple of other factors).

Last but not least, those interested in following copyright termination should check out the Second Circuit case *Baldwin v. EMI Feist Catalog*, which involved the attempted termination of EMI's rights on the song "Santa Claus Is Coming to Town".

I reiterate that these cases only represent my personal choice based on what I found interesting. There were several more in 2015 that are of greater significance and I'm sure that 2016 will also be an interesting year to be an entertainment lawyer.

Stephen B. Rodner is senior counsel at Pryor Cashman.