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**June 2016  
President's Report to the  
House of Delegates**

**1. PRESIDENT'S INITIATIVES**

A key focus of the Association during the coming year will be increasing member value and thus strengthening and growing Association membership. We offer so much of value to lawyers – CLE programming, publications, online communities, and the opportunity to participate in practice area focused Sections, among other things. Membership in our Association enables members to develop connections and friendships, and to grow and learn as a lawyer. Our Association, in turn, benefits from members' input and participation.

Part of our goal is to increase the diversity of our membership. Diverse attorneys and judges enhance public confidence and diverse members enlarge and enrich the knowledge and perspective of all our members. Growing and diversifying our membership is vital to the continued success of our Association.

To that end, I am challenging all of our members – particularly members of the House and Executive Committee, Section, and committees – to help us engage our members and grow our membership. Our goal is to increase membership in the Association and each of our Sections by five percent by the end of 2018. We launched the Membership Challenge at the Section Leaders Conference in May and held a Section Membership Roundtable earlier this week to continue identifying best practices for Section membership efforts. I'm grateful that Tom Maroney and Michelle Wildgrube have agreed to co-chair the Membership Challenge, with key support from our Membership Committee and Association staff. In the coming months, we will be announcing a variety of initiatives and programs to help us reach our goal.

Another priority this year will be to increase collaboration with local, women's, diverse and specialty bar associations, looking for ways to work together and encouraging cross-membership. In addition to visits by me and President-Elect Sharon Gerstman to many bar associations, our new Committee on Bar Leaders of New York State is holding regional bar

leader gatherings around the State and we are hosting a retreat for bar association executive directors at the Bar Center next week.

During my term, we will be continuing our longstanding commitment and efforts to increase access to justice, following in the footsteps of Immediate Past President David Miranda. For example, this summer, in collaboration with the American Bar Association, we will be bringing to fruition Dave's effort to launch NY.freelegalanswers.org in New York. The goals are to increase pro bono opportunities for our members and to give low income New Yorkers the ability to ask questions online about legal issues and to get answers and referrals for further resources, as needed. We are considering at a number of other justice initiatives, as well.

Later this summer, I will be announcing a collaborative initiative relating to women, children and families – stay tuned.

## **2. LEGISLATIVE ACTIVITIES**

### **State Legislative Advocacy**

#### **Indigent Criminal Defense Services – NYSBA Legislative Priority**

The Association has long been a leader in advocating for the provision of legal services for the poor and otherwise disadvantaged. Following this tradition, in February then-President David Miranda joined Senator John DeFrancisco and Assembly Member Patricia Fahy and urged the Legislature to pass legislation that would enhance the quality of public defense by providing sufficient state resources to providers of mandated representation and appropriate state oversight of the indigent defense system. This item is a high legislative priority for the Association in 2016.

In 2006, the State Commission on the Future of Indigent Defense Services, established by then-Chief Judge Judith S. Kaye, examined New York State's county-based indigent criminal defense system, and made the alarming finding 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."

In 2010, the state created the Office of Indigent Legal Services ("Office"). The Association viewed the creation of that Office as a significant step toward establishment of an independent indigent defense commission with broad powers to adopt standards, evaluate existing programs and service providers, and generally supervise the operation of New York's public defense system.

In the fall of 2014, the state agreed to settle a class-action lawsuit (*Hurrell-Harring v. State*) that accused New York State of failing to provide adequate legal defense for the poor in five counties (Suffolk County on Long Island and four upstate counties: Ontario, Onondaga, Schuyler and Washington). The settlement committed the state to paying for improvements to the indigent defense systems in those counties.

Throughout the 2016 legislative session, the Association urged the Legislature and the Governor take another important step by enacting legislation to provide appropriate state funding and

ensure consistent rules and standards for the provision of indigent criminal defense services throughout New York.

I am pleased to report that the New York State Assembly has passed legislation to accomplish this goal and, at the time this document was printed, our advocacy efforts continue for passage of that legislation in the Senate.

### **Recording of Juvenile Interrogations**

As the legislative session winds down, a bill has advanced that would require the recording of juvenile interrogations. This is an issue that we as an Association have been seeking to address, an issue that comes to us from our Committee on Children and the Law. Children often lack the maturity to understand the consequences of their words and actions. During a stressful interrogation, they may be particularly vulnerable to making a false confession. We are pleased that lawmakers recognize the importance of recording custodial interrogations of juveniles and have advanced legislation to address this problem.

At the time this report went to print, the bill was being given serious consideration by both houses of the Legislature. We hope in the end it will be passed by both houses and signed into law.

### **NYSBA Affirmative Legislative Proposals**

#### **Judicial Wellness**

This proposal, developed by the Association's Judicial Wellness Committee, would enhance the essential work of the judicial wellness and assistance committees operated by bar associations throughout New York State.

Section 499 of the Judiciary Law currently provides that communications between lawyers and members of lawyer assistance committees are privileged, and that the members of such committees are immune from liability when acting in good faith in related matters. This provision, which was enacted in 1993 based on a proposal by the New York State Bar Association, has been critically important to the success of the Association's Lawyer Assistance Program and similar programs of other bar associations.

The Association has been concerned that the members of its Judicial Wellness Committee are not adequately covered by current provisions of the Judiciary Law applicable to lawyer assistance committees. The Association's proposal provides that the protection now covering lawyers being assisted by lawyer assistance committees would apply to judges seeking or obtaining help from judicial wellness or assistance committees throughout the state. One important difference between section 499 and the proposed new Article 22-A is that the privilege does not apply when a judge in the program may commit a substantial violation of the rules governing judicial conduct. This provision was included to protect the public.

Legislation to enact this proposal has advanced in both houses of the Legislature.

## **CPLR 1412**

In 1975, New York State enacted CPLR 1412 to join the vast majority of other jurisdictions in rejecting a plaintiff's contributory negligence as a bar to recovery. In recent years, however, case law has seemed to diverge from the original purpose and intent of this statute.

The CPLR Committee proposed a bill that would make it clear that the party asserting culpable conduct as an affirmative defense bears the burden of proof in establishing the viability of the defense. This legislation was introduced in both houses of the Legislature, and advanced to the floor of each house.

## **Revisions to the Non-Profit Revitalization Act**

The Non-Profit Revitalization Act ("NPRO") was one of the Association's legislative priorities in 2013 and was enacted in that year. The Committee on Not-For-Profit Corporations Law of the Business Law Section was integrally involved with that advocacy effort in 2013. The Committee has been active this year and strongly supports current legislation that would enhance compliance by not-for-profit corporations with the NPRO and thereby further improve governance and accountability in the not-for-profit sector. With the experience of the years since enactment of the NPRO, it has become apparent that there is ambiguity in provisions of the law as to what constitutes compliance in certain situations. This has unintentionally hindered the goal of full and effective board oversight.

Legislation to revise and enhance provisions of the 2013 law has been introduced in both houses of the Legislature.

## **Other State Legislative Activities**

### **Trusts and Estates Law Section**

On May 10th, representatives of the Trusts and Estates Law Section spent the day at the Capitol to advocate for changes on a variety of issues pertinent to those who focus their practice on Trusts and Estates. As a result of the Section's continued efforts, two of its proposals have made significant headway toward passage this year. One proposal addresses the Power To Adjust Trustee Commissions. The other addresses an exception to the attorney-client privilege with respect to revocable trusts.

In addition, the Section maintained communications with key policymakers in order to advance its other proposals.

### **Elder Law and Special Needs Section**

On May 17, leadership of the Elder Law and Special Needs Section, joined by Association Secretary Ellen Makofsky, attended meetings to advocate for the Section's proposals and the recently-approved Association report proposing revisions to the law with respect to the Power of Attorney. Makofsky, along with new Section Chair David Goldfarb, co-chaired the Association's Task Force on the Power of Attorney. Although many lawmakers agree that there is need for changes in this area, there is still much work to be done on this issue. After the important steps taken in these meetings, we anticipate that more advocacy will be required to attain appropriate revisions of the law on Power of Attorney.

The group also made good progress on advancing the Section's other proposals.

## **Federal Legislative Advocacy**

The Association's team, led by David Miranda and me, participated in ABA Day, April 19 – 21, in Washington, DC.

As background for this activity, it is important to note that in 2015 NYSBA participated in a coordinated effort with 17 local and specialty bar associations across the state, advocating to prevent sequestration from again being imposed on our federal courts, whose functioning was seriously impaired by underfunding and the resulting case delays, reduced security, and inadequate personnel to carry out necessary day-to-day operations when sequestration was imposed in 2013. On December 18, 2015, an omnibus spending package was signed into law, ending the risk that the harsh budget cuts would be re-imposed during 2016 or 2017. Nevertheless, during our April meetings with members of the New York State Congressional Delegation, we reiterated the need to properly fund the federal judiciary and the Legal Services Corporation.

In addition, our team advocated on the following issues:

- Support for criminal justice reform legislation that covers a number of issues of importance to the Association. In particular, we support provisions to reduce certain mandatory-minimum sentences, provide judges with greater discretion when determining appropriate sentences, limit the use of solitary confinement of juveniles and allow sealing convictions of juveniles in certain circumstances, and preserve cooperation incentives to aid law enforcement in prosecuting drug kingpins;
- Repeal of the “Dickey Amendment” to an omnibus spending bill in 1996, which stated that no funds “made available for injury prevention and control may be used to advocate or promote gun control.” This language has been interpreted to bar the Center for Disease Control from collecting data concerning incidents involving gun violence. The Association opposes these data sharing restrictions. In a 2015 report produced by our Task Force on Gun Violence, the Association called on Congress to lift current funding and programmatic restrictions that prevent federal agencies from collecting and sharing data regarding firearm violence;
- Opposition to the so-called Lawsuit Abuse Reduction Act (LARA), which would enact a litigation sanctions provision similar to one that was in effect from 1983 to 1993, and which was eventually repealed because it resulted in additional unnecessary legal motion practice. Under the prior law, federal lawsuits often became entangled with unnecessary litigation over sanctions -- curtailing the efficiency of the courts, adding to litigation costs and delaying the resolution of cases. This bill would reinstitute these destructive practices; and,
- Expressed the view that it is critical to the functioning of the U.S. Supreme Court that the vacancy resulting from the death of Justice Antonin Scalia be filled promptly, after due consideration, in accordance with the U.S. Constitution.

### **3. ACTIVITIES AND EVENTS**

#### **President's Pro Bono Service Awards**

On May 2, sixteen recipients were honored with the 2016 President's Pro Bono Service Awards at a Law Day luncheon at the Bar Center in Albany. President David P. Miranda, Chief Judge Janet DiFiore, and I recognized the award recipients. These awards recognize extraordinary pro bono efforts made by attorneys, law firms, students, law school groups, and corporate counsel or government offices.

#### **"The Changing Landscape of the Legal Profession"**

On May 3, our Association, together with a number of state, county and local bar associations, sponsored a CLE program spearheaded by then-President Miranda to examine and discuss efforts to bridge the justice gap between those in need of legal services and those represented by counsel and the need to ensure adherence to the core values of the legal profession. Three panels, moderated by past Presidents Glenn Lau-Kee and Vincent Doyle and by me, addressed initiatives involving non-lawyers to address the justice gap; the rise of non-lawyer entrepreneurs providing legal services; and the future of lawyer referral services. Over 500 participants registered for the program, which was held live at the Bar Center and also webcast.

#### **2016 Howard A. Levine Award**

On May 4, our Committee on Children and the Law presented its annual Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare to James J. LeCain, College Program Director at Brookwood Secure Center, and Kathleen R. DeCataldo, Executive Director of the New York State Permanent Judicial Commission on Justice for Children. The award is named in honor of retired Court of Appeals Judge Howard A. Levine, who was the first chair of the Special Committee on Juvenile Justice (now the Committee on Children and the Law) and recognizes both lawyers and non-lawyers who have done outstanding work to improve New York's child welfare and juvenile justice systems.

#### **Task Force on Family Court Forum**

In May, I attended and welcomed participants to the Task Force on Family Court-sponsored conference at the Bar Center in Albany entitled "Strategies for Increasing Assistance for the Unrepresented in New York Family Court." The conference was well attended by practitioners, judges and legal services leaders who were briefed on recent innovations for aiding unrepresented parties in various Family Courts across the State.

#### **Section Leaders Conference**

On May 12, we brought together officers and other leaders of our 25 Sections to discuss the vital role our Sections play in the work of our Association. The focus of this year's Conference, which had 104 attendees, was on membership recruitment and retention. The conference was interactive, with speakers, panels and brainstorming sessions, and included roundtable discussions that provided Section Leaders the opportunity to share best practices.

Panel discussions covered topics on diversity and inclusion; engaging volunteers through collaboration, community outreach and pro bono; policy-making and legislative advocacy efforts; and connecting to the current generation of law students and to other generations of lawyers. The Section leaders heard about generational differences and the stereotypes that

accompany them, and how bar association membership resonates with different generations of lawyers from our keynote speaker, Lauren Stiller Rikleen, Esq., a noted authority on generational issues.

### **Lawyer Assistance Program Spring Retreat**

For 26 years, our Lawyer Assistance Program and Lawyer Assistance Committee have co-sponsored a spring retreat to celebrate and support lawyers in recovery from alcoholism, substance abuse and mental health problems. I was privileged to attend the 2016 retreat at Silver Bay on Lake George. It is an opportunity for lawyers to truly know they are not alone on their recovery path. In the spectacular Adirondack resort, attendees share meals and participate in 12 step meetings, yoga and meditation.

### **Supreme Court Admissions Program**

On June 13, the Young Lawyers Section sponsored its Supreme Court Admissions Program, providing more than 40 members the opportunity to be admitted to the bar of the United States Supreme Court. I was honored to move their admission. Following the admissions ceremony, we were honored to be joined by Justice Ruth Bader Ginsberg, who congratulated the new members of the Supreme Court bar.

### **Section Meetings**

Together with Immediate Past President David Miranda, I attended the Commercial and Federal Litigation Section's spring meeting at The Otesaga in Cooperstown. I also attended the meeting of the General Practice Section in Poughkeepsie and the International Section's Executive Committee Retreat and dinner in New York City. Earlier this week, I attended a meeting of the Antitrust Law Section's Executive Committee.

### **Non-Resident Members**

We are working very hard to reach out to our non-resident members, who comprise a significant and growing segment of our membership. Working with Non-resident House of Delegates member Hilary Jochmans, David Miranda and I hosted a very successful membership reception on April 21 in Washington D.C. On May 24, David hosted a member event in Orlando, Florida in conjunction with the International Trademark Association. On June 29, Non-resident House member John Sheehan and I will host an event for non-resident members in Boston, Massachusetts.

### **Bar Association Events**

During the past months, in furtherance of my efforts to foster collaboration with other bar associations and to enhance and celebrate diversity, I have attended a number of events sponsored by other bar associations, including the Queens Women's Bar Association Judiciary Night; a reception and dinner with the Boards of Directors of the Nassau and Suffolk County Bar Associations; the Westchester County Bar Association Annual Meeting and Past Presidents' Dinner; the Queens County Bar Association Golden Jubilarians and Judiciary Night; a reception in honor of Chief Judge Janet DiFiore held by the Women's Trial Lawyer Caucus; the Association of Black Women Attorneys 40<sup>th</sup> Anniversary Gala; the Annual Meeting of the Federation of Bar Associations for the Fourth Judicial District; the Saratoga County Bar Association Law Day Luncheon; the Richmond County Bar Association Anniversary Banquet; the New York County Lawyers' Association Law Day Luncheon; the Judges and Lawyers Breast Cancer Alert Annual Dinner; the Westchester Black Bar Association 43<sup>rd</sup> Annual Gala; the New York City Bar Association Annual Meeting; the Warren County Bar Association Annual Dinner;

the New York County Bar Association Annual Meeting; the Women's Bar Association of the State of New York 2016 Convention; the Bar Association of Erie County Board Meeting and that association's 129<sup>th</sup> Annual Dinner; and the New York State Trial Lawyers Association 49<sup>th</sup> Annual Installation Ceremony.

In addition, this spring I hosted a reception at the Bar Center for upstate women bench and bar leaders, which Chief Judge Janet DiFiore and four other members of the Court of Appeals graciously attended. I also hosted my second annual brunch for downstate women bar leaders at my home, which Chief Judge DiFiore also attended along with more than 50 women attorneys and judges who are leaders in our Association and other bar associations.

*Claire P. Gutekunst*