# NYSBA Annual Meeting

## Uniform Bar Exam: A Template For New York?

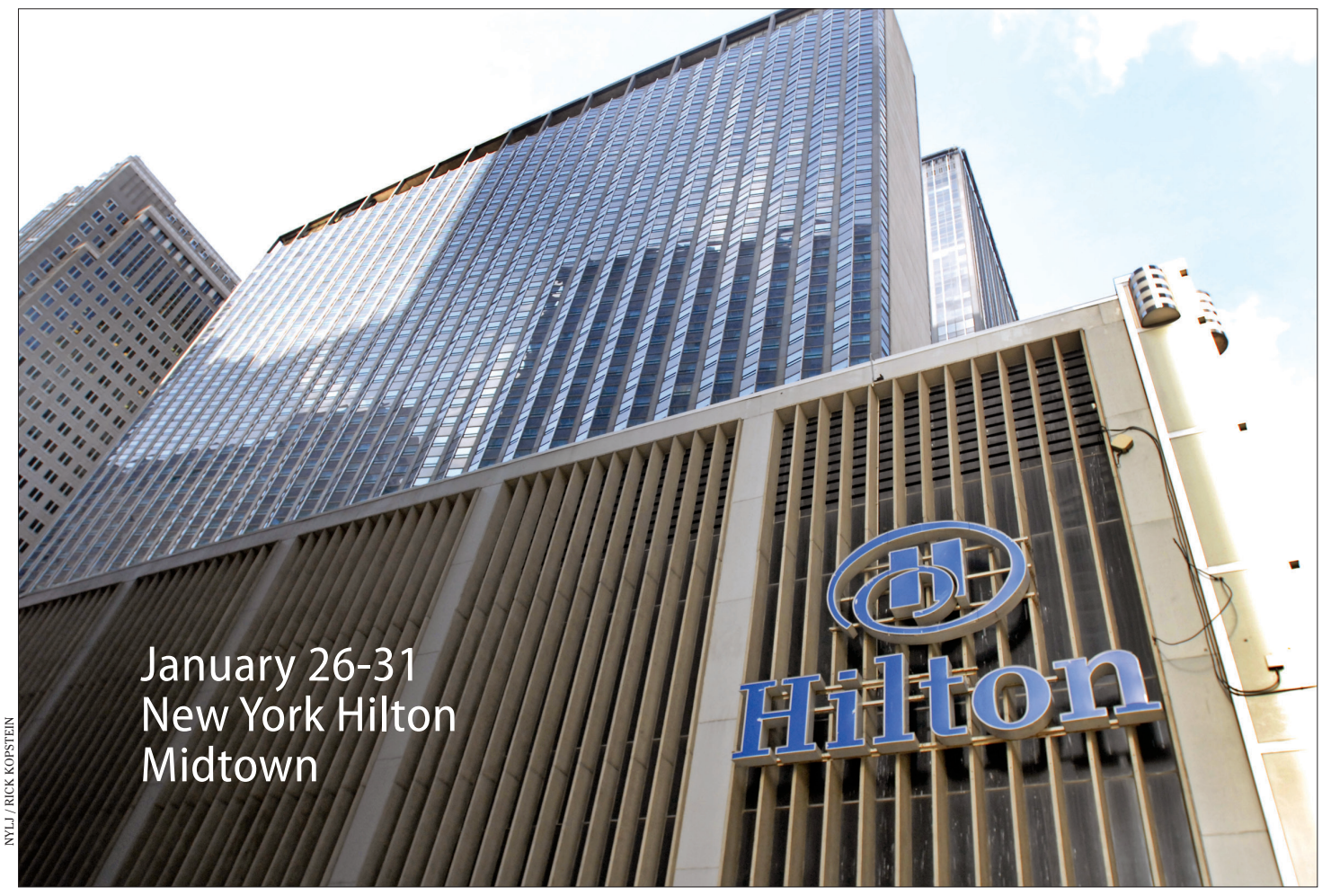
**Jonathan Lippman**
**Chief Judge**
**State of New York**

We live in an increasingly mobile world, and the practice of law and legal licensing must be in tune with the realities of a global society. Many law firms handle cases across state and international borders and operate multiple offices throughout the country and throughout the world because their clients require it. The financial sector, retail merchandisers, construction industry, health care conglomerates, and other businesses all need legal counsel who are versatile and adept at navigating issues that may arise from conflicts in different regions of the country. By catering to clients who now do business on the Web and who make contracts with suppliers and clients ranging from Buffalo to Hong Kong, practitioners can no longer necessarily confine themselves to one locale or county for the entirety of their careers.

While the legal community has adapted to the reality of multi-jurisdictional and cross-border practice, the licensing process for U.S. attorneys is dramatically out of step with these developments. Unlike other professions, law lacks a common licensing test that is shared among all 50 states. Since the early 1990s, there has been one uniform testing system to obtain a medical license for all 50 states.[1] In Europe, where there are the added barriers of language and cultural differences, the European Union has had "complete mutual recognition of lawyers who provide services in other Member States" for the past 40 years.[2]

In order to bring New York's legal licensing process into the modern age, we must consider some significant changes to the bar exam in New York and around the country. A few months ago, the Board of Law Examiners recommended to the Court of Appeals that New York adopt the Uniform Bar Exam (UBE). The Uniform Bar Exam is a uniformly administered, graded, and scored bar examination that results in a portable score that can be transferred to other UBE jurisdictions. The UBE enhances the mobility for law graduates and their families and offers graduates more options when choosing the jurisdiction in which to take the bar exam. New York tests the most prospective attorneys in the nation—over 15,200 candidates in 2014—and if adopted, New York would become the first large state in the country (in terms of bar admission candidates) to employ the UBE to assess knowledge and lawyering skills.

The UBE is not only geared toward the reality of modern-day practice, it is also enormously beneficial in addressing some of the economic difficulties that new law graduates face today. Currently, the overall employment rate for fresh law graduates has fallen for the sixth year in a row.[3] Dependable avenues of post-graduate employment have continued to erode in the face of economic pressures, technological advances, hiring freezes, and downsizing. As prospective lawyers become aware of these conditions, fewer people choose to enter the legal profession. Law school enrollment for first-year students has declined 30 percent in the past four years and is at the lowest level since 1973.[4] Enrollment at New York law schools has fallen about 23 percent since 2010.[5] People are shying away from the legal profession—despite the desperate need for affordable and accessible legal services by the poor and people of limited means—because they sense that it is no longer a reliable source of employment in today's economy sufficient to » Page 13

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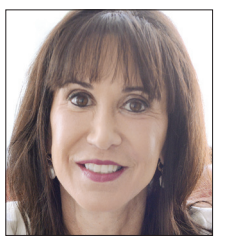
## Bar and Judiciary Are Indispensable Partners



**A. Gail Prudenti**
**Chief Administrative Judge**
**New York State**
**Unified Court System**

The core mission of our judiciary is to deliver fair and timely justice to each and every person who enters our courts. But delivering justice is a necessarily interdependent endeavor. In order to function at its best, our justice system requires the cooperation and support of all key stakeholders, with a central role played by the bar. By working together as partners in justice, the courts and the bar can identify problems, develop solutions, improve and innovate, all in the interest of better serving our ultimate constituents—the people of New York. The court system and the bar have long shared this important goal and our collaboration has continuously produced outstanding results. As Chief Administrative Judge, it has been my true pleasure and privilege to work with the bar and I could think of no better opportunity than Bar Week to highlight some of our past and ongoing joint efforts to improve our system of justice.

First and foremost, the bar has continually and vocally supported the judiciary's budget—the critical foundation that allows our courts to effectively and efficiently deliver justice. After years of no-growth budgets that left the courts short-staffed and necessitated a 4:30 p.m. courtroom closing time, the bar was quick to vocalize its concerns that service to the » Page 14

## Celebrating the Legacy Of the Magna Carta

**Luis A. Gonzalez**
**Presiding Justice**
**Appellate Division,**
**First Department**

This year marks the 800th Anniversary of the sealing of Magna Carta (the Great Charter), a monumental document of legal and administrative reform. In June 1215, in the fields of Runnymede, England, the country's most powerful feudal barons forced King John to put his seal on a draft agreement, limiting his power over them. This agreement was a purported peace treaty, for had the King not ceded to their demands, the barons promised civil war. Despite King John's seal, peace was not achieved and the First Baron's War of 1215 was not averted. It was not until after the death of King John that Magna Carta was resurrected, revisited, and substantially reformed.

The original Magna Carta was annulled later in 1215 and in the next two centuries, the document was repeatedly issued, withdrawn, reissued and confirmed.[1] That said, the original document still represents a milestone: a monarch subjugating his royal power to a written rule of law.[2] There were 63 clauses in Magna Carta, and a few are direct ancestors of provisions in the U.S. Constitution.[3] For example, provisions in our federal Constitution that draw directly from Magna Carta are: the requirement of legislative approval for taxation (U.S. Const. Art. 1 §7); the guarantee of freedom of religion (U.S. Const. Amdt. 1); » Page 13

## A Step Toward Counsel for All

**Randall T. Eng**
**Presiding Justice**
**Appellate Division,**
**Second Department**

In 1963, the U.S. Supreme Court recognized that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him [or her]." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Accordingly, the court concluded that the Sixth Amendment right to counsel, which includes the right of an indigent defendant to have an attorney appointed to represent him or her at the government's expense, is applicable to criminal proceedings in state courts. Identifying and applying the necessary resources to meet this heavy responsibility has challenged government for over half a century.

In 1965, the New York Legislature responded to the Supreme Court's ruling in *Gideon* by enacting Article 18-B of the County Law, which assigns all responsibility for making attorneys available to indigent defendants to the counties of the state, except within New York City, where that responsibility is assigned to the city. This law requires the city and each of the 57 counties outside the city to establish a plan for » Page 14

## MHLS Offers Guidance, Hope to the Vulnerable

**Karen K. Peters**
**Presiding Justice**
**Appellate Division,**
**Third Department**

Last year, Mental Hygiene Legal Service (MHLS) commemorated its 50th anniversary—a milestone reminding us that for over half a century, MHLS has provided superior legal services to the most vulnerable members of our society. Undoubtedly, the mission of MHLS has evolved over time,[1] yet the outstanding dedication and focus exhibited by MHLS when representing individuals with disabilities has remained steadfast.

The mandated activities of MHLS are defined by the special rules of each Appellate Division[2] and are statutorily prescribed by article 47 of the Mental Hygiene Law. Among other things, §47.01 prescribes that MHLS provide legal assistance to patients or residents in facilities licensed or operated by the Office of Mental Health and the Office for People with Developmental Disabilities.[3] It also states that "there shall be a mental hygiene legal service of the state in each judicial department" and indicates that the presiding justice must establish standards and qualifications for its personnel.[4] The powers and duties » Page 14

## A Phased Approach To Age Increase Is Best

**Henry J. Scudder**
**Presiding Justice**
**Appellate Division,**
**Fourth Department**

For the third consecutive year, state lawmakers will consider measures to raise the age of criminal responsibility in New York from 16 to 18. Now is the time, but the age should be raised incrementally to allow an adequate opportunity to address the complex issues associated with the change.

In his 2012 State of the Judiciary address, Chief Judge Jonathan Lippman called on lawmakers to pass legislation ending the practice of prosecuting 16- and 17-year-olds in adult criminal court. The effort gained momentum in 2014 when Gov. Andrew Cuomo appointed a Commission on Youth, Public Safety, and Justice that was charged with developing a plan to raise the age of criminal responsibility.

Advocates have made a convincing case for changing the jurisdictional age. New York is out-of-step with the rest of the nation. When the Family Court Act was passed in 1962, the legislature chose 16 as the age of criminal responsibility as a temporary measure until public hearings could be held. No hearings were ever held and, today, » Page 14

## Inside

# Panels Tackle Wrongful Convictions, Generational Differences

**Glenn Lau-Kee**
**President**
**New York State Bar Association**

The work of the New York State Bar Association encompasses serving the public and the profession. This year's Presidential Summit includes topics that address each of these constituencies in important ways.

The first Presidential Summit plenary session will examine the issue of wrongful conviction, a tragedy of justice that exacts a tremendous cost on society. In 2013 alone, there were 87 exonerations, including eight in New York state, according to the National Registry of Exonerations.

Frequent news headlines highlight the exonerations and releases of individuals who have spent years, sometimes decades, in prison for crimes they did not commit. And city and state governments settle lawsuits brought by the exonerated, at the cost of millions in taxpayer dollars.

The Association has done important work studying this issue. In 2009, after a careful review of 53 wrongful conviction cases, the NYSBA called for a slate of legislative reforms in the final report of its Task Force on Wrongful Convictions. Efforts to pass all the recommended reforms have, to date, not been successful, but interest recently has been expressed in legislation that would require videotaping of custodial interrogations and provide "double-blind" witness identifications. Our leadership and governmental relations department continue to work towards passage of these reforms.

At the Summit, a panel of key players in this field will examine how this issue has evolved, identify and discuss the latest scientific and policy developments, and discuss what reforms are needed to prevent future wrongful convictions. The panel is comprised of representatives of government, academia, prosecutor's offices and the defense bar. Brooklyn District Attorney Ken Thompson will deliver the keynote address. During his first six months as district attorney, his office vacated the convictions of six men.

Our second Presidential Summit panel addresses an aspect of our legal profession that has a daily and often significant impact on our delivery of legal services: generational differences among attorneys. Today's legal profession is far different from the one I entered into upon graduation from law school. Our profession has a new normal of rapidly changing technology, increased client demands, global competition and changing business models. And working together is a generational mix of practicing attorneys—Gen Y, Gen X, Baby Boomer and Traditionalist lawyers—that complicates these challenges.

To highlight these issues, we are convening a panel of attorneys, representing the different generations and different segments of the legal profession: big firm practice, academia, an educational start-up company and a not-for-profit institution.

This panel will discuss the differences in the generations' communication strategies, use of technology and expectations of privacy; whether and how ethics might evolve and fit into a new and changing culture; and their interest in professional development and mentoring. I hope that this discussion leads to greater understanding among the generations.

The Presidential Summit will take place on Wednesday, January 28 from 2:00 to 5:00 p.m. The Summit is the only plenary continuing legal education session of the Annual Meeting, and it is offered free of charge to all Annual Meeting registrants. I hope to see you at the Summit, as we continue to work together to build our profession's future.

*Glenn Lau-Kee is a partner at Kee & Lau-Kee.*

# Civics Education Means Citizen Engagement

**David P. Miranda**
**President-Elect**
**New York State Bar Association**

Across the nation, some are questioning their confidence in our courts and justice system. This process, whether it be through lawful protest or advocacy of legislative change, is an essential part of what makes our American system of justice a vibrant one that protects individual rights and preserves the values of our communities.

Our system of justice, rooted in our Constitution, is intended to ensure that no person is deprived of life, liberty or property without due process of law, and that all are treated equally and fairly regardless of race, gender, creed, ethnicity or orientation.

The ongoing dialogue about our justice system reminds us of a speech by retired Associate Supreme Court Justice David Souter in Albany on the importance of civics education. Souter urged us to persuade our state to reinvest in teaching our students civics education, American history and the humanities. This teaching has been in steady decline over the last half century. The result is that only a small portion of American adults—our electorate—has a good understanding of the constitutional framework of our government, our courts and how they work.

Souter was speaking about civics education in our schools. We at the New York State Bar Association also are also interested in cultivating a greater public understanding of the workings of our court and justice system.

Our justice system and its fundamental constitutional principles, including due process, rely on citizen engagement and understanding to remain vigorous. We can only expect widespread confidence in our justice system when we do a sufficient job of keeping the public informed about how our system operates, and ensuring that it is properly reflective of the people that appear before our courts.

For 40 years, the NYSBA has worked with schools on civics education through our Law, Youth and Citizenship Committee. Hundreds of attorneys have volunteered their time to work with teams of high school students in a Mock Trial Tournament and visit schools to talk about the meaning of Law Day and Constitution Day.

We cannot expect our citizens to trust our courts if they do not understand them and see themselves in them. This is why we as lawyers undertake continuous measures to keep our courts open and transparent. There is no greater cause for distrust than the lack of information, or the appearance that decisions are not being made under the light of openness.

Our State Bar Association also has contributed to the public debate by carefully studying issues, such as wrongful convictions and adolescent behavior, and has advocated substantive reforms, such as videotaping interrogations of criminal suspects and raising the age of criminal responsibility from 16 to 18.

This year, bringing education to the public about our justice system continues to be an important goal. The NYSBA and our legal community must seize the opportunity to do the public good, not only by promoting legal services for the needy and the underserved and equal justice for all New Yorkers, but also in becoming a productive part of the dialogue regarding our justice system and how it can be improved for all of us.

We as attorneys have an obligation, individually and collectively, to use the strength of our voices and our understanding of our legal system, not only to explain how our legal system is intended to work, but also to raise awareness of injustices that undermine the values of our communities.

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

# Conduct Within the Scope Cannot Be Beyond the Reach

**Barbara Hart**
**Chair**
**Antitrust Law Section**

Since the Federal Trade Antitrust Improvements Act's (the FTAIA) passage, the federal courts have discussed, at length, whether the FTAIA speaks to the court's power to hear the case (subject matter jurisdiction) or to the substantive elements of a Sherman Act claim.[1] The FTAIA was enacted to "clarify the legal standard determining when American antitrust law governs foreign conduct." *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 404 (2d Cir. 2014). The FTAIA does this by "placing all nonimport activity involving foreign commerce outside the Sherman Act's reach. It then brings back such conduct within the Sherman Act's reach provided the conduct both" has a "'direct, substantial and reasonably foreseeable effect' on American domestic, import or (certain) export commerce" and "gives rise to a Sherman Act claim." *F. Hoffman-La Roche Ltd. V. Empagran S.A.*, 542 U.S. 155, 162 (2004) (emphasis removed).

Among the issues still percolating is the interplay between the FTAIA and personal jurisdiction over a foreign defendant.[2] Although the FTAIA does not and was not intended to address personal jurisdiction specifically, when one examines the Sherman Act and the FTAIA, as well as the burden of proof the FTAIA places on plaintiffs, a convincing argument can be made that personal jurisdiction is established if the two "Acts" elements are met.

With the exception of import commerce,[3] the FTAIA extends Sherman Act protection to domestic commerce that is injured by antitrust violations perpetrated by foreign entities. By carving out an exception for domestic commerce impacted by foreign antitrust activity, the Act recognizes an American citizen's right to a private cause of action in U.S. courts, for harms caused by a foreign defendant. In demonstrating that a defendant's conduct was "direct, substantial and reasonably foreseeable," the plaintiff arguably satisfies the "Calder effects test"—the causal link necessary to show a connection between the defendant's acts and the plaintiff's injury. *United States ex rel. Piacentile v. Novartis AG*, 2010 U.S. Dist. LEXIS 146050 at *14 (E.D.N.Y. 2011). In order to establish specific personal jurisdiction over a foreign defendant, the plaintiff must show that "defendants expressly aimed their allegedly tortious conduct at the United States." *In re Terrorist Attack on September 11, 2001*, 714 F.3d 659, 665 (2d Cir. 2013). This language is consistent with the "direct, substantial and reasonably foreseeable" language of the FTAIA.

There are allegations of market wide, worldwide conspiracies currently being litigated; each with tremendous economic ramifications for international commerce. It would be illogical that an actor whose conduct falls within the scope of the Sherman Act's prohibitions might escape accountability due to a technical and constrained personal jurisdiction analysis. To allow such a defendant to escape liability on these grounds would appear to defeat the purpose of the Sherman Act.

1. In a series of recent decisions, the Second, Third, Seventh, and Ninth Circuit have all held that the FTAIA applies to the substantive elements of a Sherman Act claim. See *Animal Sci. Prods. v. China Minmetals*, 654 F.3d 462 (3d Cir. 2011), *Minn-Chem v. Agrium*, 683 F.3d 845 (7th Cir. 2012), *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395 (2d Cir. 2014), *United States v. Hui Hsiung*, No. 12-10492, 2014 U.S. App. LEXIS 13051 (9th Cir. 2014).

2. This article only addresses situations involving a foreign entity engaging in anticompetitive conduct abroad, with the intent to affect U.S. domestic commerce. This article does not address foreign parties who wish to sue foreign entities for engaging in anticompetitive conduct abroad in U.S. courts.

3. Import commerce and "conduct involving import commerce" are within the scope of the Sherman Act and that truth was not impacted by the FTAIA despite the sometimes considerable energy trying to make case law to the contrary. *Precision Assocs. v. Panalpina World Transp. (Holding)*, 2011 U.S. Dist. LEXIS 51330 at *115 (E.D.N.Y. 2011).

*Barbara Hart is the chief operating officer and head of Lowey Dannenberg's securities litigation practice.*

# Assessing Damages For Attorney Misconduct

**Richard A. Klass**
**Chair**
**General Practice Section**

**Elisa S. Rosenthal**
**Member**
**General Practice Section**

Judiciary Law §487 provides for an award of treble damages and/or criminal prosecution and punishment for misconduct by attorneys. "Judiciary Law §487 exposes an attorney who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party to criminal misdemeanor liability and treble damages, to be recovered by the injured party in a civil action."[1]

### Elements of a §487 Claim

Generally, New York courts have held that a cognizable claim under Judiciary Law §487 exists when there is a "chronic and extreme pattern of legal delinquency." See *Solow Management v. Seltzer*, 18 A.D.3d 399 (1st Dept. 2005), citing to *Jaroslawicz v. Cohen*, 12 A.D.3d 160 (1st Dept. 2004); *Cohen v. Law Offices of Leonard and Robert Shapiro*, 18 A.D.3d 219 (1st Dept. 2005). Some courts have held "a single act or decision, if sufficiently egregious and accompanied by an intent to deceive, is sufficient to support liability [under Judiciary Law §487]. *Trepel v. Dippold*, 2005 WL 1107010 (S.D.N.Y. 2005).

In bringing an action against an attorney under Judiciary Law §487, the plaintiff must plead that "the alleged deceit forming the basis of such a cause of action, if it is not directed at a court, must occur during the course of a 'pending judicial proceeding.'" *Costalas v. Amalfitano*, 305 A.D.2d 202 (2d Dept. 2003), citing to *Hansen v. Caffry*, 280 A.D.2d 704, lv. den., 97 N.Y.2d 603.

In order to recover under Judiciary Law §487, a plaintiff must plead and prove both actual deceit by the attorney, *Bernstein v. Oppenheim*, 160 A.D.2d 428, (1st Dept. 1990), and causation; that is, that the deceit or collusion actually caused plaintiff's damages. See, e.g., *Manna v. Ades*, 237 A.D.2d 264 (2d Dept. 1997); *DiPrima v. DiPrima*, 111 A.D.2d 901 (2d Dept. 1985); *Brown v. Samalin & Bock*, 155 A.D.2d 407 (2d Dept. 1989).

As to what constitutes "deceit" under Judiciary Law §487, the court in *Amalfitano v. Rosenberg*, 428 F. Supp. 2d 196 (S.D.N.Y. 2006), set forth the definition from Black's Law Dictionary (8th Ed. 2004), as including: (1) The act of intentionally giving a false impression … (2) A false statement of fact made by a person knowingly or recklessly (i.e., not caring whether it is true or false) with the intent that someone else will act upon it … (3) A tort arising from a false representation made knowingly or recklessly with the intent that another person should detrimentally rely on it.

### Six-Year Statute of Limitations

In *Melcher v. Greenberg Traurig*, the defendants/attorneys filed a motion to dismiss on the premise that the plaintiff's time to bring suit had passed, and as such, the claim was not timely. The trial court based its denial of the motion not on whether the statute of limitations had passed, but rather on whether the defendants were equitably estopped from raising the statute of limitations defense. The First Department reversed the trial court and dismissed the entire action pursuant to CPLR 214, which provides a three-year statute of limitations. The Court of Appeals, however, looking at *Amalfitano* for New York's common law, reversed and reinstated the complaint. In its decision dated April 1, 2014, the court held that "claims for attorney deceit are subject to the six-year statute of limitations in CPLR 213(1)."

While the Court of » Page 13

*Richard A. Klass is principal of the Law Office of Richard A. Klass. Elisa S. Rosenthal is an associate at the firm.*

# Speakers Discuss Lab Oversight, Medical Device Policies

**Brian J. Malkin**
**Chair**
**Food, Drug and Cosmetic Section**

The New York State Bar Association established the Food, Drug and Cosmetic Law Section in 1945 as one of the first sections of the NYSBA following enactment of the Food, Drug and Cosmetic Act of 1938 (the Act). This Section was the first of its kind in the nation, serving as the forum for those experts in this field in the private and public sectors. The focal point for the Section's professional education has always remained the NYSBA's Annual Meeting, supplemented with specialty topics and events throughout the year. Some highlights of the 2015 Annual Meeting follow.

FDA Case Updates will include:

• *State of New York v. Actavis and Forest Laboratories*: Why is the New York attorney general seeking to enjoin as an antitrust violation "product hopping" or "forced switches"?

• A review of Hatch-Waxman settlements since the U.S. Supreme Court's decision in *FTC v. Actavis*.

• An update since the Supreme Court's decision in *Association for Molecular Pathology v. Myriad Genetics*.

• *POM Wonderful v. Coca Cola*: How has this case changed the rules for labeling foods and beverages?

Panelists also will discuss the proposed guidance from the FDA on regulatory oversight of clinical laboratory developed tests (LDTs), proposed comments from the Section and the NYSBA Health Law Committee on Medical Research and Biotechnology, and the current status of New York state oversight of such methods, as well as the impact of these regulatory systems on test manufacturers and laboratories. The approximately 900 New York state permitted laboratories have been submitting validation materials for laboratory developed tests, all those not cleared by the FDA, technical review by the state agency since 1990. The FDA is proposing undertaking a huge workload with admittedly no increase in resources.

On July 5, 2014, New York became the 23rd state with an effective medical marijuana law under the Compassionate Care Act (CCA). The CCA allows doctors to prescribe marijuana in a nonsmokable form to patients with serious ailments that are recognized by the state on a predefined but flexible list of conditions. With a conflict between the New York state legislation and the federal laws, how does the relatively new 2009 New York Lawyer's Code of Professional Responsibility and Disciplinary Rules effect attorney representation of clients seeking advice regarding participation in the medical marijuana business? Is an attorney allowed to be paid with funds generated by a business that is in violation of the federal laws? These and other ethical issues will be discussed.

The FDA has jurisdiction over the labeling of all devices and the advertising of restricted Class III devices. Meanwhile, the Federal Trade Commission has jurisdiction over the advertising for all other medical devices. The presentations will address: the requirements for "restricted" and "prescription" devices, the differences between the drug and device advertising, the requirements for combination products, and the different standards used by the agencies in their review of promotional materials. The speakers will also address current and future enforcement priorities and possible policy changes.

*Brian J. Malkin is senior counsel at McGuireWoods. Janet Linn, a partner at Bleakley Platt & Schmidt, Ann M. Willey, an adjunct professor at Albany Law School, Lisa Ayn Padilla, an attorney at Estates for Lifemates, and David Weinstock, an attorney at Bayer Corporation, assisted in the preparation of this article.*

# The Time Has Come for Maintenance Guidelines

**Alton L. Abramowitz**
**Chair**
**Family Law Section**

Those of us who are members of the "baby boom generation," the "children of the sixties," have witnessed half a century of evolution in the world of family law. When many of us entered high school, the only ground for divorce in New York state, was also a criminal act—adultery. By the time we graduated college, our legislature had added abandonment, as well as cruel and inhuman treatment, etc., as additional grounds to enable previously "trapped" spouses to escape "bad marriages." Like Chicken Little of our childhoods, crying "the sky is falling, the sky is falling," critics of this sea change in our approach to divorce proclaimed the demise of marriage as an institution that was a foundation of our Society. Today, few would question the right of our citizens to terminate the "bonds of matrimony" (a phrase, which itself alludes to indentured servitude). For some 40 years, doomsayers managed to prevent New York from joining the No Fault Divorce movement that had begun in California. The cataclysm that opponents predicted when Irretrievable Breakdown of the Marriage Relationship was added as a basis for divorce in 2010 has yet to be witnessed; no calamity has befallen the people of this state, just as none occurred back in 1966. The perplexing and frustrating complexities that pervaded fault-based divorce gave way to a result oriented process that has muffled the accusations that oftentimes formed a roadblock to reasoned solutions of issues such as child custody, division of marital property, child support and spousal maintenance. While judges still are called upon to act as striped-shirted referees, they are no longer caught up watching the soap opera that grounds trials presented to them.

Like the issues of fault and no fault divorce, predictions of "doom and gloom" have followed each new development in the law, from equitable distribution of property and rehabilitative maintenance in the 1980's to child support guidelines in later years. Yet, matrimonial law has changed for the better with each new development, providing relief time and again for stakeholders, particularly the poor and middle class, by affording them justice from a system in which many cannot reasonably afford legal counsel.

This past spring, just as I was assuming my position as Family Law Section Chair, we successfully lobbied the legislature to hold off on enacting Maintenance Guidelines legislation in a form that many of us found untenable, while some of us recognized the inevitability of the ultimate adoption of some form of guidelines legislation. Subsequently, in June 2014, following his appointment as Chair of Chief Administrative Judge Prudenti's new Matrimonial Practice Advisory and Rules Committee, Judge Jeffrey S. Sunshine *informally* brought together lawyers representing the warring groups in an attempt to achieve a compromise that takes into account the various competing and conflicting concerns of the constituencies within those groups. Over the next several months, a series of meetings were held with participation by representatives of the Family Law Section, the New York Maintenance Standards Coalition, the Women's Bar Association of the State of New York, and the New York Chapter of the American Academy of Matrimonial Lawyers. The result of the group's collective efforts is a proposed bill that is now being circulated. It was crafted based upon reasonable and fair compromises, including recognition of the need to address the concerns of the poverty communities, the domestic violence communities, families with middle class economics and families with exceptional wealth. The resulting bill was achieved with no acrimony based on a shared goal of "doing right" by all concerned. Some of the highlights of the proposal are:

1. The Income Cap for the formula portion of Temporary Maintenance Awards is lowered from $500,000 to $175,000 of the payor's income. The same $175,000 cap would apply to Post-Divorce Maintenance Awards.

2. There will be two formulas: one where the payor is also paying child support to his or her spouse and one where child support is not being paid.

3. Where there is income over the cap, additional maintenance "may" be awarded after consideration of one or more factors.

4. Temporary maintenance terminates no later than the issuance of a judgment of divorce or the death of either party, clarifying that the court has the power to limit the duration of temporary maintenance.

5. Post-divorce maintenance terminates on the death of either party or the remarriage of the payee former spouse.

6. The court can allocate the responsibility for payment of specific family expenses between the parties when formulating its maintenance award.

7. The definition of income for post-divorce maintenance will include income from income producing property that is being equitably distributed.

8. A durational formula has been included that is "advisory" only, and the durational periods contain ranges to guide judges in exercising their discretion, while not binding them to those formulas. Non-durational maintenance can still be awarded in appropriate cases.

9. In determining the duration of maintenance, the court is required to consider anticipated retirement assets, benefits and retirement eligibility age.

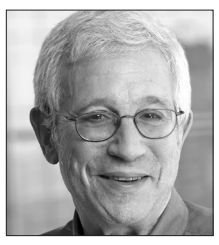
10. Actual or partial retirement will be a ground for modification assuming it results in a substantial diminution of income.

11. Elimination of all forms of enhanced earning capacity as a marital asset—i.e., a legislative annulment of the infamous *O'Brien* theory.

Suffice it to say that, despite the doomsayers, this legislative proposal should be embraced by family law practitioners and matrimonial judges alike, for it provides a framework that will surely enable our system of divorce to better serve the families of litigants, and of those seeking reasoned, non-litigated settlements. When the legislature takes up this proposal, all of us who toil in this field on a daily basis should join in the chorus of support for its enactment.

*Alton L. Abramowitz is a senior partner at Mayerson Abramowitz & Kahn.*

# Termination Rights and the 'Ninja' Turtles



**Stephen B. Rodner**
**Chair**
**Entertainment, Arts & Sports Law Section**

Back in the old days (and I remember them), the only sources of recorded music were vinyl records and tape cassettes. That, of course, has radically changed. The copyright owners of the recordings (usually the record companies) relied solely on income from sales. There was no performance right in the recordings as there was for the musical compositions contained on them. The record companies received no royalties from broadcast of the recordings on the radio or TV. The artists who performed on the recordings received income mainly from royalties generated by sales of the physical recordings as calculated by their record contracts, and they almost always assigned the copyrights in the records to the record company.

All of that is changing. Performing rights in pre-1972 sound recordings is presently the subject of several court cases. Copyright ownership is likely to be the subject of litigation in the future as a result of copyright termination rights. Both of these issues should occupy upcoming discussions and many CLE programs for the Entertainment, Arts and Sports Law Section.

U.S. Copyright Act §304(c) gives an "author" the right to terminate any grant of copyright (including, presumably, copyrights in sound recordings) entered into prior to Jan. 1, 1978 effective starting 56 years after the securing of copyright in the recording. Recording artists are now beginning to serve termination notices on record companies for recordings made in the 50s and 60s, some of which are still generating significant income. While termination of copyright grants have been occurring for some time for books, musical compositions and other works, it is only beginning for sound recordings.

The record companies are not likely to take the termination notices lying down. There are several issues relating to sound recordings that don't apply to other works, such as whether the artist's services are a work for hire as it states in most contracts (termination rights do not apply to works for hire), whether the artists are "authors" for purposes of termination, and, if so, which artists in a group or singers or musicians so qualify. I wouldn't be surprised if one or more cases on termination rights in sound recordings, eventually reach the U.S. Supreme Court.

Sound recordings were not accorded federal copyright protection until 1972, and never had exclusive performing rights (such as for radio play) until 1995 when the Copyright Act accorded sound recordings performing rights, but only for digital transmission. It was never clear whether performing rights affecting digital providers such as Sirius, Pandora and Spotify, applied to state laws according copyright protection to sound recordings made prior to 1972. Performing rights in pre-1972 recordings is currently occupying the time and case loads of judges in several states.

A class action led by the 60s rock group The Turtles, and separate lawsuits by the major record companies, have launched a full-frontal assault on digital providers demanding payment of performing rights royalties for streaming of pre-'72 recordings under state laws. As of this writing, Sirius has been battered by adverse decisions in at least three states: California, Florida and New York. If the digital providers end up losing on this issue, as appears to be the trend, there are still matters to resolve, such as how to allocate performance royalties on a state-by-state basis. Stay tuned.

*Stephen B. Rodner is senior counsel at Pryor Cashman.*

# Making Strides Toward Diversity

**Ellen M. Spodek**
**Chair**
**Judicial Section**

The Judicial Section of the NYSBA will be giving its Distinguished Jurist Award to Judge Betty Weinberg Ellerin and its first Advancement of Judicial Diversity Award this year to Judge Karen K. Peters. Judge Ellerin was a true trailblazer. She has accomplished many "firsts" in her life. She was the first woman appointed Deputy Chief Administrative Judge for the New York City courts; the first woman appointed as an Associate Justice of the Appellate Division, First Department in 1985; the first woman to be appointed Presiding Justice of the Appellate Division, First Department and a founding member and director of the Women's Bar Association of the State of New York. This award will be added to a long list of accomplishments and well deserved awards.

Judge Peters was the first woman elected to the Supreme Court in the Third Department in 1992. On April 5, 2012 she was the first woman appointed as the Presiding Justice of the Third Department. She has received many awards and has done much to promote diversity with the bench and bar. She was a natural choice to receive the first Advance of Judicial Diversity Award.

Diversity can be measured in many ways: gender, sexual orientation, race, religion or ethnic origin. Last year the Judicial Section of the New York State Bar Association compiled a report on Judicial Diversity. The report gave a comprehensive breakdown of diversity within the members of the Judiciary. The report "attempts to advance our understanding of judicial diversity and inclusion through an analysis of the gender, racial, and ethnic composition of New York State's Judiciary as compared with the general population and population of attorneys." It provided a greater understanding of where change is needed.

Growing up in Brooklyn, attending public schools, I never thought much about diversity. There were boys and girls in my classes. There were Catholics, Protestants, Jews, Muslims and Hindus. There were Asian children, African American children, Hispanic children and Caucasian children. That was the makeup of the class and I really didn't give much thought to it. When I became an adult I realized that's the exception and not the rule.

When my father graduated from law school in the 1950s Betty Weinberg Ellerin was one of 12 women in a graduating class of 500. When I graduated law school in the 1980s my class was about 40 percent women and 60 percent men. Today's graduating classes are slightly more than 50 percent women. In the 1950s there were a handful of minority graduates, in the 1980s minority graduates were about 10 percent and today approximately 40 percent of graduates are minority. Progress has been made but there is more that can be done. We must all be aware of natural biases inherent in everyone's life and strive to be inclusive of all.

While New York City's judiciary reflects the diversity in the community and the increased number of women and minorities graduating law school the same cannot be said for the rest of the state. Judge Peters has gone above and beyond in increasing the number of women and minorities on the bench in the Third Department and we all hope more can be done to create more diversity in the future.

*Ellen M. Spodek is a justice of the New York Supreme Court. She sits in a guardianship part and a general trial part.*

# Many Questions Remain About the UBE

**Sarah E. Gold**
**Chair**
**Young Lawyers Section**

Alabama, Alaska, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Utah, Washington, and Wyoming. What do these 14 states have in common? They have adopted the Uniform Bar Exam (UBE).

And with the possibility of New York adopting the UBE, what does it mean to law students and lawyers alike? With jobs on the wane, will lawyers seeking a newfound reciprocity come knocking? Will our newly minted lawyers flee for other climes? Barriers to entry to practice are varied. But in New York comparatively it's not money. New York has one of the cheapest exams in the country at $250, but difficulty hampers many. States with no reciprocity still remain.

What is the rationale behind this change? Isn't it imperative that this hurdle to licensure serve the public? New York is a complex state with complex laws. To test to a standard that is neither New York nor any other jurisdiction is irrational. Like the MPRE, the UBE would be based on a standard which does not necessarily hew to New York rules. It has been said that New York was never a state for accepting uniform laws. There are portions of the UCC that still have not been adopted by New York, and we are the last state to do so. The current complaint that new attorneys are not ready to practice in New York would certainly not be helped by such a change. There are items that I remember from the Bar Exam that still pop up now in the strangest of circumstances, but I know them because I studied New York law for a New York test.

The main thrust of the argument has been that it gives new portability to lawyers. However, the cost of such portability does not come cheap. To transfer to Missouri will cost you $1,240, and you will still need to sit for their own state portion of the exam. And unlike normal reciprocity, you are time limited on the use of those scores. The score must be used within 24 months of the application in Missouri and North Dakota. And yet, it is actually cheaper to just sit for the full exam in Missouri. At $910 as an attorney, if you are willing to forgo using a laptop ($125), you can sit and pass their exam.

Many examinees sit at the Javits or in Albany and then drive to a neighboring state for Day 3. In this instance, that may no longer be a choice. Depending on the configuration of the exam and the scores required, there is no guarantee that our neighboring states may take those scores as a portion of their own exams. Massachusetts and New Jersey do not offer the UBE.

Without a great deal more consideration, the rush to the UBE may not only be misguided but detrimental to the practice of law in New York for those students who choose to study here. I have been proud to be a licensed New York attorney, and know many who are. To think that those students who have chosen to study and become New York attorneys would not need that same knowledge to practice in our state makes me wonder about the value of my license.

*Sarah E. Gold is the owner of the Gold Law Firm in Albany.*

# Addressing Critical Business Issues and Honoring Achievements

**Paul D. Sarkozi**
**Chair**
**Commercial & Federal Litigation Section**

The Commercial and Federal Litigation Section plays a leadership role in supporting business litigators, business clients and the courts that oversee the resolution of business disputes—whether the disputes are heard in New York's Commercial Division or in our federal courts. The Section provides this support by fostering cooperation between bench and bar, by educating the bar about important changes in both procedural and substantive law that affect the business community, and by taking an active role in promoting innovation and excellence in litigation.

At its Annual Meeting, the Section will be providing two CLE programs that address critical issues affecting the New York business community. First, a panel of distinguished experts and litigators will discuss the hot topic of data breach litigation. Then, a panel of federal and Commercial Division judges, in-house counsel and trial counsel will discuss best practices for presenting complex financial disputes to courts.

At the luncheon that follows, the Section will confer its Stanley H. Fuld Award upon Chief Administrative Judge A. Gail Prudenti. Working with the Administrative Board, Prudenti has ensured that the reforms recommended by the Chief Judge's Task Force for Commercial Litigation in the 21st Century have been translated from ideas to actions through the adoption of new Commercial Division rules. Prudenti's message has been clear: New York courts have made the fair, efficient, and cost-effective resolution of business disputes a top priority.

On the federal side, the Section is working closely with the Southern and Eastern Districts of New York to celebrate their 225th and 150th anniversaries, respectively. For decades, these two districts have served as the nation's epicenter for adjudicating complex commercial disputes. To honor these accomplishments, the Section will be making a presentation to Chief Judge Loretta A. Preska and Chief Judge Carol Bagley Amon at the Annual Meeting. Moreover, whether it be analyzing the new proposed federal rules of civil procedure, addressing new approaches to antitrust and OFAC issues or otherwise working with the federal judiciary to promote education and reform, the Section is committed to helping ensure our federal courts' continuing prominence.

Finally, we note that while much of the Annual Meeting will be focused on downstate celebrations, the Section has devoted substantial resources to fostering innovation and education in business litigation statewide. The Section has appointed district leaders in each of the state judicial districts to help coordinate and support local business litigation projects. In 2014, the Section sponsored programs on social media ethics in Buffalo and Rochester. In 2015, the Section will sponsor bench-bar programs in each Commercial Division county to ensure that business litigators statewide are aware of all of the new Commercial Division rules and to promote a dialogue about how the new rules can best achieve their goals. Finally, at the Section's Spring Meeting at The Sagamore on May 15-17, 2015, we will recognize and honor the federal courts of the Western and Northern Districts of New York.

*Paul D. Sarkozi is a partner at Tannenbaum Helpern Syracuse & Hirschtritt.*

# Supplemental Needs Trusts Benefit the Disabled

**Richard A. Weinblatt**
**Chair**
**Elder Law & Special Needs Section**

New York state provides Medicaid home care services through a managed long-term care program (MLTC). Currently, in order to be eligible to receive MLTC services, a recipient is permitted to have no more than $825 per month of income. Income in excess of this amount must be spent on the recipient's medical care before Medicaid will contribute towards the cost of such care. This eligibility requirement leaves many disabled individuals with insufficient income to pay for their essential nonmedical expenses, such as food, clothing and shelter. Without a way for these disabled individuals to retain a sufficient amount of their income to pay for these essential nonmedical expenses, these unfortunate individuals would be forced to leave their homes and be cared for in an institution.

Fortunately, under both federal and New York state law, a disabled individual residing in the community is permitted to contribute his or her income in excess of the current $825 monthly allowance to a supplemental needs trust. The funds in the supplemental needs trust may then be used to pay for such person's nonmedical expenses enabling such person to afford to remain in his or her home.

On Aug. 5, 2014, the New York State Department of Health (DOH) issued a policy directive (GIS 14 MA/15) that effectively prohibited married individuals receiving MLTC services from contributing their excess income to a supplemental needs trust. This directive was premised upon New York state's interpretation of §2404 of the federal Affordable Care Act.

In opposition to the issuance of GIS 14 MA/015, the Elder Law and Special Needs Section issued a memorandum that was sent to DOH expressing its position that GIS 14 MA/015 violated federal law. In response to the memorandum, members of our Section were given the opportunity to meet with representatives of DOH to discuss the issue.

At the meeting, our Section members set forth the concerns from both a policy perspective as well as a legal perspective. Specifically, from a policy perspective, our Section members addressed the issue of the discriminatory nature of the policy against married individuals and the fact that the policy may force many individuals to choose between obtaining a divorce or not being able to afford to live in their home. Our Section members also presented an analysis of how the policy violated both the federal New York state statutes and regulations.

On Nov. 5, 2014, DOH issued policy directive GIS 14 MA/025, which rescinds GIS 14 MA/015 pending clarification from the federal government of the requirements of §2404 of the Affordable Care Act. The good news is that, at least for now, disabled individuals receiving MLTC services, whether single or married, may contribute their income in excess of $825 per month to a supplemental needs trust to be used to pay for their nonmedical expenses. In many cases, this will allow them to remain in their homes.

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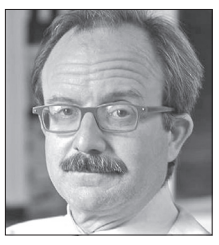
*Richard A. Weinblatt is a partner of Haley Weinblatt & Calcagni.*

# New York: An Improving Environment for ADR



**Sherman Kahn**
**Chair**
**Dispute Resolution Section**

In 2010, Steve Younger, then-President of the New York State Bar Association, established a Task Force on New York Law in International Matters. The Task Force included members from more than 30 major law firms as well as academics and judges. It issued a final report in April 2011. The Final Report included a variety of recommendations for initiatives in the dispute resolution field that the Task Force felt could help cement New York's standing as a first-tier center for international dispute resolution proceedings.

Some of the proposed initiatives seemed at the time to be more aspirational than achievable. For example, the Task force proposed that the State Bar support the creation of a permanent Center for International Arbitration in New York. At the time, this seemed somewhat fanciful: How could we finance a brick-and-mortar arbitration center? But only three years later, it exists.

The New York International Arbitration Center, also known as NYIAC, with the support of the NYSBA Dispute Resolution and International Sections as well as a number of major law firms is now firmly embedded in the fabric of arbitration practice in New York.

The Task Force also recommended that the State Bar explore with the New York judiciary the introduction of a degree of judicial specialization, such as the designation of particular judges as specialized chambers to deal with international arbitration matters. This too has been implemented.

On Sept. 16, 2013, Chief Administrative Judge A. Gail Prudenti issued an Administrative Order Designating Judge Charles E. Ramos, Justice of the Supreme Court, New York County, to handle all international arbitration cases before the Commercial Division, New York County. For purposes of this designation, international arbitration cases are defined as cases brought under CPLR article 75 or under the Federal Arbitration Act except for cases arising out of a relationship that is entirely between citizens of the United States with no reasonable relationship with a foreign state. This should send all international arbitration cases filed in the state court system in New York County to Ramos for decision.

There is news regarding mediation as well. The Commercial Division of the Supreme Court, New York County, is implementing a pilot project in which, subject to only limited exceptions, every fifth case assigned to the Commercial Division will be automatically assigned to mediation. The pilot program should greatly expand the number of Commercial Division cases that are referred to mediation. This Pilot Program presents an enormous opportunity for mediation to take hold as an essential part of the life of a court proceeding in New York. If successful, this mediation Pilot Program could be expanded to other Commercial Divisions throughout the state.

The items discussed above are just a few of the initiatives that are improving the environment for ADR in New York. The Dispute Resolution Section looks forward to seeing even more success in the coming year.

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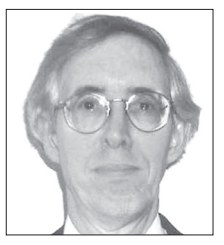
*Sherman Kahn is an attorney at Mauriel Kapouytian Woods.*

# Unfunded State Mandates Threaten Municipalities



**Mark Davies**
**Chair**
**Municipal Law Section**

*"Don't spit in the soup. We've all gotta eat."*
— U.S. Senator Majority Leader Lyndon B. Johnson

Over the years, by unfunded state mandates, the legislature and the governor have repeatedly spit in the municipal soup, soup we've all gotta eat. As a result, unfunded state mandates now threaten the fiscal security of municipalities throughout the state. Yet Albany remains heedless to entreaties by municipalities for relief, instead enacting a municipal tax cap, which is nothing less than an unfunded state mandate on steroids.

The time has come to end this disgusting, unhealthy, and irresponsible habit.

Accordingly, let me propose my own solution: an amendment of the New York State Constitution prohibiting *all* unfunded state mandates, whether past, present, or future. What the state wants, the state funds.

To that end, article 9 of the New York State Constitution should be amended to add a new §4: "The expenses of any existing or future action or program required by the state of any municipality shall be fully borne by the state." Such actions and programs would include those set forth in state legislation, executive orders, and state agency rules and regulations. Whether a state court order or judgment constitutes an "action" of the state for these purposes would depend on whether the order or judgment enforces a state mandate or a municipal mandate. Protected municipalities would include not only counties, cities, towns, and villages (political subdivisions) but also school districts, fire districts, public libraries, BOCES, and the whole host of municipalities reflected in article 18 of the General Municipal Law.

Exceptions to the unfunded state mandate prohibition would number but three:

- an action or program required to comply with federal law but only to the extent necessary to comply with federal law;
- an action or program that would cost a municipality no more than $1,000 per year; and
- an action or program that has been requested by the affected municipality through a home rule message or other resolution but only to the extent it has thus been requested.

Of particular importance, the amendment would include no grandfather clause: If the state wishes to maintain existing mandates, it must pay for them. A further exposition of this proposal, and a draft concurrent resolution, may be found in my Chair Message for the Summer 2014 "Municipal Lawyer," the Section's publication.

While prudence may dictate that we citizens reject Surrogate Gideon J. Tucker's admonition that "no man's [or woman's] life, liberty or property are safe while the Legislature is in session,"[1] one may forgive municipalities for concluding that for them the admonition holds true. It's time to end it. Abolish all unfunded state mandates, now and forever.

1. *Final Accounting of A.B.*, 1 Tucker (N.Y. Surr.) 247, 249 (1866).

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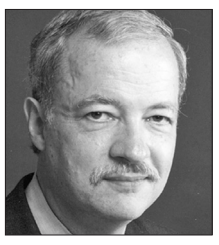
*Mark Davies is executive director of the New York City Conflicts of Interest Board. The views reflected in this article are not necessarily those of the New York City Conflicts of Interest Board or the City of New York.*

# CLEs Focus on Cyber Liability and Data Security



**Thomas A. Reed**

**Chair**
**Corporate Counsel Section**

The Corporate Counsel Section (CCS), one of 25 Sections of the New York State Bar Association, was founded in 1981 to provide an institutional means for attorneys employed by single clients, primarily business organizations (including nonprofits), but also including governmental and other public entities, to make their voices better heard in NYSBA affairs and to network with each other through participation in CCS activities. More recently, the CCS has welcomed as members "outside" practitioners who have a business-oriented practice, and has grown to approximately 1,600 members, including a fair number from out of state and from other countries. If you are or become a member of the NYSBA and fit into one of these two categories, I strongly urge you to consider joining our Section (dues are currently only $30 per year in addition to basic NYSBA dues).

The CCS, working both alone and in conjunction with other NYSBA sections, regularly offers valuable and timely CLE programs especially targeted to attorneys whose clients are business entities. In April 2014, we joined with the Intellectual Property Law Section to offer a two-hour program entitled "Update 2014: Cyber Liability, Data Loss and Privacy Claims—Preparing, Protecting and Defending," followed by a networking reception for the attendees. In October 2014, we offered our bi-annual "Ethics for Corporate Counsel," a four-hour program designed to fully meet the New York CLE minimum ethics education requirement; this too was followed by a networking reception. In November 2014, we joined with the Law Practice Management and Continuing Legal Education Committees to present a full day CLE on "Security Concerns for Law Firms | What You Need to Know about Cybersecurity, Data Security, Office Security and More." This program was especially timely and appropriate, given the number of recent instances of major companies having their computer networks breached and data lost to hackers, of which the destructive Sony Pictures "hack" in December 2014 is only the most recent instance (as of this writing). A number of this program's panelists have written articles relating to their topics, which have been printed in the Winter 2014 issue of the CCS newsletter "Inside," available free to Section members and also available to attendees of the Section's programs being offered on Wednesday and Thursday during the NYSBA Annual Meeting. As New York Times columnist Frank Bruni wrote in the Sunday Review section on Dec. 21, 2014 (p. 3): "Hard drives and even the cloud have memories that resist erasure. And the Internet can circulate any purloined secret fast and infinitely far." Helping in-house counsel as well as their employers' outside legal advisors by educating them regarding the tools they need to help keep their clients safe and secure in today's environment is one of the prime missions of the CCS.

There are many more reasons to join the CCS than I have space to detail here, but I hope to have piqued your curiosity and your interest.

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*Thomas A. Reed, a legal consultant assisting companies with commercial contracts, is a former in-house counsel for numerous telecommunications companies.*

# Strengthening the New York, U.N. Relationship

**Thomas N. Pieper**

**Chair**
**International Section**

**Gerald J. Ferguson**

**Chair-Elect**
**International Section**

Recognizing the unique role of New York state and New York City as the hosts of the United Nations, the International Section of the New York State Bar Association has identified the monitoring of the development of international law at the United Nations as a key mission. In furtherance of this mission, the Section held its 2014 Seasonal Meeting in Vienna, featuring a day of seminars at the Headquarters of the U.N. Commission on International Trade Law (UNCITRAL).

The panels—moderated by UNCITRAL legal officers and NYSBA members—focused on international law harmonization projects that UNCITRAL is currently promoting. NYSBA was welcomed with remarks by the Federal Chancellor of Austria, Werner Faymann, the U.S. Ambassador to Austria, Alexa L. Wesner, and Justice Georg E. Kodek of the Austrian Supreme Court, among others. Through this meeting, and other activities, NYSBA is building a strong rapport with the UNCITRAL Secretariat, and is exploring ways of deepening that relationship going forward.

Through efforts promoted by the Section, NYSBA has become an official participant in many functions of the U.N. system as a non-governmental observer. NYSBA is now a recognized NGO before UNCITRAL and the U.N. Department of Public Information. Official NGO status facilitates the monitoring of the U.N. process and enables NYSBA to become respected as a thoughtful and constructive participant in the development of U.N. priorities in the development of international legal norms and procedures across a wide variety of public and private concerns. It also gives NYSBA a better perspective from which to deploy its resources at the federal level in promoting U.S. adherence to significant international conventions and treaties.

The New York bar is not just your typical local or state bar—it is an international bar. Over 18,000 lawyers admitted to the practice of law in New York live and practice law outside the borders of the United States. Due to the globalization of commerce, banking and many aspects of individual as well as corporate life, the traditional legal framework based on national and local laws is too fragmented to deal with the complexity of legal issues among private actors as well as state actors across international borders. Harmonization of legal norms under the auspices of the United Nations and other international bodies that work with the United Nations is a prominent feature of the legal landscape as we move further into the 21st century. With members located in many countries around the globe and chapters and representatives in over 60 countries, the Section is in a unique position to help NYSBA and the New York bar make positive contributions towards this end.

To be a part of this growing effort and role of NYSBA in the exciting development of international law at the U.N. system, we urge all practitioners to join us by becoming a member of NYSBA and the International Section (www.nysba.org/ILP).

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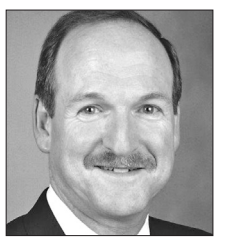
*Thomas N. Pieper is counsel at Hogan Lovells in New York and Gerald J. Ferguson is a partner at Baker & Hostetler in New York.*

# The Problem Of Short-Term Rentals



**David L. Berkey**

**Chair**
**Real Property Law Section**

The New York State Attorney General and New York's courts frown on short-term apartment rentals by tenants and owners of Class A multiple dwellings, such as luxury rental buildings and cooperative and condominium apartment houses. In its October 2014 report titled "Airbnb in the city," the Attorney General highlighted the explosion in rentals of traditional apartments as transient hotel rooms, both by building owners and tenants, often in violation of the Multiple Dwelling Law and the New York City Administrative Code. The ease of posting apartments for short-term rental on websites such as Airbnb and VRBO (Vacation Rentals by Owner) has led to a shadow hotel industry in New York City having annual rental revenue expected to exceed $282 million, where more than 70 percent of such rentals appear to violate the law.

Landlords have an arsenal of remedies to stop tenants engaged in illegal short-term rentals. In *Brookford v. Penraat*, NY Slip Op. 24399, dated Dec. 19, 2014, Judge Carol R. Edmead granted the landlord a temporary restraining order enjoining the tenant from advertising and renting the apartment to tourists and other visitors for stays of less than 30 days; operating an illegal hotel and/or bed and breakfast out of her apartment; breaching a substantial obligation of her tenancy by using the apartment for impermissible business purposes and/or commercial use by renting it for profit in violation of the rent control law and regulations, the Multiple Dwelling Law, the New York Housing Maintenance Code, the New York City Building Code and the building's certificate of occupancy; and from providing unfettered access to, from and within the building to tourists and other transient visitors to the building. A hearing has been scheduled for Feb. 6, 2015, to determine whether a preliminary injunction and other relief should be granted to the landlord.

There is a class of building that is appropriate for short-term rentals, and that is Class B multiple dwellings, which include hotels, lodging houses, rooming houses and lodgings. Such buildings have significantly more stringent egress and fire safety requirements set forth in the Multiple Dwelling Law and in local Building, Fire and Housing Maintenance Codes than do Class A multiple dwellings. Unfortunately, there are a large number of commercial owners of Class A buildings that rent apartments on a short-term basis and avoid the costs to comply with these more stringent fire safety and egress requirements. In many cases, tourists and transients renting apartment in a Class A building are totally unaware that the rooms are rented in violation of the law, resulting in a danger to them and to other building occupants.

In addition to the fire and safety violations and dangers, landlords and cooperative and condominium boards oppose short-term rentals to transients because they change the character of the building, allow strangers to appear at all hours of the day and night and have unfettered access to building amenities, cause excessive noise, strain elevator usage and engender fear among long-term tenants who do not know the transients coming into their building. They also argue that tenants should not be permitted to profiteer by leasing apartments on a short-term basis when the landlords could not lawfully do so in their Class A buildings.

Cooperative and condominium boards are especially keen on keeping a tranquil quality of life for apartment owners. Building staff are trained to learn the names of owners and occupants and control unwanted visitors to a building. When a cooperative or condominium apartment owner engages in short-term rentals, boards try to clamp down on such behavior by issuing default notices, threatening eviction from the building, and commencing injunction suits. Boards can and do charge the defaulting owner for all attorney fees incurred. Any landlord or board plagued by short-term rentals should consult with counsel and take action to stop such conduct.

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*David L. Berkey is a partner at Gallet Dreyer & Berkey.*

# Lippman

« Continued from page 9

justify the significant cost of legal education.

As the regulator of the legal profession, the judiciary has the distinct responsibility to respond to these shifts in the legal landscape. Law students who take the bar exam in one state but find a job in another state end up having to study for, pay for, wait for, and take multiple bar exams with uncertain results. Recently admitted New York lawyers also cannot reap the benefits of the long list of 37 reciprocal jurisdictions that permit admission on motion for seasoned New York lawyers.

Adopting the UBE would eliminate the duplication of effort by law graduates in taking the bar exam in multiple jurisdictions and would maximize their employment opportunities. After taking the UBE, new graduates receive a portable score that they can use to gain admission to any of the other states that have adopted the UBE. Because the candidates are taking the same exam as the applicants in the other UBE states, it doesn't matter if the test was taken in Missouri, Washington, Arizona, or New Hampshire. All UBE jurisdictions recognize that applicants are tested with the same high-quality examination and rely on their UBE scores to demonstrate that applicants have the fundamental knowledge and skills necessary for legal practice. Meanwhile, each state still maintains control over setting the requirements for admission to their individual jurisdiction and the method of evaluating knowledge of local law. While 14 other states have already adopted the UBE, New York's decision to adopt the UBE would undoubtedly spur other states to follow suit.

When the public notice and request for public comment were first made known in October 2014, the Court of Appeals proposed adopting the UBE for the administration of the July 2015 bar exam. The idea was to balance the goals of testing fundamental legal knowledge and analytical skills in a uniform exam while preserving the emphasis on New York law through a state-specific multiple choice component. After receiving more than 100 comments from practicing lawyers, law students, bar associations, and law school faculty, we decided to make sure, before we acted, that we fully examine all the issues and answer all questions relating to changes to New York's bar exam. While on balance adopting the UBE received positive support, questions with regard to passing rates, effects on minorities, time for students to familiarize themselves with new testing formats, and a striking lack of knowledge on the UBE and the New York bar exam itself demonstrated the need for a blue ribbon group on this subject.

With that in mind, I asked my colleague, Judge Jenny Rivera, a noted scholar and academic, to head a study committee comprised of a broad cross-section of practitioners, law school representatives, members of the Board of Law Examiners, and the judiciary. This committee will take the next few months—until March 1, 2015—to consider all manner of feedback on the UBE, listen to testimony from interested stakeholders, inform the public on the nature of the proposed changes, hold informational hearings on the UBE featuring presentations by the New York Board of Law Examiners, and extend the widest possible reach in gathering input, disseminating facts and information, and examining all questions relating to the UBE.

We want New York's lawyers to have the ability, skills, and knowledge to work in the global world that we live in, while maintaining an expert knowledge of New York law. Our consideration of the UBE is toward these ends, and the time has come to contemplate the realities of our modern, peripatetic society and how we can adapt to the needs of current day law graduates. We look forward with great anticipation to the study committee's report that will so significantly inform the future of the legal profession in New York.

1. Donald E. Melnick, Gergard Dillon & David Swanson, "Medical Licensing Examinations in the United States," Critical Issues in Dental Education, May 2002, p. 597. http://www.jdentaled.org/content/66/5/595.full.pdf.
2. "Evaluation of the Legal Framework for the Free Movement of Lawyers," Nov. 28, 2012, p. 46. http://ec.europa.eu/internal_market/qualifications/docs/studies/2013-lawyers/report_en.pdf.
3. Dimitra Kessenides, "Jobs are Still Scarce for New Law School Grads," Bloomberg Businessweek, June 20, 2014, http://www.businessweek.com/articles/2014-06-20/the-employment-rate-falls-again-for-recent-law-school-graduates.
4. Elizabeth Olson and David Segal, "A Steep Slide in Law School Enrollment Accelerates," N.Y. Times, Dec. 17, 2014, http://dealbook.nytimes.com/2014/12/17/law-school-enrollment-falls-to-lowest-level-since-1987/.
5. Karen Sloan and Andrew Keshner, "NY Law Schools Mirror Nationwide Drop in Enrollment," N.Y. Law Journal, Dec. 26, 2014. http://www.newyorklawjournal.com/id=1202713273846/NY-Law-Schools-Mirror-Nationwide-Drop-in-Enrollment?slreturn=20141129102958.

# Gonzalez

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the requirement of speedy trials in criminal cases (U.S. Const. Amdt. 6); and the establishment of an independent judiciary (U.S. Const. Art. III §1). Especially significant is the Due Process Clause of the Fifth Amendment to the Constitution, which echoes the 39th clause of Magna Carta:

> No free man shall be taken or imprisoned or deprived or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land. (Magna Carta, Clause 39)

Despite reformation of the document, antiquated provisions that are no longer relevant, and the unrest that followed its execution, we celebrate the Magna Carta for "a small collection of provisions that express kernels of transcendent significance."[4] It was used as a template for our federal Constitution, our subsequent Bill of Rights, and later, the Fourteenth Amendment's due process clause.[5] The Magna Carta continues to impact our federal constitutional jurisprudence. The U.S. Supreme Court has cited Magna Carta in more than 80 opinions in the last 50 years, not for historical reasons, but in favor of the protection of what we have come to consider fundamental rights.[6]

Chief Justice John Roberts has referred to Magna Carta as "planting the seeds" of the protection of our essential liberties.[7] While the barons in 1215 were interested in protecting their own narrow interests, many of which are not relevant 800 years later, the importance of the document is the fact that King John recognized it as constraining his powers. This concept, since extensively expanded, has lead the United States "down [a] path to constitutional democracy."[8]

Magna Carta was also instrumental in the development of colonial and state statutes and constitutions protecting the civil liberties of New Yorkers. For example, New York's "Charter of Liberties" (1683), the first statute enacted by our colonial legislature after the English conquest of Dutch New Netherlands, incorporated the right to trial by jury, and other provisions of Magna Carta, for all inhabitants of our former colony.[9] Notably, the Charter of Liberties did not receive the assent of the British Monarchy "because it savoured too strongly of popular freedom and seemed to run counter to the Crown's prerogative and the legislative supremacy of Parliament."[10] Notwithstanding, our colonial government recognized the Charter as a valid governing statute that protected the rights and liberties of New York colonists.[11]

Provisions from Article 39 of the Magna Carta were included in New York's Colonial Constitution, and later, our state's First Constitution in 1777.[12] New York's Statutory Bill of Rights can also be traced directly to language in the Magna Carta,[13] and our state Court of Appeals has cited Magna Carta in support of protecting citizens' civil rights.[14]

Judge Albert Rosenblatt, a former member of our state's Court of Appeals, gave a speech in Philadelphia in which he referred to Magna Carta as a "turning point in the history of free peoples in their relationship with their governing authority, and the pre-eminent symbol of the belief that no government or sovereign—no matter how much loyalty or fidelity it has gained or even earned—may stand above the people and rule with arbitrariness or caprice."[15] Recognizing that the 1215 "accord" was made between a monarch and a small group of wealthy landowners, he noted that we have improved on Magna Carta, and that we have a responsibility to continue to do so as "[w]e no longer speak of freedom for a privileged few, but for all people who subscribe to the law of the land."[16]

I am proud to celebrate the legacy of Magna Carta on its 800th birthday. Thanks in large part to the parties at Runnymede, we presently live in a Constitutional democracy, where protecting the rights and liberties of the people of our state is paramount. By honoring our system of government, we can adapt in a principled manner to the challenges of the future.

1. Randy Holland, "Magna Carta, Muse and Mentor" 2 (2014).
2. Id.
3. A.E. Dick Howard, "Magna Carta, Text and Commentary" (1998).
4. "Star of the Show: The Magna Carta reaches celebrity status as its 800th anniversary nears," ABA Journal, October 2014 at 64.
5. Gale Encyclopedia of American Law, 3d Edition at 425.
6. Holland, supra note 1, at 7; see also *Solem v. Helm*, 463 U.S. 277, 284-85 (1983); *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968); *Smith v. Bennett*, 365 U.S. 708, 712 (1961).
7. Holland, supra note 1, at xi.
8. Tony Mauro, "Roberts Hails Magna Carta in Appearance Before ABA," National Law Journal, Aug. 11, 2014).
9. H.D. Hazeltine, "The Influence of Magna Carta on American Constitutional Development," 17 Colum. L. Rev. 1, 12 (1917).
10. Id.
11. Id.
12. Charles Z. Lincoln, "The Constitutional History of New York," 62 (1994); see also, Holland, supra note 1 at 125:

> [T]he New York Constitution of 1777 began with a detailed inventory of the violations of rights that led to the break with England, implicitly invoking the catalogue of offenses found in Magna Carta.

13. Robert Emery, "New York's Statutory Bill of Rights: A Constitutional Coelacanth," 19 Touro Law. Rev. 363 (2003).
14. See *Brown v. State*, 89 N.Y.2d 172 (1996) (unlawful searches and seizure); *People v. Davis*, 33 N.Y.2d 221 (1973), cert. den. 94 S. Ct. 1999 (1974) (cruel and unusual punishment).
15. John Caher, "Rosenblatt Reflects on Impact of Magna Carta," NYLJ, July 11, 2002, at 6.
16. Id.

# Klass

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Appeals appears to have expanded the statute of limitations for claims under Judiciary Law §487, this also depends on the nature of the underlying action. In *Farage*, the Second Department recently held that if the action sounds in legal malpractice and the claims under Judiciary Law §487 are included among the causes of action, the statute of limitations is still three years. *Farage v. Ehrenberg*, 2014 NY Slip Op 07977 (2d Dept. Nov. 19, 2014).

Therefore, although the determination in *Melcher* appeared to have been a global expansion of Judiciary Law §487, courts are still inclined to look at the claims as a whole to determine whether the statute of limitations for other specific causes of action, such as legal malpractice, should apply.

1. *Melcher v Greenberg Traurig*, 23 N.Y.3d 10, 12-13 (2014) rearg. den., 23 N.Y.3d 998 (2014).

# Prudenti

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public was suffering. We in the court system took those concerns very seriously and did all that we could to address them—exploring every means of cost-efficiency in the new fiscal reality and submitting budgets that would allow us to mitigate the impact of the cutbacks. We are extremely grateful for the bar's strong support of our budget, and especially for their recognition of just how essential last year's 2.5 percent increase was to the effective operation of the entire court system. The passage of our last budget allowed us to take our first steps on the road to recovery, and with the ongoing support of the bar and all of our justice partners, we look forward to continuing down that path in the year ahead.

The active support of the bar associations was also vital to achieving another major breakthrough—the creation of new Family Court judgeships. We fully recognize and deeply appreciate the bar's extensive lobbying for this crucial legislation that has allowed us to provide much-needed and long-awaited support in our overburdened Family Courts. In addition, the comprehensive report of the New York State Bar Association's Task Force on Family Court proved instrumental in supporting the court system's efforts to address the crisis in our Family Courts.

The bar has also been a committed partner in our tireless efforts to meet the great need for civil legal services in our state. The State Bar in particular has long been an active advocate of equal justice for all New Yorkers, raising awareness and encouraging pro bono service through its President's Committee on Access to Justice, its Department of Pro Bono Affairs, the Empire State Counsel Program, the President's Pro Bono Service Awards and by sponsoring a Conference on Access to Justice Issues. In recognition of the central role of the State Bar in addressing this issue, the President of the New York State Bar Association presides with the Chief Judge, the Chief Administrative Judge and the Presiding Justice of each respective Judicial Department at the Chief Judge's annual hearings on civil legal services.

When the Administrative Board of the Courts adopted a pro bono reporting requirement to enable the court system to accurately assess how much of the need for civil legal services is being met and shape our access to justice strategies accordingly, the State Bar raised concerns about certain features of the rule. In adopting the new requirement, the court fully intended for it to be relatively non-intrusive and in the best interests of the profession and the public. We value the input of the bar as a partner in justice dedicated to the same ultimate goal of advancing pro bono service, and it was therefore of great importance for the leadership of the bar and the courts to meet, address any misgivings, and reach a common understanding on this important issue.

Through repeated discussions with the State Bar's President Glenn Lau-Kee and President-Elect David Miranda, as well as Helaine Barnett, chairwoman of the courts' Task Force to Expand Access to Civil Legal Services, we worked to fashion a compromise and develop recommendations that would strike a balance between the bar's concerns and the Chief Judge and legal community's long-term interest in accurately assessing the justice gap. On Dec. 18, 2014, the Administrative Board of the Courts considered and unanimously approved modifications to the mandatory pro bono reporting framework consistent with those recommendations, including providing anonymity when attorneys report pro bono service and contributions, and expanding the activities that qualify as reportable pro bono. I greatly appreciate the cooperation and collegiality of the bar leaders on this issue, and am truly pleased that we have reached an outcome that addresses all concerns and advances our common purpose—serving the public good.

The bar plays an integral role in the court system's efforts to improve the administration of justice and promote legislative reforms. Representatives from the bar have been productive members on several of the Chief Judge's Task Forces and Commissions, including the New York State Justice Task Force, the Task Force to Expand Access to Civil Legal Services in New York, the Task Force on Commercial Litigation in the 21st Century, as well as the New York State Permanent Commission on Sentencing and the Pro Bono Scholars Task Force Committee. Bar associations also perform a critical service in helping to assure the highest quality of our judiciary by screening judicial candidates.

Perhaps most significantly, however, the bar contributes ongoing critical commentary and valuable insights on proposed court rules, in response to our request for public comment. We in the courts recognize the importance of reaching out to the organized bar to ensure that they are heard on issues that affect the law, the courts and the legal profession. To this end, the Office of Court Administration regularly publicizes important proposed rule changes and requests the bar's input. OCA's Counsel's office and the Administrative Board of the Courts then review the commentary received from bar associations as well as from individual practitioners as part of the approval process. In many cases, the courts have modified or improved proposed rules in response to the public comments.

Recently, the public comment process influenced the Chief Judge's decision to delay adoption of the Uniform Bar Exam (UBE), a nationally standardized exam that produces a more portable score for new lawyers. While this possible change remains viable and promising in our increasingly global world, the bar, law school deans and other constituencies raised valid questions about the UBE during the comment process that warrant spending more time discussing the issue and ensuring a greater comfort level for all impacted parties. As a result, the Chief Judge extended the public comment period and created a new committee, comprised in part of law school administrators and members of the bar, to study the Uniform Bar Exam proposal in greater depth and hold at least two public hearings on the adoption plan. This modified course is just the latest example of how the collaboration of the bar and the judiciary is ensuring the best possible results for the people of New York.

The insights, perspective, experience and knowledge of the bar are indispensable resources to the courts as we work to fulfill our constitutional mission. As we begin a new year, I look forward to continuing and strengthening our invaluable partnership with the bar and collaborating with all of our partners in justice for the good of all New Yorkers.

# Eng

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the provision of counsel to indigent defendants. Such a plan may consist of creating a public defender office, or designating a private legal aid bureau or society, or adopting a plan of a bar association, coordinated by an administrator, under which private counsel are provided on a rotating schedule (see County Law §722). The city and the counties are also required to provide the vast majority of the funding for the compensation of assigned counsel.

Article 18-B provides that a judge, justice or magistrate of any state or local tribunal shall assign counsel in accordance with the plan adopted by the county in which the tribunal is located, or by New York City, if the tribunal is located there (see County Law §722[4], [5]). The statute mandates such assignments for indigent parties in criminal prosecutions (see CPL 170.10, 180.10, 210.15, 720.30), in post-conviction proceedings (see, e.g., CPL 440.10) where a hearing is ordered, in resentencing proceedings (see, e.g., Correction Law §601-d[4]), and in proceedings under the Sex Offender Registration Act (see Correction Law art 6-C). The statute requires assignment of counsel pursuant to a local plan not only in criminal matters, but also in various types of proceedings under the Family Court Act (see Family Court Act §262) and various types of proceedings in the Surrogate's Court (see Surrogate's Court Procedure Act §407). Furthermore, on an appeal in any of these types of criminal or non-criminal proceedings, the Appellate Division is required to assign counsel to an indigent party in accordance with the plan in effect in the locality wherein the judgment or order appealed from was entered (see County Law §722[5]).

During the past 50 years, New York's method of providing constitutionally mandated representation to indigent parties has been the subject of numerous studies and reviews by various organizations. The most comprehensive of these studies was undertaken by the Commission on the Future of Indigent Defense Services, which was formed by then-Chief Judge Judith S. Kaye in 2004. In its final report, the Kaye Commission concluded that there is "a crisis in the delivery of defense services to the indigent throughout New York state and that the right to the effective assistance of counsel, guaranteed by both the federal and state constitutions, is not being provided to a large portion of those who are entitled to it" (Final Report to the Chief Judge of the State of New York [June 18, 2006], at 15). Echoing prior reports on the subject, the Kaye Commission found that "this failure is attributable to a lack of an independent statewide oversight mechanism that can set standards and ensure accountability in the provision of indigent criminal defense services and to a grievous lack of adequate funding by the state for those services" (id.).

In 2010, the Legislature established the Indigent Legal Services Board (ILS Board) and the Office of Indigent Legal Services (ILS Office). The stated purpose of the nine-member ILS Board is to "monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law" (Executive Law §833[1]). The ILS Office, among other things, reports to the ILS Board, makes recommendations to the ILS Board, and executes the ILS Board's decisions (see Executive Law §832[1], [3][l], [3][m]).

Meanwhile, in 2007, a class action lawsuit, *Hurrell-Harring v. State of New York*, was commenced in the Supreme Court, Albany County, on behalf of defendants in ongoing criminal prosecutions in five counties outside New York City (Onondaga, Ontario, Schuyler, Suffolk, and Washington Counties). The plaintiffs in that action contended that the arrangement set forth in Article 18-B, "involving what is in essence a costly, largely unfunded and politically unpopular mandate upon local government, has functioned to deprive them and other similarly situated indigent defendants in the aforementioned counties of constitutionally and statutorily guaranteed representational rights." *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 15 (2010). The defendants moved to dismiss the action as nonjusticiable, and the denial of that motion was ultimately upheld by the Court of Appeals. That court concluded that the plaintiffs were not merely raising claims of ineffective assistance of counsel, which could be developed and remedied only within their individual criminal actions, but were alleging that they had been deprived of their right to counsel altogether, which potentially warranted "prospective systemic relief." Id. at 19; see id. at 20 (plaintiffs' pleading raises the issue of "whether the State has met its foundational obligation under *Gideon* to provide legal representation").

In September 2014, after *Hurrell-Harring* had made its way back to the Supreme Court for trial, the Civil Rights Division of the U.S. Department of Justice filed a Statement of Interest in the case. In October 2014, on the eve of the scheduled trial, the parties to *Hurrell-Harring* reached a settlement. The settlement was approved by the ILS Office and the ILS Board. Among the provisions of the extensive settlement agreement are the following:

• The state of New York must ensure, within 20 months, that each indigent criminal defendant in the five subject counties is represented by counsel at his or her arraignment.

• The state of New York must ensure that the caseload/workload standards to be determined by the ILS Office are implemented and adhered to by all assigned counsel in the five subject counties.

• The state of New York must provide specified amounts of funding dedicated to programs to be undertaken by the ILS Office to increase the quality of representation of indigent defendants in the five subject counties.

• The governor must include, in the executive budget appropriation bills for the next two fiscal years, specified amounts of dedicated funds for the improvement of the quality of representation of indigent defendants in the five subject counties, and the state must use its best efforts to provide such funding.

The settlement of *Hurrell-Harring* is small but significant step toward ensuring that New York is in compliance with its constitutional obligation to guarantee that every criminal defendant, regardless of financial means, receives the effective assistance of counsel. The principal challenge that lies ahead consists of providing comparable relief to the remaining 52 counties outside the New York City, so that such compliance will be uniform throughout the state.

# Scudder

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New York and North Carolina are the only two states that continue to prosecute 16-year-olds as adults.

Several states increased the age to 18 in response to mounting scientific evidence on adolescent brain development. Since 2005, in at least three cases, the U.S. Supreme Court has relied on that scientific evidence in concluding that juveniles are less culpable than adults who commit the same crimes. In *Roper v. Simmons*, 543 U.S. 551 (2005), the court held that persons under the age of 18 could not be subject to capital punishment. In *Graham v. Florida*, 560 U.S. 48 (2010), the court prohibited sentencing juvenile offenders to life without parole in non-homicide cases. And, in *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455 (2012), the court placed limitations on the imposition of mandatory sentences of life without the possibility of parole for juveniles convicted of homicide. In each case, the court cited developments in psychology and brain science showing fundamental differences between juvenile and adult minds.

In addition to the evidence on adolescent brain development, support for raising the age of criminal responsibility has been fueled by the success of the Adolescent Diversion Program (ADP). Chief Judge Lippman created the pilot program in nine of New York's 62 counties to adjudicate cases in which 16- and 17-year-olds are charged with non-violent offenses. The program blends the best features of Family Court and criminal courts in a youth division of adult criminal court presided over by specially trained judges who have access to an expanded array of dispositional options. Preliminary evaluation by the Center for Court Innovation concluded that the program is achieving its goals. Youth are being linked to age appropriate services without compromising public safety.

Raising the age of criminal responsibility will require lawmakers to address many complex issues including court processing, appropriate sanctions for youth who commit serious offenses, detention and placement capacity, and funding for rehabilitative services.

In my view, these cases should be processed in Family Court rather than a youth division of criminal court. Each year, about 40,000 16- and 17-year-olds are prosecuted as adults in New York criminal courts. Legislators have been justifiably concerned that the transfer of these cases from criminal courts would overwhelm the Family Court. However, the recent establishment of 25 new judgeships should allow the Family Court to absorb the increased caseload. Furthermore, adjudicating cases within the existing Family Court structure avoids the necessity of crafting a new hybrid code that would combine provisions of the Family Court Act, Penal Law and Criminal Procedure Law.

The ADP pilot program helped demonstrate that the majority of youth convicted of non-violent offenses can have their cases resolved with age appropriate services and sanctions without compromising public safety. That said, the state must preserve the ability to prosecute violent youth as adults. The age of criminal responsibility should remain at 13 for designated felonies such as murder, and 14 for other major felonies. Raising the age of criminal responsibility does not require the state to abandon its responsibility to protect the community.

The change in age of criminal responsibility will shift youths from the adult correctional system to the juvenile correctional system, where they, and the community, will be better served. The New York State Office of Children and Family Services (OCFS) has the capacity and expertise to accept the additional youths. Young offenders can have success in state operated facilities, especially if they are placed close to home. A model program exists in Monroe County, where OCFS teamed with the County to have Monroe County youths placed at Industry, an OCFS facility located within the County. The County then collaborated with community partners to establish a Juvenile Re-entry Task Force. The results have been impressive. Placing youths close to home provides the continuity of services and staff necessary for successful transition to the community. The close-to-home concept should be embraced for youth who are placed in limited-secure and secure settings throughout the state. Geographic based placement in juvenile facilities is a far superior alternative to the current practice of confining youths in adult jails and prisons.

The rehabilitative services for these young offenders must be adequately funded. The suggestion that "nothing works" in rehabilitating offenders has been debunked. We now know that meaningful interventions such as family therapy, vocational and educational training, and services to address substance abuse and mental health issues reduce recidivism or, at least, de-escalate the seriousness of repeat crimes. These effective interventions are costly. However, the alternative, raising the age of criminal responsibility without funding the necessary services, is a recipe for failure. Lack of adequate funding for rehabilitative services proved to be a significant impediment to progress after the definition of Person in Need of Supervision (PINS) was expanded to include 16- and 17-year-olds in 2001. More recently, the Close to Home pilot program for youths in non-secure placements in New York City was criticized because of insufficient resources to locate juveniles who escaped from those placements.

Local probation departments, aptly described as the "workhorse" of the juvenile justice system, will surely bear the brunt of responsibility for the influx of young offenders. Probation departments cannot be expected to screen the cases at intake, determine if they should be diverted or sent to Family Court, prepare investigation reports, monitor compliance with court-ordered services, and provide supervision, without a significant infusion of dollars. The state must reimburse counties for their additional probation and detention expenses, and not simply shift new costs to county taxpayers.

State lawmakers should pass legislation this session raising the jurisdictional age of New York's juvenile justice system from 16 to 18. The change from 16 to 18 should be phased in to allow necessary system reforms to be implemented. When Connecticut passed similar legislation in 2007, the age of criminal responsibility was incrementally raised to 17 in 2010 and 18 in 2012. Lawmakers would be wise to consider a similar approach here.

# Peters

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of the Service are summarized below:[5]

(1) to study and review the admission and retention of all patients or residents, which shall include a review of the willingness of the patient or resident to remain in his or her status;

(2) to inform patients or residents of the procedures for admission and retention and of the right to have a judicial hearing and review;

(3) to inform patients or residents of other legal resources which may be of assistance;

(4) to be granted access at any and all times to mental hygiene facilities for the purpose of carrying out its functions, powers and duties; and

(5) to initiate and take legal action deemed necessary to safeguard the right of any patient or resident to protection from abuse or mistreatment

In addition to these duties, MHLS attorneys may also serve as counsel, court evaluator or guardian ad litem in Mental Health Law art. 81 and Surrogate's Court Procedure Act art. 17-A guardianship proceedings. MHLS is also charged with representing criminal defendants who are alleged to be incapacitated by reason of mental disease or defect pursuant to Criminal Procedure Law (CPL) article 730 and defendants found not responsible by reason of mental disease or defect pursuant to CPL 330.20. Inmates confined in correctional facilities suffering from mental illness are also constituents of MHLS.[6] The services provided to inmates range from representing them in involuntary treatment proceedings to representing inmates who are referred for civil management pursuant to the Sex Offender Management and Treatment Act.[7] MHLS attorneys do not offer criminal defense services to their clients, but may offer assistance to the defense bar when the mental status of a criminal defendant is at issue.[8]

Although all four judicial departments share the same mission, the offices are organized differently.[9] The Third Department encompasses 28 counties that stretch from the Canadian border in the north to the lower Catskills in the south and from the Vermont and Massachusetts borders in the east to the Finger Lakes in the west. To best serve the needs of individuals across our sprawling department, MHLS offices are divided into three geographic regions—Albany, Binghamton and Ogdensburg. In addition, there are satellite offices in Kingston, Oneonta, Elmira, Tupper Lake and Plattsburgh. Each office represents clients in multiple practice areas. Due to the sensitive nature of so many cases, MHLS attorneys must balance the ability to empathize with their clients with the need to maintain a conventional attorney-client relationship, as much as possible.

Justices and judges who preside over MHLS hearings consistently praise the work of MHLS attorneys. They applaud the fact that MHLS attorneys excel at representing the desires of their clients in a sensitive and exemplary way. Not only are they thorough and well-versed in the law, but they have a great deal of empathy for their clients. The bench also appreciates the fact that MHLS attorneys have mastered the art of representing the interests of their clients, while treating them with great dignity. Indeed, even when hearings go in very unexpected directions, MHLS attorneys carry themselves with great calm, poise and full understanding.

The staff at MHLS also shared sentiments about the work they do. David M. LeVine, the soon-to-be retired Deputy Director of MHLS in the Third Department with 37 years experience, shared the following:

> I am especially proud of everything the [MHLS] staff does on a day to day basis to counsel and assist its clients in charting a course that will meet the individuals' needs and interests, without the need for judicial intervention. In 2013 alone MHLS staff statewide provided more than 361,000 advocacy services on behalf of persons admitted to inpatient and community based facilities for the mentally disabled. The 9,774 court hearings that were conducted in 2013 were, therefore, just the tip of the advocacy iceberg and the citizens of the State of New York owe a debt of gratitude to everything the dedicated staff of this small agency does behind the scenes to promote the welfare of its clientele.

What appears to be a common theme among the new and seasoned attorneys at MHLS is that they understand the value of providing a voice to their clients in situations where they would not ordinarily be heard.

## Conclusion

As Presiding Justice, I have the honor of officiating at admission ceremonies for attorneys who wish to practice in the Third Department. In my remarks, I often emphasis the importance of zealously representing each client. Clearly, MHLS attorneys provide an excellent example; they have dedicated their legal careers to the advocacy of individuals with disabilities, providing hope and guidance to the vulnerable.

1. Sheila Shea, The Mental Hygiene Legal Service at 50: A Retrospective and Prospective Examination of Advocacy for People with Mental Disabilities, NYSBA Government, Law and Policy Journal, Winter 2012, Vol. 14, No. 2.
2. 22 NYCRR 622; 694; 823; 1023.
3. Mental Hygiene Law §47.01(a).
4. Mental Hygiene Law §47.01(a).
5. Mental Hygiene Law §47.03(a-e).
6. Testimony of the Mental Hygiene Legal Service, Assembly Public Hearing/Mental Illness in Correctional Settings, November 13,2014 (pp. 3-7).
7. Mental Hygiene Law art 10.
8. Sheila Shea, Defense Practice Tips: Representing Clients with Mental Disabilities, Public Defense Backup Center Report, Volume XXVIII, Number 1 (January-April 2013).
9. Mental Hygiene Law §47.01(a).