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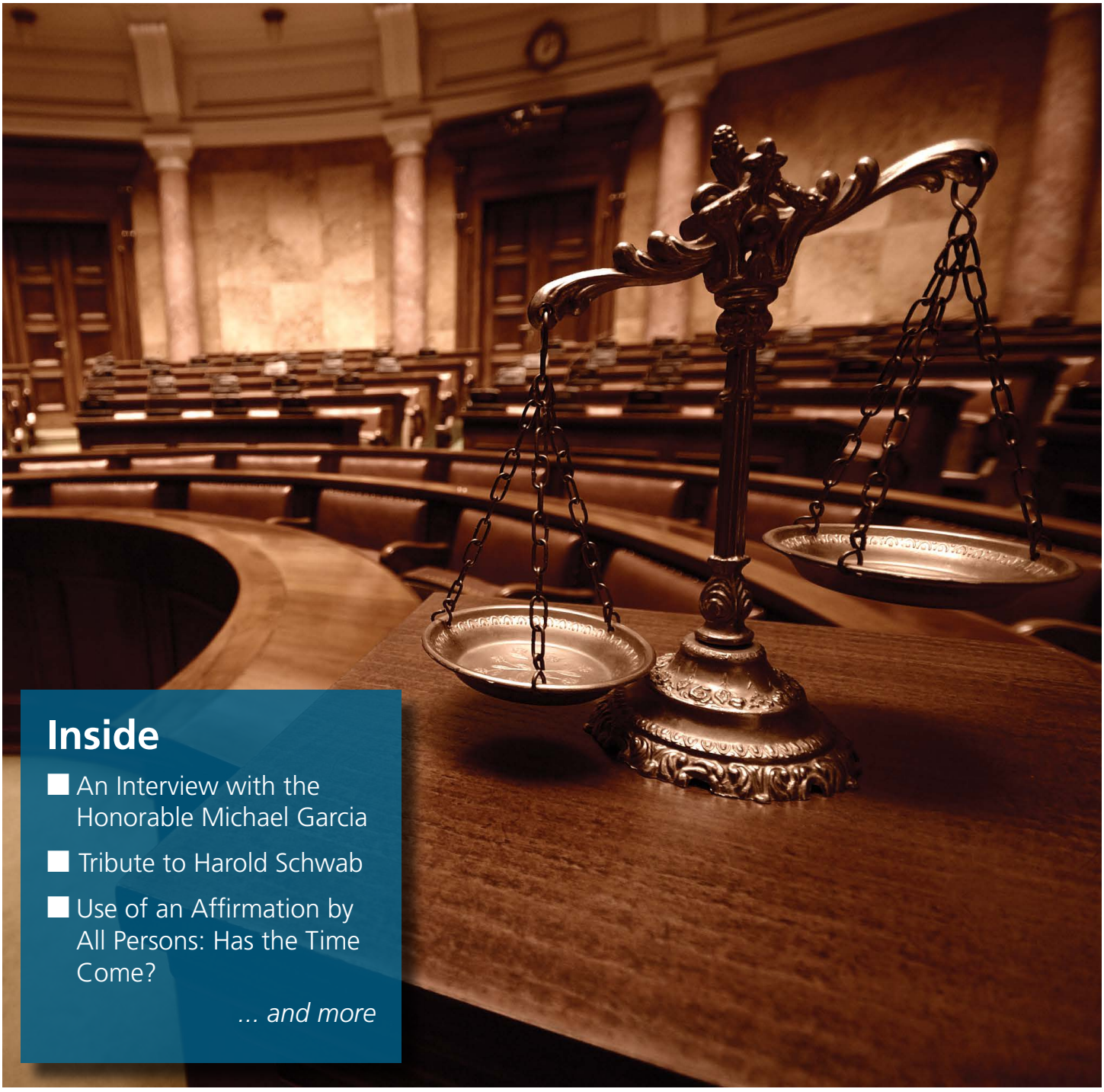
Trial Lawyers Section Digest

A publication of the Trial Lawyers Section
of the New York State Bar Association



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Trial Lawyers Section 2018 Summer Meeting




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Message from the Outgoing Chair

It's hard to believe that my time as chairperson of New York State Bar Association Trial Lawyers Section for 2018 is over. It has been a rewarding experience and I want to express my heartfelt thanks to the officers, Executive Committee, members, and friends of the Section.

We have accomplished much together in the almost one year that passed too quickly. We had nine Executive Committee meetings with terrific support from the committees. A tenth meeting was held during the New York State Bar Association (NYSBA) annual meeting.

We sponsored and supported the annual law school trial competition which Thomas Valet, Esq., headed up in February, 2018. We also supported the Young Lawyer's Trial Academy through scholarships in March, 2018.

We held the Section's summer meeting in Mystic, Connecticut August 2-5, 2018. It was a small group of attendees. Peter Kopff, Esq., chaired an amazing Continuing Legal Education program with a panel of prominent legal practitioners and a law school dean. Regrettable, the program was not videotaped. The dinner locations were excellent and the food was phenomenal. Our resident photographer, Charles Siegel, Esq., took lots of photographs and posted them in the Section's gallery.[1]

As I prepare to transition to immediate past chair, I am looking back and I am proud to say that while the purpose of this message to the Section and executive board is not to reflect on specific elements of my tenure, I would like to share with you the sentiments which are most ingrained. The gratification that I now enjoy from reflecting on my experiences as the chairperson would not have been possible without the support, efforts, and participation of so many people, beginning with Section liaison Stephanie Bugos, my family, friends, and colleagues in the Section and the Executive Committee. No one individual can attain and maintain a position such as this without the help of many people. In that regard, among numerous others, I remain eternally grateful and appreciative of the help and cooperation of the executive board members.

Regarding the Law Students Committee, at the April 16, 2018 board meeting, I brought in Kyle Knox, the current chairperson, and Phillip Kostanakis from Touro Law School on that date; I also brought in Michael Ferguson and Brandon Ferguson, graduates of Cooley Law School. The four member-committee is currently up and working. Each member has promised to do an article for the *Trial Lawyer's Digest*. Some have begun to write articles while others are contemplating topics. Mr. Knox completed an article that will appear in a subsequent edition of the *Digest*.

In the past the Section's Diversity Committee sponsored meet and greets, speakers on courtroom etiquette and continuing legal education geared toward leadership development and stimulating and energizing new attorneys. Since mid-2016, to early spring 2018 the committee co-sponsored some meet and greets, but was otherwise quiet. With the consent of the Section's Diversity Committee Chairperson, Angélicque Moreno, Esq., I kept Ms. Moreno as a co-chair for the downstate members and asked William Friedlander, Esq., to co-chair the committee and serve the upstate membership, which he accepted. Today, Ms. Moreno and Mr. Friedlander have rallied their thoughts together in proposing new beginnings. There are plans for breakfast meetings for law students and young lawyers which the chairpersons plan to begin later this year. Ms. Moreno and Mr. Friedlander also embarked on a plan to interview judges and profile the committee and Section's members. The committee completed an interview of Associate Judge Michael Garcia of New York Court of Appeals and the first spotlight on a committee member, Betty Lugo, Esq. Both are in this issue of the *Digest*. I look forward to continuing my service as a longtime member of this committee.

Sherry Levin Wallach, Esq., the longtime chairperson of the Section's Membership Committee, resigned in July 2018, due to additional duties as the Secretary of NYSBA and a member of one of President Michael Miller's task forces. I appointed Daniel Ecker, Esq., to serve as membership co-chair for the downstate members and Christian Zoller, Esq. as the upstate co-chair. In the summer of 2018, while in Mystic, Mr. Ecker discussed the co-chairs' plan to survey the Section members who did not renew their Section membership in order to gain insight and devise ways to better serve the Section members. The survey is now complete and I have no doubt that the results will point them in the right direction.

I also proposed a change to the Section's bylaws, to improve officers' accountability and participation, and to ensure that incoming officers are held accountable to perform their duties or delegate them in a timely manner to another consenting colleague. My goal was and continues to be to promote better organization and accountability within the Executive Committee.

I see exciting new projects on the horizon for the Young Lawyers Committee. I appointed Syed Fatmi, Esq., a Cooley Law school graduate, to join Sean Lescault, Esq. in this committee. While we wait for the Young Lawyers Section to appoint a new liaison we must add more members to this committee. I look forward to seeing this committee grow and thrive under its new leadership with Kevin Sullivan, Esq., as chairperson. Kevin's combined energy, creativity and leadership should no doubt allow the group to flourish with what we already have in place and point to novel and exciting new directions and activities for this Section.

In December 2018, Clotelle Drakeford, Esq., resigned from her treasurer position and as Young Lawyers Section liaison to the Trial Lawyers Executive Committee to focus on "growing" her law practice. William Friedlander, Esq., a longtime member of the Section succeeded her as the acting treasurer. Clotelle continues as a non-voting member of the Trial Lawyers Executive Committee.

This year we honor T. Andrew Brown, Esq., Mark Moretti, Esq., and Charles Siegel, Esq., with distinguished service awards. These members have gone way beyond their call to represent and serve the Executive Committee and Section.

While there is still much to do, Kevin Sullivan, the incoming chairperson, is invigorated, motivated and anxious to work with the ongoing officers and Executive Committee members to make the Section the best in the Bar. We should continue to make changes which improve the Section. If we continue to do so with the belief that the improvements we are making will allow us to move toward a better Section, I am confident that these changes and our beliefs will bring us closer together as a Section, stimulate our leaders to energize the committees to bring programs and activities into the Section, which will help us grow as a Section, attract new members to New York State Bar Association and to our Section, help us retain current membership and eventually improve and grow in profitability during future years to achieve the same profitability level we enjoyed a few years ago.

The joint annual CLE between the Trial Lawyers Section and Torts, Insurance and Compensation Law (TICL), entitled *Class Action Law Suits, All You Need to Know,* was held on January 17, 2019. I co-chaired the CLE with Lisa Smith, Esq., the TICL representative. Our cast of speakers included the Honorable Eugene M. Fahey, Judge of the New York State Court of Appeals, and distinguished law professors and practitioners from California, Miami, New Jersey, New York, and Ohio.

Finally, if you have called into or attended the Executive Committee meetings, shared a thought, lent an ear or participated in an activity, I sincerely thank you. It takes a collective effort to make a Section like ours viable, and I think it is only fair that special thanks also go out to all the members on our Executive Committee for all their hard work. Thank you, officers, members, and friends of the Section. Thank you for your unwavering support and the opportunity to serve a Section that deserves to grow and prosper, and **will** grow and prosper with your continued participation.

All of this leads up to the message I would like to leave with the entire Section and the Executive Committee, and all of you, especially the young people of our Section. Beyond my expression of appreciation, I want to leave a message of hope, hope that many of you will consider devoting some of your professional life to serving in committees, participating in Section activities that prepare members for leadership positions and on task forces in NYSBA. Granted, while the hours are long and, like any endeavor, there indeed are frustrations, the rewards are limitless.

"Thank you, officers, members, and friends of the Section. Thank you for your unwavering support and the opportunity to serve a Section that deserves to grow and prosper, and will grow and prosper with your continued participation."

Growing a dynamic, diverse Section requires dedicated and committed people to ensure that the Section's committees are up and running and producing the result of all that we can be. Nothing happens on its own. I can assure you that should you devote some of your time, talents and energies to the purpose of serving on the Section's committees, task forces and positions that prepares you for leadership in NYSBA, you will get back much more than you give. I certainly do, and I have all of you to thank. I am confident that those of you who take me up on this suggestion will take a fond look back at your term(s) and feel the same way I do now. Thank you all.

Violet E. Samuels

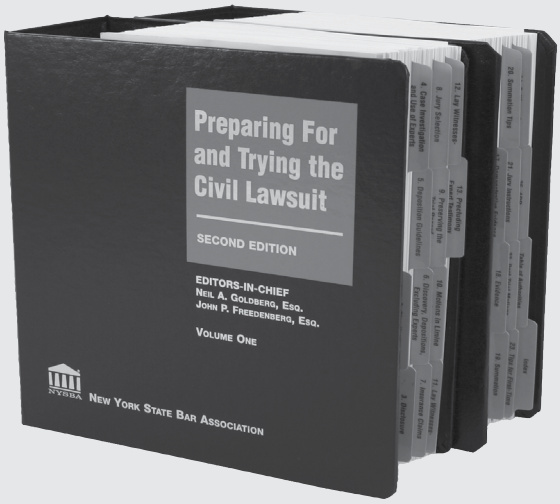
Endnotes

1. I often wonder how it would be if the meeting were held at *Chateau Elan*, Georgia, which was my choice for the summer meeting!

From the NYSBA Book Store

Preparing For and Trying the Civil Lawsuit, 2d Ed, 2018 Rev

More than 30 of New York State's leading trial practitioners and other experts reveal the techniques and tactics they have found most effective when trying a civil lawsuit. Expert commentary and numerous practice tips guide you through all aspects of a civil lawsuit, from discovery to appeals. A thorough discussion of pretrial preparation and investigation will aid the attorney in obtaining an advantageous settlement even if the case never goes to trial.



Especially helpful are the excerpts from actual trial transcripts, which illustrate the effectiveness of certain lines of questioning. Trial attorneys will benefit by using the book to supplement and reinforce their own methods of practice. The 2018 Revision includes updates to the previous edition, as well as a chapter on Attorney-Client Privilege.

EDITORS-IN-CHIEF
Neil A. Goldberg, Esq.; John P. Freedenberg, Esq.

PRODUCT INFO AND PRICES

Print: 41955 | 2018 | 1,606 pages | 2 vols. | **NYSBA Members $185** | Non-Members $235

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Message from the Incoming Chair

When I was a high school student, I learned two gifted New York City trial lawyers were drawing a jury in the summertime in Buffalo, New York. I had never been in a courtroom. I knew absolutely nothing about the practice of law, trial work, or anything involving the legal profession. I had no idea what I intended to do or what type of career path I might take.

I took a few days off from my summer job and intently watched these two great trial attorneys practice their profession trying a product liability case involving an exploding gas tank.

Watching Al Julien and Harold Schwab try this case created such a strong impression that I no longer had to consider what type of occupation I might like to consider. After watching them in the courtroom, I knew I wanted to become a trial attorney.

While attending law school I was lucky enough to meet and take a product liability course from W. Page Keeton, a lawyer who was considered one of the nation's foremost authorities on the law of torts. Keeton was the Emeritus Dean of the University of Texas School of Law and co authored one of the most cited works in tort law known as *Prosser and Keeton on Torts*.

From an early age, I was lucky enough to know what career path I intended to take. It was shaped not only by these great lawyers, but also to a large degree by my uncle, Paul Beltz, who was an exceptional trial lawyer who practiced in Buffalo.

I have enjoyed my past experience as a member of the Trial Lawyers Section Executive Committee and in 2018 I became the vice-chair of our Section. It has been an interesting year working with our Section chair, Violet Samuels. Violet has had a remarkable and successful year in managing the many activities and projects our Section has been involved with.

For over 25 years the Trial Lawyers Section of the New York State Bar Association has sponsored and hosted the New York Regional Round of the National Trial Competition. This has been a longstanding "signature" event that our Section has been involved in hosting. The mission of the NTC is to "encourage and strengthen students' advocacy skills through quality competition and valuable interaction with members of the bench and bar. The program is designed to expose students to the nature of trial practice and to serve as a supplement to their education." Our Section would like to recognize and thank Thomas Valet, a past chair of the Trial Lawyers Section, who has volunteered considerable time in organizing this event for years. This year's competition was held from February 8 to 10 in Buffalo.

The Trial Lawyers Section also co-sponsored the Young Lawyers Section's Trial Academy held in the spring at Cornell University. Our Section hopes that the next generation of gifted trial lawyers will rise from these groups.

Our Legislative Committee has reviewed several proposed laws, including CPLR Article 99, involving asbestos litigation, the Child Victim's Act, and we have reviewed some potential jury instructions involving the subject of conscious bias, unconscious or implicit bias.

On February 4, 2019, the Diversity Committee held a breakfast meeting in New York City which was a success. Our committee chairs, Angelicque Moreno and William Friedlander, indicated several law students who attended the program were interested in observing trials and depositions. We will discuss potential ways to engage young lawyers and students at our next Executive Committee meeting.

The Trial Lawyers Section has amended its bylaws in order to establish a Fast Action Committee if the Executive Committee is not in session and a matter arises that requires an immediate response or decision before the Executive Committee can formally meet. The Executive Committee voted to amend a bylaw under Article VI Meetings. This amendment was made in an effort to require greater participation from both officers and executive committee members.

Our 2019 summer destination meeting will be held August 4 to 7 at Queens Landing Hotel in Niagara-on-the-Lake, Ontario, Canada, located at the juncture of the Niagara River and Lake Ontario. A visit is well worth the trip—the area is rich with vineyards (27 in all), and is a haven for food, wine, history and culture. Planned activities include golf, a winery tour, the opportunity to visit the renowned Shaw Theatre Festival for a play, and a dinner at Ravine Vineyard. Niagara Falls, Canada is only 25 minutes away and Toronto, 90 minutes. Please consider joining us. This is a terrific opportunity to network and recharge while picking up CLE credit. Passports or enhanced licenses are required for the entry into Canada. Keep an eye on our Section webpage: www.nysba.org/triasu19 for information on the meeting coming soon.

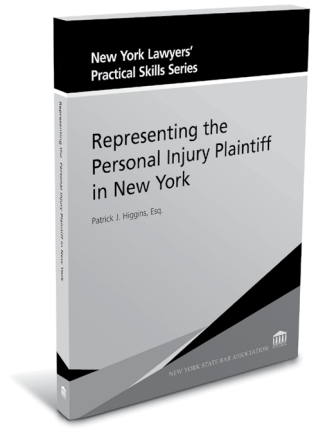
Finally, I would like to acknowledge the former chairs of our Section who participate in our meetings and who have kept our Section on a path to provide terrific benefits to our members.

I look forward to guiding the direction of the Trial Lawyer Sections in 2019.

Kevin Sullivan

From the NYSBA Book Store

Representing the Personal Injury Plaintiff in New York



PRODUCT INFO AND PRICES

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Author

Patrick J. Higgins, Esq.
The Law Offices of Patrick J. Higgins PLLC, Albany, NY

Covering the many facets of plaintiffs personal injury practice, this practice guide addresses investigation of the case, the substantive law of personal injury practice, the automobile negligence case, liens, insurance law, pleadings, discovery, trial techniques, and more.

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Message from the Editor

This edition of the *Trial Lawyers Section Digest* shares thoughts of our outgoing chair, Violet Samuels, and thoughts of our incoming chair, Kevin Sullivan. Violet has served us well, bringing tremendous energy and a fresh sense of vision to the role of chair. Her dedication as chair and willingness to take on the challenges facing the Trial Lawyers Section, including membership, educational programming, and diversity, to name a few, has put our Section on a better path for years to come. Violet remained tireless in her efforts to improve the Section. It was a pleasure working under your leadership, Violet, and I thank you for the opportunity to work closely with you on your initiatives. I know that you will remain committed to the Section, lending your input and support wherever you can.

I equally welcome with enthusiasm our new leader and chair of the Section, Kevin Sullivan. Kevin's accomplished trial lawyer skills will lend well to his championing of our Section's causes. Kevin worked closely with Violet during her term and he will no doubt continue to improve the Section and further its mission. As he shares in his Message from the Incoming Chair, included in this edition, he will work to advance many of the Section's signature events and programs, including the sponsorship and hosting of New York State law schools' participation in the National Trial Competition. Please read Kevin's message for what we have to look forward to throughout the year.

Kevin will lead us to Ontario, Canada, for this year's Summer Meeting, which will take place at Niagara -on-the-Lake; a superb choice for a summer meeting… and some well-earned relaxation! It's a beautiful location. I look forward to a large turnout of members and guests.

In addition to thanking Violet and Kevin, I also want to thank all those who contributed to this edition. The *Digest* is only as good as our members' willingness to author articles and contribute in other ways. As many of you have heard me say, there's great material sitting on your desk right now waiting to be turned into an article.

In closing, I would be remiss if I did not take this opportunity to salute one of our most distinguished past members and past president, the late Harold Schwab. Harold recently passed in February of this year. Those who got to know him were fortunate and will miss him. He was legendary. I encourage you all to read the wonderful tribute in this edition written by Section member Steven Prystowsky. As Steve stated so well, "Harold was a great trial lawyer. He was the Tom Brady of trial lawyers." We will miss you, Harold. You will always be at our table.

T. Andrew Brown

NEW YORK STATE BAR ASSOCIATION

If you have written an article you would like considered for publication, or have an idea for one, please contact the Editor-in-Chief:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

REQUEST FOR ARTICLES

An Interview with the Honorable Michael Garcia

Associate Judge
New York State Court of Appeals
Conducted by Betty Lugo and Angélicque M. Moreno

The Honorable Michael Garcia is an Associate Judge on the New York State Court of Appeals. He was appointed by Governor Cuomo on January 20, 2016 and confirmed on February 8, 2016.

Judge Garcia received his undergraduate degree with honors from the State University of New York at Binghamton in 1983 and an M.A. degree from the College of William & Mary in 1984. In 1989, he received his law degree (summa cum laude) from Albany Law School, where he graduated as valedictorian. He began his legal career as an associate at Cahill Gordon & Reindel LLP in 1989. From 1990 to 1992, he served as law clerk to Hon. Judith S. Kaye, then Associate Judge of the New York State Court of Appeals.

From 1992 to 2001, Judge Garcia served as an Assistant United States Attorney for the Southern District of New York. For his work in a number of high-profile terrorism investigations and trials, he received two Attorney General's Awards for Exceptional Service, the Attorney General's Award for Distinguished Service and the CIA's Agency Seal Medallion. In 2001, he became Assistant Secretary of Commerce for Export Enforcement in the Bureau of Industry and Security, and in December 2002, he became Acting Commissioner of the Immigration and Naturalization Service (INS) at the United States Department of Justice. In that role, he led the transition of the agency into the United States Department of Homeland Security. From March 2003 to August 2005, Judge Garcia served as Assistant Secretary for Immigration and Customs Enforcement (ICE) at the Department of Homeland Security. Judge Garcia was the United States Attorney for the Southern District of New York from 2005 to 2008, when he joined Kirkland & Ellis LLP.

Judge Garcia previously served on the Board of Trustees of El Museo del Barrio. He was also previously President of the Americas for INTERPOL, the international police organization, from 2003 to 2006. From 2012 to 2014, he was Chair of the Investigatory Chamber of the Ethics Committee of the Federation Internationale de Football Association (FIFA).

Q Please tell us a little about your background, personal and education.

A I grew up in Valley Stream, Long Island. My parents both graduated from public high school in Brooklyn,

Honorable Michael Garcia

but neither attended college. My father, Manuel, was something of a classic American success story; he started work at a shipping company in the mail room and retired 30-plus years later as president and chair of the board. Although it may sound like a cliché, my parents stressed education and always assumed their children would go to college. I then attended Binghamton University, the College of William and Mary, and Albany Law School. My school choices were, for the most part, guided by scholarship dollars. I am grateful to each of those institutions for providing me with the opportunity to earn a degree without taking on—or having my parents take on—enormous debt.

I took a few years off before law school and really never thought much about becoming a lawyer. Of course, I look back on that somewhat spur-of-the-moment decision to take the LSAT as a significant turning point. It's a

bit unsettling, even now, to think about what would have happened if I had not followed through.

I have had a number of different legal jobs and I have enjoyed each one. What I love most, though, is public service. I enjoy going to work each day and knowing that—while others may take a different view of my approach—I go about my job every day trying to determine what is right. I am very grateful for the opportunity to do that now at the New York State Court of Appeals.

Q Why did you become a lawyer?

A The economy. I had an M.A. degree in English and was working for various local newspapers on Long Island—writing and editing. The economy was in a downturn and I saw little room for advancement in that business. I felt like I needed to start fresh on a new playing field.

Q You have had a tremendous career in the legal profession, and as a trial lawyer, rising to become U.S. Attorney for the Southern District and now Associate Judge of the New York State Court of Appeals. Tell us about some of your most memorable moments as a trial lawyer?

A My most memorable trials were in terrorism cases. As a very junior Assistant United States Attorney, I worked on the investigation and trial of the 1993 World Trade Center bombing. In fact, I called my very first trial witness during that case—the sketch hangs on the wall in my chambers. It was the first of several trials that really created the model for prosecuting terrorism cases in federal court. (Unfortunately, one of the most memorable moments in that case was when a key witness mistakenly identified one of the jurors as a co-conspirator in the attack.)

My most memorable trial was the prosecution of Ramzi Yousef and two others for a failed plot to plant bombs aboard U.S. jetliners flying from southeast Asia to the United States. That trial, which required witnesses to be called from a number of foreign jurisdictions, was truly groundbreaking in its scope.

The last terrorism case that I prosecuted—of those responsible for the 1998 bombings of the American embassies in Kenya and Tanzania—was perhaps the most difficult. I called a number of the surviving victims and the relatives of some of those who died, and that experience brought home the tragic human consequences of terrorism. The embassy bombings resulted in more than 200 deaths. The final verdicts came in July 2001—less than two months before 9/11. Among the nearly 3,000 killed in the September 11 attacks was an FBI agent I had called as one of the last witnesses in the embassy bombing trial.

Q As an Associate Judge on the New York State Court of Appeals, tell us about what an average week is like.

A Most of our work focuses on the Court's docket of appeals: drafting and editing decisions, and preparing for the next round of oral argument in Albany. I am constantly reading briefs and relevant authority, and my clerks prepare bench memos for my review. At the same time, I review criminal leave applications and civil motions for leave to appeal. It is a bit like law school—you are always getting ready for the next test. And the time goes by so quickly.

Q What advice would you give to a lawyer who is interested becoming a trial lawyer?

A Take your time. Some of it just comes from getting comfortable with the role. I would hesitate to take a job just to "get in court"—you want the right experience.

Q Would you be willing to invite lawyers to visit the New York State Court of Appeals?

A It is always terrific to see students and lawyers visiting the Court of Appeals. I think it was Robert Jackson who said he learned more from sitting in that courtroom in Albany than he did from attending classes at the law school. It's not always possible, of course. But now you can watch the videos online—it's not quite the same, but it does give you a good sense of what the Court is like.

Betty Lugo, Esq., is a founding member of Pacheco & Lugo, PLLC, the first Hispanic women-owned law firm in New York, and leads the firm's litigation practice. She is the Secretary of the New York State Bar Association Trial Lawyers Section and Member of the Committee on Diversity.

Angélicque M. Moreno, Esq., is a member at Avanzino & Moreno, P.C. and Co-chair of NYSBA's Trial Lawyers Section Committee on Diversity, and is skilled in litigating personal injury matters throughout New York City.

Tribute to Harold Schwab

By Steven B. Prystowsky

There is an old Talmudic saying:

> When Death summons a man to appear before his Creator, he has three friends.
>
> The First, what he loves most, is his earthly possessions accumulated over a lifetime. But they cannot accompany him one step;
>
> The second friend is relatives and friends. But they can only accompany him to the grave and cannot defend him before the Judge;
>
> It is his Third friend, his Good Deeds and reputation who go with him and appear before the Almighty to argue on his behalf.

GOD—BE PREPARED FOR A LONG AND PERSUASIVE SUMMATION,

Harold was a great trial lawyer. He was the Tom Brady of trial lawyers.

Harold did not actively engage in sports—I doubt he ever played golf—but while he was in his 50s Harold accomplished a feat that is beyond most of us: He ran and finished the New York City Marathon. He pounded over 26 miles of New York City pavement in five boroughs. Why, you probably ask, did Harold at his age and work schedule undertake such a difficult challenge?

The answer is simple. One day Harold decided he wanted to run the marathon. He was not a runner or a jogger. But after he decided to run the marathon, he trained every day, running a few miles at a time until he was ready to run the distance. And after running each day, Harold nonetheless arrived at the office at his usual time.

Harold was enrolled in ROTC when he attended Harvard College. At Harvard, he married Ronnie, a Radcliffe student. It was a beautiful merger of two great schools for 65 years.

After graduating, Harold worked for his father at his textile mill in Rhode Island from 7 a.m. to 3 p.m. His day, however, was not over. From 5 p.m. to 11 p.m., he attended and graduated from Boston College Law School.

While taking the New York State Bar Review course, he received notice that the U.S. Air Force assigned him to Clovis, New Mexico to serve as a First Lieutenant in JAG.

On his first day of active duty in the Air Force, his commander handed him two court martial files and the manual for court martial.

Harold immediately pointed out that he had never taken moot court mock trials and had, in fact, never been in a courtroom. He was told: "Now was the time to learn, and learn fast." And Harold did. He learned how to argue on behalf of his clients, examine witnesses and present opening statements and summations.

Harold's decision to be a trial lawyer was influenced by his exposure in the Air Force to trying approximately 200 special court martials and general court martials, where he gained trial experience and expertise.

Harold passed the New York State bar exam while on active duty, but did not immediately practice law. After his discharge from the Air Force, Harold returned to work for his father in the New York office as a vice-president. His new position required him to "peddle the piece goods"—a job Harold maintained he did not enjoy.

Harold decided it was time for a career change. He wanted to try cases. But Harold knew nothing about New York law firms. His college roommate recommended he seek a position at an insurance company where they try cases.

One day he stopped unannounced at the Consolidated Mutual Insurance Company located in Brooklyn. He was told it had no attorney positions available but suggested he try the law firm of Emile Zola Berman and A. Harold Frost, where the insurance company sends its cases for trial.

Shortly thereafter, while "peddling piece goods" to a naval outfitter on Vesey Street, Harold decided to visit Berman & Frost even though he had no job interview scheduled. He was interviewed by a junior partner who referred him to a partner. Finally, the managing partner, A. Harold Frost, interrogated him.

Harold recalled that at the interview, Mr. Frost, in a "gruff" manner, said: "You don't even know what a bill of particulars is." Harold agreed, but insisted that he will learn soon enough—if he was hired.

Even though he was offered less money than he was receiving working for his father and there were no benefits, Harold accepted a position with Berman and Frost.

In 1967, he was made a partner at Berman & Frost. and remained there until it was dissolved in 1974. During the 14 years he was with Berman & Frost, Harold tried cases involving product liability issues. He also lectured and wrote articles.

He defended cases against some of the legends of the plaintiffs' personal injury bar at that time, including Robert Conason, Harry Lipsig, Al Julian, Joseph Kelner and Peter James Johnson.

After the dissolution of Berman & Frost, he and three former Berman & Frost partners, Howard Lester, Mel Katz

and Thomas Dwyer, formed the firm known as Lester Schwab Katz & Dwyer in 1974.

Lester Schwab, from its inception, became a leading defense firm in New York and the country, especially in products liability. Harold represented large automotive companies, such as Chrysler and Honda. Harold frequently defended the motorcycle giant Harley Davidson.

Whenever Harold's adversaries saw Harold in court and he was handling one of their cases, they knew he was there prepared to try the case.

As a trial lawyer, Harold tried to verdict over 125 major cases in both state and federal courts involving claims of product liability and personal injury—a record few attorneys can claim. He tried the first case establishing the law of strict liability in tort in New York. Many of his cases are regularly cited in decisions, briefs, and memorandums of law.

As Harold's reputation as a trial lawyer spread, so did Lester Schwab's. It expanded to over 75 lawyers. The new lawyers needed guidance in practical aspects of the law not taught in law school, such as how to conduct discovery and finding and hiring the right experts for a case.

Harold was always there to assist not only the associates but also the junior partners as well. Harold lectured Lester Schwab attorneys regularly on key legal topics, such as: "How to Try a Case," "Direct Examination of an Expert," "Use of Demonstrative Evidence" and "Opening Statements and Summations." When Harold lectured at the firm it was standing room only.

Harold's knowledge of the law and trial practice and his sterling character were major reasons that young attorneys sought his guidance. Harold's door was always open—never closed. Harold was always courteous. He treated everyone with respect whether you were a file clerk, secretary, associate or partner. He never berated anyone. If he criticized an attorney's work, he did not embarrass the attorney. The attorney knew Harold's criticism was to make him or her a better lawyer. In the 38 years that I had the privilege to work with Harold, I never heard him yell at anyone or even raise his voice.

After Harold passed away, I received emails from many of his friends, including judges and former Lester Schwab attorneys who worked closely with Harold. Three emails stand out. They describe Harold in words that convey the tremendous loss we have suffered in his passing.

Kings County Justice Larry Martin writes:

Harold Schwab at Annual Meeting 2018

> Harold was a remarkable man. He was fearless in the courtroom. I witnessed his courage as well as his stellar trial skills, first as a judge before whom he appeared and later as his client in my defamation action.
>
> As a sitting New York State Supreme Court Justice, I was the subject of a series of false newspaper articles. Harold came to my aid and over the course of several years represented me. He was able to obtain an appellate ruling that I had been defamed and that the reporting was "sloppy and inaccurate."
>
> In the course of that litigation, we became close friends. We learned we had a lot in common. For example, we were both former Judge Advocate General Corps lawyers. We made each other laugh loud and often. We thoroughly enjoyed each other's company. Harold entertained me at the Harvard Club and I and my wife Mirlande entertained Ronnie and him at the Comus Club Ball. Harold was generous to a fault; our friendship transcended race, which is, sad to say, no small feat in our society.
>
> I am proud and privileged to have been his friend.

Howard Hershenhorn, now a named partner in one of the country's leading plaintiffs' personal injury firms, was perhaps one of the attorneys who worked closest with Harold. His everlasting praise of Harold captures Harold's professionalism and humanity.

> As a person and a young lawyer, Harold Schwab was my mentor and he was also a father figure to me. I owe much of my success to him. He was the best defense trial lawyer I have ever known, and we have truly lost a giant of the profession.
>
> Harold taught me that there is absolutely no substitute for hard work, very hard work. He never said it but rather he led by example. When I was an associate in my 20s and we were preparing for trial, most times I left the office at midnight. When I left Harold was still in the office. I tried to make it my goal to never leave before him but sometimes that was impossible to do. He worked harder than any other lawyer that I have ever known.

Howard continues:

> Watching Harold at trial was truly like watching a master at work. When Harold tried a case he owned the courtroom. He owned his adversary, the judge and, most importantly, the jurors. He was truly the very best! Only he could convince a jury to find in favor of a defendant who was not at fault for the serious injuries plaintiff sustained.

Harold's favorite things to do to prepare for trial were experiments. He would typically take the proposed alternative design, install it in a product and show how the accident happened anyway.

Harold was also a great storyteller. He often told stories about when he was in the judge advocate general program. When he told his stories you could see the human side of him.

Other attorneys who worked with Harold echoed the same sentiments as Howard.

Jim Yukevich, who worked closely with Harold defending Honda lawsuits, credits Harold with helping him achieve success on the West Coast. Jim has 40 attorneys working for him in California.

He emailed me his "love letter" to Harold. I will read a few excerpts from his two-page letter.

> Dear Harold,
>
> I am sure you are looking down and seeing us now. You helped so many of us to start our careers to grow as lawyers and people and in some cases like mine, leave the nest and fly on our own.
>
> You demanded excellence, but helped us up when we missed our mark. You brought class and pride and camaraderie to our office. You and Howard Lester taught me—a Catholic boy—to "dress British but think Yiddish." You believed a senior partner should attend the special events in your attorneys' lives. You introduced me to Sharon. We married and had two beautiful kids. You went to their christenings with Ronnie, Mel, Steve and many of our partners.
>
> You loved your kids and were always so proud of them when we talked. Although you were extremely successful, you always remained a man of the people.
>
> I have so many things I would like to say. I wish we had a few days to be together again. Looking forward to seeing you in the future but not too soon.
>
> Your Los Angeles partner and friend,
>
> Jim.

Harold was not only a role model for young attorneys on how to defend a lawsuit but also how to be a decent person—a mensch. Every attorney who had any contact with Harold could not help observing how dignified he conducted himself. It was years before Harold accepted "dress down" days in the office.

Harold was a prolific writer and an eloquent lecturer. He authored over 32 articles on the law and trial practice in publications published by legal associations.

Harold lectured extensively around the state on legal issues before judges, legal associations, and law schools. Extensive is an understatement. I counted 166 lectures Harold gave during his legal career. He was also interviewed on radio stations on legal issues.

During his legal career, Harold was a member and officer of numerous legal associations. The list is too long to read. But to name just a few:

- The New York State Bar Association where he served as a chair of the Trial Lawyers section. He also edited its *Law Digest* for a number of years.
- He was one of only 500 attorneys nationwide invited to be a fellow of the International Academy of Trial Lawyers.
- He was a past Chairman of the New York City Chapter of the American Board of Trial Advocates, a past Vice President of the Federation of Insurance and Corporate Counsel.
- Until recently he was a member of the Committee on Character and Fitness for the Appellate Division, First Judicial Department. As a committee member he devoted 20 to 40 hours a year interviewing applicants for admission to the Bar.

In 1992, Harold was honored by the Trial Lawyers Section, UJA-Federation—Lawyers Division. In 2013, Harold received the Lifetime Achievement Award from The New York City Trial Lawyers Association. And last year, the Trial Lawyers Section of the New York State Bar Association honored him for "Outstanding dedication and commitment to the advancement of trial lawyers."

Harold had been listed repeatedly as one of the "Top 100 New York Metro Lawyers" and as a Super Lawyer.

In 2017, the New York State Bar Association published its Fourth Edition of *Medical Malpractice in New York* and dedicated it to Harold Schwab and two other attorneys. The dedication reads in part:

> In recognition of [your] generous contribution of time, effort and experience [in] fostering [the] goals and aspirations of [the] members of the Trial Lawyers' Section. [You] for more than 40 years of

[your] professional life, made us proud to be lawyers.

As most of you know, Harold enjoyed writing and telling war stories. In 2014 and 2015, he authored articles for The New York State Bar Association *Journal* entitled "War Stories from the New York Courts" and, not surprisingly, "More War Stories from the New York Courts."

At award receptions, Harold always entertained the audience with his war stories.

A tribute to Harold would not be complete if I did not include at least one of his war stories. I know this is not the norm at a funeral service. But knowing Harold, if he were standing here next to me he would say: "Steve, you cannot complete the tribute without at least one war story."

Harold, I will not disappoint you.

One of Harold's experiences happened when he was a "novice" attorney preparing a defense case for Zuke Berman. The plaintiff claimed that she sustained a low back injury after being struck by a free moving cart in a supermarket parking lot. Harold agreed with the insurance adjuster's assessment that the case appeared to be a phony. When he informed Mr. Berman that the plaintiff's attorney was Paul O'Dwyer, he was told to check the accident out personally because "if Paul has the case, it's legitimate."

The next day Harold went to the supermarket. He observed a significant slope extending down into the parking lot—a fact that was not noted in the adjuster's report.

Harold experimented. He released one of the shopping carts at the top of the slope and observed it "freewheeling like a missile" to the very spot where the plaintiff had been standing.

Harold concluded that "liability and causation were established." He reported the results of his experiment and the case was settled that week.

To Harold cross-examination was an art. And Harold was the consummate artist.

In *Weiss v. Chrysler Motors*, plaintiff claimed she lost control of her 4-year-old Chrysler Imperial because Chrysler manufactured a metallurgical defective part in steering linkage known as a Pitnam arm stud. At trial, the jury was impressed with plaintiff's expert who insisted he was an expert in cadology, which he defined as the scientific study of automobile accidents. On cross-examination, Harold quickly exposed the expert's lack of qualifications:

Q. Did I understand you to say earlier that your field of expertise is cadology?

A. Yes.

Q. And cadology is the scientific study of automobile accidents?

A. Yes.

Q. You are a cadologist?

A. Yes.

Q. How many cadologists are there in the United States?

A. One.

Q. Who.

A. Me.

Q. If I were to submit to you that last night I looked at my son's 3-volume edition of *Webster's International Dictionary* and was unable to find the words "cadology" or "cadologist," would you say that I was mistaken?

A. No.

Q. And if I were to submit that the words"cadology" and "cadologist" do not appear in the *Random House Dictionary*, would you say that I was mistaken?

A. No.

Q. If not in *Webster's* or *Random House*, could you tell me where the word "cadology" comes from?

A. I invented it.

Q. You invented it?

A. I invented it.

Q. Did you perchance register or trademark this word with the United States government?

A. Yes.

Q. So no one else can use it?

A. That's right.

Q. That's why you are the only cadologist?

A. Yes.

Following a one-month trial, the jury returned a unanimous verdict in favor of the defendant. It obviously did not accept the testimony of plaintiff's cadologist.

Harold was not a quitter. His love for the law and trial work never diminished. When he was ill—even seriously ill—he never considered giving up practicing law. Less than a year ago, Harold updated his resume. It was 31 pages long. Yes, Harold could not wait to return to the courtroom.

I read of a man who spoke at the funeral of his friend. He referred to the dates on his tombstone from the beginning to the end. He noted that first came the date of his birth. But what mattered most of all, he said, was the dash between those years. For that dash represented all the time that he spent on earth. And now only those who loved him know—what that little dash is worth.

Harold, may you rest in peace.

Trial Lawyers Section Is Committed to Diversity and Inclusion

By Angélicque M. Moreno and William S. Friedlander

The New York State Bar Association Trial Lawyers Section is committed to diversity and inclusion. Our committee is active and supports attorneys of all genders, races, colors, ethnic origins, national origins, religions, sexual orientations, ages and disabilities. In order to achieve this objective, we seek to promote a bar that is reflective of the diversity in New York State. We proudly sponsor events and programs with featured speakers, diversity workshops, mentoring, law school outreach programs and after work networking opportunities. Our simple fundamental idea is—inclusion not exclusion.

This year, the New York State Bar Trial Lawyers Section and its Committee on Diversity look forward to:

- conducting interviews for the *Digest* with trial attorneys and judges throughout the State who foster leadership development, innovation and knowledge sharing aimed at enhancing the status of diverse individuals in the legal profession;
- having quarterly get-togethers with prominent New York State trial attorneys (upstate/downstate) to mentor members of our section on their pursuit to becoming a trial attorney. Our get-togethers will take place in May, August and November at different locations;
- co-sponsoring an annual happy hour, together with other Bar and Specialty Bar Associations, where there is a forum to network and promote discussions regarding diversity and inclusion in the law; and
- scheduling an annual informal dinner with judges and/or mediators that will focus on diversity and enhancing trial and negotiation skills.

The Committee on Diversity strives to advance and promote all individuals from diverse backgrounds so that they may have opportunities in the trial and legal profession.

We welcome you to join us and to contribute ideas on how we can best assist to increase diversity in the NYSBA and in the legal profession.

Angélicque M. Moreno, a member at Avanzino & Moreno, P.C. and Co-Chair to the Committee on Diversity, is skilled in litigating personal injury and medical malpractice matters throughout New York City.
William S. Friedlander, a member at Friedlander & Friedlander and Co-Chair to the Committee on Diversity, is skilled in litigating school violence and nursing home matters throughout New York State.

Use of an Affirmation by All Persons: Has the Time Come?

By Richard B. Long

Under current New York law, as we all know, only a select group of professionals—attorneys, physicians, osteopaths and dentists—may use an affirmation declared to be true under penalty of perjury in civil actions in lieu of and with the same effect as an affidavit (CPLR Rule 2106(a)). With one recent and notable exception, all other persons must swear to tell the truth of a document in the presence of a notary public, in short, by the use of an affidavit.

The one exception: if a person is physically located outside of the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that person may also use an affirmation declared to be true under penalty of perjury in place of an affidavit (CPLR Rule 2106(b)).

This exception is patterned after the Uniform Unsworn Foreign Declarations Act, promulgated by the Uniform Law Commission, (ULC) in 2008, and adopted to date in 25 states. The act was adopted to address the problem of obtaining a valid document requiring a sworn signature at a time when the declarant from America is outside of the country.

Affiants in foreign countries with information relevant to an action in the U.S. were required to visit the nearest U.S. consular office to finalize an affidavit in a manner similar to a person within the U.S visiting a notary public. The authority of a New York (or other state) notary public does not extend beyond the borders of the state of the notaries' residence. In recent years, particularly since 9/11, access to U.S. embassies and consulates has become more difficult, and, as a practical matter, might be located several hours away from the affiant's overseas location.

By enactment of the Uniform Unsworn Foreign Declarations Act, New York's Rule 2106(b) has extended to state proceedings the same flexibility that federal courts have employed for over 40 years. Since 1976, federal law (28 U.S.C. § 1746) has allowed an unsworn declaration (or affirmation) whether it is executed outside of or within the continental United States to be recognized as valid and the equivalent to a sworn affidavit if it was accompanied by a declaration that the document was true under penalty of perjury.

Recognizing the popularity and success of the Unsworn Foreign Declarations Act, the ULC in 2016 promulgated two new acts: the Uniform Unsworn Domestic Declarations Act for states that had already adopted the foreign declarations act, and the Uniform Unsworn Declarations Act, for states that had no similar laws.

Which brings us to where we are in New York. The current law in our state, 2106(a), because of the limits it places on those persons who are entitled to use an affirmation, has created a significant problem by requiring a notarized affidavit for all others including litigants, often unrepresented, who by reason of location or time constraints have difficulty locating a notary. In rural areas of the state it is often difficult to even find a notary outside of central business districts.

Picture this situation: a timely supporting affidavit is needed in a summary judgment motion and the rural client to whom you have mailed the affidavit for sworn signature cannot locate a notary because she resides on a farm several miles from your office and from the nearest town; or it is a weekend and the only available notary is at the bank, and the bank is closed.

In the City of New York, and other large New York cities, there are other problems. The significant needs of pro se litigants for notary services has resulted in a heavy demand upon the county and court clerk's offices, resulting in a load on those offices and a time burden upon the unrepresented parties. Delay and unnecessary cost often results for the poor, for persons residing outside of cities, and for those for whom notary services may be necessary outside of business hours.

A solution is now within reach, provided by the uniform laws mentioned above which address the broad use of unsworn declarations. The ULC, as well as OCA's Advisory Committee on Civil Practice, are seeking the enactment in New York of the following replacement for current CPLR R. 2106:

> Rule 2106. Affirmation of truth of statement. The statement of any person, wherever made, subscribed and affirmed by the person to be true under the penalty of

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perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

"I affirm this ___day of _____, at _____ under penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that the foregoing may be used in an action or proceeding in a court of law.

Signature."

The effect of this amendment will be the extension of the use of an unsworn affirmation to all persons whether the declaration is made within or outside of the continental United States. It will thus repeal New York's limited available use of an affirmation in 2106(a) and its version of the Unsworn Foreign Declarations Act in 2106(b), and enact for use in civil actions the Uniform Unsworn Declarations Act.

A few potential concerns have been advanced: 1. The proposal is anti-notary public; 2. It will totally eliminate the use of an affidavit; 3. It conflicts with other laws which require an oath as to the identity of the declarant, a document's authenticity, or an oath of office; 4. An oath taken in the presence of a notary public is more apt to promote truth than a declaration made under penalty of perjury. Each if these concerns lack substance for the following reasons:

1. When the three uniform acts were being considered in their respective ULC drafting committees, leaders of several national and state notaries public organizations including the American Society of Notaries, the National Notary Association, and the Pennsylvania Association of Notaries participated in the drafting process. These leaders firmly stated that their organizations would support the Unsworn Foreign Declarations Act and would not oppose enactment in the states of the unsworn domestic declarations and unsworn declarations acts.

2. The proposed amendment to R. 2106 does not preclude or affect the efficacy of a notarized affidavit or its continued use. Sworn affidavits are still being used frequently by attorneys and by the other professionals who are entitled by current 2106(a) to use an affirmation. An unsworn affirmation will simply be a permissive alternative to the use of an affidavit when circumstances cause difficulty in obtaining a notary.

3. The proposed changes in CPLR R. 2106 are limited to the establishment of the "truth" of a document or statement. They do not affect the obligation to establish the identity of the declarant (for example the witness at a deposition (CPLR R. 3113(b)), the authenticity of the applicable document (for example R. 3116), or the taking of an oath of office, when required by other law.

4. The collective wisdom from the 40-plus years of the use of unsworn declarations in the federal court system, and the use of such declarations in several states, as well as in New York by those eligible professionals, has demonstrated that making a declaration under penalty of perjury is as great as, and in the opinion of many, an even greater incentive to be truthful, than swearing in the presence of a notary public, usually a perfect stranger, that the subject document or statement is true. And, the making of a false statement made with intent to mislead the court, whether that statement is made by a notarized affidavit or by an affirmation made under penalty of perjury, will constitute perjury in the second degree, a Class E. felony punishable by up to four years imprisonment. (Penal Law 70.00(2), and 210.00(1)).

CONCLUSION

It is hoped and indeed anticipated that comments from members of the NYSBA Trial Lawyers Section, based upon their practical experiences, will assist in securing the enactment of proposed amended CPLR R.2106 in New York in 2019.

Member Spotlight: Betty Lugo

Interviewed by Angélicque M. Moreno and William S. Friedlander

The New York State Bar Association Trial Lawyers Section is committed to diversity and inclusion. Our committee is active and supports attorneys of all genders, races, colors, ethnic origins, national origins, religions, sexual orientations, ages and disabilities. In order to achieve this objective, we seek to promote a bar that is reflective of the diversity in New York State. We proudly sponsor events and programs with featured speakers, diversity workshops, mentoring, law school outreach programs and after work networking opportunities. Our simple fundamental idea is—inclusion, not exclusion. We welcome you to join us and to contribute ideas on how we can best assist to increase diversity in the NYSBA and in the legal profession.

Member Spotlight

Betty Lugo is a founding member of Pacheco & Lugo, PLLC, the first Hispanic women owned law firm in New York established at One World Trade Center in 1992. In 2014, Pacheco & Lugo, PLLC received one of the Top 2014 New York Verdicts and was ranked among Top Worker/ Workplace Negligence Cases in New York State Ms. Lugo leads the firm's litigation practice in the areas of general and commercial liability, construction, labor law, and real estate. She has conducted trials, hearings, arbitrations and appeals in complex matters in both state and federal courts. She has counseled and represented clients on matters involving real estate and corporate issues.

Ms. Lugo received her Juris Doctor degree in 1984 from Albany Law School of Union University and her Bachelor of Arts degree *cum laude* in 1981 from Brooklyn College of the City University of New York. She is admitted to practice in New York, as well as before the U.S. District Court for the Southern and Eastern Districts of New York. She began her legal career as the first Hispanic woman to work as an Assistant District Attorney in the Nassau County District Attorney's Office from 1984 to 1987.

As the past Co-Chair to the Committee on Diversity, she remains instrumental in our mission to challenge the bar and demanding—that as attorneys—we do better. She strives to eliminate obstacles and barriers to the profession, provide equal access to the law, and support the profession of trial lawyers.

Q How has your experience and background prepared you to be an effective trial attorney?

A As a young woman, I assisted my mother in her small business and with her customers when they needed translating before various government agencies, such as, New York City human resources, immigration, social security, unemployment and others. While translating for them, I ended up advocating for them and obtaining for them the services they needed. This inspired me to become a lawyer and to help others.

Q What was your biggest obstacle in becoming a trial attorney?

A I am thankful that the obstacles for me were not too great. However, good mentorship and training is necessary. When you do not see attorneys or judges who look like you it can become intimidating. However, since I received training early on as an Assistant District Attorney, I was quite fortunate. I encourage all to overcome the obstacles and seek mentorship and network with attorneys of all backgrounds. The NYSBA Trial Lawyers Section is a great place to start. Our members are willing to mentor and allow you to observe a trial and learn.

Q Why did you decide to open the first Hispanic women owned law firm in NYC?

A I began my legal career at the Nassau County District Attorney's office as the first Puerto Rican and Latina. I then joined a defense litigation firm in Nassau County where I was the first Puerto Rican. I litigated and tried many cases to verdict in criminal and civil matters. Thereafter, I received a call from my good friend Carmen A. Pacheco, an associate in a Wall Street firm, who invited me to join her and start our own law firm. The timing was just right. On January 27, 1992, we started Pacheco & Lugo, at One World Trade Center. Our commitment has

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always been to provide high quality and cost-efficient legal services and to ensure equal access under the law to members of all communities.

Q How can we do better, as trial attorneys, in creating a diverse and inclusive work environment?

A We must continue to reach out, encourage and mentor members of diverse communities who have been historically underrepresented in the legal profession. We must not only "talk the talk," but "walk the walk." We need to be more inviting and accepting of members of diverse backgrounds. I encourage our members to take on interns from law schools, colleges, paralegal schools and high schools and mentor them.

Q What advice would you give to someone starting out today as a trial lawyer?

A Be prepared. Know your case inside and out. Try your best to eliminate surprises. Anticipate and try to plan for everything. Watch trial attorneys and practice in front of others. Eventually you will develop your own style. Be professional and respectful at all times.

What's Left of Class Arbitration After *Lamps Plus, Inc. v. Varela*?

By Steven C. Bennett

In *Lamps Plus, Inc. v. Varela*,[1] the U.S. Supreme Court held that "ambiguity" in an arbitration clause, like "silence" on the question whether an arbitration clause authorizes class action arbitration, "does not provide a sufficient basis" to conclude that parties to a contract "agreed to sacrifice the principal advantage of arbitration" (informality) in favor of the "new risks and costs" and "due process concerns" attendant to class action arbitration.[2] The Court, noting the "fundamental" difference between class arbitration and individual arbitration, "refus[ed] to infer consent" to class arbitration from an "ambiguous" arbitration clause.[3] The Court reinforced its view, stated in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,[4] that "courts may not infer consent to participate in class arbitration absent an affirmative contractual basis for concluding that the party agreed to do so."[5]

Is *Lamps Plus* the death knell for class arbitration? Given the legal and political forces at play, perhaps not. As outlined below, other forms of class-action-like procedures may be available to claimants in arbitration, and there may be reasons for respondents (even large institutions) to agree to class arbitration, under certain circumstances. In the arena of consumer and employee rights, moreover, political forces are afoot, which may lead to new legislation (perhaps even modifications to the Federal Arbitration Act itself) that could affect the use of such procedures.

The *Lamps Plus* Case

The *Lamps Plus* case arose out of a data breach. Plaintiff Frank Varela filed a class action complaint against his employer, Lamps Plus, Inc., on behalf of himself and approximately 1,300 other employees whose financial information had been exposed, after the company was tricked into disclosing their tax information. In response to the complaint, the company moved to compel arbitration, based on an arbitration agreement Varela signed, as a condition of employment. The district court granted the motion to compel arbitration, but expressly stated that the arbitration could proceed on a class-wide basis.[6] The company opposed class arbitration because the agreement said nothing about such a system. The district court, however, noted that "lack of an explicit mention of class arbitration" does not mean that the parties "affirmatively agree[d] to a waiver of class claims in arbitration." Further, the court opined that, although *Stolt-Nielsen* stated that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to do so,"[7] "failure to mention class arbitration in the arbitration clause itself does not necessarily equate with the 'silence' discussed in Stolt-Nielsen."[8]

Thereafter, plaintiff Varela filed a demand for class-wide arbitration with the American Arbitration Association. The company moved to stay class arbitration, pending an appeal. The district court rejected the stay, suggesting that "the issue is one of simple contract interpretation[.]"[9]

The Ninth Circuit Court of Appeals affirmed, noting that the agreement was "capable of two reasonable constructions" (one supporting class arbitration; one not).[10] Given that ambiguity, the court opined that "State contract principles require construction against [the company], the drafter of the adhesive Agreement."[11] Thus, the appeals court held, the district court properly concluded that the "ambiguous Agreement permits class arbitration," and satisfies the requirements of *Stolt-Nielsen* for a "contractual basis for agreement to class arbitration."[12] A brief dissenting opinion concluded that the arbitration agreement was "not ambiguous," and suggested that "we should not allow [plaintiff] to enlist us in this palpable evasion of Stolt-Nielsen[.]"[13]

The Supreme Court Decision

In a 5-4 decision, the U.S. Supreme Court in *Lamps Plus* reversed the Ninth Circuit decision, and remanded for further proceedings consistent with the opinion.[14] The majority opinion, written by Chief Justice Roberts, held that ambiguity in an arbitration agreement regarding the availability of class arbitration, like the "silence" on the issue evident in *Stolt-Nielsen*, does not sufficiently evidence consent to such a procedure, given that class arbitration is "markedly different from the traditional individualized arbitration contemplated by the FAA," and that it "undermines the most important benefits of that familiar form of arbitration."[15] Because consent is "foundational" to arbitration, and because of the "crucial differences" between class and individual arbitration, courts may not "infer consent" to such a procedure, absent an "affirmative contractual basis," and ambiguity, like silence, "does

Steven C. Bennett is a Partner at Scarola Zubatov Schaffzin PLLC in New York City, and an arbitrator on the American Arbitration Association Commercial Panel. B.A., Macalester College; J.D., New York University School of Law; Adjunct Professor, Brooklyn College; Member of the Executive Committee of the Dispute Resolution Section of the New York State Bar Association.

not provide a sufficient basis to conclude that parties to an arbitration agreed to sacrifice the principal advantage of arbitration."[16]

The majority opinion specifically addressed a state law principle of contract interpretation, *contra proferentem*, on which the Ninth Circuit opinion relied. The Court deferred to the Ninth Circuit's view that the agreement at issue was ambiguous on the question of class arbitration.[17] As the Court saw *contra proferentem*, however, the doctrine applies "as a last resort," when a court "*cannot* discern the intent of the parties," and instead rules, "based on public policy," that an ambiguity should be resolved against the drafter of the agreement.[18] Thus, in the Court's view, the *contra proferentem* rule "seeks ends other than the intent of the parties."[19] The Court rejected the view that the rule is "nondiscriminatory," in that it does not specifically target arbitration agreements, because the rule, as applied, "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[20]

Aftermath of the Decision

The majority opinion in *Lamps Plus* emphasized the view that "[o]ur opinion today is far from the watershed" claimed by the dissent.[21] Indeed, the trend in recent years has been for the Court to express deep skepticism over the concept of class action in arbitration. As Justice Kagan observed, dissenting: "The heart of the majority's opinion lies in its cataloging of class arbitration's many sins. In that respect, the opinion comes from the same place as (though goes a step beyond) this Court's prior arbitration decisions."[22] Justice Ginsburg, dissenting, went further, suggesting that "[i]n relatively recent years, [the Court] has routinely deployed the law to deny to employees and consumers effective relief against powerful economic entities."[23]

Public reaction to the Court's views on so-called "mandatory" arbitration clauses (contracts of adhesion that include provisions for arbitration, as a condition for employment, or as a condition for purchase of goods or services by a consumer) has been strong.[24] As Justice Ginsburg noted, "[r]ecent developments outside the judicial arena" may "ameliorate some of the harm this Court's decisions have occasioned," including private efforts to change corporate policies regarding arbitration.[25] Efforts at the state level, moreover, may yield changes in the law,[26] although the question of preemption looms large in such efforts.[27] Involvement of state governments themselves might offer another solution.[28]

Justice Ginsburg, however, looked to the broadest potential solution in the area, reform of the FAA itself: "Congressional correction of the Court's elevation of the FAA over the rights of employees to act in concert remains urgently in order."[29] Calls for revision of arbitration law at the congressional level have been sharp and persistent.[30] The *Lamps Plus* decision will certainly add to public pressure in that direction, but the prospect for bipartisan congressional support for revision of the FAA remains doubtful.[31] Restrictions on arbitration might also be imposed by federal regulation, but here too politics may intervene.[32]

Perhaps of most interest, given the legal and political developments that may preclude progress toward wide use of class arbitration (or limitations on the use of so-called "mandatory" arbitration clauses with class action waivers), is the adjustment that plaintiffs and their lawyers may make in response to restricted access to the class action device. In recent years, some plaintiff-side attorneys have begun to file "masses" of individual arbitrations, essentially "recreating class actions in a different form."[33] Such mass actions can be costly for corporations, providing leverage toward settlement, while remaining "surprisingly affordable" for plaintiffs (largely due to minimum due process standards adopted by arbitration-sponsoring organizations, such as the AAA and JAMS, plus cost limitations imposed by the companies themselves, in order to avoid court decisions rendering arbitration clauses unenforceable, as unconscionable).[34] Individual arbitrations, moreover, may present greater risks for corporations seeking to resolve claims on a broad basis, which is difficult, absent the mechanism of a class action settlement.[35] Thus, although the conventional wisdom may be that arbitration favors "repeat players" (mainly, corporations), available data may suggest that arbitration actually "favors repeat players on both sides," so long as, on the plaintiffs' side, a "serially arbitrating" plaintiffs law firm is involved.[36]

Data regarding the effectiveness of arbitration in providing fair and effective relief in small-value consumer claims (especially those involving *pro se* claimants), [37] and in employee rights cases,[38] remains elusive. Yet, if limits on class action (in and out of arbitration) have "effectively barred" some small claims from proceeding,[39] and that reality is not likely to change in the current legal and political climate, a further question emerges. Are there additional (or new) procedures, such as On-Line Dispute Resolution (ODR) that may change the calculus, at least in part?[40] In theory, companies and consumers (or employees) should share an interest in fair and efficient dispute resolution.[41] Reducing the cost of arbitration (for both company and individual), while maintaining a fair system for all parties, may offer a practical (and more widely accepted) solution than the current dichotomy between arbitration "doves" and "hawks," who perceive the choices as entirely binary. And a more efficient arbitration system could benefit all parties, including those who have no contact with dispute resolution systems.[42] Development of such systems cannot offer a panacea; but it would, at least, offer some hope of improvement.

Endnotes

1. ___ S. Ct. ___, 2019 WL 1780275 (Apr. 24, 2019).
2. *Id.* at *5-6 (quotations omitted).
3. *Id.* at *6 (quotation omitted).
4. 559 U.S. 662 (2010).
5. *Lamps Plus*, 2019 WL 1780275 at *6 (quoting *Stolt-Nielsen*).
6. *See Varela v. Lamps Plus, Inc.*, 2016 WL 9110161 at *6-7 (C.D. Cal. July 7, 2016).
7. *Id.* at *6 (quoting *Stolt-Nielsen*, 559 U.S. at 684).
8. *Id.* (quotation omitted).
9. *See Varela v. Lamps Plus, Inc.*, 2016 WL 9211655 at *2 (C.D. Cal. Dec. 12, 2016).
10. *See Varela v. Lamps Plus, Inc.*, 701 Fed. Appx. 670, 673 (9th Cir. Aug. 3, 2017).
11. *Id.*
12. *Id.* (citation omitted).
13. *Id.* at 673.
14. *Lamps Plus*, 2019 WL 1780275 at *8.
15. *Id.* at *4 (quoting Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018)).
16. *See id.* at *5-6 (quotations omitted).
17. *See id.* at *4. Justice Thomas, concurring, would have held that the language of the agreement was not ambiguous, in that the terms of the agreement were repeatedly stated in the singular. *See id.* at *8 (Thomas, J., concurring) (citing provisions including waiver of "any right *I* may have to file a lawsuit," and statement that "*the Company and I* mutually consent" to arbitration) (emphasis in original). Justice Kagan, dissenting, pointed to language suggesting the "opposite conclusion." *Id.* at *17 (noting remedial and procedural terms calling for resolution by arbitration of "all claims or controversies"); *see id.* at *16 (citing language that arbitration "shall be in lieu of any and all lawsuits"). As Justice Kagan saw it, the arbitration agreement contained "no hint of consent to surrender altogether—in arbitration as well as in court—the ability to bring a class proceeding." *Id.* at *16.
18. *Id.* at *6-7 (majority opinion).
19. *Id.* at *7.
20. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).
21. *Id.* at *8 (referring to dissenting opinion of Kagan, J.).
22. *Id.* at *21 (Kagan, J., dissenting). Justice Kagan further observed: "The [majority] opinion likewise has more than a little in common with this Court's effort to pare back class litigation." *Id.* (citing *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)).
23. *Id.* at *9 (Ginsburg, J., dissenting).
24. See Stephen J. Ware, *A Short Defense of Southland, Casarotto and Other Long-Controversial Arbitration Decisions*, 303, 303 (2018) (noting that "scalding" criticism of Supreme Court arbitration decisions "appeared in the 1990s and is now widespread"); *see also* Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses Are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 Fordham L. Rev. 2119, 2120 (2017) (experimental data reveals that "the more the public learns about predispute binding arbitration clauses, the more they believe this dispute-resolution procedure is unjust and illegitimate"); Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 Harv. Negot. L. Rev. 29, 32 (2017) (suggesting that "the political center on consumer law has moved somewhat to the left while the Supreme Court's decision on adhesive arbitration law have moved further right, resulting in governing decisions that sometimes diverge from the political mainstream").
25. *See id.* at *10 ("some companies have ceased requiring employees to arbitrate sexual harassment claims, or have extended their no-forced-arbitration policy to a broader range of claims") (citations omitted); see also Lorelei Laird, *ABA House Urges Legal Employers Not to Require Mandatory Arbitration of Sexual Harassment Claims*, Aug. 7, 2018, www.abajournal.com (reporting on ABA House of Delegates Resolution 300); Amanda Robert, *ABA House Urges Legal Employers Not To Require Mandatory Arbitration in an Expanded Variety of Claims*, Jan. 28, 2019, www.abajournal.com (reporting on ABA House of Delegates Resolution 107B).
26. *See Lamps Plus*, 2019 WL 1780275 at *10 (Ginsburg, J., dissenting) (noting that "some States have endeavored to safeguard employees' opportunities to bring sexual harassment suits in court;" citing N.Y. CPLR 7515, "rendering unenforceable certain mandatory arbitration clauses covering sexual harassment claims"); *see also* Ramit Mizrahit, *Sexual Harassment Law After Looking To California #MeToo:as a Model*, June 18, 2018, www.yalelawjournal.org (summarizing California proposals for statutory revisions, including revisions affecting "forced arbitrations").
27. There may nevertheless be mechanisms, at the state level, that could avoid the preemption effects of the FAA. *See* Sarath Sanders, *A New Strategy For Regulating Arbitration*, 113 N.W. Univ. L. Rev. 1121, 1121-22 (2019) (suggesting state laws that "prohibit sexual harassment as a subject matter for employment contracts," which "would not be preempted because they do not derive their meaning from the fact that an agreement to arbitrate is at issue").
28. *See id.* at 1122 (suggesting that states could level fines against employers for certain actions, and that the state "a third party" would not be "subject to the arbitration agreement"); *see also* Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 Fordham L. Rev. 2223, 2226-27 (2018) (proposing *parens patriae* actions, attorney general enforcement proceedings, and private attorney general mechanisms as solutions that are "not baldly preempted" by the FAA).
29. *See Lamps Plus*, 2019 WL 1780275 at *11 (quotation omitted).
30. *See* Vincent Sauvet, *New Push Coming For Familiar Arbitration Bills?*, Apr. 3, 2019, www.blog.cpradr.org (noting "long-running efforts, some dating back to the 1990s" seeking to limit arbitration processes that limit the ability of consumers and employees to file suits, "especially those that targeted class actions").
31. *See id.* (summarizing recent legislative proposals, and suggesting that "[t]hese moves, collectively, provide at least some momentum," but suggesting that "more-specific bills—those providing small incremental changes" with "more potential for bipartisan support" are "more likely to succeed"); *see generally* Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems and Alternatives*, 67 Disp. Resol. J. 32 (2012) (noting difficulties in enacting arbitration reform legislation).
32. *See* John Heltman, *Trump Signs Resolution Killing CFPB Arbitration Rule*, Nov. 1, 2017, www.americanbanker.com; Renae Merle, *Treasury Department* Sides *With Wall Street, Against Federal Consumer Watchdog Agency on Arbitration Rule*, Oct. 23, 2017, www.washingtonpost.com.
33. Alison Frankel, *Sweeping New Arbitration Study: "Enterprising" Plaintiffs' Lawyers Adapt*, Sept. 12, 2018, www.reuters.com (quoting David Horton, U.C.-Davis Professor of Law); see David Horton & Andrea Cann Chandrasekher, *After The Revolution: An Empirical Study of Consumer Arbitration*, 57, 63 (2015) ("some plaintiffs' lawyers, whom we call 'arbitration entrepreneurs,' have tried to overcome their inability to aggregate disputes by bringing scores of discrete proceedings against the same company").
34. *See id.* (quotations omitted).
35. See Alison Frankel, From The 11th Circuit, A Cautionary Tale For Employers Imposing Arbitration On Workers, Aug. 9, 2018, www.reuters.com.

36. *See* Andrea Can Chandrasekher & David Horton, *Arbitration Nation: Data From Four Providers*, 107 Cal. L. Rev. 1, 9 (2019) (summarizing data from more than 40,000 consumer, employment, and medical malpractice arbitrations).

37. *See* Terry F. Mortiz, *Can Consumers' Rights Effectively Be Vindicated In The Post-AT&T Mobility World?*, 30 Loyola Consumer L. Rev. 32, 34 (2017) (noting "little empirical evidence" to support "definitive" response to question: "Is the risk that many small-dollar claims will go unresolved due to the costs associated with pursuing individual consumer claims a sufficient reason to either preclude arbitration of those claims or allow consumer class claims in an arbitration process?").

38. *See* Christopher Murrary, *No Longer Silent: How Accurate Are Recent Criticisms Of Employment Arbitration?*, Alternatives to the High Cost of Litig., www.cpradr.org (May 2018) (suggesting that claims that employment arbitration agreements "generally silence employees in their attempts to protest unlawful workplace conduct and vindicate their rights" are "unsubstantiated").

39. *See id.* at 46.

40. ODR systems, in reality, are not "new." Courts, administrative agencies, companies and ADR service providers have used such systems for roughly the past 20 years. *See* Ayelet Sela, *The Effect Of Online Technologies On Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 Lewis & Clark L. Rev. 633 (2017) (summarizing developments in development and use of ODR technologies); Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenge of Pro Se Litigation*, 26 Cornell J. of L. & Pub. Policy 331, 333 (2016) (ODR technologies "have been honed and vetted for almost twenty years in both private and public settings. They are an economic and effective means to positively impact a large constituency, introduce institutional efficiencies and improve the accessibility of services.").

41. *See* Amy J. Schmitz, *A Blueprint for Online Dispute Resolution System Design*, J. of Internet Law at 3 (Jan. 2018) ("consumers and companies enjoy more commonalities than contradictions;" both benefit from resolving disputes "quickly and cheaply").

42. *See* Andreas von Goldbeck, *Consumer Arbitrations in the European Union*, 18 Pepperdine Disp. Resol. J. 263 266 (2018) (arguing that consumer protection, *including dispute* resolution, comes at a cost, which consumers pay in the form of higher prices for goods and services, and that development of more cost-efficient dispute resolution systems should benefit all consumers, by lowering company costs, and thus reducing prices).

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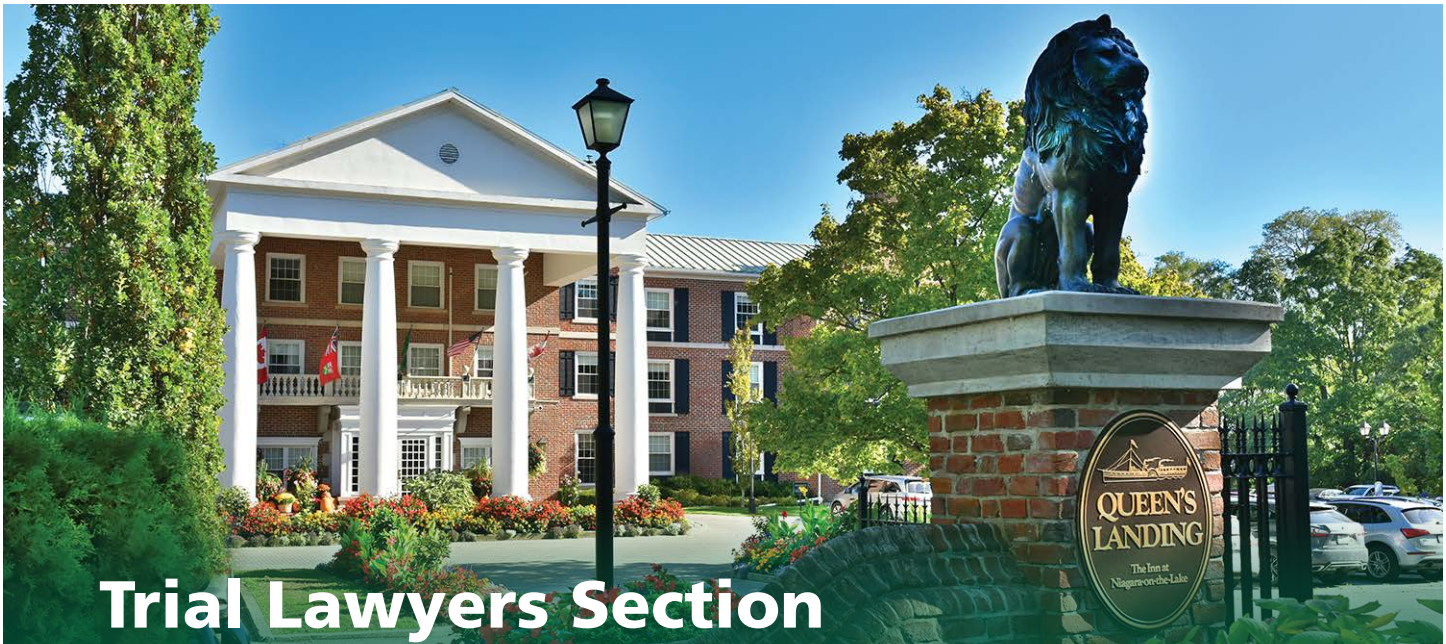

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