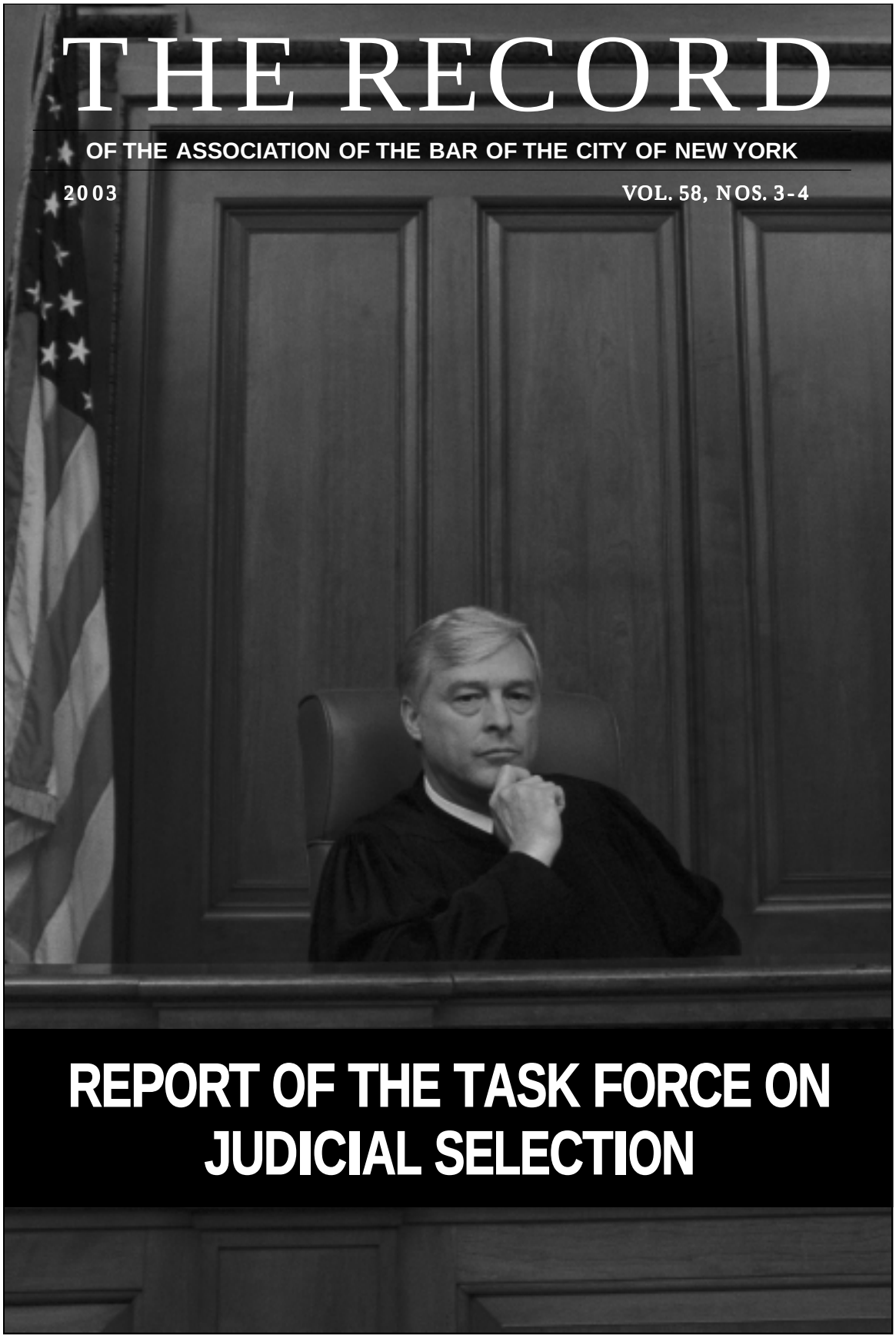
THE RECORD

OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

2003 VOL. 58, NOS. 3-4



REPORT OF THE TASK FORCE ON JUDICIAL SELECTION

THE RECORD

2003 VOL. 58, NOS. 3-4

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Of Note

❊

THE FORDHAM UNIVERSITY SCHOOL OF LAW CAPTURED THE REGIONAL round of the 54th Annual National Moot Court Competition on Thursday, November 20, 2003, at the Association. Law students on the winning team included Ross M. Kramer, Leah A. Ramos and Amanda N. Slatin.

Seton Hall University School of Law took second place honors. Members of the Seton Hall team included John W. Leardi and John J. Zefutie, Jr. Both teams will advance to the final rounds beginning February 2004.

Best Brief honors went to Fordham University School of Law, and Best Runner-Up Brief went to New York Law School. The New York Law School team included Susan Eylward, John Tatulli and Noah Melnick.

Best Speaker went to Amanda N. Slatin of Fordham and runner-up honors went to John W. Leardi of Seton Hall.

The American College of Trial Lawyers, a national organization composed of approximately 2,000 of the leading advocates in the United States, is a co-sponsor of this year's competition with the Association's Young Lawyers Committee. The final round of the regional competition was judged by: The Honorable John Buckley, Louis A. Craco, the Honorable Andrew J. Peck and Stuart A. Summit.

Twenty-eight winning and runner-up teams from fourteen regions across the United States will compete in the final rounds of the National Moot Court Competition in February.

❊

ON JANUARY 27, THE ASSOCIATION PRESENTED THE KATHRYN A. McDonald Award for excellence in service to the New York City Family Court to Carol R. Sherman, Executive Director, Children's Law Center; Barbara H. Dildine, Deputy Director, Children's Law Center; and Molly Armstrong, Coordinator of Demonstration Projects at the Vera Institute of Justice.

The Kathryn A. McDonald Award is named in honor of the former Presiding Judge of the New York City Family Court, and is sponsored by the City Bar's Committees on Children and the Law, Family Court and Family Law, and Juvenile Justice, and its Council on Children.

Hon. Judith S. Kaye, Chief Judge of the New York Court of Appeals, presented the awards.

❊

THE FOLLOWING NEW COMMITTEE CHAIRS HAVE BEEN APPOINTED for terms begun September 1, 2003:

Elizabeth Donoghue (Housing Court); Catherine O'Hagan Wolfe (Project on the Homeless); Brenda L. Gill (Recruitment and Retention of Lawyers); and Mark A. Meyer (European Affairs).

Recent Committee Reports

African Affairs
Letter to President George W. Bush Regarding the HIV/AIDS, Tuberculosis and Malaria Act of 2003

Alternative Dispute Resolution/
Legal Issues Affecting People with Disabilities
Recommended Revisions to the Model Standards of Conduct for Mediators

Art Law
Report re: A.5384, An Act to Amend the Tax Law and State Finance Law in Relation to Gifts for the Support of the New York State Council on the Arts

Banking Law
Letter Commenting on the Proposed Interpretation of the Anti-Tying Restrictions of Section 106 of the Banking Holding Company Act Amendments of 1940

Bioethical Issues
Statement in Opposition to a Federal Legislative Ban on Therapeutic Cloning

Capital Punishment
Amicus Brief: *Orbe v. True* (addresses the impact of the Fourth Circuit's decision regarding page limits on briefs, in the context of the ethical and constitutional mandates imposed upon capital defense attorneys to provide effective assistance of counsel)

Downtown Redevelopment, Task Force on
Letter to the President of the Lower Manhattan Development Corporation Commenting on the Scope of the Draft WTC Memorial and Redevelopment Plan

Education and the Law
Amicus Brief: *Kruger v. Bloomberg,* re: New York City Schools Governance

Report on Ending Discrimination in Gifted Education in the New York City Public Schools

Election Law
The New York City Campaign Finance Program in the 2001 Elections: To Make a Good Program Better

Federal Courts

Letter to President George W. Bush Regarding the National Commission on Public Service (the Volcker Commission)

Letter to the Committee on Rules of Practice and Procedure Regarding Amendments to the Federal Rules of Civil Procedure Concerning Discovery of Electronic Evidence

Letter to Senators in Support of S.1023, a Bill to Increase the Annual Salaries of Justices and Judges in the United States

Financial Reporting

Letter to the Public Company Accounting Oversight Board Commenting on the Proposed Auditing Standard for Internal Control Over Financial Reporting

Futures Regulation

Letter to the Secretary of the Commodity Futures Trading Commission Regarding Performance Data and Disclosure for Commodity Trading Advisors

Letter to the FTC Commenting on the Proposed Rules for CPO and CTA Registration and Other Regulatory Relief

Letter to the Department of the Treasury Regarding Anti-Money Laundering Programs for Commodity Trading Advisors

Immigration and Nationality Law

Amicus Brief: *Beharry v. Ashcroft* (regarding exhaustion of administrative remedies in deportation proceedings)

Letter to Mayor Bloomberg Urging that He Take a Position Against the Enforcement of Immigration Laws by the New York City Police Department

Insurance Law

Letter to legislative leaders re: A8536/S3878A, Legislation to Extend the Provision Authorizing Insurers to Enter into Derivative and Replication Transactions

International Affairs, Council on

Letter to the President of Kyrgyzstan Regarding the Criminal Prosecution of Galina Kaisarova, a Member of the Kyrgyz Bar

International Human Rights

Letter to the Clerk of the Bills Committee of Hong Kong Regarding Proposed National Security Bill

Letter to Prime Minister of Malaysia Expressing Concern that the Trial and Conviction of Human Rights Activist Irene Fernandez Violates Internationally Recognized Standards of Free Expression

Judicial Administration, Council on

Comments to the New York State Commission on Public Access to Court Records

Report on State Class Actions: Three Proposed Amendments to Article 9 of the Civil Practice Law and Rules

Judicial Administration/Government Ethics

Amicus Brief: *Spargo v. Commission on Judicial Conduct*, re: Permissible Statements and Actions of Judges

Judicial Selection

Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York

Legal Education and Admission to the Bar

Report on Law School Debt and the Practice of Law

Legal Issues Affecting People with Disabilities

Letter to Congress Commenting on Various Recommendations Made in S.1248 Which Would Amend the Individuals with Disabilities Education Act

Legal Issues Pertaining to Animals

Letter to the Commissioner of the New York City Office of Emergency Management Regarding Emergency Procedures for the Benefit of Animals

Comments on HR1976, a Bill to Amend the Internal Revenue Code of 1986 to Treat Charitable Remainder Pet Trusts in a Similar Manner to Charitable Remainder Annuity Trusts and Charitable Remainder Unitrusts

Lesbian, Gay, Bisexual and Transgender Rights

Letter to New York State Senator Thomas Duane and Assemblyman Richard Gottfried Regarding the Same-Sex Marriage Bills

Letter to Congressional Subcommittee on the Constitution Opposing House Joint Resolution 56 Which Would Federalize a Traditional State Function of Defining and Interpreting What Constitutes a Marriage

Mergers, Acquisitions and Corporate Control Contests

Letter to the SEC Regarding Possible Changes in the Proxy Rules, File No. S7-10-03

Letter to the SEC Concerning Disclosure Regarding Nominating Committee Function and Communications Between Security Holders and Boards of Directors

Military Affairs and Justice

Letter to the Inspector General, Joseph Schmitz, Regarding Enemy Prisoners of War and Other Detainees

Letter to William Haynes, General Counsel of the Department of Defense, Commenting on Military Commission Instruction—Crimes and Elements for Trial by Military Commissions

New York City Affairs

Report on Ballot Proposals of the 2003 New York City Charter Revision Commission

Testimony Before the New York City Council on the Charter Revision Commission

New York City Affairs/Election Law/Government Ethics

Letter to Frank Macchiarola, Chair of the 2003 Charter Revision Commission, Regarding the Issue of Non-Partisan Elections

Non-Profit Organizations

Letter to NYS Department of Law, Regarding Proposed Legislation to Amend the Not-for-Profit Corporation Law in Relation to Protections Against Financial Fraud and Abuse

Patents

Amicus Brief: *Integra v. Merck* (regarding the extent to which the common law "experimental use defense" to infringement applies to exploratory research and whether the term "solely for uses reasonably related" in 35U.S.C.§§271(e)(1) should be interpreted to exclude the identification or selection of potential pharmaceutical candidates)

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Formal Opinion 2003-3, Conflicts of Interest; Recordkeeping Policies and Systems for Conflicts-Checking Purposes

Professional Discipline
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Letter to the U.S. Department of State Commenting on the Draft Addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

Real Property Law
Letter to the Financial Crimes Enforcement Network Regarding the Requirement that Financial Institutions Establish Anti-Money Laundering Programs

Securities Regulation
Comments to the SEC on File No. S7-12-03, Rating Agencies and the Use of Credit Ratings Under the Federal Securities Laws

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State Courts of Superior Jurisdiction
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Memo in Support of Bill Amending Section 4545 of the CPLR to Eliminate the Favorable Exception to the Collateral Source Rule for Plaintiffs who are Public Employees

Copies of any of the above reports are available to members by calling (212) 382-6624, or by e-mail, at akhtar@abcny.org.

Leslie H. Arps Memorial Lecture

Are We a Litigious Society? The So-Called Litigation Explosion

*Leon Silverman**

It is an honor to have been invited to give this Eighth Leslie H. Arps Memorial Lecture and to follow such illustrious predecessors as Lewis Powell, Ed Walsh, Jim Oakes, Herb Brownell, and Judges Sweet and Wald.

Les was admitted to the bar in 1931. During his early years at the bar, he was an associate at Root, Clark, Buckner and Ballentine, and during the Second World War he served as an assistant to John Harlan who headed the operation research section of the 8th air force in England. He was appointed a major at Harlan's request and was heavily involved in analyzing the accuracy of bombing and air gunnery—so vital to the success of the 8th air force mission in the European theatres.

Les was a founding partner at Skadden, Arps, Slate, Meagher & Flom and literally set the tone for that eminently successful law firm. Indeed he served as its conscience till his death in July of 1987. His imprimateur has permitted that great institution to continue to grow and flourish.

I was first introduced to Les by his beloved wife. Ruth was most active in The Legal Aid Society—an organization in which I had and continue to have a great interest. Les not only assisted Ruth in her efforts on behalf

* Leon Silverman is Of Counsel to Fried Frank Harris and Jacobson LLP. He is past President of the American College of Trial Lawyers, past President of The Legal Aid Society, and Chairman of the Supreme Court Historical Society.

of the Society but became a dedicated legal aider himself and led his firm to become a most generous sponsor of that organization. Les was a kind, generous, and effective member of the bar and no useful cause was ever put to him that he and his firm did not embrace with enthusiasm.

It is fitting that Skadden Arps has endowed this lecture series in tribute to a great lawyer and eminent litigator.

As I have said, I am honored to have been asked to deliver the Leslie Arps Lecture this year and to share with you some views about the ability of the federal courts to deal with the ever increasing litigation burden which has been put upon them. Having been a litigator during my entire professional life, I have thought from time to time about the litigation burden which is of increasing concern to the bench and bar. Let me first note that there are no quick fixes or easy solutions. If there were, they would have been thought of before now. My observations and suggestions are quite simple and, you may think, simplistic. Nevertheless, I think them worthy of consideration even if found ultimately lacking in merit.

Much has been said and written about the so-called "litigation explosion." It has become the order of the day for lamentation and the foretelling of doom and destruction for a society that has, it is said, elevated litigation into a national past-time. Judges and lawyers have become apologists for what is seen to be a remarkable change from the halcyon days of the small country lawyer who, if the movies are to be credited, always had time to go fishing with his village cronies. In those bucolic days, it is said, did America realize its potential as a democracy. All was good.

Since then, it is argued, we have become a nation gone berserk, in a feeding frenzy of litigation.

As an example, a newspaper commentator wrote:

> across the country, people are suing one another with abandon; courts are clogged with litigation; lawyers are burdening the populace with legal bills. This massive, mushrooming litigation has caused horrendous ruptures and dislocations at a flabbergasting cost to the nation."

This theme was adopted by then Chief Justice Warren Burger and was rather hysterically articulated by Judge Laurence Silberman of the D.C. court of appeals when he spoke of how "the legal process, because of its unbridled growth has become a cancer which threatens the vitality of our form of capitalism and democracy."

I respectfully submit that these critics, doomsayers and hand wring-

ers have little sense of history and little appreciation for the healthy development of our legal institutions.

Those who are apologists are unneccessarily defensive. It is time that we began to understand what this so-called "litigation explosion" is all about and make those adjustments to our institutional ability to cope with the expansion of litigation, that will accommodate society's need for the speedy and effective resolution of disputes, and the realization of those personal rights which our legislatures and courts have provided during these past two centuries.

First—history in an encapsulated and simplistic series of propositions. As our country grew from east to west—settlements outstripped the law. Violence, lawlessness, and the absence of institutional restraints marked the frontier. If anarchy did not characterize our westward expansion, surely law and order were in short supply.

Without laboring this aspect of our national life, let me ask you to go back to your childhood and remember the Saturday afternoon at the movie house—motion pictures in which the good guy wore white and the bad guy wore black—the inevitable confrontation between those who would take the law into their own hands and those who would wait for the arrival of the marshal or the judge. Was this anything more than a reflection there was a national, almost subliminal, recognition of the need to direct dispute resolution from the street to the courthouse? A positive stamp of social approval was given to those who took dispute resolution from the six gun and lynch mob to the dispute resolution procedures which were established by the constitution and legislatures.

More recently, we have determined to provide additional remedies for perceived wrongs against those who had for generations been denied access to the courts. In the last 40 years, the congress has, among other things, enacted laws to prevent employment discrimination; to prevent discrimination in public accommodations; to provide fair housing; and to bring our heretofore dormant political minorities into the political mainstream. As an enlightened society, we have declared that we will no longer tolerate discrimination based on race, creed, sex or age. To provide the disadvantaged with an alternative to the streets for the redress of grievances, we have channelled these problems to the judicial process for determination by our courts.

It is this national effort, to bring disputes to the courts, which I suggest is the root cause of our heavy litigation calendars. Indeed, it is the triumph of this national effort, which curiously forms the basis for the dirges which are increasingly heard. Instead of proclaiming increased liti-

gation a cardinal success of democracy, our doomsayers characterize it as a phenomenon gone wild.

But, is our admittedly heavy litigation burden a recent development? The use of the opprobrious "litigation explosion" would imply a sudden and recent event.

We should remind ourselves that between 1876 and 1895, the number of cases pending in the federal courts doubled. More dramatically, the increase in cases filed between 1900 and 1925 was approximately 400%.

When looking at federal filings since 1900 on a per capita basis, we find large swings. However, if one compares per capita filings in 1925 of .986 per thousand against per capita filings in 1988 of 1.153 per thousand, the growth in that 63-year period does not seem disproportionate. Surely, it does not represent a "litigation explosion." Nor has there been a great change since 1988. In 2002, the per capita number is approximately 1.194 per thousand.

But then whether it is fair to use the concept of explosion is really irrelevant. Perhaps we should ask whether we are an unnecessarily litigious society.

In 1986, Professor Marc Galanter of the University of Wisconsin published a study which included an overview of the types of cases making up the increase in federal court filings from the years 1975 to 1984. Professor Galanter found that the categories of cases primarily involved were prisoner petitions, recovery of overpayments by the federal government and enforcement of judgments, civil rights cases, social security cases and tort cases.

Prisoner petitions had increased by about 61% since 1975. However, this increase merely reflected a growing prison population and not more litigation per prisoner.

With the exception of prisoner petitions, if we view the areas in which litigation increased in the federal courts, we find that this increase may be, in part, a direct result of a deliberate policy on the part of the most recent administrations. According to Professor Galanter's study, "half the total increase is accounted for by two giant increases—recovery cases and social security cases." By recovery cases is meant the recovery of government overpayments and the enforcement of judgments, these cases generally are filed by the government to recover overpayment of veterans benefits and to recover defaulted student loans and the like. These cases were up by an astonishing 6683% between 1975 and 1984.

Another area in which there is an increase reflecting a change in government policy is in social security cases. These cases are up 413% as of

1984. This too reflects a general policy on the part of the administration to curtail or deny benefits to a large number of social security recipients.

Thus, the increases in federal court filings do not necessarily reflect a litigious predisposition on the part of the general public. It can be explained in large part as reflecting an overall government policy.

The only area in which there is an increase apparently belying this conclusion is in the field of torts. Torts filings were up 46% in federal courts between the years 1975 and 1984. Many of these cases were products liability cases, an area in which there has been a dramatic increase and which has borne much of the brunt of the critics' ire. However, a large percentage of these cases are asbestos cases. The dramatic increase in this kind of toxic tort litigation reflects much more the problems of substantial latency periods between exposure to a dangerous product and the manifestation of disease, than to a litigious society. Where a dangerous product has an immediate impact, the number of litigations resulting from its distribution is limited. Dangerous products are changed or withdrawn. With latency periods of as much as forty years, the numbers become enormously increased before the dangerous product is recognized and withdrawn. In sum, Professor Galanter's research revealed that the increase in filings per capita does not necessarily indicate an increase in the proclivity to sue. Rather, it reflects in part a change in the policies of the administration, and in part a reaction to the complexities of modern day society.

Let me turn for a moment to the effect on judges of the burden of the large caseload confronted by the federal courts. The number of cases filed per judge has increased since 1950. Then, there were 425 cases filed per judge. Whereas in 1988 there were 520 cases filed per judge. In 2002, there were 518 filings per authorized judgeship and this does not take into account the services of senior judges which, if taken into account, would reduce the filings per judgeship even more.

However, if you look back further, we find that the federal judge was far more burdened in the less recent past. In 1925, there were close to 900 cases filed per federal judge. It should also be noted that although 514 cases were terminated by judges in 1988 and 615 in 2002, 591 were terminated in 1895, with that number increasing to 1017 in 1925. Perhaps the decrease in cases terminated is due to the fact that modern cases are more complex than their earlier counterparts. Complicated antirust and securities matters were unknown to the turn of the century jurist. Multiparty, multi-district litigations were a thing of the future.

However, on the other side of the ledger, a judge's arsenal has been

supplemented in more recent years. Now, judges have two law clerks, full time secretaries, computers permitting the use of additional internet research tools, courtroom deputies and other members of the courthouse administrative staff who move various filings through the channels. All these additions are welcome and deserved. Indeed, many more are necessary. They ease the federal judge's burden, and ameliorate the weight added by modern day complexities.

Having said all of this, it has been argued that the federal courts are having difficulty in coping with the number of cases now on their plates.

What can be done to alleviate the problems without doing violence to our national objective of channeling the resolution of disputes to our judicial system? There are logically only two ways to deal with the problem. One to reduce input; the other to increase our capacity to expand output.

Let us briefly examine the recurring suggestion to reduce input: eliminate federal diversity jurisdiction, thus keeping all claims based on state law in state courts.

Quite clearly the impact on the federal system would be enormous. Without refining the figures this would lead to a reduction in federal cases of at least 30% and an increase in state court filings of a mere 1%. However, this resolution I respectfully submit would be shortsighted and irresponsible. Our state courts are unable to cope with their present volume of litigation. In this state, it can take years from the institution of a lawsuit until its disposition. Five, six, or seven years to trial is not unknown. It is cynicism of a very high order to say as had one respected federal appellate judge:

> ...some reallocation of cases from federal to state courts will not significantly impair the quality or efficiency of state courts from the levels they are currently achieving, coping as best they can with their heavy caseloads...

In essence it is a philosophy of "devil take the hindmost." It is a policy which will aid the federal courts at the expense of state systems. But most importantly it will exacerbate even further the delays experienced by those who use state courts.

A partial step has already been taken in this direction by increasing the jurisdictional amount in controversy in federal courts from $50,000 to $75,000. However, since in most cases this only results in a change in pushing the number key on the computer from a five zero to a seven five, I do not think the practical effect of the change will be significant.

Another suggestion for reducing diversity jurisdiction is to deny federal court access to resident plaintiffs in diversity cases, leaving it to out-of-state defendants to remove the case to the federal courts. Again, I do not consider this to be of great significance in either reducing the burden of the federal courts or increasing the burden on the state courts. This proposal, which I think has merit, should be judged on other jurisprudential bases and I will say no more about it here.

I should mention alternative dispute resolution techniques as a means for relieving the pressure on federal litigation. They are surely worth encouraging but I doubt that alternative resolutions of disputes will ever have a significant impact on relieving the federal courts of any substantial volume of litigation. And one must always be wary of tampering with a fundamental right of a democratic society, *i.e.* permitting access to a court and jury by those choosing that course for the resolution of disputes. To push too hard to keep cases out of a courtroom is a dangerous expedient and must be monitored constantly.

I should also mention and leave for another time consideration of the establishment of separate Article II courts for various types of cases or expanding the role of administrative agency adjudicatory bodies. These devices would, I believe, have only a small effect on district court dockets but create policy issues beyond the scope of these remarks.

Thus, although I believe we must continue to attempt to reduce input in a responsible manner, I do not believe we will solve the problem by that means.

If reducing input does not do the trick, what then can we do to facilitate the federal court's ability to discharge its duties. The answer which is logically compelled produces such an emotional reaction from lawyers, laymen, legislators and especially judges that one must mention it *sotto voce*.

Since sufficiently reducing input is not a feasible possibility, why then do we shy away from increasing the supply of courts and judges. As I have said, many lawyers, laymen, legislators and judges are opposed. Why? Many lawyers have a vested interest in a system which moves slowly. For many their economic interest is benefited by being able to handle more matters in fewer courts. More courts might result in their inability to handle the same number of cases. However, the overwhelming majority of lawyers and the organized bar are more responsible then that and will respond if the issue is clearly put. Although sleeping giants today, they can be awakened to become an overwhelming force. If we can but agree on what needs to be done. It should be noted that there are presently about

60 vacancies in the ranks of the judiciary. If filled, these new judges would provide substantial relief. But that in itself will not solve the problem.

Laymen and legislators neither appreciate the need for or are willing to face up to the unpleasantness of providing more money to expand a system which continues to limp along and is not at a state where collapse is imminent. In this day when we have elevated tax reduction into an article of faith and treat the notion of increased taxes as virtually treason, a substantial effort at changing attitudes is necessary, a long-term commitment to demonstrating the need and desirability of expanding the judiciary is essential.

The objection of many judges, however, is perhaps the greatest deterrent to expanding judicial facilities. The main argument made so far as I know it is that the quality of the judiciary will suffer.

First, the exclusivity of federal judicial appointment, which has attracted the top of the litigation bar to the bench, will, it is argued, be diminished. In essence, cheapening the currency will make judicial appointment less desirable.

Second, it is further argued that both investigation by the ABA standing committee on the judiciary and the senate judiciary committee will be compromised by the sheer weight of numbers. More unqualified judges will be appointed and the quality of justice will be diminished. I know of no demonstrable evidence which will prove these assertions.

First, let me dismiss summarily the notion that the ABA evaluation committee could not deal with an increased number of candidates. I have never heard anyone in the ABA advance that proposition and as a former member of that standing committee I can personally attest to the capacity and willingness of that dedicated group of lawyers to discharge, with continued distinction, any additional burdens that may be placed upon them. Indeed, the committee is, I am sure, ready, willing, and able to deal with any number of judicial appointments and deal with them effectively.

As for the senate judiciary committee, the increased burden of evaluating more judicial candidates has never been thought to impact on the quality of judges. This despite more than doubling the federal trial courts in the past 40 years. This argument I believe is a makeweight and ought not seriously be considered as a reason to assume that insufficient attention will be paid to the quality of candidates under review.

Second, it is impossible for anyone to insure against bad appointments to the bench, whatever the size of the bench. In 1988, we had 544 judges sitting on the district court. At the end of September 30, 2002, there were 665 district judges authorized. In 1950, there were 214. Other

than the perfectly normal feeling that each of us has that the days of our youth were the halcyon days, there is not a scintilla of evidence that supports the notion that the judges appointed in the past forty years are not at least the equal of their predecessors. I cannot think that any judge now sitting will argue to the contrary. When one thinks of 615 judges as of September 2002 expanded to even 750 judges—and I am being somewhat extravagant—the additional judges to be selected from a bar of over one million lawyers—it cannot be the numbers that will have an adverse impact on quality. The numbers are relatively insignificant. It is the political process which dictates quality and it is the conscience of individual senators and the administration that will impact on quality.

Nor, I submit, will numbers turn off the many fine lawyers who believe judicial service to be the capstone of a legal career. If there is any single impediment to attracting the best of the bar to the bench it is the inadequate compensation afforded judges. Give judges a decent salary and quality candidates will present themselves by the score. Federal trial judges are paid about $150,000 a year. Second year associates at the larger law firms make more. Contrast that with what a British high court judge receives—£145,000, *i.e.* $230,000.

Now I know, from having discussed this issue with my friends on the bench, that increasing the number of judges is a sore subject. Many believe that the office will become *infra dig* if additional judges are appointed. It is no great answer to say I disagree, but disagree I do. Indeed, some fifty years ago when federal judges numbered only about 170, Felix Frankfurter articulated the same fear. But the judiciary has increased more than 300% since then and the quality and prestige of our federal judges is no less today then it was in 1938. Increasing the number of judges will not per se reduce quality, and since the quality of the judiciary will determine its prestige, the post will continue to be sought after by qualified members of the bar.

Thus, having educated a nation to use courts for dispute resolution and having increased individual rights to an unprecedented extent, providing for the enforcement of those rights by the courts, it ill behooves us to lament "a litigious society." Indeed, we should proclaim the success of our efforts and bend those efforts to increasing our ability to discharge these happily assumed burdens. Sensibly diverting input without disrupting the state court system should always be in the forefront of our minds. But increasing the capacity to deal with increasing numbers has an irrefutable logic to it. The great impediment in attracting the highest quality of judge is the failure of the congress to provide adequate compensation.

I believe that sooner or later (and I believe it will be sooner) the congress will increase the compensation of our federal judiciary so that this impediment will be overcome. We will then once again be able to draw from a large pool of judicial talent in numbers sufficient to permit the courts to effectively resolve the disputes brought to them and vindicate the rights which a democratic society continues to provide—for an increasing population.

October 29, 2003

The Orison S. Marden Lecture

A Lawyer's Role in Corporate Governance: The Myth of Absolute Confidentiality and the Complexity of the Counseling Task

Harvey J. Goldschmid[1]

It is wonderful to be back at the House of the Association. The Association of the Bar is one of the nation's great legal institutions, and among institutions, only Columbia Law School competes with it for my deepest respect and affection. I am honored to have been asked to give the Marden Lecture.

Orison Marden, who died in 1975, provided the bar, in the words of Bob MacCrate, who gave this lecture ten years ago, the "model. . . of the lawyer as [a] responsible professional and public citizen."[2] My focus tonight is on what "responsible professional" and "public citizen" should

1. Harvey J. Goldschmid has been a Commissioner at the United States Securities and Exchange Commission since July 2002. He is on leave from the Columbia University School of Law, where he serves as Dwight Professor of Law. The views expressed in the Marden Lecture are Commissioner Goldschmid's and do not necessarily represent the views of the Commission, his fellow Commissioners, or the Commission Staff.

2. Robert MacCrate, Preserving the Marden Legacy: Professional Responsibility in the Twenty-First Century, 48 A.B. Rec. 948, 949 (1993).

mean in the corporate context in this fourth year of the 21st century. I will address the issues in the context of the lawyer's role in the large public corporation, and from a securities law perspective, but much of what I have to say is relevant to non-public corporations, other for-profit entities, and nonprofit institutions.

My lecture tonight comes in three basic parts. First, I will provide a thumbnail sketch of developments in corporate governance during my professional lifetime. Second, again relatively briefly, I will relate pre-Enron developments to corporate governance themes in the Sarbanes-Oxley Act (signed on July 30, 2002) and to the SEC's implementation of Sarbanes-Oxley. Third, I will focus on the lawyer's role in corporate governance. I will address: (i) a lawyer's legal and ethical responsibilities to report serious wrongdoing up the corporate ladder or chain of command; (ii) so-called "reporting out" issues and the myth of absolute confidentiality; (iii) state and federal tensions in the area; and (iv) an area often unaddressed or in the shadows, the lawyer's counseling responsibilities with respect to nonlegal considerations.

Thumbnail Sketch of Corporate Governance Developments

I began teaching at Columbia Law School in the fall of 1970. The great scandal of that time involved the bankruptcy of Penn Central. Penn Central was the nation's largest railroad, our sixth largest industrial corporation, and its bankruptcy was the nation's largest since the 1930s. SEC and congressional reports—and a book aptly entitled *The Wreck of the Penn Central*[3]—charged that Penn Central's directors had received almost no realistic financial information and had little idea of where the company stood. The SEC alleged that the board ignored indications of impending disaster.[4] A director who joined the board in December 1969, when bankruptcy was near, is reported to have said the following about his fellow directors:

> [T]hey sat up there on the eighteenth floor in those big chairs with the [brass name] plates on them and they were a bunch of, well, I'd better not say it. The board was definitely responsible for the trouble. They took their fees and they didn't do anything. Over a period of years, people just sat there.[5]

In the late 1960s and early 1970s, as documented by numerous schol-

3. Joseph R. Daughen & Peter Binzen, The Wreck of the Penn Central (1971).

4. SEC, The Financial Collapse of the Penn Central Company (1972).

5. Joseph R. Daughen & Peter Binzen, supra note 3, at 308.

ars, this Penn Central picture had become too close to the corporate norm.[6] Senior managers dominated, and directors spent roughly 30 to 40 hours a year on the job. I, among others, urged during the 1970s that boards must be far more active and involved; the "board's truly important function is to actively check or monitor management."[7] The corporate governance movement from the early 1970s until pre-Enron 2001 was primarily aimed at creating a serious check and balance function in the board. The American Law Institute's *Principles of Corporate Governance*, published in 1994, set forth a "monitoring model" in which the board would principally: (1) hire, regularly evaluate, compensate, and, where appropriate, fire senior executives; (2) oversee the conduct of the corporation's business; and (3) review and approved (or disapprove) major corporate plans and actions.[8] By 2001, the average director was spending roughly 150 hours on the job.

Sarbanes-Oxley Corporate Governance Themes

The corporate and financial scandals of the 1990s and early 2000s are the most serious that have occurred in this country since the scandals of the Great Depression. We have witnessed a systemic failure. The checks and balances that we thought would be provided by independent directors (acting pursuant to the monitoring model), independent auditors, securities analysts, investment and commercial bankers, rating agencies, and lawyers too often failed. The regulatory checks represented by the SEC, and by federal and state legal constraints, also proved inadequate because, in meaningful part, of scarce resources and overly protective case law and legislation.

My focus tonight is on governance. What went wrong in the boardroom? The facts will be developed as the various criminal and civil cases move forward, but Steve Cutler, the SEC's very able chief of enforcement, observed:

> Yet too often. . . boards were disinterested and disengaged . . . . [T]hey are dominated by associates and friends of senior

6. See Harvey J. Goldschmid, The Governance of the Public Corporation: Internal Relationships, in Commentaries on Corporate Structure and Governance 167 (Donald E. Schwartz 1979).

7. Id. at 174; see Harvey J. Goldschmid, The Greening of the Board Room: Reflections on Corporate Responsibility, 10 Colum. J.L.& S.P. 17 (1973).

8. Principles of Corporate Governance: Analysis and Recommendations ' 3.02 (American Law Institute 1994).

> management. . . . Many outside directors have lacked expertise.[9]

Recently, in August 2003, Richard Breeden, former Chairman of the SEC and Corporate Monitor for WorldCom, reported that the "board . . . consistently ceded power over the direction of the Company to Ebbers. As CEO, Ebbers was allowed nearly imperial reign."[10]

Does this sound like Penn Central in 1969? Does it suggest the failure of the monitoring model? My answers are "yes" and "no." It does sound like Penn Central, but the monitoring model—staffed by active, independent directors—continues to make sense. Indeed, we don't know how many additional Enrons or WorldComs were prevented by active, independent directors. But the board failures do suggest that independent directors cannot carry the load alone. The monitoring model, even when directors are trying to do their jobs properly, is heavily dependent on effective information flows, proper disclosure, and the vigilance of gatekeepers like accountants and lawyers.

Sarbanes-Oxley provides the right fundamental framework for correcting the failings that were found in area after area. In the governance area, Sarbanes-Oxley, and what the SEC has done to build upon it, puts even more weight and responsibility on independent directors. The audit committee, for example, has been greatly strengthened and now is "directly responsible" for the appointment, evaluation, compensation, and replacement of a corporation's independent auditor. The audit committee also now has authority to engage independent counsel, accountants, and other advisers. For public corporations, the oversight of the accounting profession has been dramatically reformed. Auditors are now monitored by the Public Company Accounting Oversight Board, a new regulatory institution, which has effective disciplinary, rulemaking, and quality control powers.

What role should lawyers have in corporate governance? In Orison Marden's terms, what is the lawyer's role when acting as a "responsible professional" and "public citizen" today?

A Lawyer's Role in Corporate Governance

There is, I believe, a broad consensus that lawyers should play a critical gatekeeping role in large public corporations. The term "gatekeeper"

9. Stephen M. Cutler, Remarks at the University of Michigan Law School (Nov. 1, 2002), available at http://www.sec.gov/news/speech/spch 604.htm.

10. Richard C. Breeden, Restoring Trust 1 (Aug. 2003).

suggests a guardian with independent professional responsibilities, including a responsibility for protecting the institution. Certainly, this was a virtually unanimous view of Congress when, in Section 307 of Sarbanes-Oxley, it required the SEC to establish a system for lawyers to report wrongdoing up the corporate chain of command or ladder and to establish other "minimum standards of professional conduct."

The rationale for this critical gatekeeping role relates back, at least in part, to my earlier observation about the need for independent directors to receive adequate information flows and proper disclosure. Ira Millstein, an active member of the Association of the Bar and an internationally recognized expert on corporate governance, recently answered a question about how "such a mess [could have been] created" as follows:

> As agents [*i.e*, directors] serving the corporation, we were overcome by self-interest in the extreme, or greed . . . . [Directors] looked away as accountants, bankers and lawyers replaced responsibilities to the corporation and its shareholders with loyalty to the management team that hired them.[11]

Few things are more clear in the ethical codes of all of our states than that the entity is the client of a lawyer and not those who mange a corporation.[12] As Bill Donaldson, the current Chairman of the SEC, recently put it: "The basic principle that [Section 307 and the SEC's] rules build upon is unassailable and needed reinforcement—the client of a lawyer representing a corporation is the corporation—and not the CEO, or other members of management, or the company officer doing the deal on which the lawyer is working."[13] Another basic legal and ethical proposition should also be carefully remembered by the bar: a lawyer must not participate in, or assist a client in, the commission of a fraud.

Reporting Up

Congress in Section 307 of Sarbanes-Oxley made the following five basic policy decisions.

1. A "reporting up" system would significantly enhance the flow of key legal information (involving various "reasonably likely" material vio-

11. Ira M. Millstein, Keynote Address to the NACD Annual Corporate Governance Conference (Oct. 20, 2003).

12. Model Rule of Professional Conduct 1.13a; EC S-18 of the Model Code of Professional Responsibility.

13. William H. Donaldson, Remarks to the Practicing Law Institute (Nov. 6, 2003).

lations) to independent members of the board. "Reporting up" also empowers lawyers. I have long read Model Rule of Professional Conduct 1.13, and New York law, as strongly suggesting a "reporting up" requirement. Any ambiguity in Model Rule 1.13 was removed by the American Bar Association's amendments in August 2003. A lawyer is now clearly required—even in all those areas not covered by Sarbanes-Oxley—to report material violations up to a corporation's highest authority.

2. Consistent with corporate governance developments over the past 30 or so years—and consistent with many other Sarbanes-Oxley provisions (*e.g*, involving audit committees)—certain important legal issues that could materially harm the corporation must now be resolved by independent, dispassionate directors and not by managers alone. As must be obvious, I have no doubt about the validity and wisdom of this approach.

3. Sarbanes-Oxley in Section 307, and elsewhere, has placed a sensible emphasis on corporations and law firms establishing effective programs and procedures to make a "reporting up" process work. A recognition of the need to establish such programs and procedures in corporations and law firms led the SEC to postpone the effective date for "reporting up" from January 2003 until August 5, 2003.

4. Although not a matter free of legitimate controversy, Congress took a dramatic step in Section 307 when it mandated "reporting up" as a matter of substantive federal law. As of August 5, available for violations of Section 307 are the Commission's traditional broad spectrum of remedies, penalties, and other sanctions.

5. Contrary to the views of many commenters to the Commission, Congress clearly contemplated additional SEC rulemaking—beyond "reporting up"—under Sarbanes-Oxley. Section 307 expressly states that the "Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys . . . including a rule . . .[requiring 'reporting up']."

Obviously, the words "minimum standards" and "including" are critical to any serious the consideration of the various "reporting out" issues that I am about to discuss.

Reporting Out

Two things have always been clear to me about "reporting out" issues (*i.e.*, reporting outside the corporation when its board has failed to stop ongoing financial fraud or other serious violations). First, the bar, during my professional lifetime, has never had an absolute prohibition against "reporting out." Rule 1.6 of the Model Rules of Professional Conduct,

since it was promulgated by the A.B.A. in 1983, has always permitted "reporting out" to prevent acts that a lawyer reasonably believes are likely to result in death or substantial bodily harm. At least 40 states—including New York—have rejected the narrowness of Model Rule 1.6. The myth of absolute confidentiality protection is also demonstrated by traditional—widely accepted—"reporting out" dispensations for client perjury, a lawyer's self-defense, and various rectification scenarios.

Second, "reporting out" issues, while of large emotional concern to many in the bar, are of considerably less practical importance than the "reporting up" approach now accepted almost everywhere in the nation. I believe that it will be a most unusual circumstance (*e.g.*, the OPM hard-core fraud situation in New York during the 1970s or the recent Spiegel, Inc. situation[14]) where reporting up to senior executives and independent directors will not stop wrongdoing or reckless behavior.

But assume securities fraud or corporate looting is occurring. Involved is serious ongoing—present and future—wrongdoing. And, contrary to what I believe will occur 90-plus percent of the time, the senior officers and independent directors have refused to stop the wrongdoing.

In such circumstances, for me, an absolute emphasis on confidentiality is incomprehensibly out of balance. Think of the enormous human cost of Enron, WorldCom, and other corporate scandals on employment, college plans, retirement plans, etc. Are the economic and psychological harms of those scandals—to thousands upon thousands of individuals and families—really less deserving of protection than threats to the life or physical health of one individual? An absolute emphasis on confidentiality for lawyers in financial fraud situations is contrary to the duties that the securities and corporate laws now place on accountants and corporate directors.[15]

The modern answer to old Model Rule 1.6's absolutism with respect to financial fraud is that both the SEC (in its January rulemaking) and the A.B.A. (in August 2003) have rejected it. The SEC's Section 205.3(d)(2) provides that an attorney "may reveal . . .confidential information" to "prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors." There is also a "noisy withdrawal" provision (Section 205.3

14. See Jonathan Weil & Cassell Bryan-Low, Report Bolsters SEC's Proposal for Attorneys, Wall St. J., Sept 15, 2003 at C1.

15. See, e.g., 15 U.S.C.S.' 78j-1(1999 & Supp. 2003); Francis v. United Jersey Bank, 87 N.J. 15, 432 A.2d 814 (Sup. Ct. 1981); 1 Principles of Corporate Governance: Analysis and Recommendations 134-98 (American Law Institute 1994).

(d)(2)(iii)) to rectify a misuse of an attorney's services. After the A.B.A.'s August meeting, it and the SEC are in roughly the same position on these issues.

The key open issue for the SEC with respect to "reporting out" relates to whether to require mandatory—as opposed to permissive—reporting out. This would involve the kind of "noisy withdrawal"—really an alerting mechanism—contemplated in the SEC's November 2002 proposing release. Two alternative approaches—either a company reporting requirement or a combined company, but if not, lawyer "reporting out" requirement—are now under consideration. The combined company and lawyer approach would, if adopted, parallel the approach we now use for accountants under Section 10A of the 1934 Act.

The issues related to mandatory reporting out are complex and difficult; they will probably be addressed by the Commission this winter or spring. One main concern would be to avoid undue interference with attorney-client relationships. On the other hand, what are the odds of permissive "reporting out" taking place for even hard-core financial wrongdoing? At least 40 states have long allowed some kind of permissive reporting out, but there is almost no empirical or anecdotal evidence to suggest that lawyers have acted on the invitation in the financial fraud area.

Federalism Issues

Congress, in enacting Section 307 of Sarbanes-Oxley, acted under its constitutional authority to regulate commerce. Lawyers practicing before the SEC, for public corporations or mutual funds, are surely subject to federal regulation. It is true that historically lawyers have largely been regulated at the state level. But in the past, how many disciplinary actions for failure to "report up" have been brought? How much serious attention can state ethics authorities be expected to give to lawyer or law firm failures in the "reporting up" and "reporting out" areas?

In my view, no serious argument can be made that Congress lacked authority to enact Section 307 and federalize applicable standards. Section 307 and the SEC's professional conduct rules make enforcement realistic; they create accountability and deterrence; in corporate governance terms, they will effectively enhance information flows to the board.

Clearly, the SEC's January 2003 rulemaking, establishing mandatory rules for "reporting up," and permissive rules for "reporting out," now constitutes the law of the land. Last I looked, the Supremacy Clause remains a fundamental part of the United States Constitution. Yet at least one state seems to be in rebellion.

On July 23, 2003, Giovanni Prezioso, the SEC's General Counsel, with the full support of the Commission, wrote to the Washington State Bar Association. He warned that an "Interim Ethical Opinion," reaffirming Washington State's version of old Model Rule 1.6 (which is narrower than the SEC's permissive "reporting out" rule), was preempted in areas covered by the SEC's rule. The Washington State Bar Association claims that the ethics opinion would not frustrate federal policy because a lawyer can comply with both the permissive SEC rule and the narrower Washington rule by adhering to the latter. But the Commission is frustrated. The Washington State Bar Association is trying to prevent its lawyers from doing what federal law permits.

I believe that the position of the Washington State Bar Association is legally untenable, and its ethical opinion constitutes an essentially lawless act. In policy terms, the Washington State Bar Association is acting contrary to the positions of the SEC, at least 40 states, and, since August, the American Bar Association. It will be a tragedy, for which the Washington State Bar Association will have to accept substantial responsibility, if a Washington State lawyer—who would have "reported out" ongoing, serious financial fraud—fails to do so on the basis of the Bar Association's deeply flawed ethical opinion.

Counseling With Respect to Nonlegal Considerations

Beyond obedience to the law, the modern public corporation—if it is to be effective in the long run—should be operating with an ethical culture. There is a key role for lawyers in guiding corporations to do the "right thing." Traditionally, legal ethical codes have permitted a lawyer, in exercising "independent professional judgement," to render advice not only about the law, but also to take "other considerations such as moral, economic, social and political factors" into account.[16] But lawyers have often been reticent about offering nonlegal advice. Today's ethical codes should work harder to encourage the provision of such advice.

One of my favorite teaching hours at Columbia involves a complex corporate-securities-tax problem that raises numerous conflict-of-interest issues for an insurance CEO. After exhaustive analysis, students who came to class certain about duty of loyalty wrongs recognize that a series of transactions will pass muster under applicable precedents. When the students are ready to move on to new material, I ask why the CEO resigned (the problem is based on real facts) when the transactions came to the

16. Model Rule of Professional Conduct 2.1.

public's attention. The answer, of course, is that the shareholders and public reacted to ethical concerns and loyalty dangers even if technical analysis would demonstrate that there was no legal vulnerability. Should a lawyer today feel comfortable if he or she had not alerted the insurance CEO about nonlegal concerns?

Similar contemporary questions can be posed about, for example, lawyers counseling financial institutions providing very questionable financial products, even when the products are legally permissible, which has not always been the case. Again, the same questions are raised for those counseling on CEO compensation, whether at a public corporation or at the New York Stock Exchange.

Except in special circumstances (*e.g.*, where a sophisticated legal client demands only technical legal advice), the day of narrowly couched technical legal advice should be over. Orison Marden's "responsible professional and public citizen," in today's world, has at least an aspirational obligation to counsel clients—beyond law—about practical considerations, likely public perceptions and reactions, and generally, about doing the right thing.

I am delighted to be home again. It has been a great pleasure and honor being with you tonight.

November 17, 2003

Three Proposed Amendments to Article 9 of the Civil Practice Law & Rules

The Council On Judicial Administration

Under the sponsorship of the Council on Judicial Administration, a working group of representatives from the Council and the Association's Committees on Consumer Affairs, Litigation, State Courts of Superior Jurisdiction, and Federal Courts considered ways to improve the administration of class actions in state courts. Based on the working group's research, the Council proposes three amendments to the New York Civil Practice Law and Rules (CPLR) that would bring New York class action law into greater harmony with principles adopted in other states and by the federal courts. If accepted by the Legislature, these amendments would

(i) overrule a common law presumption that disfavors class actions against governmental entities and officials;

(ii) remove from CPLR 902 the requirement that class certification motions be brought within sixty days after expiration of the time for a responsive pleading, and substitute the "as soon as practicable" standard currently used in federal practice and in most other jurisdictions; and

(iii) clarify that the settlement of any action pleaded as a class action requires judicial approval, even if no class has been certified, but eliminate the current requirement of CPLR 908 that notice be given to the putative class of pre-certification settlements, leaving such notice to judicial discretion.

I. CPLR ARTICLE 9 SHOULD BE AMENDED TO PERMIT CLASS ACTIONS AGAINST GOVERNMENTAL DEFENDANTS

A. Introduction

While class certification in actions against governmental defendants often affords the most effective remedy, New York courts have denied or delayed class certification until it is too late to be effective based on the "governmental operations rule." This judicially created rule presumes that class certification is not the "superior" method for "fair and efficient adjudication." CPLR 901(a)(5). Thus the governmental operations rule severely restricts class actions in cases involving governmental operations, on the theory that governmental compliance and *stare decisis* will adequately protect subsequent litigants. *Jones v. Berman*, 37 N.Y.2d 42, 57, 371 N.Y.S.2d 422, 433 (1975).

Rivera v. Trimarco, 36 N.Y.2d 747, 749, 368 N.Y.S.2d 826, 827 (1975), first propounded the government operations rule, without citing any prior authority, and *Jones* immediately adopted it, citing *Rivera*. The rule persisted even though both decisions predated the new Article 9 enacted in 1975. Once the new Article 9 became effective, the governmental operations rule articulated in *Jones* and *Rivera* should have been obsolete. *E.g.*, *Long Is. Coll. Hosp. v. Whalen*, 84 Misc. 2d 637, 639, 377 N.Y.S.2d 890, 892 (Sup. Ct. Albany Co. 1975). Yet the New York courts have not recognized the rule's demise; many courts simply have reiterated the rule that class certification against governmental defendants is unnecessary, just assuming that they will apply a ruling in an individual action to all persons similarly situated. Conspicuously absent is any explication of or support for this conclusion.

The new Article 9 was modeled specifically after Federal Rule of Civil Procedure 23. Under Rule 23, however, the federal courts have routinely granted class certification at the outset of litigation involving governmental operations, so long as the usual class action criteria have been met.

B. The Federal Courts' Rejection of the Governmental Operations Rule

In applying Rule 23, federal courts have rejected the proposition that class certification against governmental defendants is unnecessary because

any relief granted in an individual case has classwide effect. *E.g.*, *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 391 (S.D.N.Y. 2000); *Brown v. Giuliani*, 158 F.R.D. 251, 269 (E.D.N.Y. 1994); *Cutler v. Perales*, 128 F.R.D. 39, 46 (S.D.N.Y. 1989). As the federal courts have observed, the assumption that class certification is unnecessary is particularly inapplicable where plaintiffs seek to require governmental defendants to take affirmative steps to remedy unlawful conditions and implement lawful operations, and a wide ranging course of conduct encompassing various practices may be involved. *Reynolds v. Giuliani*, 118 F. Supp. 2d at 391; *Monaco v. Stone*, 187 F.R.D. 50, 63 (E.D.N.Y. 1999); *Cutler v. Perales*, 128 F.R.D. at 46; *Ashe v. Board of Elections*, 124 F.R.D. 45, 51 (E.D.N.Y. 1989). Class certification has been considered a useful vehicle for presenting the court broader information concerning the practices to be remedied and thus defining the parameters of effective relief. *Ashe v. Board of Elections*, 124 F.R.D. at 51; *Koster v. Perales*, 108 F.R.D. 46, 54-55 (E.D.N.Y. 1985).

Even if the relief is not aimed at affirmatively changing governmental practices, but would by its nature inure to the benefit of others similarly situated, class certification is more than a formality. First, when a plaintiff seeking declaratory and injunctive relief obtains a favorable ruling, others similarly situated may use the ruling as precedent, but that tool is a far cry from the ability, as class members, to use the ruling as an enforceable order in their favor. *Brown v. Giuliani*, 158 F.R.D. at 269.

Second, class certification protects against mootness, a particular threat in litigation against governmental defendants. *Greklek v. Toia*, 565 F.2d 1259, 1261 (2d Cir. 1977); *Reynolds v. Giuliani*, 118 F. Supp. 2d at 391-92; *Monaco v. Stone*, 187 F.R.D. at 63; *Jane B. v. New York City Dep't of Soc. Servs.*, 117 F.R.D. 64, 72 (S.D.N.Y. 1987). Governmental defendants are particularly well positioned to make an exception for the named plaintiff to avoid judicial review of the challenged practice or procedure. The government's ability to moot individual claims to avoid addressing systemic deficiencies in governmental practices demonstrates why class actions are especially necessary in cases involving governmental operations. *Brown v. Giuliani*, 158 F.R.D. at 269. Moreover, Plaintiffs aggrieved by an encounter with government are likely to be a fluid class whose subjection to unlawful governmental conduct may be transitory, yet severely harmful. *Monaco v. Stone*, 187 F.R.D. at 60; *Koster v. Perales*, 108 F.R.D. at 54. Class certification, by protecting against mootness, promotes judicial economy by preventing subsequent actions to adjudicate the same issues. *Greklek v. Toia*, 565 F.2d at 1261; *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D.N.Y. 1986).

In sum, *stare decisis* does not adequately protect putative class mem-

bers for it does not guarantee that governmental defendants will change standards or procedures to ensure compliance with a judgment on behalf of potential plaintiffs. *Morel v. Giuliani*, 927 F. Supp. 622, 634 (S.D.N.Y. 1995). A single judgment is not an effective way to afford relief to all similarly situated persons, because governmental defendants may not be counted on, any more than other defendants, to conform their conduct for all persons in response to a judgment for one individual. This is especially true where the governmental "defendants deny liability and deny that any unlawful policies exist or that any lawful policies are implemented in an improper manner." *Koster v. Perales*, 108 F.R.D. at 54 & n.8. Rather, to enforce rights based on *stare decisis*, future plaintiffs typically must bring independent actions. *Cutler v. Perales*, 128 F.R.D. at 46.

Only when defendants withdraw a challenged policy or procedure or change it to remedy ongoing illegality will a classwide judgment be unnecessary. Otherwise, however, a class action is the preferable means to guarantee all class members easy enforcement of any judgment and prompt relief. *Bacon v. Toia*, 437 F. Supp. 1371, 1383 n.11 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1044 (2d Cir. 1978); *Brown v. Giuliani*, 158 F.R.D. at 269; *Cutler v. Perales*, 128 F.R.D. at 47; *Koster v. Perales*, 108 F.R.D. at 54-55 & n.8.

C. The State Courts' Perpetuation of the Governmental Operations Rule

The governmental operations rule rejected by the federal courts, but followed by the New York courts, rests on two presumptions. First, it is presumed that government is a special litigant, imbued with a public trust, who will voluntarily apply court rulings to similarly situated persons. Second, it is presumed that, should governmental behavior not fulfill this expectation, the aggrieved individuals will possess the knowledge and means to obtain relief in court through reliance on *stare decisis*. *Jiggetts v. Grinker*, 148 A.D.2d 1, 21, 543 N.Y.S.2d 414, 425 (1st Dep't 1989), *rev'd on other grounds*, 75 N.Y.2d 411, 554 N.Y.S.2d 92 (1990); *McCain v. Koch*, 117 A.D.2d 198, 221, 502 N.Y.S.2d 720, 754 (1st Dep't 1986). The federal courts, by contrast, do not recognize these presumptions or require their rebuttal.

Yet in the state courts just as often as in the federal courts, such presumptions prove unwarranted. Only in hindsight is it evident that the state court should not have applied the governmental operations rule, but should have granted class certification at the outset of the litigation.

1. Governmental Disobedience

The first presumption, of governmental willingness to obey court

decisions, may be overcome by proof of unwillingness and of actual, prior, usually repeated, disobedience to court orders. *E.g.*, *Chalfin v. Sabol*, 247 A.D.2d 309, 311, 669 N.Y.S.2d 45, 46 (1st Dep't 1998); *Varshavsky v. Perales*, 202 A.D.2d 155, 156, 608 N.Y.S.2d 184, 185 (1st Dep't 1994); *Lamboy v. Gross*, 126 A.D.2d 265, 273-74, 513 N.Y.S.2d 393, 398 (1st Dep't 1987); *Davis v. Perales*, 137 Misc. 2d 649, 655, 520 N.Y.S.2d 925, 929 (Sup. Ct. Kings Co. 1987).

> The governmental operations rule assumes that government officials will understand that they are bound by *stare decisis* and will follow precedent. Nevertheless, when the basis for this assumption is found to be shaky, if not completely missing, then the hesitancy of the court to treat the matter as a class action begins to disappear.

Ode v. Smith, 118 Misc. 2d 617, 619-20, 461 N.Y.S.2d 684, 686 (Sup. Ct. Wyoming Co. 1983). The New York courts impose an unduly high standard for demonstrating unwillingness to follow legal mandates. Governmental defendants must have actually flouted prior court orders. *Legal Aid Soc. v. New York City Police Dep't*, 274 A.D.2d 207, 213, 713 N.Y.S.2d 3, 8 (1st Dep't 2000).

Ironically, plaintiffs need classwide disclosure to establish defendants' "pervasive pattern of failure" to obey court ordered mandates. *Heard v. Cuomo*, 142 A.D.2d 537, 539, 531 N.Y.S.2d 253, 254 (1st Dep't 1988), *aff'd*, 80 N.Y.2d 684, 594 N.Y.S.2d 675 (1993). Yet classwide disclosure will not be forthcoming without class certification. Thus, without certification in the first place, plaintiffs cannot even take the steps to show the classwide violations necessary to class certification.

Beyond disclosure, the governmental operations rule further poses an impediment to any monitoring of whether government is applying *stare decisis*. Without class certification a court is unlikely to impose any monitoring and reporting obligations, whereas a judgment for a plaintiff class may provide for monitoring and reporting to ensure that the required relief in fact is afforded to class members.

2. Inadequate Protection Afforded by *Stare Decisis*

The second presumption, that individuals will be adequately protected by *stare decisis* when governmental recalcitrance necessitates resort to litigation, may be overcome by showing that individual actions are impracticable. To surmount this second hurdle, an individual plaintiff must demonstrate that claims at issue are too small to justify litigation, *Tindell v.*

Koch, 164 A.D.2d 689, 695, 565 N.Y.S.2d 789, 792 (1st Dep't 1991); *Ammon v. Suffolk County*, 67 A.D.2d 959, 960, 413 N.Y.S.2d 469 (2d Dep't 1979), or that the would-be plaintiffs "are not likely to seek help or gain access to the courts because of socio-economic factors," such as age, poverty, or disability. *Davis v. Perales*, 137 Misc. 2d at 655, 520 N.Y.S.2d at 929. *See Tindell v. Koch*, 164 A.D.2d at 695, 565 N.Y.S.2d at 792; *Lamboy v. Gross*, 126 A.D.2d at 274, 513 N.Y.S.2d at 398; *Brown v. Wing*, 170 Misc. 2d 554, 560, 649 N.Y.S.2d 988, 991-92 (Sup. Ct. Monroe Co. 1996), *aff'd*, 241 A.D.2d 956, 663 N.Y.S.2d 1025 (4th Dep't 1997); *Goodwin v. Gleidman*, 119 Misc. 2d 538, 544 (Sup. Ct. N.Y. Co. 1983).

Thus the individual plaintiffs, although representatives of a putative class who by definition face barriers to prosecuting or defending their rights, must on their own amass a record of governmental intransigence and unwillingness to comply with the law. All the while, the putative class members remain uniquely ill-situated to take advantage of *stare decisis* to obtain compliance and have little meaningful recourse to the judicial process apart from the ongoing action. *Bryant Ave. Tenants' Ass'n v. Koch*, 71 N.Y.2d 856, 859, 527 N.Y.S.2d 743, 745 (1988); *Seittelman v. Sabol*, 217 A.D.2d 523, 526, 630 N.Y.S.2d 296, 298-99 (1st Dep't 1995). By the time class certification is achieved, if ever, irreparable damage may well have been done.

D. An Example

N.Y.C. Coalition to End Lead Poisoning v. Giuliani, 245 A.D.2d 49, 668 N.Y.S.2d 1 (1st Dep't 1997) ("*NYCCELP*"), is but one poignant example. The members of the class, repeatedly denied certification until over 12 years into the litigation, were children 0-6 years old. Disproportionately, they belonged to racial or ethnic minorities and New York City's poorest populations. It was undisputed that hundreds of thousands already had been poisoned by exposure to lead paint—the very danger from which the litigation successfully protected the individual plaintiffs. At the same time, new poisonings occurred in the city at the rate of 10,000-15,000 per year.

Moreover, lead poisoning, except at the higher levels of toxicity, does its damage silently. It produces few symptoms readily identifiable as caused by lead exposure or does so only late in the disease process, after extensive irremediable damage has been done.

Stare decisis did nothing to prevent children's lead poisoning. For children already poisoned, even the most successful invocation of the doctrine has serious shortcomings as a remedy. Reliance on the governmental defendants' obedience to the law in such a case entrusted the

health and safety of hundreds of thousands of children to parties whose willingness and ability to obey was unproved.

The plaintiffs in *NYCCELP* sought to remedy a condition that posed an immediate threat, particularly to children under six years old. *Id.*, 245 A.D.2d at 52, 668 N.Y.S.2d at 1. *See Brown v. Wing*, 170 Misc. 2d at 560, 649 N.Y.S.2d at 991-92, *aff'd*, 241 A.D.2d 956, 663 N.Y.S.2d 1025. They could not await either individual determinations or the 12 years it took to obtain repeated injunctions, show repeated disobedience to them, and defend each of these rulings on appeal, before they obtained the necessary classwide relief. *NYCCELP*, 245 A.D.2d at 51-52, 668 N.Y.S.2d at 1.

Heeding the lesson taught by *NYCCELP*, the court in *Brad H. v. City of New York*, 185 Misc. 2d 420, 425, 712 N.Y.S.2d 336, 341 (Sup. Ct. N.Y. Co.), *aff'd*, 276 A.D.2d 440, 716 N.Y.S.2d 852 (1st Dep't 2000), at the outset of the litigation, certified a class of mentally ill prison inmates requiring discharge planning before their release and granted a preliminary injunction, because they faced "an immediate threat from the condition for which a remedy is sought."

> If the class plaintiffs are not afforded the relief sought, . . . without any adequate discharge planning, they face the immediate threat of psychological relapse, with a greater likelihood of the concomitant return to lives of drug and/or alcohol abuse, homelessness, lawlessness, and danger to themselves and/or others. *Id.*

E. The Solution

Isolated instances of persistent, herculean litigation have made inroads into the governmental operations rule. Carving out exceptions to the rule, however, does not solve the problem. Exceptions are made with little consistency and no more authority than when the Court of Appeals first announced the rule. *E.g.*, *Bryant Ave. Tenants' Ass'n v. Koch*, 71 N.Y.2d at 859, 527 N.Y.S.2d at 745. The rule and exceptions to it are applied inconsistently. In *Seittelman v. Sabol*, 217 A.D.2d at 526, 630 N.Y.S.2d at 298-99, for example, the First Department concluded:

> The government operations rule does not prohibit class certification where . . . defendants have failed to propose any other form of relief that even purports to protect the right of indigent Medicaid recipients to retroactive reimbursement of which they have been wrongfully deprived.

Likewise, in *Mitchell v. Barrios-Paoli*, 253 A.D.2d 281, 283, 687 N.Y.S.2d 319, 321 (1st Dep't 1999), the First Department found that the New York

City Department of Social Services assigned an alleged class of public assistance recipients to Work Experience Program ("WEP") jobs incompatible with the recipients' disabilities, while failing to give the recipients adequate notice of their rights to challenge the assignments. *Id.*, 253 A.D.2d at 290, 687 N.Y.S.2d at 325. This practice led to wrongful discontinuance of assistance for WEP noncompliance. *Id.*, 253 A.D.2d at 283, 288, 687 N.Y.S.2d at 321, 324. Although the relief ordered, to provide adequate notices and minimize incompatible assignments in the future, did nothing to protect recipients' rights to retroactive reimbursement of the assistance wrongfully discontinued, the court decertified the class, concluding class certification was "unnecessary in this context." *Id.*, 253 A.D.2d at 283, 687 N.Y.S.2d at 521. The court failed to explain how "the injunctive relief we uphold . . . and any future relief which may be awarded" to the named plaintiffs would adequately provide retroactive reimbursement "in like situations." *Id.*, 253 A.D. 2d. at 292, 687 N.Y.S.2d at 324.

Moreover, the identified premise for denying class certification is that both *stare decisis* and class relief ensure the same result, "that all similarly situated persons will receive the relief ordered by the court." *Id.* Yet *stare decisis* provides no means for identifying persons similarly situated.

Despite a few exceptions like *Seittelman*, state courts remain unwilling to certify a class where governmental operations are involved, reasoning simply as in *Mitchell* that the doctrine of *stare decisis* provides adequate protection to putative class members. The rule fashioned by the Court of Appeals, that in cases against governmental defendants a class action is *not* "superior to other available methods for the fair and efficient adjudication of the controversy," CPLR 901(a)(5), will continue unless changed by statute. *Jones v. Berman*, 37 N.Y.2d at 57, 371 N.Y.S.2d at 453. Recent decisions confirm the rule's ongoing influence and continue to frustrate enforcement of individuals' rights against the government, especially where the poor are affected. *Jamie B. v. Hernandez*, 274 A.D.2d 335, 336-37, 712 N.Y.S.2d 91, 92-93 (1st Dep't 2000); *Legal Aid Soc. v. New York City Police Dep't*, 274 A.D.2d at 213, 713 N.Y.S.2d at 8. Only an amendment to CPLR Article 9, prohibiting denial of class certification based on this rule, will allow the courts to monitor and control the conduct of the parties in the litigation.

1. Retroactive Relief

Even where a judgment in favor of the individual plaintiff may in fact protect *subsequent* or *future* litigants under *stare decisis*, it will be of little help to persons who were previously adversely affected by a governmental policy. *See Tindell v. Koch*, 164 A.D.2d at 695, 565 N.Y.S.2d at 793.

Stare decisis, of course, is available only after the final determination has been reached in any action not certified as a class action. Potential class members adversely affected by the policy while the action is pending obtain no relief, unless they commence individual actions to preserve their rights to the relief sought in the pending action. *See Lamboy v. Gross*, 126 A.D.2d at 274, 513 N.Y.S.2d at 398. Thus class certification is superior to *stare decisis* in ensuring relief to members of the proposed class who already have been or will be affected by a governmental policy before a final decision in the action because it is the *only* vehicle to implement retroactive relief to persons similarly situated. *Bryant Ave. Tenants' Ass'n v. Koch*, 71 N.Y.2d at 859, 527 N.Y.S.2d at 745; *Seittelman v. Sabol*, 217 A.D.2d at 526, 630 N.Y.S.2d at 298-99; *Dudley v. Kerwick*, 84 A.D.2d 884, 885, 444 N.Y.S.2d 965, 967 (3d Dep't 1981); *Brown v. Wing*, 170 Misc. 2d at 560, 649 N.Y.S.2d at 991-92, *aff'd*, 241 A.D.2d 956, 663 N.Y.S.2d 1025.

Often the persons similarly situated to the plaintiff are children or elderly persons, poor, or disabled—unable because of their physical or financial condition to pursue individual actions. Even where proposed class members do not fall into these vulnerable categories, most individuals simply do not have the wherewithal to commence or prosecute their own actions. The amount collectively at stake may be great, but the amount for each may be small and too costly to litigate. For these reasons as well, a class action is the best method to protect these potential class members.

2. Judicial Economy

Even if children or elderly, poor, or disabled persons obtain legal representation for their individual claims, the refusal to certify a class invites a multiplicity of parallel lawsuits seeking identical relief, producing potentially inconsistent rulings by different judges, and causing an unnecessary expenditure of time and resources, "an affront to basic principles of judicial economy." *Brown v. Wing*, 170 Misc. 2d at 561, 649 N.Y.S.2d at 992, *aff'd*, 241 A.D.2d 956, 663 N.Y.S.2d 1025. Government lawyers, legal services, other members of the bar, and the courts repeatedly are forced to litigate and decide the same legal issues. *See Greklek v. Toia*, 565 F.2d at 1261; *Alston v. Coughlin*, 109 F.R.D. at 612. The court system, the bar, and the public must engage in repeated and duplicative separate actions to recover each affected individual's share of the same relief. *Dudley v. Kerwick*, 84 A.D.2d at 885, 444 N.Y.S.2d at 967.

These inefficiencies outweigh the time and expense attributed to class actions many times over. Since, absent class certification, separate actions are the only means for potential class members to safeguard their rights,

certification is vastly more efficient. *See New York City Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 206, 616 N.Y.S.2d 1, 6-7 (1994). Since efficiency is a primary purpose for class action litigation, an amendment to the rule should be embraced, rather than resisted.

3. Equal Treatment of All Class Action Litigants, Both the Government and the Public

Finally, the reality is that, despite the courts' assumption that governmental parties follow the rules of law laid down by court decisions, governmental entities typically apply plaintiffs' successes in non-class actions only to the named plaintiff(s) rather than to others similarly situated. Application of the governmental operations rule assumes that litigation against the government concerns a disputed interpretation of the law, rather than noncompliance with established law. Ordering the government to comply with the law is useless when the government continually disobeys it.

All empirical data from litigation against governmental defendants demonstrates no reason to distinguish between the government and other defendants in certifying class actions. No supportable rationale dictates that members of the public affected by governmental operations should be afforded less protection than parties affected by private conduct.

On the other hand, every reason why governmental defendants are entitled to protection against unnecessary class actions is addressed by the prerequisites that must be met, and factors that must be considered before class certification in any action. CPLR 901(a)(1)-(5), 902(1)-(5). Any situation that fails to meet one or more of the prerequisites will not be accorded class status.

G. Conclusion

Eliminating the government operations rule would not affect the government's right to defend against class certification. All the means necessary to curtail unwarranted or abusive class actions against the government are available based the statutorily mandated criteria for class certification.

Because the assumptions on which the governmental operations rule is premised are not valid for all the reasons discussed above, the following amendment to CPLR 902 is warranted:

> Once the other prerequisites under section 901(a) have been satisfied, class certification shall not be considered an inferior method for fair and efficient adjudication on the grounds that the action involves a governmental party or governmental operations.

II. CPLR 902's 60-DAY TIME REQUIREMENT FOR FILING A MOTION FOR CLASS CERTIFICATION SHOULD BE AMENDED TO CONFORM WITH THE PREVAILING NATIONAL RULE

CPLR 902 begins by providing that "[w]ithin sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in a action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained." This mandatory 60-day motion requirement is virtually unique in American class action procedure. The vast majority of states follow Federal Rule of Civil Procedure 23, which provides that the court shall address class certification "[a]s soon as practicable after the commencement of an action brought as a class action." Fed. R. Civ. P. 23(c)(1). *See generally* Section of Litigation, American Bar Association, *Survey of State Class Action Law* (1999) (compiling the state rules on class certification).[1] The Council's recommendation is that New York align itself with the vast majority of American courts by adopting the "as soon as practicable" language used by the rest of the country. This recommendation would not only bring New York's practice in line with other jurisdictions and eliminate a rule often ignored by both courts and litigants, but would promote equity by allowing class certification determinations on a more complete and unhurried record. Furthermore, as discussed below, the model on which the 60-day requirement was based (a local rule of the Southern District of New York) has itself been changed to conform with Federal Rule 23, and the concerns that supported such a time requirement have been mitigated by other jurisprudence since Rule 902 was adopted.[2]

A. The Rule in Practice

CPLR 902's 60-day mandate has received little judicial attention. Sev-

1. Only three jurisdictions are like New York in requiring a motion for class certification by a mandatory date: Louisiana (within 90 days of service of the initial class pleading, Louisiana Code of Civ. P. Art. 592), Michigan (within 91 days after filing of complaint with class allegations, Michigan Court Rule 3.401(B)(1)(a)), and Pennsylvania (within 30 days after pleadings close or after the last required pleading is due, Pennsylvania Court Rule 1707(a)). However, each of these three jurisdictions' court rules also explicitly provide for extension of the mandatory filing date by stipulation or by motion for good cause shown. See Louisiana Code of Civ. P. Art. 592(a)(1); Michigan Court Rule 3.501(B)(1)(b); Pennsylvania Court Rule 1707(a). In practical effect, extensions by stipulation or court order are routine in each of these jurisdictions.

2. The Federal Rule itself is to change as of December 2003 from "as soon as practicable" to "at an early practicable time." The proposal here is to conform New York's rule to the present Federal Rule 23(c)(1), which is closer to the present mandatory New York practice and which most states will continue to follow.

eral reported decisions have strictly enforced it. *E.g.*, *O'Hara v. Del Bello*, 47 N.Y.2d 363, 368, 418 N.Y.S.2d 334, 336 (1979); *Kensington Gate Owners, Inc. v. Kalikow*, 99 A.D.2d 506, 471 N.Y.S.2d 11 (2d Dep't 1984). On one or two occasions, however, courts have read it somewhat broadly to avoid dismissing class allegations.

In *Caesar v. Chemical Bank*, 118 Misc. 2d 118, 119, 460 N.Y.S.2d 235, 237 (Sup. Ct. N.Y. Co. 1983), for instance, the court found a motion for class certification timely where the motion was made within sixty days of the Appellate Division affirming dismissal of one of the causes of action even though an answer had been filed simultaneously with the motion to dismiss that cause of action. The court reasoned that until a determination was reached as to the scope of the claims, a determination as to certification was not feasible.

Similarly, in *Independent Investors Protective League v. Options Clearing House Corp.*, 107 Misc. 2d 43, 432 N.Y.S.2d 1007 (Sup. Ct. Nassau Co. 1980), the court faced a motion to strike class allegations from a complaint where, in the four years following the action's commencement, the plaintiff had not moved for certification. Without a specific basis in Article 9 for doing so, aside from Rule 908's provision that class actions should not be dismissed or discontinued without notice to the class, the court feared that "plaintiff's indolence" may have caused class members to lose meritorious claims by the running of a statute of limitations and denied defendant's motion to strike the class allegations. *Id.*, 107 Misc. 2d at 45, 432 N.Y.S.2d at 1009. Instead, the court ordered notice to the putative class members, and the court provided leave to defendant to resubmit a motion to strike, but one that addressed the "potential prejudice to class members." *Id.*, 107 Misc.2d at 45-46, 432 N.Y.S.2d at 1009.[3] In effect, the court sought a way to sidestep the strict consequences of Rule 902 for what it perceived might be a meritorious case.

B. The Rationale for CPLR 902's 60-Day Requirement

The concern in *Independent Investors Protective League* of class members' losing their claims because of a statute of limitations running underlies CPLR 902's mandatory time requirement. While earlier versions of the proposed CPLR 902 followed Federal Rule 23's "as soon as practicable"

3. The court also faulted defendants for waiting years to file their motion to strike, referring to the then-extant Rule 11A of the United States District Court for the Southern District of New York, which not only had a similar 60-day provision (as discussed below), but also required the defendant to move within thirty days after the 60-day period to dismiss the class allegations. Id.

language, the Legislature adopted the 60-day requirement of then-applicable Rule 11A of the United States District Court for the Southern District of New York. *Id.*, 107 Misc. 2d at 45, 432 N.Y.S.2d at 1008. The rationale for these 60-day requirements was that a delay in class determination could cause class members to be "led by the very existence of the lawsuit to neglect their rights until after a negative ruling on this question—by which time it may be too late for the filing of independent actions." *Id.*, 107 Misc. 2d at 44, 432 N.Y.S.2d at 1008 (quoting Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 23 F.R.D. 39, 40). As discussed below, however, the judicial adoption of a toll on an individual's statute of limitations while a putative class remains pending in another action has addressed this concern.

C. CPLR 902's Requirement In Practice

In actual use, CPLR 902's 60-day requirement has become unreasonably short. Litigants often have ignored it (as have the courts) or have stipulated to extend the time (sometimes with, sometimes without, court order—a tactic not provided for by the rule and, accordingly, possibly of no effect). Justice Lewis Friedman wrote that the 60-day rule suggests "as is the established practice, that substantial litigation, such as limited discovery or motions pursuant to CPLR 3211 will occur prior to the making of the class certification motion." *Mazzocki v. State Farm Fire & Cas. Co.*, 170 Misc. 2d 70, 72, 649 N.Y.S.2d 656, 658 (Sup Ct. N.Y. Co. 1996). Far more often, however, the practice is for plaintiffs to file a pro forma motion for certification within the sixty days, and the disclosure will commence thereafter. As a consequence, the substantive briefing on the motion is only the opposition and reply papers on the motion.

Experience has shown that it is the rare case in which sixty days will permit the development of a record on which a reasoned class certification decision can or will be based. A hurried period of pre-certification discovery may be unjust to both plaintiffs and defendants: the court may either approve certification on an incomplete record or deny certification because the plaintiff has not developed the case on behalf of the putative class. Nor is the pro forma solution commendable—in addition to being effectively an end-run around a provision of the CPLR, also it causes the initial certification motion itself to be filed upon an incomplete and bare record. Class certification determinations—from initial briefing to judicial determination—should be upon a complete record.

Just as importantly, the rationale for the 60-day requirement now is undercut by jurisprudence since the adoption of CPLR 902 concerning

the running of statutes of limitations while a class action is pending. Through the seminal decision in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and its progeny, especially *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983), an individual's right to file a claim is tolled from the commencement of a putative class action through the determination of a class certification motion. *See In re Agent Orange Prod. Liability Litig.*, 818 F.2d 210, 213 (2d Cir. 1987) (toll applies so long as an absent member is encompassed by a putative class, even if particular state law holds that the pendency of a class action did not effect such a toll); *Swierkowski v. Consolidated Rail Corp.*, 168 F. Supp. 2d 389, 394 (E.D. Pa. 2001) ("It is well settled that filing of a class action tolls the running of the statute of limitations otherwise applicable to all class members in their individual capacities.") (citing cases). In addition, the Southern District of New York has abrogated former Rule 11A.

New York courts also have specifically adopted the *American Pipe* tolling rule. *See Yollin v Holland America Cruises, Inc.*, 97 A.D.2d 720, 720, 468 N.Y.S.2d 873, 875 (1st Dep't 1983) ("a timely commencement of the action by plaintiff herein satisfied the purpose of the contractual limitation period as to all persons who might subsequently participate in the suit as members of a class" because the alternative would be the filing of multiple lawsuits) (citing *American Pipe*); *Clifton Knolls Sewerage Disposal Co., Inc. v. Aulenbach*, 88 A.D.2d 1024, 1025, 451 N.Y.S.2d 907, 908 (3rd Dep't 1982); *cf. Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 432, 599 N.Y.S.2d 515, 516 (1993) (implicitly recognizing a toll); *Cullen v. Margiotta*, 811 F.2d 698, 719-20 (2d Cir. 1987) ("New York courts have, in the interest of avoiding 'court congestion, wasted paper and expense,' long embraced the principles of *American Pipe*.") (citing cases); *but cf. Singer v. Eli Lilly & Co.*, 153 A.D.2d 210, 213-21, 549 N.Y.S.2d 654, 656-60 (1st Dep't 1990) (the *American Pipe* toll did not apply to a suit under New York's DES revival statute because the one-year revival period was a condition precedent to a claim under the statute, not a statute of limitations; because the plaintiffs in the case were not members of putative class actions filed during the revival period; and because the policy behind *American Pipe* was not applicable in such a situation as a revival statute). Thus, even if individuals have relied on a class action to protect their rights, those individual rights are, indeed, protected.

D. Conclusion

The 60-day requirement in CPLR 902 is an artifact that no longer has a purpose. It is no longer necessary in order to protect the rights of absent class members from the running of statutes of limitations; the Southern

District of New York no longer has its similar local rule; and determinations of class certification motions should be made on a full record, fairly reflecting the merits of certification. A strict and mandatory requirement for a class certification motion—particularly such a limited 60-day period—does not make jurisprudential sense. Accordingly, the Council proposes that CPLR 902 be amended as follows:

> As soon as practicable after the commencement of an action brought as a class action, the plaintiff shall move for an order to determine whether the action is to be so maintained.

III. PRE-CERTIFICATION DISMISSALS SHOULD RECEIVE CAREFUL JUDICIAL SCRUTINY, BUT NOTICE OF THEM SHOULD NOT BE REQUIRED UNDER ALL CIRCUMSTANCES

A. Introduction

Class allegations in a complaint have immediate effects, even before a certification motion, dismissal motion, or answer. Absent class members benefit from a tolling of the statute of limitations.[4] The named plaintiff assumes a fiduciary obligation.[5] The named plaintiff and the defendant lose control over any settlement of the litigation, which (regardless of any agreement between them) cannot be dismissed without judicial approval.[6]

In addition to requiring court approval of any dismissal, discontinuance, or compromise, CPLR 908 states:

> Notice of the proposed dismissal, discontinuance or compromise shall be given to all members of the class in such manner as the court directs.

Notwithstanding this language, upon presentation of a pre-certification settlement for court approval, litigants sometimes express surprise that class action provisions in a pleading impose a duty on the named plaintiff under CPLR 908 to give"[n]otice of the proposed dismissal, discontinuance, or compromise . . . to all members of the class . . . ."[7] At this

4. Eg., American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974); Yollin v. Holland America Cruises, 97 A.D. 2d 720, 720-21, 468 N.Y.S.2d 873, 875 (1st Dep't 1983).

5. Avena v. Ford Motor Co., 85 A.D. 2d 149, 156, 446 N.Y.S. 2d 278, 281 (1st Dep't 1982).

6. CPLR 908.

7. The Council on Judicial Administration considered the CPLR 908 notice requirements at the suggestion of one of the justices of the Commercial Division of the Supreme Court, New York County. This justice observed that both plaintiffs' and defendants' counsel often appear surprised that CPLR requires notice even where no class has been certified.

stage of the litigation, of course, adversaries may have developed a common interest in the dismissal of a settled case. It is likely both sides will argue that notice is not necessary, and expressing surprise at such a reading may be only the first step in arguing that notice is not required.

CPLR 908's plain language requires notice to the class in a court-approved manner, even if the dismissal is sought before the court has considered certification. This rule is more demanding than its predecessor, and the legislative history indicates that the Legislature intended it to be so. The rule apparently was designed to protect absent members of the putative class and to prevent abuse of the class action device. It also provides a measure of protection to class representatives and lowers the risk of multiple challenges to the settlement in courts other than the one responsible for the case.

Notwithstanding CPLR 908's plain language, as well as the present Rule 23(e) of the Federal Rules of Civil Procedure, the federal counterpart of CPLR 908, not all courts require notice for dismissal of an action at the pre-certification stage. Indeed, the Judicial Conference of the United States has approved and transmitted to the U.S. Supreme Court for final action the report of the Conference's Standing Committee on Rules of Practice and Procedure, recommending that Rule 23(e) be amended (1) to eliminate the need for judicial scrutiny of pre-certification settlements and (2) to remove the requirement of notice when no class has been certified.

Given the lack of enforcement of CPLR 908's notice requirement and several reasons for excusing it, the Council has concluded that CPLR 908 should be revised. The Council has not, however, found wisdom in the approach of the federal Judicial Conference. The Council recommends that any settlement of a case pleaded as a class action be carefully scrutinized by the courts, but that the statutory requirement of notice to the class at the pre-certification stage, often unenforced in any case, should be eliminated.

In reaching this conclusion, the Council considered the development and administration of the New York rule, its evolution from Rule 23(e) of the Federal Rules of Civil Procedure, and the recent work of the Judicial Conference committees.

B. Method of Notice

The method of class notice is within the court's discretion. Thus, the court may order that notice to the class be by mail, publication, or both. *See Meshel v. City of Long Beach*, 49 A.D.2d 706, 373 N.Y.S.2d 526 (2d Dep't

1975) (ordering notice of class settlement by publication); *In re Colt Industries Shareholder Litigation*, 155 A.D.2d 154, 553 N.Y.S.2d 138 (1st Dep't 1990) (affirming notice to stockholder class by publication); *Michels v. Phoenix Home Life Mutual Ins. Co.*, 1997 WL 1161145 (Sup. Ct., N.Y. Co., Jan. 7, 1997) (notice by a combination of individual mailing and publication).[8] The New York courts are free to develop whatever method of notice is suitable to the particular facts and circumstances, limited only by reasonableness and the need to reach the class members.

In determining the method of notice, CPLR 904(c) requires the court to consider the cost of notice by the various methods, the parties' resources, and the likelihood that class members will seek to opt out of the class. The court may determine this likelihood by ordering notice to a random sampling of the class. CPLR 904(c)(III). CPLR 904(d) states that, unless otherwise ordered, the plaintiff must bear the cost of notice. The court is empowered, "if justice so requires," to require the defendant to pay all or part of the notice expense and may even conduct a preliminary hearing to determine how the cost of notice should be apportioned. *Id.*

C. Evolution of CPLR 908 from Rule 23(e) of the Federal Rules

CPLR 908 provides as follows:

> **Rule 908. Dismissal, discontinuance or compromise.** A class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.

Rule 23(e) of the Federal Rules of Civil Procedure, from which CPLR 908 derives,[9] does not use the term "discontinuance" and does not have the notice portion of the rule in a separate sentence. The federal rule provides as follows:

> **(e) Dismissal or Compromise.** A class action shall not be dis-

8. Federal authorities provide comparable flexibility. See, e.g., Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253 (S.D.N.Y. 1971) (where notice to a class of several million odd-lot traders was ordered to be published in multiple papers, announced by a press release and sent to 2000 identifiable traders and a random selection of others); In re Prudential Securities, 164 F.R.D. 362, 368 (S.D.N.Y. 1996) (notice by mailing to reasonably ascertainable class members along with publication).

9. David R. Kochery, Practice Commentary (to CPLR 1005), (McKinney 1963).

> missed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

In the settlement context, the Council has not found great significance in the minor differences in language; nor did the First Department in the leading decision construing CPLR 908.[10]

The provision that became CPLR 908 was first proposed to the Legislature in 1971. In that year the Judicial Conference of the State of New York sponsored the Tenth Annual Conference for Supreme Court Judges, one session of which was devoted to class actions under the CPLR. According to the report of the session, one commentator discussed the existing statute's inadequacy, and a second commentator criticized current legislative proposals as "impish . . . because of their failure to include any workable guidelines for use by the courts."[11] This commentator, Professor Adolf Homburger, had just published an article advocating liberalization of the CPLR's class action provisions, reprinted in the 1971 Judicial Conference Report.[12] One of the "workable guidelines" proposed by Professor Homburger was the current CPLR 908, which he patterned on Rule 23(e) of the Federal Rules.[13] While Professor Homburger did not discuss this proposed rule in his article, in sponsoring the new Article 9 of the CPLR three years later, the Judicial Conference explicitly noted:

10. Avena v. Ford Motor Co., 85 A.D.2d 149, 152, 447 N.Y.S.2d 278, 279 (1st Dep't 1982) ("Federal Rule 23(e) is substantially identical" to CPLR 908). The use of the word "discontinuance" in the 1975 amendments that added Article 9, which does not appear in Federal Rule 23(e), was a carryover from prior law. CPLR 1005(c)) (McKinney 1963), enacted by Laws 1962, c. 318. Use of the term is appropriate because CPLR 3217 uses the term "discontinuance" for voluntary dismissals (with or without a court order), while Rule 41 of the Federal Rules of Civil Procedure uses the term "dismissal."

Use of the term also may have been influenced by Section 626(d) of the New York Business Corporation Law, which required court approval for a derivative action to be "discontinued, compromised or settled." Unlike the current CPLR 908, however, notice under Bus. Corp. L. § 626(d) is completely discretionary with the court, even after a finding of a possible adverse effect on the interests of the shareholders (on whose behalf the derivative action indirectly has been commenced).

11. Report of the Administrative Board of the Judicial Conference of the State of New York, 1970-71, Legislative Doc. No. 90, at 215, 217-218 (1972) ("1972 Judicial Conference Report"). The commentators were Supreme Court Justice Mario Pittoni of Nassua County and Professor Adolf Homburger of the State University of New York at Buffalo.

12. Adolf Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609 (1971) reprinted in 1972 Judicial Conference Report, supra, at 242.

13. 71 Colum. L. Rev. at 657-59.

> The proposed provision [CPLR 908] is stricter than the present law. In addition to court approval, it requires in all cases notice to the members of the class in such manner as the court directs.[14]

D. Policies Favoring the Present CPLR 908

1. Protecting Absent Class Members

An early illustration of how the New York courts apply the notice rule for the benefit of absent class members is found in a case that predated the 1975 amendments to the CPLR. In *Borden v. Guthrie*, 42 Misc. 2d 879, 248 N.Y.S.2d 913 (Sup. Ct. N.Y. Co. 1964), a corporate defendant in a stockholder's derivative action, based on a joint stipulation with plaintiff's counsel, moved to discontinue the derivative action against two of the five defendants. The moving defendant wanted to avoid the attorneys' fees of these defendants, for which it was responsible. The plaintiff's attorney concurred, apparently believing the remaining defendants could satisfy any judgment. *Id.*, 42 Misc. 2d at 881, 248 N.Y.S.2d at 914.

As noted in footnote 10 above, CPLR § 1005(c) (the predecessor to CPLR 908) and Bus. Corp. L. § 626(d) then required court approval for the discontinuance of class and derivative actions, respectively, but notice was not mandatory as it is under the current CPLR 908. The *Borden* court denied the motion, and thus did not rule on the notice issue, but the court appeared troubled that "it does not appear, nor is it conceded, that there is no cause of action against these two defendants as distinguished from the remaining defendants . . . ," and stated that "in such actions the court may order that notice be given to those whose interests may be affected." *Borden v. Guthrie*, 42 Misc. 2d at 881, 248 N.Y.S.2d at 914. The plain implication is that the court would have required notice had the court granted the discontinuance.

Borden illustrates how a trial court is expected to act under the current CPLR 908 when presented with a pre-certification motion to dismiss, discontinue, or approve a settlement of a class action. Since the discontinuance against the two defendants would have preserved the action against the other defendants, the risk appeared not to be collusion between the named plaintiff and the remaining defendants, but rather prejudice to absent class members. The court could find no basis for granting the discontinuance, which would have resulted in the beneficiaries of the

14. Twelfth Annual Report of the Judicial Conference to the Legislature on the Civil Practice Law and Rules (1973), appearing in Report of the Administrative Board of the Judicial Conference of the State of New York, 1973-74, Legislative Doc. No. 90 (1975) ("1975 Judicial Conference Report").

derivative pleading, the corporation and its shareholders, losing a potential source of recovery. The argument favoring notice in such circumstances is that the court is likely to depend on the litigants for guidance, and the notice requirement provides class members with an opportunity to present arguments that might not otherwise be made. In this case, however, the court found *sua sponte* that a discontinuance was inappropriate and, in light of that conclusion, found notice unnecessary.

2. Protecting Class Representatives

Pre-1975 case law also suggests that the notice of dismissal to class members was intended to protect class representatives. In *Sonnenschein v. Evans*, 21 N.Y.2d 563, 289 N.Y.S.2d 609 (1968), an objector to a class action settlement sued the named plaintiff in the class action, charging the representative with having betrayed the interests of the class for a personal "wrongful profit." *Id.*, 21 N.Y.2d at 566, 289 N.Y.S.2d at 610. The objecting class member charged the named plaintiff with "breach[ing] his fiduciary obligation to plaintiff and other members of a class he represented as a plaintiff in a derivative action . . . ." *Id.* The named plaintiff had commenced a combined derivative and class action, and his preliminary injunction motion was denied before a determination of the derivative or class basis for the action. Shortly after the court denied injunctive relief, the lead plaintiff made an "appraisal rights" demand and received $22.51 per share in the settlement of his individual appraisal action. Other shareholders received $17.50 per share; thus the named plaintiff received 23 percent more than the members of the class he sought to represent. Having agreed to sell his shares, the named plaintiff (the defendant in *Sonnenschein*) no longer had standing to maintain the derivative or class action, and it was dismissed with prejudice without notice to members of the class. *Id.*, 21 N.Y.2d at 567, 289 N.Y.S.2d at 611.

The Court of Appeals accepted that a class member may sue a representative who has settled his individual claim for consideration not benefiting the entire class. The Court also found that the right to plead derivatively "is an extremely valuable one, not merely to the party prosecuting the action, but also to the non-appearing members of the class . . . ." *Id.*, 21 N.Y.2d at 569, 289 N.Y.S.2d at 613. In approving the dismissal of the challenge, however, the Court of Appeals noted that the federal court had been responsible for supervising the class representative's performance and also cited with approval Federal Rule 23(e), which the Court noted required notice to the class members of any settlement. The Court concluded:

> Under the circumstances presented here of failure to provide notice, it would appear that under the Federal rules the District Court would have no choice but to vacate its earlier order, provide the required notice and, if objection is made, determine anew whether dismissal of the class action is called for.

Id., 21 N.Y.2d at 570, 289 N.Y.S.2d at 614.

The court's decision was based largely on the view that a class representative should not be required to defend his conduct in multiple courts.

> The party prosecuting the action is in truth the champion of the nonappearing class members, and . . . he ought not to run the risk of having to answer in an unlimited number of actions and in an unlimited number of courts for his performance of these obligations . . . .

Id., 21 N.Y.2d at 569-70, 289 N.Y.S.2d at 613. While this decision offers class representatives protection from multiple challenges in different courts, the holding, that challenges to a class action must be addressed in the court before which the action was pending, is unrelated to how the absent class member receives notice of the dismissal, discontinuance or compromise he wants to challenge.

3. Preventing Abuse of the Class Action Device

The leading decision interpreting the notice requirements under the post-1975 CPLR 908 is *Avena v. Ford Motor Co.*, 85 A.D.2d 149, 447 N.Y.S.2d 278 (1st Dep't 1982). This case also illustrates how the rule is intended to discourage an individual plaintiff's possible abuse of the class action device.

In the 1970s Ford Motor Company provided an extended warranty covering cracked engine blocks. The three named plaintiffs in *Avena* were denied coverage under this warranty, and brought a class action on behalf of other car owners denied coverage. Ford reached a settlement with the individual plaintiffs, under which Ford replaced their engine blocks and paid their attorneys' fees. The settlement was without prejudice to the any class member's right to bring a later claim, but

> as a condition of the compromise Ford required that the order of discontinuance contain no provision for notice to putative members of the alleged but uncertified class and that if the court determines that such notice is necessary, then Ford shall withdraw from the settlement agreement.

Id., 85 A.D.2d at 151, 447 N.Y.S.2d at 279. The First Department noted that "[f]or some reason plaintiffs' attorneys did not apply for court approval . . . ." *Id.* Ford did, however, and approval was denied. Ford appealed, arguing that CPLR 908 did not require notice because the class had not yet been certified, citing the leading federal court decision accepting that argument, *Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978).[15] The First Department rejected this logic, holding that notice was required even in the case of "a without prejudice (to the class) settlement and discontinuance of a purported class action before certification or denial of certification." *Id.*, 85 A.D.2d at 152, 447 N.Y.S.2d at 280. The court emphasized CPLR 908's role in preventing abuse of the class action device.

> Clearly some control of settlement or discontinuance of a purported class action is necessary. The abuses which have developed incident to the beneficent widened availability of class actions and the potential for abuse in a private settlement even before certification are widely recognized. The requirement of notice to the class makes settlement more difficult, perhaps even impossible in some cases. But of course Rule 908 intends to make settlement of class actions somewhat more difficult as part of the price of preventing abuse. And by the very act of asking for court approval, which would otherwise not be necessary, the parties recognize that such settlements are subject to greater control and thus more difficult than the settlement of a purely individual lawsuit.

Id., 85 A.D.2d at 153, 447 N.Y.S.2d at 280.

The First Department further noted the role that dissenters would play in any hearing on the settlement's fairness and the importance of notice in bringing contrary points of view to the court considering a settlement.

> In our adversary system of justice the court must rely on adversary attorneys to produce the necessary facts. But here, without some notice to the outside world and to possible other members of the class and their representatives (or at least the appointment of a special guardian), who is to find and present to

15. Other federal cases are consistent with Avena and in conflict with Shelton. Magana v. Platzer Shipyard, 74 F.R.D. 61, 69 (S.D. Tex. 1977) ("as a general rule . . . class notice of the individual compromise is necessary to prevent the use of the class allegation as a coercive device"); Rothman v. Gould, 52 F.R.D. 494, 498 (S.D.N.Y. 1971) ("some reasonable form of notice" is required); Philadelphia Electric v. Anaconda American Brass, 42 F.R.D. 324, 326-27 (E.D. Pa. 1967) (same).

> the court considerations that may cast doubt upon the agreement of the attorneys for defendant and for the named plaintiffs for a settlement without notice?

Id., 85 A.D.2d at 155, 447 N.Y.S.2d at 281. In giving CPLR 908 a reading that the court acknowledged was more rigid than *Shelton* and its progeny, the court warned putative class counsel: "Fiduciary obligations should not be lightly assumed and cannot be lightly discarded." *Id.*, 85 A.D.2d at 156, 447 N.Y.S.2d at 281.

Other New York courts have followed *Avena*, although the comments of the Supreme Court Justice that were the catalyst for this inquiry[16] suggest that trial courts and class litigants commonly ignore *Avena*, and it has not escaped criticism. In the Supplemental Practice Commentaries to CPLR 908 (McKinney 1982), Judge Joseph M. McLaughlin suggested that if the class is not bound by a settlement, then an order for notice may be of questionable value. (An analogy may be drawn to the case settled after a court has denied a motion for class certification, which would not require notice to the class.[17]) Judge McLaughlin also suggested that notice for discontinuance of actions pleaded but not yet certified as class actions could lead to "half-hearted motions to certify the class" or burdening litigants with the costs of unnecessary notice. He recommended legislative review of the notice rule, but the rule has remained unchanged since his 1982 Commentary.

CPLR 908 has not been the subject of a major appellate decision since *Avena*; nor has the Legislature seen fit to modify the notice portion of the rule. The paucity of authority suggests that the fears of abuse of the class action device have been exaggerated. It is thus time to reevaluate the rule, as the federal courts are doing.

E. Proposed Amendments to Federal Rule 23(e) Remove the Notice Requirements for Pre-certification Dismissals

As noted above, Federal Rule 23(e) was the model for CPLR 908. The Judicial Conference, however, has recommended to the Supreme Court a significant change in approach from the current Rule 23(e). The Council proposes that CPLR 908 be amended, but not to adopt the federal approach in its entirety.

In June 2001 the Committee on Rules of Practice and Procedure ap-

16. See footnote 7 above.

17. In re Empire Blue Cross and Blue Shield Customer Litig., 1995 WL 594723 (Sup. Ct. N.Y. Co. 1995) (Cahn, J.) (citing Beaver Assocs. v. Cannon, 59 F.R.D. 508, 510 (S.D.N.Y. 1973)).

proved the recommendations of Civil Rules Advisory Committee and published for comment proposed amendments to Federal Rule 23, including Rule 23(e) and a report of the Advisory Committee dated July 31, 2001. The Advisory Committee report did not address the conflict among the federal courts as to whether the present Federal Rule 23(e) requires notice to the class for pre-certification dismissal,[18] but instead (i) adopted a revised rule that calls for greater judicial scrutiny of all class action settlements and dismissals, (ii) abandoned the language in Federal Rule 23(e) that would require notice of a dismissal, and (iii) adopted a general rule that notice to the class is required "only when class members would be bound by the settlement."[19] While the proposed amendments addressed notice requirements in other contexts, this 2001 proposed revision to Rule 23 removed the requirement of notice for dismissal of pre-certification cases and "focuse[d] on strengthening the rule provisions governing the process of reviewing and approving proposed class settlements." *Id.* at 30-31. At that time the Advisory Committee stated:

> New Rule 23(e)(1)(A) makes clear what many courts have required, but what lawyers and other courts often fail to appreciate: a court must approve the pre-certification settlement, voluntary dismissal, or withdrawal of class claims. Although the amendment requires court approval of a settlement, voluntary dismissal, or withdrawal of class claims, even before certification is sought or achieved, *the detailed notice, hearing, and review provisions of Rule 23(e) apply only if a class has been certified.*

Id. at 31 (emphasis supplied).

After receiving public comment, the Advisory Committee changed its approach and eliminated the requirement of judicial approval for dismissal of pre-certification class actions. Taking into account comments on the proposed rule, the Civil Rules Advisory Committee reported:

> As published, Rule 23(e)(1) required court approval for voluntary dismissal or settlement before a determination whether to certify a class. Testimony and comments underscored earlier doubts whether there is much that a court can do when the only par-

18. Compare Shelton v. Page, 582 F.2d 1298 (4th Cir. 1978), with cases cited in footnote 15 above.

19. Report of the Civil Rules Advisory Committee (Memorandum from David F. Levi, Advisory Committee Chair, to Hon. Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure), July 31, 2001, reprinted in Proposed Amendments Published for Public Comments, Text of the Proposed Amendments, August 2001, at 31. (The comments can be found at http://www.uscourts.gov/federalrulemaking.)

> ties before it are unwilling to continue with the action. This provision is amended to require court approval *only for voluntary dismissal or settlement of the claims, issues or defenses of a certified class*.[20]

The text of the new proposed Federal Rule 23(e) appears below.[21] While the Civil Rules Advisory Committee this time suggested only that the present Federal Rule 23(e) "could be read" to require court approval of pre-certification settlements, the Committee correctly noted that this second proposed revision to Rule 23(e)(1)(B), in addition to eliminating the notice requirement, makes judicial review mandatory only where class members "would be bound by a proposed settlement, voluntary dismissal, or compromise."

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s

20. Report of the Civil Rules Advisory Committee (Memorandum from David F. Levi, Advisory Committee Chair, to Hon. Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure), May 20, 2002 (revised to account for action taken by the Standing Committee at its June 10-11 meeting), reprinted in Pending Rules Amendments Awaiting Final Action, Proposed Amendments to Take Effect December 1, 2003, at p. 2-3, with emphasis added. (The comments can be found at http://www.us.courts.gov/federalrulemaking.)

21. Proposed Rule 23(e) reads as follows:

(e) Settlement, Voluntary Dismissal, Compromise, and Withdrawal.

(1) (A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) (A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

> reference to dismissal or compromise of "a class action." That language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims. . . . The new rule requires approval only if the claims, issues or defenses *of a certified class* are resolved by a settlement, voluntary dismissal, or compromise.
>
> Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; *notice is not required when the settlement binds only the individual class representatives.* Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.[22]

The Council has concluded that CPLR 908 should be amended, but does not agree with all the language of the proposed Rule 23(e) of the Federal Rules of Civil Procedure. Any action pleaded as a class action should be dismissed only after the court's approval, to provide a judicial safeguard against abuse of the class action device. Article 9 should reserve for the court the discretion to order notice, but only where the court expressly finds notice is necessary to protect of members of the putative class. Such protection might be necessary, for example, if the court finds class members likely relied on the pending action in deferring their own actions.

F. Conclusions

- CPLR 908, like the current Federal Rule 23(e), is designed to require notice of a pre-certification, dismissal, discontinuance, or compromise of an action pleaded as a class action.
- The courts do not uniformly require notice in these circumstances, the language of the Rule notwithstanding.
- Current studies suggest that the pre-certification dismissal of an action pleaded as a class action should be subject to greater judicial scrutiny, but that notice to the class should be optional.
- CPLR 908 should be amended as follows:

22. Advisory Committee Note on Federal Rule 23(e), Report of the Civil Rules Advisory Committee (Memorandum from David F. Levi, Advisory Committee Chair, to Hon. Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure), May 20, 2002 (revised to account for action taken by the Standing Committee at its June 10-11 meeting), reprinted in Pending Rules Amendments Awaiting Final Action, Proposed Amendments to Take Effect December 1, 2003, at p. 102-03, with emphasis added. (The comments can be found at http://www.us.courts.gov/federalrulemaking.)

Proposed CPLR 908
Dismissal, Discontinuance or Compromise

(1)(A) A person who sues or is sued as a representative of a class may dismiss, discontinue, or compromise all or part of the class claims, issues, or defenses, but only with the court's approval.

(B) The court must direct notice in a reasonable manner to all classmembers who would be bound by a proposed dismissal, discontinuance, or compromise. The court may direct notice in a reasonable manner to all class members or members of a putative class, even if they would not be bound by a dismissal, discontinuance or compromise, if the court finds that such notice is necessary to protect their interests.

(C) The court may approve a dismissal, discontinuance, or compromise that would bind class members only after a hearing and on finding that the dismissal, discontinuance, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a dismissal, discontinuance, or compromise under the provisions of this article must file a statement identifying any agreement made in connection with the proposed dismissal, discontinuance, or compromise.

September 2003

Council on Judicial Administration

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* Council member who abstains from voting on Part I of the Report.

** Council members who dissent from Part I of the report because they believe that the governmental operations rule is not merely a matter of procedure or judicial administration, but rather a considered determination by the Court of Appeals as to the proper threshold showing required to invoke class-wide judicial supervision of governmental operations, and that the necessary showing has not been made to justify legislative abrogation of the balance struck by the Court of Appeals.

*** Drafters of the Report

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Lucy Billings***	Litigation Committee
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Howard Kleinhendler	Committee on State Courts of Superior Jurisdiction
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The New York State Budget Process and the Constitution: Defining and Protecting the "Delicate Balance of Power"

*The Committee on State Affairs**

INTRODUCTION

The Appellate Divisions are currently considering two cases of substantial significance to the balance of budgetary power between New York's Governor and Legislature. *Pataki v. Assembly* ("*Pataki*") and *Silver v. Pataki* ("*Silver*") both address the meaning of three constitutional provisions that define the State's budget process: Article VII, sections 3, 4 and 6.[1] The Committee on State Affairs provides this review of constitutional history and case law *and proposes an approach to* these provisions *in the hope that this recommendation effectively* protects and preserves the balance and separation of powers that are critical to a properly functioning state government in Albany.

In our view, the lower court decision in *Pataki* overstates the Governor's power under section 3 of Article VII to include in budget bills almost any conditions on an appropriation, including the suspension of, or other changes to, existing statutes. That power is considerable, but not, as *Pataki*

* Richard Briffault, Vice-Dean & Joseph P. Chamberlain Professor of Legislation at Columbia Law School, drafted substantial portions of this report. The Committee wishes to thank Professor Briffault for his contribution and service to the Committee.

1. The following report was originally released by the Association prior to the decision of the Appellate Division, First Department, in Sheldon Silver v. George E. Pataki, issued on December 11, 2003, affirming the lower court ruling. That decision is available at 2003 NYSlipOp 19408, 2003 WL 22926923; we expect the decision will be appealed to the New York Court of Appeals.

would have it, unlimited. *Silver* correctly suggests that there are meaningful limits to the Governor's powers. These limits follow from the provisions of Article VII, section 6.

However, the main focus of this Report is *Pataki*'s interpretation of section 4. Under New York's constitutionally-ordained budget process, section 4 limits the Legislature's powers but it still leaves the Legislature with the authority to reject the conditions on an appropriation offered by the Governor. To interpret Article VII, as *Pataki* has done, to empower the Governor to set all the conditions on the use of appropriated moneys and leave the Legislature with only the option to strike the entire appropriation or to accept it with all of such conditions, sets up the Governor as all-powerful, not as a partner in the budget process.

The legislative history of the Constitution's budget provisions as well as their early interpretation by the Court of Appeals argue for reciprocal budgetary powers between the political branches. The Committee therefore reads section 4 to permit the Legislature to strike—but not replace—whatever conditions on an appropriation the Governor may properly include in a budget submission consistent with sections 3 and 6. Accordingly, the Committee believes that the lower court decision in *Pataki*, which would deny the Legislature this power, is mistaken.

Article VII, section 4, provides that the Legislature can alter the Governor's budget bills by striking out or reducing "items" therein. The Committee *believes the term* "items" to mean any matter in a budget bill "specifically related to" an "item of appropriation." *T*his interpretation of "item" *would* assure that if the Governor can insert a matter in a budget bill, the Legislature has the authority to respond to the Governor's action by striking out the matter. This interpretation is supported by:

- the reformist purpose behind New York's executive budget process adopted in 1927, which sought to centralize the budget's preparation in the Governor's office while protecting the Legislature's authority to review and reject the Governor's proposals;
- judicial cases interpreting sections 3, 4 and 6, as well as related constitutional provisions; and
- the constitutional separation of powers.

This Report has three sections. First, it outlines sections 3, 4 and 6, and traces their origins back to the 1915 Constitutional Convention. Second, it reviews judicial interpretations of this constitutional design, from

the two *Tremaine* cases in 1929 and 1939 through to the present litigation. Third, it *presents what we believe to be* the intended constitutional design for the budget process *to* achieve balance in the respective roles of the Legislature and Governor.

I. THE DEVELOPMENT OF THE CONSTITUTIONAL DESIGN

The legislative history of sections 3, 4 and 6 shows that these constitutional provisions were intended to improve efficiency between the branches of government. More specifically, the provisions were meant to alter the roles of the Governor and Legislature while maintaining a balance of power between them. Three periods of constitutional development are discernible: first, the failure of an executive budget amendment in 1915; second, the adoption of an analogous amendment in 1927; and third, the reorganization of that amendment in 1938.

A. The Failed 1915 Amendment

The basic constitutional design intended by sections 3, 4 and 6 debuted at the Constitutional Convention of 1915. To correct the Legislature's inefficiency and profligacy, the Convention's Finance Committee, which was named for its chair Henry Stimson, proposed an "executive budget." According to the Stimson Committee, the six-fold increase in state debt since 1885 resulted from the lack of a "scientific budget."

The Stimson Committee identified six main defects in the existing budget process. First, there was no centralized revision of departments' estimated expenditures. By the time they reached the Legislature, the estimates were "regularly so high that very little attention [was] paid to them."[2] Second, the Legislature drew up the budget but was poorly equipped to do so. It had no administrative control over spending departments; its members were accountable to different local districts, and thus were incapable of the compromises needed to establish statewide budget priorities, and were prone to "log rolling" and "pork barrel" politics; and it was slow, meaning that the work of drafting an appropriation was so long delayed that the members, and the public, were denied an opportunity to evaluate the budget.[3] Third, "nowhere, either in the Legislature or outside, is there now ever formulated or made public a really complete financial

2. Journal of the Constitutional Convention of the State of New York ("1915 Journal"), at 390 (1915).

3. Id. at 390-91.

plan or budget."[4] Fourth, legislators could attach riders too easily: "[T]here is no restriction now imposed against additions at the behest of individual members being made to the budget after it is formulated and proposed by its framers."[5] Fifth, the executive veto over the elements of the Legislature's budget "has very nearly resulted in an abandonment to the Executive of the priceless legislative function of holding the purse."[6] Finally, legislators had no opportunity or incentive to question the budget's preparation.[7]

To correct these deficiencies, the Stimson Committee proposed an "executive budget" process whereby the Governor would have the power and obligation to prepare and submit to the Legislature a single, centralized budget. The Committee took pains to explain that this process was not intended to and would not undo the Legislature's power to check the Governor's actions.

> Under present methods the Legislature has been gradually surrendering its most vital power in financial legislation to the executive veto. The proposed system would restore that power and make it final. . . . Nor is there the slightest force to the claim that the proposed system would give undue power to the Governor. It would add not one iota to the power that he now possesses through the veto of items in the appropriation bills.[8]

The proposed amendment had several elements. First, executive departments would revise their own estimates, "which would compel a greater sense of responsibility on the part of department heads in submitting their estimates of requirements."[9] Second, these estimates would be revised and coordinated by the Governor, who had authority over every department and who was accountable to the entire state.[10] The Governor's budget would be submitted to the Legislature on or before the first of February.[11] There would then be public hearings on the budget, and the

4. Id. at 392.

5. Id. at 392-93.

6. Id. at 394.

7. Id. at 394-95.

8. Id. at 401.

9. Id. at 395.

10. Id. at 396.

11. Id. at 398.

Governor, Comptroller, and heads of the executive departments would come before the Legislature for questioning on its terms.[12] The Stimson Committee even favorably invoked "Question Time" in the British House of Commons as a model for the Governor.[13]

The proposed amendment provided the basis for much of the language now appearing in sections 4, 5 and 6 of Article VII.[14] In light of the Stimson Committee's careful statements that the amendment was not intended to undo the overall balance of power between the political branches, the Committee believes that Article VII should be read to allow the Legislature an effective and practical check on the Governor's power to set the budgetary agenda.

The proposed amendment passed 137-4 in 1915, but the proposed constitution was not ratified at the polls.[15]

B. The 1927 Amendments

In 1919, with budgetary inefficiencies persisting, Governor Smith appointed a nonpartisan commission to report on the reorganization and retrenchment of state government.[16] Later that year, the commission presented its report to Governor Smith advocating revisions in the budget process "in large part built upon the plans developed by the Constitutional Convention of 1915."[17] Governor Smith then presented these proposals to the Legislature in early 1920, where they stalled for two years while he was out of office.

On his return in 1923, the Governor renewed the reorganization effort and, in 1925, the Legislature agreed to refer the matter to another commission, this one chaired by former Governor Hughes.[18] The Hughes Commission then recommended the constitutional adoption of an executive budget, which "[i]n its essentials differed but little from the amendment proposed by the Constitutional Convention in 1915."[19]

12. Id. at 398-99.

13. Id. at 399.

14. See Proposed Amendments of the Constitutional Convention of the State of New York 1915, Vol. III (1915).

15. Revised Record of the Constitutional Convention of the State of New York, Vol. III: April 6th to September 10th, 1915, at 2383-86 (1916).

16. New York State Constitutional Convention Committee, Problems Relating to Taxation and Finance 18 (1938) ("Finance Report").

17. Id.

18. Id. at 19.

19. Id. at 20-21.

The Legislature adopted the Hughes Commission amendment in 1927. It was easily ratified by public referendum later the same year.[20] The amendment was placed at Article IV-A of the Constitution in four sections.[21]

Section 1 provided that on or before October 15, the heads of the executive departments would submit itemized estimates of appropriations to the Governor, and that appropriate hearings on such estimates would be conducted. With the exception that the submission date was moved from October 15 to December 1, this section is substantially similar to section 1 of the current Article VII.

Section 2 provided that on or before January 15, the Governor would submit a budget to the Legislature, with a "complete plan of proposed expenditures and estimated revenues." This section is substantially similar to sections 2 and 3 of the current Article VII.

Section 3 began with a provision concerning the right and duty of the Governor and executive department heads to appear and be heard at legislative hearings. This language now appears at section 3 of Article 7. The effective remainder of the old section 3 is now found in section 4 of the current Article VII.

Section 4 prohibited further appropriations until the Governor's appropriations were made; required that appropriations be presented in single bills; and provided for emergency bills. These provisions now appear in sections 5 and 6 of the current Article VII.[22]

In January 1929, the Governor submitted the first executive budget, which contained several lump-sum appropriations to be spent in accordance with the directions of the Governor. As discussed *infra*, the Legisla-

20. See A. Int. No. 1860, A. Pr. Nos. 2271, 232, by Reorganization Commission. S. Int. No. 1504, S. Pr. Nos. 1871, 1941, 1959; S. Int. N. 120, S. Pr. No. 120. A. Int. No. 191, A. Pr. No. 191. The vote count totaled 1,291,990 in favor and 446,107 against. See Legislative and Ratification History set forth in Amendments Proposed to New York Constitution, 1895-1937: New York State Constitution Annotated, at 303 (1938).

21. The structure of old Article IV-A, in which sections 1 and 2 related to the function of the Governor, while sections 3 and 4 related to the function of the Legislature, strengthens the argument that Article VII also sets forth, first, provisions relating to the Governor (Art. VII, secs. 1-3), and second, provisions relating to the Legislature (Art. VII, secs. 4-6). Indeed, old Article IV-A, section 3, clause 1, concerning the right and duty of the Governor and other executive department heads to appear before the Legislature, was moved to the end of new Article VII section 3, such that the first three sections concern the executive, and the latter three concern the Legislature. This structure again suggests that the Governor cannot look to Article VII section 6 as a source of authority. See infra note 77.

22. Amendments Proposed to New York Constitution, 1895-1937: New York State Constitution Annotated, New York State Constitution Annotated, at 301-03 (1938).

ture unsuccessfully challenged this budget in *People v. Tremaine*, 252 N.Y. 27 (1929).

C. The 1938 Amendments

The 1938 Constitutional Convention repackaged these provisions with certain changes into a single Article VII. There was relatively little debate over the adoption of this Article.[23] The committee report on the amendments explained:

> The executive budget system has been in operation for ten years, and it has firmly established its worth. However, in light of experience during its operation, it seems to the committee that a few improvements can be made, and, in conjunction with the present codification, the committee has incorporated these improvements. Otherwise, the existing language of the Constitution has not been altered, except where, in the opinion of the committee, necessary for purposes of codification, clarification, and the removal of nonessential matter.[24]

Consequently, the 1938 amendments represent the present form of the Stimson Committee's original design for an executive budget process.

The key provisions of Article VII, as enacted in 1938 and as they remain today, are as follows:

- Section 2 requires that the Governor submit to the Legislature a budget containing "a complete plan of expenditures to be made before the close of the ensuing fiscal year and all moneys and revenues estimated to be available therefor, together with an explanation of the bases of such estimates and recommendations as to proposed legislation, if any, which he may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures."
- Section 3 states how the budget is to be submitted, specifically that "the Governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included

23. Revised Record of the Constitutional Convention of the State of New York, Vol II: April 5th to August 6th, 1938, at 940 (July 13, 1938); see also id. at 1062 ("[T]his is the proposed codification and revision of the sections of the Constitution relating to State finances.") (July 18, 1938). See id., at 2631, 2636-2641. Article VII was approved 102-0 on August 14, 1938. See id. at 2641. After further minor edits, it was reapproved 144-1 on August 17, 1938. See id. at 2976-2981.

24. Proposed Amendments to the Constitution of the State of New York, No. 748, Int. 665 (July 8, 1938), at 16.

in the budget and the proposed legislation, if any, recommended therein."[25] The words "and the proposed legislation, if any" were not added until the 1938 recodification.

• Section 4 limits the power of the Legislature, specifically that it "may not alter an appropriation bill submitted by the Governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose. Such an appropriation bill shall when passed by both houses be a law immediately without further action by the governor, except that appropriations for the legislature and judiciary and separate items added to the governor's bills by the legislature shall be subject to his approval as provided in section 7 of article IV." Relatedly, section 7 authorizes the Governor to veto items of appropriation without vetoing an entire appropriations bill.

• Section 5 prohibits the Legislature from "consider[ing] any other bill making an appropriation until all the appropriation bills submitted by the governor shall have been finally acted on by both houses."

• Section 6 states two requirements. "Except for appropriations contained in the bills submitted by the governor and in a supplemental appropriation bill for the support of government, no appropriations shall be made except by separate bills each for a single object or purpose." In addition, "[n]o provision shall be embraced in any appropriation bill submitted by the governor or in a supplemental appropriation bill unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation." This second requirement was derived from what had been section 22 of Article III, not from Article IV-A.

II. JUDICIAL PRACTICE FROM *TREMAINE* TO *PATAKI*

A. *Tremaine I* and *Tremaine II*

1. *People v. Tremaine I* [26]

The executive budget provisions became effective in 1928. Governor

25. In the pending litigation, the State Senate and Assembly read section 3, so far unsuccessfully, to direct the governor to put proposed legislation in a bill separate and apart from the appropriation. Under this reading, the restrictions of section 4 do not apply to the governor's proposed legislation.

26. People v. Tremaine, 252 N.Y. 27 (1929).

Roosevelt's budget bills for 1929-30 contained several lump-sum appropriations for personal service expenses for state officials in various departments. Provisions in the bills authorized the relevant department heads, acting with the approval of the Governor, to segregate appropriated amounts for specific positions and salaries.

The Legislature struck all the items for which the Governor purported to retain control over segregation. Then it restated the items, requiring that gubernatorial approval be supplemented with approval from the chairs of the Senate Finance Committee and of the Assembly Ways and Means Committee.

The Legislature made appropriations dealing with agencies undergoing reorganization subject to section 139 of the State Finance Law. That section provided that when a state department was reorganized and a lump sum appropriated for its maintenance, operations and personal service, no payments could be made until a schedule of payments had been approved by the Governor and the chairs of the Legislature's two finance committees.

The Legislature made lump-sum appropriations dealing with construction subject to section 11 of one budget bill, which barred the use of any payments for personal services without the approval of the Governor and the finance chairs. Governor Roosevelt ultimately disapproved the general segregation clause of section 11, and insisted that section 139, as applied to the budget items at issue, was unconstitutional.

In *People v. Tremaine* ("*Tremaine I*"), the Attorney General sued on behalf of the Legislature to enjoin the Comptroller from making payments without the approval of the finance chairs. *Tremaine I* held that by giving the finance chairs power over the segregation of funds, both section 139 of the State Finance Law and the new provisions added by the budget bills violated the constitutional prohibition on legislators receiving civil appointments.[27] The Court of Appeals viewed the power to review and reject proposed segregations of funds as administrative; the resulting combination of legislative and administrative power was unconstitutional. The legislative additions were therefore ineffective, while the appropriations stood. "The Legislature may not attach void conditions to an appropriation bill. If it attempts to do so, the attempt and not the appropriation fails."[28]

Having disposed of the constitutional issue under the appointments

27. 252 N.Y. 27, 45 (1929).

28. Id.

clause, the Court of Appeals considered two other issues: whether the legislative action was inconsistent with the executive budget process, and whether the executive veto of the conditions on the appropriation was constitutional. Without giving a direct answer, the Court hinted that the legislative language was unconstitutional under Article VII, but that were it proper for the Legislature to add such language, the Governor could veto it.

The Attorney General argued that the legislation was constitutional because it met the germaneness test in section 22 of Article III, which required all provisions of an appropriation bill to "relate[s] specifically to some appropriation in the bill." The Court disagreed. With respect to appropriation bills submitted by the Governor, it was not enough for the Legislature to follow section 22. The new executive budget provisions now limited the Legislature to striking out or reducing items, or adding new items of appropriation that were separately and distinctly stated.[29]

The Court then stated that "[a]ssuming . . . section 11 was a proper item for the Legislature to insert in a budget appropriation bill, much force attaches to the contention that such a direction is one which the Governor might veto. It is an item or particular, distinct from the other items of the bill, although not an item of appropriation."[30] Significantly, the Court continued:

> If the Legislature may not add segregation provisions to a budget bill proposed by the Governor without altering the appropriation bill . . . it would necessarily follow that the Governor ought not to insert such provisions in his bill. He may not insist that the Legislature accept his provisions in regard to segregation without amendment, while denying to it the power to alter them. The alternative would be to strike out the items of appropriation thus qualified in toto and a possible deadlock over details on a political question outside the field of judicial review.[31]

In concurrence, Judge Crane went further and flatly determined that section 11 was not an item of appropriation within the meaning of the Constitution. "If anything, it is an attempted alteration, which is void."[32]

29. Id. at 48-49.

30 Id. at 49-50.

31. Id. at 50.

32. Id. at 63.

Tremaine I's treatment of the executive budget provision is both unsatisfying and revealing. It is unsatisfying because the Court of Appeals did not definitively resolve—even in *dicta*—whether the executive budget provisions of the Constitution were consistent with the Legislature's proposed segregation provision. On the one hand, section 11 was plainly germane to the appropriations it affected. On the other hand, it seemed to involve legislative alteration of the Governor's bill without either a strike out or reduction of an item, or the addition of a separate new item of appropriation, which should have made it unconstitutional. As, indeed, Judge Crane would have held.

Yet *Tremaine I* is revealing because it shows significant judicial concern with preserving the proper balance of legislative and executive power. The Court of Appeals assumed that if the Legislature could add the provisions, then the Governor must be able to strike them out. Conversely—and of great relevance to the recent budget battles—the Court also assumed that if the Legislature lacked the power to alter the Governor's provisions, then the Governor ought to be barred from including such provisions in the first place.

2. *People v. Tremaine II* [33]

Ten years later, the *Tremaine II* decision was more straightforward. In Governor Lehman's budget bill for 1939 were general appropriations for state government departments that included detailed itemizations for personal service expenditures. The Legislature struck out every item and substituted a single item of appropriation for each of the departments, thereby combining expenses for maintenance and operation, personal services, and travel outside the state into lump-sum appropriations.

The Court found that the Legislature's action was unconstitutional under section 4 of Article VII because that provision required new items proposed by the Legislature "to be additions, not merely substitutions."[34] Under section 4, "the Legislature may not alter an appropriation bill by striking out the Governor's items and replacing them for the same purpose in different form."[35] Unlike in *Tremaine I*, the Court of Appeals in *Tremaine II* did not address what this limitation meant for the balance of powers between the branches. However, it did approve the reasoning of the Appellate Division, which noted in rejecting the Legislature's changes

33. People v. Tremaine, 281 N.Y. 1 (1939).

34. Id. at 11.

35. Id.

that "[i]f the appropriation bill submitted by the Governor can be reconstructed in altered form it becomes impossible for the Legislature to act as the Constitution has directed by reducing or striking out items thereof."[36]

Tremaine II also suggested that a legislative preference for lump-sum appropriations was inconsistent with the 1927 reforms. "The present Constitution emphasizes the necessity of items, not lump sums, for an entire department or bureau."[37] The Court of Appeals tempered this position, however, by recognizing the impracticability of itemization in all cases. It called for the executive and legislative branches to pursue a course "between the two extremes" of inadequate and excessive itemization."[38]

B. Budget Cases Between *Tremaine II* and the Current Litigation

In the five decades following *Tremaine II*, the executive budget provisions drew little attention from the courts, and most of the cases involved challenges by citizens and taxpayers, not lawsuits by the Governor or the Legislature against the other branch.

In *C.V.R. Schuyler v. South Mall Constructors*,[39] the Appellate Division rejected the argument that a provision of the 1969 Deficiency Budget authorizing the Commissioner of General Services to negotiate a contract for the construction of the Albany Mall violated section 6 of Article VII, which required that all provisions of an appropriation bill be specifically related to an appropriation within it. The Court found that the negotiation provision was contained in a bill making $136 million in appropriations for the construction of state buildings and other improvements. "Since the negotiation provision concerns an item which may be constructed with funds from the appropriation," the constitutional nexus was satisfied, "even though the particular appropriation to which it relates is not precisely itemized in the general appropriation bill."[40] At the same time, the Court was clear that section 6 imposed real limits on non-appropriation "budget" legislation. Echoing *Tremaine I*, *Schuyler* held that the purpose of section 6 is to "eliminate the legislative practice of tacking onto budget bills propositions which had nothing to do with money matters; that is, to prevent the inclusion of general legislation in appropriation bills."[41]

36 People v. Tremaine, 257 A.D. 117, 120.

37. Tremaine, 281 N.Y. at 7.

38. Id. at 12.

39. C.V.R. Schuyler v. South Mall Constructors,32 A.D.2d 454 (3rd Dep't 1969).

40. Id. at 456.

41. Id. at 455-56.

Similarly in *Saxton v. Carey*,[42] a challenge by a private party, the Court of Appeals unanimously rejected the argument that the 1978-79 budget was invalid because the Governor's budget bills were insufficiently itemized for the Legislature to analyze and act on them effectively. The plaintiffs also attacked various provisions for the intra-program transfer of appropriated funds. By the time the case reached the Court of Appeals, the Legislature had already passed the budget. The Court of Appeals held that although subject to review, the budget process is primarily a matter for the political branches. So long as the Legislature approved the Governor's actions, "the degree of itemization and the extent of transfer allowable are matters which are to be determined by the Governor and the Legislature, not by judicial fiat."[43]

In a later case, *Schulz v. State*,[44] the Supreme Court, Albany County, rejected the argument that a lump-sum appropriation of $48 million added by the Legislature to the 1992-93 local assistance budget for so-called "member items"—which would assertedly be doled out to pet projects of individual legislators—was unconstitutional. The member-item appropriation was an addition to, not a substitution for, the Governor's budget, and was thus consistent with section 4 and *Tremaine II*. Although the expectation was that allotments would respect the preferences of individual legislators, the budgetary language gave the Governor complete control, such that there was no violation of *Tremaine I*.

In two budget cases decided during this period, the Court of Appeals took a more aggressive posture, but neither involved the executive budget process *per se*. *Matter of County of Oneida v. Berle* held in 1980 that the Governor lacked inherent authority to impound funds that had been appropriated by law.[45] The next year, in *Anderson v. Regan*,[46] a closely divided Court of Appeals held that section 7 of Article VII, which provides that "[n]o money shall ever be paid out of the state treasury . . . except in pursuance to an appropriation by law," applied to federal funds transmitted to the state for the support of particular state programs. As a result, such funds could not be spent without a legislative appropriation in the form of a duly enacted appropriation bill.

Although *Berle* was instituted by the beneficiary of an impounded

42. Saxton v. Carey, 44 N.Y.2d 545 (1978).

43. Id. at 551.

44. Schulz v. State, 160 Misc. 2d 741 (Sup. Ct. Albany Co. 1994).

45. Matter of County of Oneida v. Berle, 49 N.Y.2d 515 (1980).

46. Anderson v. Regan, 53 N.Y.2d 356 (1981).

appropriation and not by the Legislature, both these cases can be seen as limitations on the power of the Governor. In addition, both *Berle* and *Regan* invoked the "delicate balance" of executive and legislative powers.[47] As *Berle* explained, "history teaches that a foundation of free government is imperiled when any one of the coordinate branches absorbs or interferes with another."[48] *Regan* was more pointed in stressing that the appropriations clause, which dates back to the Constitution of 1846, was part of an effort "to stabilize the financial management of the State and to superimpose a measure of legislative control over the then unbridled power of the executive branch to spend."[49] If the Governor could spend federal funds without a legislative appropriation, "the balance of power [would be] tipped irretrievably in favor of the executive branch," a result the Court of Appeals was not willing to sanction.[50]

In a recent case that touched tangentially on the constitutionality of present budget practices, the Court of Appeals was more deferential to the executive. *Matter of Cohen v. State* rejected the argument that Chapter 635 of the Laws of 1998—which seeks to promote compliance with the April 1 budget deadline by deferring the payment of legislative salaries until a delayed budget is actually enacted—violates the separation of powers. The Court acknowledged that the separation of powers "has deep, seminal roots in the constitutional distribution of powers among the three coordinate branches of government," but concluded that separation of powers in fact dictates judicial acceptance of a measure agreed to by both branches to lubricate the "delicately calibrated mechanism" of the budget process.[51]

Finally, in 1993, for the first time in more than half a century, the Court of Appeals considered the core executive budget provisions, although once again the case involved suit by a private party and not a direct conflict between the Governor and the Legislature. The Governor's 1990-91 state operations budget bill contained an appropriation for New York's Department of Taxation and Finance to audit banks. The Legislature added to that appropriation a provision authorizing the Department's Commissioner to charge banks a fee for their audit costs. The Governor did not challenge this provision, but rather sought to enforce it. In *New York*

47. Berle, 49 N.Y.2d at 515; Anderson, 53 N.Y.2d at 365.

48. Berle, 49 N.Y.2d at 522.

49. Anderson v. Regan, 53 N.Y.2d at 363-64 (plurality opinion).

50. Id. at 366 (plurality opinion).

51. Cohen v. State, 94 N.Y.2d 1, 12.

State Bankers Association v. Wetzler, the Court of Appeals held that the Legislature's fee provision violated section 4. The Court reasoned that because this provision was not an "item of appropriation," it could not be added by the Legislature.

C. The Current Litigation

1. *Pataki v. New York State Assembly* [52]

In January 2001, Governor Pataki submitted six appropriations bills and five bills that contained legislation to implement the budget. In some cases, the Governor's stated "when, how, and where" conditions on an appropriation modified existing statutory law. Thus, the Governor proposed as part of an appropriation bill more than twenty-five pages of substantive provisions altering existing section 3602 of the Education Law. Another item of appropriation would have reauthorized the lapsed section 153-i of the Social Services Law.[53]

In March of the same year, one appropriation bill passed without substantial amendment. In August, however, the Legislature passed "altered and amended" versions of the Governor's remaining budget bills, with some amendments stipulating how certain appropriations were to be spent. Immediately thereafter, the Legislature also passed thirty-seven single-purpose appropriation bills, which added further conditions on the appropriations made in the Governor's bills.

The Governor protested that these actions were unconstitutional, but signed all the bills into law. Shortly thereafter, he sued the Senate and Assembly in the Supreme Court for Albany County for a declaratory judgment that many of the Legislature's amendments and additional new bills violated section 4 because they "replac[ed] the items of appropriations submitted by the Governor."[54]

The Assembly and Senate counterclaimed for a declaratory judgment. On their cross-motions for summary judgment, they contended that the Governor's inclusion of "general," "substantive" and/or "programmatic" material within appropriation bills usurped legislative authority under Article III, and violated the constitutional design of Article VII. Because this material was constitutionally void, they argued, striking it out did

52. Pataki v. N.Y. Assembly, 190 Misc. 2d 716 (Sup. Ct. Albany Co. 2002).

53. Affidavit by Dean Fuleihan in support of Assembly's Cross-Motion for Summary Judgment, at 15, 17.

54. The suit also named the Comptroller as a defendant. However, the Comptroller successfully moved to dismiss the action against him. See id. at 728.

not constitute an illegal "alteration" under section 4. Any such substantive material, according to the Legislature, should have been submitted in separate "programmatic budget bills," which the Legislature would have the "unfettered discretion to amend and alter . . . in any manner that it sees fit."[55]

Thus, the case squarely presents the question of whether the Legislature can alter or amend the "when, how and where" language accompanying an appropriation proposed by the Governor other than by reducing or deleting the appropriation itself. The Court put the issue as follows: "may the Legislature strike out what it finds to be extraneous nonappropriation measures from the Governor's proposed budget."[56] In a decision rendered in January 2002, Justice Malone ruled for the Governor.

The Court focused first on the propriety of the Governor's inclusion of programmatic language in the budget bills. Citing section 3, the Supreme Court noted that the Constitution gives the Governor the option of submitting his budget in "a bill or bills" and that his budget bills could contain not simply "all the proposed appropriations and reappropriations included in the budget" but also "the proposed legislation, if any, recommended therein."

> It would seem inappropriate to conclude that the framers did not intend to mean what they said when by the literal language they carefully chose they gave the Governor the option of submitting his "proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein" in "a bill or bills."[57]

Citing *Schuyler* and *Saxton*, the Court noted that on "the few prior occasions when the issue has come before New York courts those courts have not limited appropriations bills solely to the statement of dollar amounts and the purpose thereof."[58] (However, the Court did not note

55. Id. at 732.

56. Id. at 733.

57. Id. at 734-35.

58. See id. at 735. The Court also cited Rice v. Perales, 156 Misc. 2d 631, 640 (Sup. Ct. Monroe Co. 1993), modified on other grounds, 193 A.D.2d 1135 (4th Dep't 1993). Rice concerned a change to the rule under which the Department of Social Services calculated Home Relief benefits for "mixed households" in which one member receives Supplemental Security Income. The authorization for the rule change came from the 1991 Aid to Localities Budget, which sought a revision of the methodology for calculating mixed household benefits. Rice rejected the argument that the language directing the change in benefits "was

that these cases were brought by private parties after the Legislature had *accepted* the Governor's language.)

The most troubling part of *Pataki*, however, is its consideration of section 4 and the power of the Legislature to respond to the Governor's proposed budget. Justice Malone acknowledged that language in *Tremaine I* suggests that the Governor and the Legislature have parallel powers over the budget process. According to *Pataki*, "it is language that gives this lower court some pause."[59] However, the Court ultimately described this language as "dictum which is not binding authority upon lower courts."[60]

Citing both *New York State Bankers Association* and section 4, the Court concluded that the Legislature is without power to alter by deleting allegedly unconstitutional language from the Governor's budget bills. By deleting such allegedly unconstitutional text, the Legislature violated Article VII by attempting "to discard the executive budget and write one of its own."[61] According to the Supreme Court, to counter legislative policies advanced by the Governor in the budget the Legislature must "simply fail to enact into law the Governor's appropriation bills. . . . [T]he resulting deadlock, if compromise cannot be reached, will cause public pressure to build to the point where these political questions" will be settled politically.[62]

Appeals by the Senate and Assembly are now pending in the Third Department of the Appellate Division.

2. *Silver v. Pataki*

Although decided after *Pataki*, *Silver* addresses the earlier 1998-99 budget. Six of the nine bills that comprised the budget contained appropriations. Three others did not. These so-called "non-appropriation" bills contained provisions, schedules, and suballocations for already budgeted funds.[63] All nine bills "struck out or reduced certain appropriations proposed by the Governor, while adding new appropriations and directives."[64]

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general legislation in a budget bill," in violation of Art. VII, section 6, see 156 Misc. 2d 631, 639, finding instead that "[b]y no means was the direction to contain welfare costs 'general legislation' that had nothing to do with the money matters that were the focus of the Aid to Localities budget," id. at 640.

59. Pataki v. N.Y. Assembly, 190 Misc. 2d 716, 736 (Sup. Ct. Albany Co. 2002).

60. See id.

61. Id. at 737 (quoting People v. Tremaine, 257 A.D. 117, 122, aff'd 281 NY 1).

62. Id.

63. Silver v. Pataki, 96 N.Y.2d 532, 535 (2001).

64. Id.

In addition to vetoing several provisions of the appropriations bills, Governor Pataki exercised fifty-five line item vetoes to remove specific "legislative directions, segregations and limitations" from the non-appropriation bills. In response, Speaker Silver sued in the State Supreme Court for New York County for a declaratory judgment that under section 7 the Governor was without constitutional authority to veto items in non-appropriation bills.[65]

By agreement of the parties, Justice Lehner addressed only thirteen of the Governor's fifty-five line item vetoes. All but one of the thirteen vetoed provisions that referred to appropriations. More specifically, these provisions "either (i) suballocated appropriated funds, (ii) provided that the appropriation was contingent on the enactment of subsequent legislation, or (iii) set forth criteria to implement the appropriation."[66] The Governor maintained that the provisions thereby violated section 4 by "altering" his "items of appropriation," all of which properly related to an appropriation as required by section 6. The Speaker countered that section 4's limitations applied only to legislative action on appropriations bills, and the measures were therefore immune from the item veto.

Justice Lehner rejected the Speaker's contention. By "inserting several directions, segregations, and limitations with respect to the spending of appropriated monies," the Legislature had unconstitutionally "altered" the Governor's "items of appropriation" in violation of section 4 and *Tremaine II*. It did not matter that the Legislature had made its alterations in *non-appropriation* bills. Although the Legislature had thereby done so indirectly rather than directly, it was still unconstitutionally substituting its language for the Governor's items of appropriation.[67]

65. Silver v. Pataki, 179 Misc. 2d 315 (Sup. Ct. N.Y. Co. 1999). For the first three years, the case focused on the question of standing. Justice Lehner of the State Supreme Court, New York County, held that Silver had standing as Speaker and as a Member of the Assembly to challenge the item vetoes. The First Department reversed on a 3-to-2 vote. Silver v. Pataki, 274 A.D.2d 57 (1st Dep't 2000). The Court of Appeals reversed in part, finding that the Silver had standing as a Member of the Assembly, but not as Speaker because the Assembly had not passed a resolution "expressing its will that the Speaker engage in this litigation." Silver v. Pataki, 96 N.Y.2d 532, 538. (Judge Graffeo dissented, finding that Silver lacked standing even as a member of the Assembly.)

66. Silver v. Pataki, 192 Misc. 2d 117, 122 (Sup. Ct. N.Y. Co. 2002). For example, with respect to an approved appropriation of $180 million for the development, design and construction of a new maximum security facility in Franklin County, the Legislature added language providing that the money could not be spent unless certain conditions were met and the expenditure authorized in a separate chapter, and that, if built, the facility was to have certain indoor common space.

67. Id. at 125-26.

The Court declined to go further and find that the Governor can veto provisions that the Legislature unconstitutionally adds to the budget. Yet, while it refused to resolve this matter formally, the Court noted that it was aware of "no provision in the Constitution granting such right on that basis."[68]

However, having disposed of the issue directly before it, by way of *dictum* the Court went significantly farther than *Tremaine II* when it considered the extent to which the Governor can constitutionally include language in budget bills that goes beyond appropriations. The Court noted that while section 3 authorizes the Governor to submit as part of any proposed appropriation bills "proposed legislation recommended in connection therewith," under section 6 such material must relate "specifically to some particular appropriation in the bill" and be "limited in its operation to such appropriation."[69] Quoting *Saxton*, the Court stated that non-appropriation provisions may set forth "when, how or where" appropriated monies are to be spent, and such provisions the Legislature may not alter.[70] Thus, the Governor can stipulate "the location and type of prison to be built" in a bill appropriating monies for a new prison, and the Legislature can only accept or reject that. The Court was clear that this did not mean that the Governor can submit substantive legislation as part of an appropriation bill, for example by "amend[ing] the Penal Law to alter the definition of robbery in a bill appropriating monies to construct a new prison."[71] However, as the Court noted, the Speaker did not challenge the Governor's proposed budget on this basis.

Silver's core is entirely correct. Section 4, *New York State Bankers Association* and *Tremaine II* together mean that all the Legislature may *add* to the Governor's budget bills are separately-stated "items of appropriation," and thus that the Legislature cannot simply substitute its own items of appropriation for the Governor's proposed items. But *Silver* effectively serves to raise a much more difficult question that it does not answer. What is the Governor's power to add non-appropriation language to his budget bills relative to the Legislature's power to *delete* such language?

III. RESTORING THE "DELICATE BALANCE" OF POWER

As the Court of Appeals first noted in *Tremaine I*, one fundamental

68. Id. at 127.

69. Id. at 126.

70. Id. at 124, 126-27.

71. Id. at 126.

issue in interpreting the executive budget provisions is to maintain the "delicate balance" of power between the Governor and the Legislature. It is clear from their legislative history that the core provisions of Article VII were not intended to upset that balance. In *Regan*, the Court of Appeals reaffirmed the importance of balance to the constitutional design of the budget process, noting that "application of the strictures imposed by section 7 of Article VII to federal funds is necessary to the maintenance of the delicate balance of powers that exists between the legislative and executive branches."[72]

The lower court decision in *Pataki* reveals a budget process increasingly inconsistent with the basic norms of that balance. Section 3 is taken to be completely open-ended: not only may existing statutes be stretched to accommodate a Governor's budget plan, but they may be completely rewritten, and wholly new statutes may be submitted by the Governor as part of an appropriation bill.[73] Moreover, *Pataki* reads section 4 to give the Legislature only one response: to reject the appropriation in its entirety, and attempt to force a compromise on that basis.[74] *Silver*, in contrast, is more consistent with the interpretation of Article VII that the Committee proposes, and with the "delicate balance of power" between the Governor and the Legislature.

> Extended analysis is not needed to detail the dangers of upsetting the delicate balance of power existing among the three, for history teaches that a foundation of free government is imperiled when any one of the co-ordinate branches absorbs or interferes with another. . . .[75]

As designed by the Stimson Committee, New York's centralized budget mechanism allows the Governor to set the budgetary agenda. That design was intended to improve accountability, defeat logrolling, and expose

72. Anderson v. Regan,53 N.Y.2d 356, 365. In Berle, the Court of Appeals was mindful of this balance when it held that "once [an] appropriation was approved," the Governor could not impound it. "Such usurpation of the legislative function cannot receive judicial sanction." Matter of County of Oneida v. Berle, 49 N.Y.2d 515, 523.

73. As described above, Silver is more measured. Justice Lehner specifically noted that "no claim is made herein that the Governor included substantive law amendments in the appropriation bills at issue." The Court also distinguished the Governor's submission of modifications of the Penal Law from language concerning the location and type of prison to be built. See 192 Misc. 2d 117, 126-127.

74. See Pataki v. N.Y. Assembly, 190 Misc. 2d 716, 737.

75. Berle, 49 N.Y.2d at 522.

proposed budgets to public scrutiny. At the same time, the Stimson Committee was mindful of the overall balance of executive and legislative power, and thus intended for the Legislature to have the power to review and reject the Governor's budget proposals.

To restore that balance to the budget process and for the reasons that follow in this section, this Committee proposes that:

- the Governor's section 3 power to submit conditions on the use of proposed expenditures within an appropriation bill should be read as limited by section 6; and
- the Legislature's section 4 power to strike "items" should be read to extend to all such conditions.

The Committee believes that these interpretations recognize that "the State Constitution is . . . to be construed liberally and with regard to its fundamental aim and object and not with the acute verbal criticism to which a penal ordinance is properly subjected."[76] The executive budget provisions are also thereby "construed from a common sense standpoint in a way that makes their operation practicable."[77]

While the Committee's proposed reading of the constitutional text can ameliorate the present constitutional conflicts between the political branches, it cannot fully realize the budget process that the Stimson Committee envisioned and that New Yorkers deserve. For example, one of the Stimson Committee's most pressing concerns was the need for public participation and scrutiny in the budget process. To be sure, the Committee's proposed reading of section 4 would likely increase friction between the political branches with respect to conditions on appropriations, which might lead in turn to greater public awareness of the constituent elements of the proposed budget, such as the suspension of or other changes in existing statutes. But even with a revitalized section 4, there is unlikely to be significant public participation where the political branches agree on a budgetary item. In short, achieving much of the Stimson Committee's agenda will require specific legislative reforms well beyond the scope of the present report.

A. The Governor's Power to Include Substantive Language in the Budget is Broad but not Unlimited

As intended, Article VII clearly gives the Governor substantial power

76. Tremaine I, 252 N.Y. at 40.

77. People Ex. Rel. Boyle v. Cruise, 197 A.D. 705, 710 (1st Dep't 1921).

to set the budgetary agenda. Outside of the executive budget, the Governor has no constitutional power to introduce proposed legislation. Section 3, however, *requires* the Governor to propose the appropriations in the budget and "the proposed legislation, if any, recommended therein." To similar effect, section 2 requires the Governor to submit "a complete plan of expenditure . . . together with recommendations as to proposed legislation, if any, which he may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures."[78] The Governor's final budget power is to veto any of the Legislature's additions to the budget.[79]

Even beyond these formal powers, it is evident that some non-monetary language must be included in a budget bill. The State cannot just appropriate $100 million. It has to be appropriated for a purpose, which entails some description—what Justice Malone, borrowing from then-Justice Breitel, described as the appropriation's "when, how, or where."[80] An appropriation for a prison can reasonably describe the prison's location and size, whether it is to be a maximum- or medium-security facility, and when it is scheduled to open. Indeed, the Legislature cannot perform its proper function if the Governor's budget bill simply contained bare numbers, which do not show for what purpose or in what department or program the money is to be expended.[81] If the Governor has the authority to introduce the budget, then that authority must extend to such matters.

78. It appears that Governor Pataki has erroneously used section 6 to justify the inclusion of detailed programmatic material, including changes in existing statutes, in an appropriation. See Governor's Br. to Appellate Division, Third Department. Section 6 provides in relevant part: "No provision shall be embraced in any appropriation bill submitted by the governor . . . unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation." In Tremaine I, the Court of Appeals considered the argument that section 6—which was then section 22—supported a legislative addition as "germane to the particular appropriations in the bill to which it applied and . . . limited in its operation to such appropriations." Tremaine I, 252 N.Y. at 49. Tremaine I squarely rejected the Legislature's reliance on this text, stating that the provision "which is prohibitory in terms, has no affirmative application to 'an appropriation bill submitted by the governor' so as to permit the addition of the rider in question." Id. Moreover, the legislative history of section 6 confirms that the provision is prohibitory and lacks affirmative application. See Report of Committee on State Finance, 1938 Constitutional Convention __ (noting that provision was adopted in 1894 for the express purpose of "prevent[ing] the inclusion of riders in appropriation bills"); accord 19l5 Opinions of the Attorney General at 368 (quoting 1894 debate).

79. See art. IV, section 7.

80. See Hidley v. Rockefeller, 28 N.Y.2d 439, 444 (1971) (Breitel, J., dissenting).

81. See Saxton v. Carey, 44 N.Y.2d 548, 550 (1978) ("itemization is necessary to facilitate proper legislative review of the proposed budget").

Yet the language in budget bills now goes far beyond a simple description of the program to be funded by the appropriation.

1. "General Provisions"

Thus, *Pataki* addresses in part provisions that subject the flow of appropriated funds to the Director of the Budget's approval and that allow the interprogram transfer of funds. Such provisions are certainly "related to" the budget, but they do much more than state the "when, how, or where" of an appropriation. They depart from procedures in existing legislation for the appropriation or transfer of funds—which is why they are put into the legislation in the first place.

Such language does not necessarily violate the Constitution. It is clear that section 6 blocks the Governor from submitting budget bill provisions that do not "relate[] specifically to some particular appropriation in the bill." Some case law echoes this language in rejecting generally applicable budget provisions that do not relate to a specific appropriation. In *Tremaine II*, for example, the Court of Appeals noted curtly: "All agree that the 'general provisions' are unconstitutional and have no place in the budget." While there is little indication in the opinion what the Court meant by this remark, the Legislature's brief (which the opinion openly praised) provides intriguing background.[82] According to this submission, "general provisions dealing with the power of allocation of appropriations made, and with the transfer and interchangeability of such appropriations," violate Article VII, sections 1 through 4, because they are not "items" and are the proper subject of general laws, and they violate section 6 because they relate to all appropriations and not "some particular appropriations."[83] In addition, as noted, *Tremaine I* and, forty years later, *Schuyler* both confirmed that the purpose of section 6 is to prevent the "inclusion of general legislation" in budget bills.[84]

On the other hand, the Court of Appeals has upheld budget provisions allowing "the transfer of funds within particular programs and departments."[85] The exact scope of the constitutional prohibition, if any,

82. Tremaine II, 281 N.Y. at 12.

83. Pataki, Br. for the People of the State of New York, Plaintiffs-Respondents, by John J. Bennett Jr., Attorney-General, Point III pp. 89-92, reprinted in Exhibit C to cross-motion of State Assembly.

84. Tremaine I, 252 N.Y. at 48; Schuyler, 32 A.D.2d at 455-56.

85. Saxton, 44 N.Y.2d at 548, 551. The Court found that the transfer provisions were not properly subject to judicial consideration, but were a matter for the political branches to resolve between them. See id.

against including "general provisions" or "general legislation" in budget bills is therefore hard to determine.

2. Programmatic Provisions

The constitutional prohibition may, however, encompass programmatic provisions that address neither the procedure for paying an appropriation nor the "when, how, or where" of its expenditure, but instead the substantive programs funded by the budget. The budget for the Department of Correctional Services, for instance, might include not just money for a new prison, but amendments to the Penal Law that, by reducing the period of incarceration for certain penalties, would reduce the size of the planned facility and, thus, the size of the appropriation. Here, there is a logical nexus between the appropriation and the substantive change to the Penal Law, but it is far more attenuated than the nexus between the appropriation for the prison and the location of the prison. In addition, the change in substantive law—even if "sufficiently 'related'" to the budget—is not "limited in its operation" to an appropriation, and may therefore violate section 6. Likewise, a change in the Medicaid eligibility rules, for instance, is in some sense "related" to a budgetary appropriation, but would not be "limited in operation" to the budget.[86] *Silver* suggests that this distinction may be significant. The language of *Pataki*—even if not the substance of the decision—obliterates it.

The distinction is important because the budget is essential legislation; although often delayed, it is always enacted. If the budget can properly include material that goes beyond the "when, how, or where" of an appropriation, the Governor may be able to force the passage of measures that change existing law but that would lack legislative support if considered separately.

In a budget of thousands of pages, legislators and the public will hardly even have the opportunity to consider their substantive merits—if they notice them at all. In practice, budget bills are enormously detailed, complex, and obscure. Thus, they are simply not subject to the kinds of scrutiny that interested members of the public can give to other bills. Plus, when the Governor and the Legislature agree on substantive changes, the judiciary may be less likely to intervene.[87]

86. Conversely, budget language requiring Budget Director approval of the payment of certain funds, or authorizing the interprogram transfer of specific funds, or even spelling out the details of an appropriation, such as the exact facilities to be included in a new prison, would all be "limited to the operation" of such appropriation.

87. See Saxton, 44 N.Y.2d at 545.

Whether or not the judiciary is willing to police the line between "general" legislative provisions submitted with the budget and provisions that "relate specifically to some particular appropriation," there can be no question but that the Governor's power to include programmatic language is still significant. Thus, to maintain the basic purposes of the executive budget process, and respect the constitutional separation of powers, the Legislature must have the power to block such executive initiatives. In fact, the broader the Governor's power to propose detailed and sweeping programmatic legislation, the more the "delicate balance" of legislative and executive power requires that the Legislature be able to check the Governor "item" by "item."[88]

B. The Legislature Must Have the Effective Power to Check What the Governor May Propose

Central to Justice Lehner's decision in *Silver* is the notion that "when, how, or where" provisions, "being part of an item of appropriation, . . . are subject to the 'no alteration' restrictions of section 4 of Article VII."[89] However, the "no alteration" restrictions of section 4 are not absolute. According to the plain language of this constitutional provision, the Legislature may "strike out or reduce items" in the Governor's budget bills. One way for the courts to restore the delicate balance of power, therefore, is to recognize that non-monetary provisions attached to appropriations are separable "items," and subject to limited alteration accordingly.

Once read as separable "items," programmatic provisions become subject to deletion without deletion of the rest of the appropriation. For example, the Legislature can delete language giving the Director of the Budget control over the flow of appropriated funds without deleting the appropriation to which that language was attached. Further, the Legislature can delete the detailed specifics for an appropriation for the construction of a new prison without deleting the appropriation for the prison. In this way, the Legislature can maintain the existing legislative framework, while accepting the new appropriation.

Without this reading of section 4, the Governor's programmatic proposals, once attached to an item of appropriation, are made invulnerable to legislative action except by the Legislature's striking the entire appropriation. Yet the appropriation itself may be supported by the Legislature. To take one example, the Legislature may support needed funding for

88. Berle, 49 N.Y.2d at 515; Regan, 53 N.Y.2d at 365.

89. Accord 1982 Opinion of Attorney General.

prison maintenance but not be willing to accept a tangentially-related change in the Penal Code as the price of that funding. If section 4 is read as it is in *Pataki* to bar all deletions of programmatic material, the Legislature then faces a Hobson's Choice. It can either accept a policy change of which it disapproves in order to obtain needed funding, which is evidently contrary to the anti-log-rolling animus of the Stimson Committee. Or it can forego the funding altogether, and precipitate a budgetary crisis, even though both the Governor and Legislature agree on the appropriation in question.

The Legislature therefore should be able to assert its power one step further. Precisely because of the Governor's enormous power, it makes sense to read the Constitution as enabling the Legislature to strike out anything the Governor can insert.

Such a reading is entirely consistent with both the textual provisions and case law barring legislative additions—as well as the underlying policy goal of enabling the Governor to limit overall spending through control of the budget submission and the item veto. So, too, it would be consistent with the constitutional structure of simultaneously curbing the Legislature's power to add new material while protecting its power to reject gubernatorial proposals. Indeed, enhancing the Legislature's power to reject gubernatorial language legitimates a broad gubernatorial power to add such language because it assures that, as with appropriation items and all other legislation, enactment requires the active participation of both branches.[90]

In addition, this interpretation of section 4 responds directly to *Tremaine I*'s "fundamental question."

> If the Legislature may not add . . . without altering the appro-

90. In King v. Cuomo, 81 N.Y.2d 247, 254-55 (1993), the Court of Appeals struck down the Legislature's century-old practice of recalling a passed bill formally transmitted to the Governor. According to King, "this unconstitutional procedure 'creates a negotiating position in which, under the threat of a full veto, the Legislature may recall a bill and make changes in it desired by the governor, thus allowing him to exercise de facto amendatory power." Id. at 254-255. As a result, "the practice undermines the integrity of the law-making process as well as the underlying rationale for the demarcation of authority and power in this process." Id. at 255.

By the same token, if sections 3 and 4 are together interpreted in such a manner that legislative proposals made by the Governor are enacted ipso facto into law, without deliberative legislative action, the same kind of situation could result. Upon the Legislature's deletion of an entire appropriation, the Governor would submit an amended bill. That paralyzing process undermines the integrity of legislative power as well as the underlying rationale for the demarcation of authority and power in the executive budget process.

> priation bill, it would necessarily follow that the Governor ought not to insert such provisions in his bill. He may not insist that the Legislature accept his propositions in regard to segregation without amendment, while denying to it the power to alter them.[91]

Finally, this interpretation of section 4 not only serves to protect the "delicate balance" of executive and legislative power, but also accords with the very open-ended meaning given to the concept of "itemization" by the Court of Appeals. Thus, in *Saxton* the Court of Appeals quoted at length the dissenting opinion of Justice Breitel in *Hidley v. Rockefeller*:[92]

> There is no constitutional definition of itemization. There is no judicial definition of itemization. Itemization is an accordion word. An item is little more than a 'thing' in a list of things. A house is an item, and so is a chair in the house, or the nail in the chair, depending on the depth and purpose of the classification. The specificness or generality of itemization depends upon the function and the context in which it is used.[93]

Likewise, in considering the meaning of an "item" of appropriation, *Tremaine II* stated that "details must not run into absurdities, and only those details need be given which are necessary or appropriate to show where and for what the money is to be spent."[94] *Saxton* reaffirms *Tremaine II*, holding that "[t]he degree of itemization necessary in a particular budget is whatever degree of itemization is necessary for the Legislature to effectively review that budget."[95]

CONCLUSION

The Committee agrees that the Legislature should be able to "alter" items of appropriation only as provided in section 4. As the Court of Appeals recognized in *Tremaine II*, the Legislature cannot simply submit

91. Tremaine I, 252 N.Y. at 50 (Pound, J. (dictum)).

92. In Hidley v. Rockefeller, 28 N.Y.2d 439, 444 (1971), the majority of the court determined the plaintiff lacked standing and dismissed the claim. Justice Breitel dissented on the question of standing but would have dismissed the claim on the merits.

93. Saxton, 44 N.Y.2d at 550 (quoting 28 N.Y.2d 439, 444).

94. People v. Tremaine, 28l N.Y. l, 10 (1939).

95. Saxton, 44 N.Y.2d at 549.

"substitute" items of appropriation. Allowing it to do so would undermine the unique constitutional design of the executive budget process. By giving the Governor the primary responsibility for proposing appropriations, that design tends to create accountability, restrain government spending, and minimize favoritism across the multitude of constituencies represented by each legislator. But this same design does not bar the Legislature from altering items of appropriation that are loaded with programmatic material in conflict with existing state policy.

We believe that this approach would restore the proper, "delicate balance" between the political branches. *Our analysis leads us to conclude that* section 6, section 3 does not grant the Governor *unlimited* power to submit substantive legislation with an appropriation. The legislation that is included by the Governor must be specifically related to and limited in its operation to an appropriation. Second, and more important, section 4 to allows the Legislature to strike items of programmatic material without striking an appropriation in its entirety.

October 2003

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Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York

The Task Force on Judicial Selection

I. INTRODUCTION

This Task Force was convened by the Association of the Bar of the City of New York (the "Association") to examine the process by which judges are selected in the State of New York, and particularly in New York City, and to make recommendations on behalf of the Association for improving the process. An examination is timely. A few recent cases of judicial misconduct have attracted significant attention and have prompted political officials, including Mayor Bloomberg and Brooklyn District Attorney Hynes, to call for an examination and overhaul of the selection process. Ultimately, the issue is the delivery of justice and the public's confidence that justice is being delivered by women and men who are honest and competent and not subject to institutional pressures that undermine those qualities. The questions being raised go beyond misconduct, they go to the best way to construct a system for selecting judges to better administer justice. We address the issues posed herein, but first a nod to the current climate.

A. The Immediate Background

On January 22, 2002, New York Supreme Court Justice Victor I. Barron was arrested on charges of soliciting and accepting a bribe from a plaintiff's

lawyer to approve a $4.9 million settlement in a case involving a young girl who suffered brain injuries during a car accident.[1] Mr. Barron later pleaded guilty to the felony charge and received a sentence of three to nine years in prison, which will result in Barron spending more time incarcerated than any other New York judge convicted of either state or federal crimes.[2] In December 2002, Barron was officially disbarred by the Appellate Division, Second Department.[3]

Mr. Barron's conduct prompted Brooklyn District Attorney Hynes to examine the integrity of the New York judicial system.[4] Upon concluding his investigation, Hynes was satisfied that corruption in Brooklyn was not endemic.[5]

But in June of 2002, the State Commission on Judicial Conduct ruled that Supreme Court Justice Reynold N. Mason should be removed from office for misconduct.[6] The Commission found that Justice Mason violated ethical rules when he improperly sublet his rent-stabilized apartment to his former brother-in-law, mismanaged an escrow account by using it for personal expenses, and refused to cooperate with an investigation into such activity.[7] In May of 2003, the New York Court of Appeals upheld the Commission's findings and removed Mason from the judiciary.[8]

Stories of judicial misconduct continued to surface in 2003. In April, Brooklyn Supreme Court Justice Gerald P. Garson was arrested on charges

1. See, e.g., Daniel Wise, Justice Barron Charged with Taking a Bribe, 227 N.Y. L.J. 1 (Jan. 23, 2002); Daniel Wise, Justice Allegedly Demanded $250,000 to Approve Settlement: Witness Against Barron is Solo New York Lawyer, 227 N.Y. L.J. 1 (Jan. 25, 2002).

2. See, e.g., Daniel Wise, Barron Pleads Guilty to Taking Bribe: Former Brooklyn Supreme Judge Will Be Sentenced to 3- to 9-Year Prison Term, 228 N.Y. L.J. 1 (Aug. 6, 2002) [hereinafter Wise, Barron Pleads Guilty]; Daniel Wise, Brooklyn Judge Barron Gets 3 to 9 Years: Negotiated Bribery Plea Means He Will Spend 3 Years in Prison Before Parole Eligibility, 228 N.Y. L.J. 1 (Oct. 29, 2002).

3. Ex-Judge Baron Is Disbarred, 228 N.Y. L.J. 1 (Dec. 19, 2002).

4. See Wise, Barron Pleads Guilty, supra note 2.

5. Id.

6. See STATE COMM'N ON JUDICIAL CONDUCT, MATTER OF REYNOLD N. MASON, A JUSTICE OF THE SUPREME COURT (July 1, 2002) (disciplinary proceeding), reprinted in 227 N.Y. L.J. 6 (July 1, 2002) [hereinafter Disciplinary Proceeding].

7. See Tom Perrotta, Commission Orders Mason Off the Bench, 227 N.Y. L.J. 1 (June 28, 2002); Disciplinary Proceeding, supra note 6.

8. See John Caher, Panel Declares it is Not Bound By 'Spargo' Case: Mason Removed from Bench Despite Federal Ruling, 229 N.Y. L.J. 1 (May 2, 2003).

that he accepted money and gifts in exchange for favorable rulings in matrimonial disputes.[9] Garson's arrest resulted in his indictment in August 2003 on bribery charges.[10]

Justice Garson's arraignment prompted Brooklyn District Attorney Hynes to denounce the judicial selection process of Supreme Court justices as "indefensible" and a "sham."[11] Shortly after the arrest of Justice Garson, Mr. Hynes convened a special grand jury to investigate the New York judicial selection process.[12] In particular, Mr. Hynes focused on the Democratic nominating process for the Supreme Court in Brooklyn because of the large sums of money that were being raised for Democratic candidates who were generally considered "shoe-ins."[13]

The numerous and simultaneous cases of judicial misconduct also attracted the attention of Mayor Michael R. Bloomberg. Concerned that the recent cases of judicial misconduct were causing a crisis of confidence in the judiciary, the Mayor urged political leaders to adopt a system for screening judicial candidates, similar to the process established by executive order, that is used to select Criminal and Family Court candidates.[14] Mayor Bloomberg confided that, in the long run, he supported a constitutional change, requiring all judges to be appointed, rather than elected.[15]

Only recently Mayor Bloomberg testified before the Commission to promote public confidence in Judicial Elections.[16] He testified that although

9. See Tom Perrotta, Hynes Begins Investigation Of Supreme Court Elections: Criticism of Process Comes on Heels of Brooklyn Judge's Arraignment, 229 N.Y. L.J. (Apr. 25, 2003).

10. Daniel Wise, Prosecutors File Upgraded Indictment Against Garson: Bribery Count, Three Others Added to Brooklyn Judge's Earlier Charges, 230 N.Y. L.J. 1 (Aug. 6, 2003).

11. See Perrotta, supra note 9.

12. Tom Perrotta, Trouble in Brooklyn Spurs Court Reforms: Oversight Added for Matrimonial Matters, 229 N.Y. L.J. 1 (Apr. 28, 2003).

13. See Daniel Wise, Probe Will Follow Funds Raised in Electing Judges: Brooklyn D.A. Seeks to Change Party Convention System, 229 N.Y. L.J. 1 (Apr. 30, 2003). More recently, the Commission on Judicial Conduct admonished Brooklyn Supreme Court Justice Martin Schneier for throwing a $20,000, 250-guest victory party and using excess campaign funds for donations to a not-for-profit organization and other unjustified post-election expenses. Tom Perrotta, 230 N.Y. L.J. 1 (Oct. 2, 2003).

14. See Daniel Wise, Mayor Urges Reform in Judicial Screening: Citing 'Crisis of Confidence' in Judiciary, Bloomberg Calls for Broader-Based Panels, 229 N.Y. L.J. 1 (May 29, 2003); Exec. Order of the Mayor of the City of New York No. 8, § 1-2 (Mar. 4, 2002)[hereinafter Exec. Order No. 8].

15. See Wise, supra note 14.

16. Press Release, Office of the Mayor of the City of New York, Mayor Michael R. Bloomberg Delivers Testimony Before the Commission to Promote Public Confidence in Judicial Elections (Sept. 16, 2003) (at http://www.nyc.gov).

he does not believe that corruption pervades New York's courts, a lack of rigorous merit-based selection standards endangers the public's trust and respect for the courts.[17] He pointed out that under the current process, party leaders virtually handpick the winning judicial candidates. He testified that "[t]here's nothing wrong with being politically active, but knowing where the local clubhouse is should not be a prerequisite for becoming a judge."[18]

The flood of criticism regarding the judicial selection process, in general, and the process employed in Brooklyn, more specifically, also prompted action by Brooklyn Democratic Party Chairman Clarence Norman Jr., who has been in the center of the storm over judicial selection in Brooklyn.[19] In response to criticism that the current judicial screening process by which Supreme Court candidates are referred to nominating delegates for consideration[20] is less than transparent, Mr. Norman in April agreed to make public the future findings of his screening panel.[21] Nonetheless, two panel members, concerned that the screening process was too closely controlled, stepped down in May.[22] Mr. Norman subsequently adopted additional measures to increase confidence in the Brooklyn judicial selection process and judiciary. In May 2003, Mr. Norman appointed a ten-member committee to examine Brooklyn's process for screening candidates.[23] The committee ultimately approved a plan, to be implemented in 2004,[24] that will create an eighteen-member screening panel, six members of which will be selected by party leaders.[25] The approved plan also authorized the Brooklyn Democratic Party leader to select the panel's chairman and expanded the party's involvement so that it reviews Civil Court candidates as well.[26]

17. Id.

18. Id.

19. Clarence Norman Jr. has since been indicted on charges of grand larceny and filing a false instrument in connection with his activities as chairman. See Andy Newman, Party Chief in Brooklyn Denies Guilt Over Funds, N.Y. TIMES, Oct. 11, 2003, at B4.

20. See infra Part II.C.

21. Daniel Wise, Brooklyn Leaders Adopt Judicial Screening Reform, 230 N.Y. L.J. 1 (Aug. 20, 2003).

22. Id.

23. See Reformers Fail to Overhaul Judicial Screening Process, 229 N.Y. L.J. 1 (May 27, 2003); Wise, supra note 21.

24. Graham Raymon, Delegates Punchy, NEWSDAY, Sept. 17, 2003, at A02.

25. Wise, supra note 21.

26. Id.

II. THE CURRENT JUDICIAL SELECTION PROCESS IN NEW YORK STATE

Following is a description of the judicial selection process, as established by the various laws of New York State and City, including the constitution, the laws of the judiciary, election laws, and a mayoral executive order. In addition, this report goes on to examine more closely the judicial screening process as it is in fact implemented in the five boroughs of the City of New York, where most of the recent attention has been directed.

A. The Court of Appeals

New York state's highest court consists of the chief judge and six associate judges.[27] Vacancies in the Court of Appeals are filled by what is known as "merit selection":[28] new judges of the Court of Appeals are appointed for a fourteen-year term by the governor of New York, with the advice and consent of the senate, from among those recommended by the judicial nomination commission.[29]

The judicial nomination commission for the Court of Appeals consists of twelve members.[30] Four of the members are appointed by the governor; four are appointed by the chief judge of the Court of Appeals; and one each is appointed by the speaker of the assembly, the temporary president of the senate, the minority leader of the senate, and the minority leader of the assembly.[31] No more than two of the members appointed by the governor and two of the members appointed by the chief judge of the Court of Appeals can be from the same political party.[32] In addition, two of the members appointed by the governor and two of the members appointed by the chief judge of the Court of Appeals must be lawyers; the other two appointed by each must be non-lawyers.[33]

27. N.Y. CONST. art. VI, § 2(a).

28. "Merit selection" is a term of art used to refer to the appointment of judges from a small group of nominees who have been selected as the best qualified by an independent nominating commission of broadly-based membership. Merit selection is one form of appointment, and as such, can be distinguished from appointment in which the appointing power has unfettered discretion (except perhaps as to confirmation) to appoint. The federal system utilizes this second type of appointment. The term "merit selection" does not imply that elected judges lack merit. Furthermore, this Task Force emphasizes that it does not intend to malign elected judges by the use of the term. Instead, it adopts the term to describe a process which is on balance more likely to lead to a greater proportion of meritorious judges than the elective process.

29. N.Y. CONST. art. VI, § 2(e).

30. N.Y. CONST. art. VI, § 2(d)(1); N.Y. JUDICIARY § 62(1) (McKinney 2001).

31. N.Y. CONST. art. VI, § 2(d)(1); N.Y. JUDICIARY § 62(1) (McKinney 2001).

32. N.Y. JUDICIARY § 62(1) (McKinney 2001).

33. Id.

The judicial nomination commission evaluates the qualifications of candidates, and, upon the concurrence of eight members of the commission, prepares a written report recommending to the governor persons who by their character, temperament, professional aptitude, and experience are qualified to hold judicial office.[34] The commission's written report must be released to the public when submitted to the governor.[35] For the position of chief judge of the Court of Appeals, the commission recommends seven persons; for a vacancy in the office of associate judge, the commission recommends at least three but not more than seven candidates.[36]

If a vacancy occurs, essentially the same procedure applies. The governor will make an appointment from those recommended by the commission.[37] If the senate is not in session at the time, the governor's appointment is considered an "interim appointment" until the senate has the opportunity to confirm or reject the appointment.[38]

B. The Appellate Division

Appellate Division justices are designated by the governor of New York from among the Supreme Court justices approved by the governor's screening committee of the applicable department.[39] Unlike the judicial nomination commission, the screening committee does not narrow the field of qualified candidates, it passes on each qualified candidate to be considered by the governor. After interested Supreme Court justices submit applications, the committee examines each candidate's history and interviews lawyers and the candidate before deciding whether the judge is qualified to be a candidate for the Appellate Division bench. If the committee deems the candidates qualified, the candidate is permitted to continue the application process and be considered by the governor. Thus, although the committee does not make recommendations, it acts as a gatekeeper in the Appellate Division designation process.

Appellate Division justices are appointed for five-year terms or the unexpired portion of their respective fourteen-year terms, if less than five years.[40] For each of the four judicial departments the governor also selects

34. N.Y. CONST. art. VI, § 2(c), (d)(4); N.Y. JUDICIARY § 63(1), (3) (McKinney 2001).

35. N.Y. JUDICIARY § 63(3) (McKinney 2001).

36. N.Y. JUDICIARY § 63(2)(a)-(b) (McKinney 2001).

37. N.Y. JUDICIARY § 68(2) (McKinney 2001).

38. See N.Y. JUDICIARY § 68(3) (McKinney 2001).

39. N.Y. CONST. art. VI, § 4(c); N.Y. JUDICIARY § 71 (McKinney 2001).

40. N.Y. CONST. art. VI, §§ 4(c), 6(c); N.Y. JUDICIARY § 71 (McKinney 2001).

a presiding Appellate Division justice, who serves until the expiration of her or his term of office.[41] Presiding Appellate Division justices must be residents of the department to which they are appointed.[42] When the terms of such designations expire or vacancies occur, the governor must make new designations.[43] In addition, upon the request of the Appellate Division, the governor may make temporary designations in the case of any justice's absence or inability to act, as well as when additional justices are needed for the speedy disposition of the court's business.[44]

C. The Supreme Court

New York State's trial court of general jurisdiction is the Supreme Court. The justices of the Supreme Court are elected by the voters in the district in which the justices are to serve for a term of fourteen years from and including the first day of January following their election.[45] To be eligible to serve as a Supreme Court justice an individual must be a member of the Bar of New York for at least ten years.[46] From among those eligible to serve, justices to the Supreme Court are selected by a somewhat complex and controversial process.

First, political parties elect delegates to a judicial district convention, assembly district by assembly district, at a primary election.[47] There are twelve judicial districts,[48] and there are multiple assembly districts within each judicial district. The number of delegates a political party of a given assembly district can elect to the judicial district convention is determined by party rules, but is required to be "substantially" proportional to the assembly district's share of the vote cast for governor on the party's line in the immediately preceding election.[49] Individuals seeking to be elected as delegates to a judicial convention must gain access to the primary bal-

41. N.Y. CONST. art. VI, § 4(c); N.Y. JUDICIARY § 71 (McKinney 2001).

42. N.Y. CONST. art. VI, § 4(c); N.Y. JUDICIARY § 71 (McKinney 2001).

43. N.Y. CONST. art. VI, § 4(d); N.Y. JUDICIARY § 71 (McKinney 2001).

44. N.Y. CONST. art. VI, § 4(d), (e); N.Y. JUDICIARY § 71 (McKinney 2001).

45. N.Y. CONST. art VI, § 6(c).

46. N.Y. Const. art VI, § 20(a).

47. See N.Y. ELECTION § 6-124 (McKinney 1998). New York election law defines a political party as "any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor." N.Y. ELECTION § 1-104 (McKinney 1998).

48. N.Y. JUDICIARY § 104 (McKinney 1983).

49. See N.Y. ELECTION § 6-124 (McKinney 1998).

lot by submitting petitions containing the signatures of no less than five percent of the enrolled voters of the particular party within the given assembly district.[50]

Second, the elected delegates nominate candidates for the Supreme Court vacancies.[51] Some view the delegates' role as merely perfunctory, arguing that the delegates do nothing more than ratify or rubber stamp the choices of the party leaders, "who essentially get to pick the candidates."[52] The process by which candidates are proposed to the delegates varies by judicial district.[53]

Third, those candidates nominated at the judicial district conventions of the various parties run against each other in a general election within their respective judicial district.[54] In areas of the state where one party dominates—the Democrats in New York City and the Republicans in most upstate districts—nomination by that party is tantamount to election. To further complicate the election, many candidates are "cross-endorsed"—that is, endorsed by political parties other than the party that nominated them. Consequently, a candidate can appear on the party line of multiple parties.

When a vacancy occurs, otherwise than by expiration of term, it is filled for a full term at the next general election held not less than three months after the vacancy occurs.[55] Until the vacancy is filled by election, the governor, by and with the consent of the senate, may fill it by appointment.[56] As in the Appellate Division designation process, the governor may only pick from those candidates deemed qualified by the governor's screening committee.

D. Other Courts

1. Appellate Term

The Appellate Division of the Supreme Court may establish an Appel-

50. See N.Y. ELECTION § 6-136 (McKinney 1998); France v. Pataki, 71 F. Supp. 2d 317, 320 (S.D.N.Y. 1999).

51. N.Y. ELECTION § 6-106 (McKinney 1998); France v. Pataki, 71 F. Supp. 2d at 321.

52. Gary S. Brown, The Merits of Merit Selection, THE METROPOLITAN CORP. COUNS., May 1996, at 53.

53. See infra Part III.

54. France v. Pataki, 71 F. Supp. 2d at 321.

55. N.Y. CONST. art. VI, § 21(a).

56. Id. If the Senate is not in session, the governor's appointment will continue until the December following the election to fill the vacancy. Id.

late Term of the Supreme Court.[57] Three to five Supreme Court justices are assigned by the chief administrator of the courts, with the approval of the presiding justice of the Appellate Division, to hear appeals from certain lower courts.[58] Currently, an Appellate Term of the Supreme Court exists only in the First and Second Judicial Departments.

2. County Courts

There is one County Court in each county outside of New York City. County Court judicial candidates are nominated at primary elections by their county-political-party.[59] Voters in the county in which the judges are to serve then elect the County Court judges from among those nominated.[60] Judges are elected for ten-year terms.[61]

3. Court of Claims

In reality, many judges appointed to the Court of Claims serve as Acting Supreme Court justices and assist with the caseload in the City of New York. Judges of the Court of Claims are appointed by the governor, with the advice and consent of the senate, for nine-year terms.[62] If a vacancy occurs, otherwise than by expiration of term, the governor, with the advice and consent of the senate, may appoint a judge for the unexpired term.[63]

4. Surrogate's Court

There is a Surrogate Court in each county of the state, which is served by at least one judge.[64] Candidates for Surrogate Court are nominated at primary elections by their county-political-party.[65] Judges of the Surrogate Court—surrogates—are then elected by the voters of the county in which the surrogates are to serve from among those nominated.[66] Surro-

57. N.Y. CONST. art. VI, § 8(a).

58. N.Y. CONST. art VI, § 8(a), (e); N.Y. JUDICIARY § 212(2)(a) (McKinney 1983).

59. The Fund for Modern Courts, Judicial Selection in the Courts of New York, at http://www.moderncourts.org/js-ny.htm (last visited Oct. 15, 2003).

60. See N.Y. CONST. art. VI, § 10(a).

61. N.Y. CONST. art. VI, § 10(b).

62. N.Y. CONST. art. VI, § 9.

63. N.Y. CONST. art. VI, § 21(b).

64. N.Y. CONST. art. VI, § 12(a).

65. See The Fund for Modern Courts, supra note 59.

66. N.Y. CONST. art. VI, § 12(b).

gates outside of New York City are elected for ten-year terms; surrogates within New York City are elected for fourteen-year terms.[67]

5. Family Court

There is a Family Court in each county of the state, which is served by at least one judge.[68] Family Court judicial candidates outside of New York City are nominated at a primary by their county political-party;[69] judges are then elected, from among those nominated, for ten-year terms by the voters of the county in which the judges are to serve.[70] Judges of the Family Court within New York City are appointed for ten-year terms by the mayor[71] from those nominated by the Mayor's Advisory Committee. If a vacancy occurs within the New York City Family Court, otherwise than by expiration of term, the mayor may appoint a judge for the unexpired term.[72]

a. The New York City Mayor's Advisory Committee

The Mayor's Advisory Committee was established by executive order of the mayor to recruit, evaluate, consider, and nominate judicial candidates for appointment and to evaluate incumbents for reappointment to the New York City Family Court, New York City Criminal Court, and interim appointments to the New York City Civil Court.[73] The Committee consists of nineteen members, all of whom either reside or have their principal place of business in New York City.[74] Committee members serve for a term of two years.[75] All members of the Committee are appointed by the mayor. The mayor selects nine members to the Committee directly. However, the remaining ten members are nominated by members of the judiciary and the legal community: the chief judge of the New York Court of Appeals nominates four members, the presiding justices of the Appellate Division for the First and Second Judicial Departments each nomi-

67. N.Y. Const. art. VI, § 12(c).

68. N.Y. Const. art. VI, § 13(a).

69. See The Fund for Modern Courts, supra note 59.

70. N.Y. Const. art. VI, § 13(a).

71. N.Y. Const. art. VI, § 13(a).

72. N.Y. Const. art. VI, § 21(c).

73. See Exec. Order No. 8, supra note 14.

74. Id. § 5(a).

75. Id.

nate two members, and the deans of two law schools within New York City (on a rotating basis) each nominate one member.[76]

The mayor may not appoint any judge without the nomination of the Committee, nor may the mayor reappoint any judge without the Committee's recommendation.[77] After selecting a candidate for appointment from among the nominees, the Committee conducts a public hearing to gather more information about the candidate; no hearing is held in the case of an incumbent judge.[78] The Committee may reconsider a nomination based on the findings of the public hearing.[79]

6. New York City Criminal Court

Judges of the New York City Criminal Court are appointed for ten-year terms by the mayor from those nominated by the Mayor's Advisory Committee.[80] If a vacancy occurs, otherwise than by expiration of term, the mayor may appoint a judge for the unexpired term.[81]

7. New York City Civil Court

Judges of the New York City Civil Court are elected by the voters for ten-year terms.[82] If a vacancy occurs, otherwise than by expiration of term, it is filled for a full term at the next general election held not less than three months after the vacancy occurs.[83] Until the vacancy is filled by election, the mayor with the consent of the Mayor's Advisory Committee, may fill it by appointment.[84] Although the judges of the New York City Civil Court are elected, judges for the housing part of the Civil Court are appointed by the administrative judge from among a list of qualified candidates prepared by the advisory council for the housing part.[85]

8. District Courts

Judges of the district courts are nominated at party primaries and

76. Id.

77. Id. § 4(a).

78. Id. § 3(a).

79. Id.

80. N.Y. CONST. art. VI, § 15(a).

81. N.Y. CONST. art. VI, § 21(c).

82. N.Y. CONST. art. VI, § 15(a).

83. N.Y. CONST. art. VI, § 21(c).

84. Id.

85. N.Y. CITY CIV. CT § 110(f) (McKinney 1962).

elected for six-year terms by the voters in the district in which the judges are to serve.[86] If a vacancy occurs, otherwise than by expiration of term, it is filled for a full term at the next general election held not less than three months after the vacancy occurs.[87] Until the vacancy is filled by election, it may be filled by appointment.[88]

9. Town, Village, and City Courts

Judges of the town courts are elected by the voters in the town in which the judges are to serve for four-year terms.[89] The method of selecting judges of village and city courts outside of New York City is prescribed by the legislature.[90]

E. Evaluation by the Association of the Bar of the City of New York

The Association of the Bar of the City of New York is involved extensively in the process of evaluating candidates for elective and appointive judgeships. Candidates for elected judgeships are invited and expected to participate in the Association's evaluation process. The Judiciary Committee of the Association contacts every candidate once he or she has been selected for inclusion on the ballot (regardless of whether the candidate is unopposed or on a minor or major party line), sends the candidate a uniform questionnaire and a waiver of confidentiality and invites the candidate to appear before a meeting of the full committee for an interview. The Judiciary Committee is comprised of thirty-nine experienced attorneys from the private, public and academic sectors of the legal profession, and up to ten interim members who serve to assist with the workload.

Once the questionnaire is completed and submitted, a subcommittee reviews the information provided by the candidate, reviews the candidate's writings and public statements, interviews ten to forty attorneys and judges who know the candidate professionally and interviews the candidate. Based on the information gathered, the subcommittee prepares a report and recommendation to the full committee.

The full committee considers the report and interviews the candidate itself. The full committee then, by majority vote of those present, votes the candidate "Approved" or "Not Approved." If the candidate is voted

86. N.Y. Const. art. VI, § 16(h).

87. N.Y. Const. art. VI, § 21(d).

88. Id.

89. N.Y. Const. art. VI, § 17(d).

90. Id.

"Not Approved" but there are at least four votes (or 25% of those present) in dissent, the candidate has the right to appeal the Judiciary Committee's decision to the Executive Committee of the Association.

This evaluation process is designed to be, and is, nonpartisan, to ensure that those who are elected or appointed judges in this city have the requisite qualifications for office. This is one of the central missions of the Association.

The evaluation process is confidential, but, in the case of candidates for elected judicial office, the final determinations are made public and issued in a press release shortly before election. These results often appear in the *New York Law Journal*, on the editorial page of *The New York Times* and elsewhere.

In the case of mayoral appointments to Criminal Court, Family Court and interim Civil Court judgeships, the mayor and two of his predecessors have pledged not to appoint anyone found "Not Approved" by the Association. Candidates for appointment are interviewed by the Judiciary Committee after the candidates are screened and approved by the Mayor's Advisory Committee. The Association also reviews candidates for federal judgeships, Housing Court, District Attorney and U.S. Attorney.

III. HOW THE PROCESS WORKS IN PRACTICE IN NEW YORK CITY

In the course of its work, the Task Force went beyond the examination of the legal requirements for selecting judges and investigated the reality of the process by which candidates for Civil Court or Supreme Court are selected by the political parties in each borough of this city. The Task Force, itself consisting of people familiar with the reality of the process, spoke to several people close to the selection process in each borough.

The process by which a party endorses a primary candidate for Civil Court or selects a nominee for Supreme Court varies from borough to borough within New York City. The reality, however, is that the leader of the majority political party in each borough has enormous influence on the party's choice, which, in this city, is very often tantamount to election in November.

Candidates for Civil Court are elected like all other candidates for elected office in this state. Civil Court candidates must qualify for the ballot by obtaining the requisite number of signatures of registered voters. Primary contests may occur in the event more than one Civil Court candidate seeks a party's nomination and qualifies for the ballot. In that

instance, party leadership may endorse one of the candidates in the primary, and that endorsement is often crucial to success.

As stated before, the Supreme Court follows a delegate system in which by law party nominees are selected by delegates at a judicial nominating convention of each party. This practice has existed for over 100 years. Delegates to the convention are themselves elected in the primary in September of each year. Shortly thereafter, the elected delegates meet at the nominating convention and select the party's nominees for Supreme Court, who will then appear on the November ballot. Thus, candidates for Supreme Court do not themselves compete in primary elections for the party's nomination.

The selection of judicial delegates is often perfunctory, as generally only one slate of delegates is nominated per assembly district to attend the judicial convention (indeed, when only one slate is nominated, they are deemed elected and do not even appear on the party's primary ballot). Similarly, judicial nominating conventions are often perfunctory and preordained, as the delegates do no more than ratify the choices of party leaders. In addition, the minority parties in this city very often cross-endorse the candidate of the majority party.[91]

What follows is a description of the Democratic Party process in each borough. We focus on the Democratic Party because of its dominance in the New York City judicial selection process:

Given the indictments of Justices Garson and Barron, and the recent allegations in Brooklyn that judgeships can be "bought" from Democratic Party leaders,[92] the process in Brooklyn has received by far the most scrutiny in recent months.

In Brooklyn, the Democratic Party leader appoints a 16-member screening committee of lawyers to review applications of those who seek the party's endorsement for Civil Court or nomination for Supreme Court. (Because Brooklyn and Staten Island are both within the Second Judicial District of the Supreme Court, the Staten Island Democratic Party leader is allowed certain appointments to this committee.)[93]

Although the idea of a screening committee is a good one in theory, the Democratic Party screening committee in Brooklyn operates with few

91. Some argue that cross-endorsement allows the major political parties to barter for political favors, including getting their judicial candidate elected. See Brown, *supra* note 52. Others contend that cross-endorsement eliminates election risks for well-qualified candidates.

92. Kevin Flynn and Andy Newman, Some Say Inquiry Could Lead to Overhaul in Picking Judges, N.Y. TIMES, June 21, 2003, at B1.

93. See Daniel Wise, Exchange of Letters Reveals Politics Behind Brooklyn Judicial Selection, 228 N.Y. L.J. 1 (Sept. 20, 2002).

objective guidelines and procedures, and appears to be subject to extensive influence from the party leader. These 16 committee members have no fixed term of office and serve at the pleasure of the party leader; many have reputations as either persons active in the Democratic Party or close to Clarence Norman personally. Until recently, the committee's determinations were forwarded to the county leader, but not known to the public nor even the candidate.[94]

According to news accounts, in 2002 the screening committee refused to evaluate a Civil Court judge for Supreme Court who was "repugnant" to the party leadership, revealing that the process was not open to all who wished to apply.[95] (Mr. Norman himself has been quoted as saying "it's my screening committee ... if I know there is someone we are not going to endorse, then what's the point."[96]) Two members of the screening committee reportedly resigned as a result of this incident. One was quoted as saying that committee members are not "free to vote their consciences" because of the presence of others on the committee who are close to Mr. Norman.[97]

In response to public outcry, Brooklyn party leadership adopted proposals to reform the screening committee process and to permit the appointment of some of its members by sources independent of the party leader.[98] It remains to be seen whether such reforms improve the judicial selection process in Brooklyn because such proposals do not take effect until 2004.[99]

The Democratic Party in the Bronx has a 12-member screening panel appointed by the party leader. The party advertises in the *New York Law Journal* for candidates, who apply directly to the screening committee. Those associated with the process in the Bronx insist there is "zero gatekeeping" by party leaders.[100]

94. Leslie Eaton, Behind a Troubled Bench, an Arcane Way of Picking Judges, N.Y. TIMES, June 30, 2003, at B1.

95. See Wise, supra note 93.

96. Id.

97. See Daniel Wise, Brooklyn Panel Approves 17 Judge Candidates, 229 N.Y. L.J. 1 (June 24, 2003).

98. The proposal includes increasing the number of members on the screening committee to eighteen and limiting the number of members who could be selected by party leaders to six. See Wise, supra note 21; Kati Cornell Smith and Tom Topousis, Courting Reform – Brooklyn Dem Leaders OK Plan to Fix Judge Picks, N.Y. POST, July 3, 2003, at 15.

99. Rayman, supra note 24.

100. Wise, supra note 93.

The Queens Democratic Party has no screening panel at all, and has not had one for years.[101] In Queens, candidates for judicial office are selected by the county leader himself, with recommendations from district leaders. Compared to other boroughs, there are few primary contests for Civil Court in Queens. Thus, the reality that the Democratic Party leader handpicks elected judges could not be more obvious than in Queens.

The Democratic Party process in the First Judicial District, composed of Manhattan is referred to as a "double blind" or "reform" process. It is the most open and inclusive, and by far the most complicated. Only a community with a high degree of party activism could support such a process. In Manhattan multiple screening committees are selected by a variety of bar and community groups ostensibly free from influence by the party leader. Applications for judgeships are solicited in the *Law Journal*, and made directly to the screening committee. The screening committees investigate and evaluate the qualifications of each applicant, and select 2-3 candidates for each judicial vacancy, which are then forwarded to party leadership. The party will not endorse or offer to the nominating convention any candidate who is not screened and approved by a screening committee.

Given the level of party activism in Manhattan, delegate selection and nominating conventions can at times be competitive events. Democratic clubs may put forth on the primary ballot competing slates of delegates for election, and delegates may differ at the convention about which candidate screened and approved by the screening committees should be nominated by the party. In reality, though, the party leader controls a number of delegate votes at the convention.

IV. THIS ASSOCIATION'S RECORD ON THESE ISSUES

The Association has long supported a system by which judges of the State of New York will be appointed by an executive, following approval by a non-partisan merit selection or nomination commission. However, most of the Association's written comments were issued more than 20 years ago. Nevertheless, it is striking that the issues remain very much the same. The solutions we recommend in this report are certainly in harmony with and in many ways quite similar to those adopted by the Association since its inception.

101. Id.; Editorial, Screening Panels for Decoration Only, DAILY NEWS, September 5, 2003, at 50.

On June 20, 1869, in response to a steady decline in judicial integrity and the public's perception of the legal community, a letter was published in the *New York Times* editorial page proposing that "[t]he true remedy is not in a public meeting [among lawyers], but in a permanent, strong and influential association of lawyers for mutual protection and benefit."[102] After a similar letter was published in December 1869, a letter began to circulate among lawyers calling for the organization of a bar association that would, among other things, "sustain the profession in its proper position in the community, and thereby enable it, in many ways, to promote the interests of the public."[103] In the month following this "call for organization" over 200 lawyers joined what would become the Association of the Bar of the City of New York.

The debate between elected versus appointed judges in particular played a key role in the founding of the Association. New York State's Constitution initially provided for the appointment of state judges. Constitutional conventions in 1846 and again in 1867 proposed elections for judges. In 1869, the public ratified the election method by a close margin. As stated in *Causes and Conflicts—The Centennial History of the Association of the Bar of the City of New York*, "[t]he decline of quality on the bench under the elective system and the necessity for reversing the trend had been among the chief reasons for founding the Association."[104]

Soon after the amendment was ratified, the Association began efforts to repeal it and promote judicial reform. An early initiative in advancing judicial reform was the Association's decision to join the Committee of Seventy in opposing Boss Tweed's candidates for the Supreme Court in the November 1871 judicial elections.[105] In its first official act to reform the New York State judiciary, the Association approved a report drafted by the Association's Judiciary Committee to be sent to the legislature.[106] The report included a full description of the corruption that had plagued the judiciary in New York and led to an investigation of four judges by the New York State Assembly's Judiciary Committee.[107]

In 1873, the Association supported a referendum on the ballot to

102. GEORGE MARTIN, CAUSES AND CONFLICTS–THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1870-1970 12 (1970).

103. Id. at 15.

104. Id. at 104.

105. Id. at 69.

106. Id. at 72-73.

107. Id. at 73.

reinstate the appointive method of selecting judges.[108] In addition, the Association published an open letter to the voters of New York arguing that facts and statistics showed that elected judges were less impartial and less capable than appointed judges.[109] The referendum was defeated.[110]

In 1962, in a continuing effort to reform the judicial selection process, the Association formed the Committee on Judicial Selection and Tenure with the responsibility of studying and making recommendations on improving the selection of judges.[111] In 1965, Chauncey Belknap, as chairman of the committee, proposed that an appointive system for the selection of judges be implemented in New York City, before it was proposed statewide. The plan was based on three principles: (1) all judges were to be appointed by the mayor; (2) recommendations of three to five names were to be made to the mayor by a statutory judicial selection commission and no appointments could be made of anyone not recommended; and (3) the commission must be nonpartisan and representative of the courts, the mayor, the bar, and the interests of the community.[112] The Senate Judiciary Committee considered the plan briefly, but the full legislature refused to entertain the proposal.[113]

Under the stewardship of President Rosenman, the Association turned its attention to the New York Constitutional Convention of 1967.[114] An Association member, Roswell Perkins, chaired a convention committee that advanced the Association's agenda with reports calling for a reform of the judicial selection process. The recommendation mirrored the plan proposed by the Association's Committee on Judicial Selection and Tenure. The proposed amendment carried the support of several organizations including the New York County Lawyers' Association, the League of Women Voters, the Citizens Union and the Institute on Judicial Administration. Notwithstanding this support, the convention voted not to endorse the plan.[115]

Upon his election as Governor, Hugh Carey appointed then President of the Association, Cyrus Vance, as head of a task force on the state

108. Id. at 104.

109. Id. at 107-09.

110. Id.

111. Id. at 309.

112. Id. at 310.

113. Id. at 311.

114. Id. at 311-13.

115. Id. at 311-12.

court system.[116] Other members of the task force included Ruth Bader Ginsburg, Mario Cuomo, and Victor Kovner. The result of their efforts was an executive order by Governor Carey, issued in February 1975, that provided for the appointment of Court of Appeals judges from a list of lawyers recommended by a nonpartisan commission, a commission on judicial conduct to review, remove, or censure certain judges, and a centralized state court system under the Chief Judge of the Court of Appeals.[117] In 1977, the executive order was submitted by the Legislature to the voters of New York as a constitutional amendment, and the electorate approved it. In 1978, Governor Carey signed a bill codifying the terms of the amendment.[118]

In 1973, the Association published a report entitled "The Selection of Judges," outlining a plan for merit selection of judges similar to the process by which Court of Appeals judges are now selected.[119] The conclusion reached thirty years ago is equally apt now:

> Merit selection of judges in New York is long overdue. This state should have a judiciary of the highest quality at all levels, one that is uniformly respected by lawyers and laymen alike. The present elective method of judges has in too many instances failed. We strongly urge that judges in New York be elected in the manner outlined above.[120]

In the 1970s the Committee on State Courts of Superior Jurisdiction, one of the authors of "The Selection of Judges," continued to focus on the critical issue of merit selection of judges and issued three reports on the general subject, the last of which contains the most comprehensive comments and recommendations.[121] That 1980 report entitled "Legislative Proposals on Court Merging and Merit Selection of Judges" analyzed five different legislative proposals dealing with court merger and merit selec-

116. JEFFREY B. MORRIS, MAKING SURE WE ARE TRUE TO OUR FOUNDERS–THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1970-95 54-55 (1997).

117. Id. at 55.

118. Id.

119. 28 THE RECORD 372 (1973).

120. Id. at 376.

121. The first report written in 1976 dealt with the narrow issue of a proposed change in the Judicial District Nominating Convention System. A Proposal to Restructure the Judicial District Nominating Convention System, 32 THE RECORD 615 (1977). The following year the Committee issued a report entitled "Legislation Implementing the Court Reform Amendments." 33 THE RECORD 525 (1978).

tion.[122] In concluding that it would continue to support the appointive rather than the elective method, the Committee provided five justifications.

First, nominating conventions do not provide for adequate participation by the electorate because the delegates are selected by local political leaders. This makes the nomination of Supreme Court judges "largely a political process."[123] Second, in many areas of the state one political party dominates and in effect determines who will be elected. Third, one-issue political parties can have an undue impact on the judicial selection process. Fourth, judicial election campaigns are fraught with potentials for abuse and do not adequately educate the public about the relevant issues. Fifth, election campaigns are costly, thereby limiting the pool of potential candidates.

The report recommended establishing procedures for judicial nominations for Supreme Court justice by judicial district nominating commissions, one for each judicial district, with the governor to make the appointment. The commissioners would function as a screening and selection group. The members of the commission were to be selected by the presiding justices of the respective Appellate Division, the state legislative leaders and the governor. The commissions would consist of both lay and attorney members but none should hold any other public office. The Committee recommended as well that the commission be permitted to submit only three to five candidates for each vacancy and that there should be no interim appointments.

In 1985, a representative of the Association testified in favor of legislation which would have merged the trial courts and retained the way each judge was placed on the court ("merger-in-place") but provided for retention elections rather than regular elections at the end of a judge's term. The representative testified that:

> Such election will maintain both the appearance as well as the reality of judicial independence. It will provide comfort to sitting judges so they will not be at the mercy of political leaders if they seek to remain at the bench.[124]

122. 35 THE RECORD 66 (1980).

123. Id. at 74.

124. Statement of Bettina B. Plevan on Behalf of the Association of the Bar of the City of New York to the September 30, 1985 Hearing Held by the Senate Judiciary Committee on Senate Bill 6751. See also Assembly Bill 8329 (1984).

V. THE TASK FORCE'S GENERAL CONCLUSIONS: INCREASE MERIT SELECTION & MOVE TOWARDS A FULLY APPOINTIVE SYSTEM

Although there are many excellent judges in New York, the Task Force is concerned that the current system selects for strong political loyalty, and is not constructed to select for strong legal credentials or character.[125] There is nothing wrong with selecting judges who have been active in politics, but political loyalty should not be a primary or even important qualification for selection. A process which relies on political connections may not sufficiently emphasize the importance of character and integrity, and the extensive political ties of those judges chosen by such a process may additionally make them more susceptible to requests for favors from the political leaders who helped elect them.[126]

Another concern of the Task Force is that the election process, together with the money necessary to participate in it, is hardly ideally suited to select good judges and has a deleterious effect on the administration of justice. In a democracy, the role of the electorate in selecting members of the executive and legislative branches is obvious. Questions of policy, direction, personality and character are those which are entrusted to voters. It is far less obvious that elections are the best mechanism for selecting who will make the best judge,[127] particularly when the issues of fund rais-

125. Tom Hays, Corruption Scandal Shakes Brooklyn's Court System, THE ASSOCIATED PRESS, Aug. 3, 2003.

126. One study seems to support this: A study by The Fund for Modern Courts comparing New York City judges selected by the elective system with those selected by the appointive system reports that only one of 188 judges selected by a merit system from 1977 to 1992 compared with seven of 181 elected judges were convicted of a crime, or removed from office, or censured or publicly admonished for misconduct, or suspended from the practice of law. M.L. Henry, Jr., THE FUND FOR MODERN COURTS, CHARACTERISTICS OF ELECTED VERSUS MERIT-SELECTED NEW YORK CITY JUDGES, 1977-1992 15 (1992).

127. An address by the Association in 1873 correctly framed the issue in a way that is still applicable today:

> Judges are not selected, like senators, assemblymen, and city officers, to represent the property, the opinions, or the interests of the people of a locality, but they are the mere selection of the fittest members of a single learned profession for the purpose of interpreting and applying the laws of the State in the same sense and the same spirit throughout its borders, irrespective of all parties, and all local interests, and all popular feelings. The fact that we vote for representatives is no reason why we should vote for judges, but quite the contrary. It is essential that a judge should be selected by a method which does not arouse personal prejudice or popular passion, which places him under no commitment to any locality, interest or political party, which shall give all the people who may be suitors or prisoners before him, the same power

ing and campaigning are factored into the elections. The need for funds limits the people who can run to those with access to financial resources, and the need to obtain funds for election and reelection raises the specter of candidates beholden to those who fund them.[128] Although such factors are accepted by the public when it comes to the election of executives and legislators,[129] we should not accept them when it comes to the selection of judges. Even if corruption or undue influence may be limited to a few cases, it is a few cases too many.

Therefore, this Task Force concludes that merit-based judicial selection is vital to the independence and integrity of the New York judiciary. The Task Force believes that merit-based selection is best accomplished through an appointive process, which minimizes the corrupting influences of money and helps ensure that the selection of judges is based on qualifications rather than party politics. Although the current elective process provides the illusion of voter participation, the Task Force believes that judicial selection guided by an independent, diverse screening body representative of the public in the respective districts or counties will better provide the public with a judiciary of the highest quality and independence. As set forth in detail below,[130] such a screening committee would investigate judicial candidates and choose a single nominee, or a very small number of nominees, believed by the screening committee to be the best qualified of all the applicants. Only candidates so nominated by the screening committee would be eligible to become a judge.

The Task Force emphasizes that New York's judiciary contains unusually well-qualified judges, many of whom are among the nation's outstanding judges. Unfortunately, even a few corrupt or incompetent judges can taint the public's perception of many. The goal of the Task Force's recommendations are threefold: (1) to safeguard the legitimacy of the judiciary in the view of the public, (2) to ensure that judges in New York are consistently selected based on merit, and (3) to provide greater access

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and participation in placing him upon the bench, and the same grounds of confidence in his impartiality.

ADDRESS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, AN ELECTIVE JUDICIARY 6 (Oct. 24, 1873).

128. See e.g., Committee on Government Ethics, Report on Judicial Campaign Finance Reform, 56 THE RECORD 157 (2001). In 2001 the Association's The Committee on Government Ethics proposed a system of public financing for judicial elections. Id. at 164-65.

129. The Association holds a long-standing position in favor of public financing of campaigns for legislative and executive office.

130. See infra Part VI.

to the opportunity to become judge to those who were formerly precluded by party politics.[131]

VI. RECOMMENDATIONS TO REFINE THE CURRENT PROCESS

Although the Task Force strongly recommends replacing the current system of elective judgeships with a system of merit appointment, we recognize that the process of constitutional amendment that such a change would entail could take several years to effectuate. But the need for reform is urgent, and ought not to await the outcome of that lengthy process. There are a number of significant potential reforms which can be put in place either by legislation or even by agreement of party officials.

In listing these reforms of the current system, some principles must be stated at the outset. The first principle is that it will accomplish nothing—indeed, it will only add to cynicism about the justice system—for reforms to be added as "window dressing" disguising a fundamentally corrupt or autocratic system. For instance, an "advisory" committee or a judicial "selection" committee which has only persuasive authority is simply unacceptable. Unless a selection committee effectively limits the number of possible appointees to a small number, its influence will be overwhelmed by naked political considerations. Similarly, where the selection committee is itself selected by or beholden to a party leader, it cannot effectively insulate the process of judicial selection from party politics. Such a toothless selection committee was in effect in Kings County, and we have found no evidence that the work of the committee had any effect in improving the quality of the judiciary or in ensuring its independence. While recently a package of reforms has been implemented ostensibly to improve the process in Kings County, the committee will still be asked only to distinguish between qualified and unqualified candidates; it will not be asked to select only the most highly qualified candidates for Supreme Court Judge. The Task Force opposes the formation of ineffective screening committees, and, indeed, we urge members of the bar not to participate in such cynical attempts to add a façade of legitimacy to a "politics as usual" process.

131. Although the Task Force's focus has been the selection of judges in New York City, and the present press coverage has focused on the Borough of Brooklyn, the problems addressed by this Report are endemic to the system throughout the state. The only difference is that the dominant party varies in regions of the state. Accordingly, our conclusions and recommendations are not limited to New York City.

Any package of reforms, therefore, even those short of constitutional amendment, must at a minimum follow these principles:

- For appointive judgeships, the person or persons effectively choosing judges must be themselves politically visible and subject to election. But the elected official making the decision should be choosing among a small number of candidates–in most instances, no more than three–selected as the most qualified by a screening committee independent of the elected official's authority.[132]
- Insofar as possible, the system should insulate judges from political or financial indebtedness.
- Members of a judge's staff, including law secretaries, should themselves be merit hires, chosen without influence from political parties.

With these broad guidelines in mind, there are important reforms that can be made within the existing system to improve the quality and independence of judicial selections.

A. First: Refining the Elective Process To Make It More Merit-Based

1. Supreme Court

While New York State Election Law requires that all "party nominations for the office of justice of the Supreme Court shall be made by the judicial district convention,"[133] in practice there is a wide divergence among the counties with respect to how this convention works. In some counties, the "convention" is a mere formality, held during a lunch hour, at which the delegates simply vote as instructed by the county political leader. In other counties, the convention is genuinely contested, and the delegates engage in a process of compromise and coalition-building before a candidate is selected.

We believe that in order for the conventions to nominate the best possible candidates, they must each set up an effective screening committee to review the qualifications of candidates. The members of the screening committee should be selected from a broad range of bar groups, law school faculties, and civic organizations and include both lawyers and nonlawyers. While the party leadership will determine which organiza-

132. These principles apply equally to committees which screen for selection to run for elective office.

133. N.Y. ELECTION SS 6-106 (McKinney 1998).

tions will appoint members to the screening committee, the organizations themselves, not the party leadership, should decide who they will appoint to the committee. Appointed members are not to serve as their organizations' representative. The purpose of such a selection system for the screening committee is to ensure that the members of the screening committee are diverse, yet independent. This will help to ensure that the diverse public has confidence in the selections.

The screening committee must also have adequate resources. The committee should have the funds to hire an independent counsel who answers to the committee and not to outside political leaders. Additionally, the screening committee should conduct some version of a background check on potential candidates using any online or public sources available.[134]

To encourage accountability, the members of the screening committee should be selected for fixed nonrenewable terms, and their identities should be known. The screening committee's rules and procedures should be written and public so that there is a degree of transparency although the committee's deliberations should be private.

The screening committee should accept applications from any persons who wish to apply and should have an active outreach function to encourage the highest quality and diversity of potential candidates. No applications for judicial nomination should be accepted except through the screening committee. The screening committee should also effectively investigate potential candidates, interviewing colleagues, adversaries, and judges who are familiar with the attorney's work.

The screening committee should forward only the three most highly qualified candidates for consideration by the judicial district convention for each vacancy. If more than three candidates are forwarded per vacancy, the committee should rate them, *i.e.*, put them into ranked categories. The committee's decision should be final, and not subject to an appeal from political leaders who may favor a particular candidate.

Finally, delegates of the judicial district convention should agree to be bound to choose only among those three candidates found most highly qualified by the screening committee for each vacancy.

2. Elective judgeships generally

Other elective judgeships do not involve nomination through a judicial district convention. However, there are important reforms that are generally applicable to improve the electoral process.

134. For example, Regulatory DataCorp Int'l LLC, provides such services to the financial resources industry. See http://www.regulatorydatacorp.com.

First, although any candidate could circulate petitions and run in a party primary, party leaders should run an endorsed slate selected on merit. The party could form a screening committee, similar to that described above for the Supreme Court, which would select those three candidates most highly qualified for each vacancy. Party leaders would agree in advance to select for endorsement only candidates included in this list of the most highly qualified candidates. As in the description for the Supreme Court, screening committees generally would conduct background checks on potential candidates.

Second, voter guides should be provided to the public in all judicial elections, including those for the Supreme Court, to facilitate informed voting.[135] A frequent complaint is that, in contested judicial elections, voters enter the voting booth having no knowledge whatsoever of the candidates among whom they can choose. Voter guides would include a summary of each candidate's qualifications and endorsements, and a statement from the candidate.

Finally, although the prospect of a non-partisan judicial election is an intriguing one, the Task Force does not recommend its adoption. In the case of judicial elections, the change to a nonpartisan election would require a constitutional amendment, and the Task Force does not believe that this reform would in practice lead to better-qualified judges.[136]

B. Second: Refining the Appointive Process

While the Task Force strongly favors an appointive process of judicial selection, it recognizes that even that process must be carefully structured if it is to produce the best-qualified judges. There are two essential elements for effective judicial appointments.

The first is an effective screening or nominating committee. Such a committee would have similar characteristics to the screening committee described above with regard to Supreme Court nominations (*i.e.*, diverse membership, fixed terms, set rules, adequate resources). In addition, the committee should be bipartisan in composition and independent of the appointing authority.[137] The committee should actively solicit and review

135. Bar associations may also play an educational role by sponsoring educational programs within the community and establishing information hotlines. See, e.g., National Summit on Improving Judicial Selection, Call to Action, 34 LOY. L.A. L. REV. 1353 (2001).

136. In addition, the effect of interest groups and the pernicious effect of the need to raise money would still play an undue role.

137. One study found that members of screening committees were less likely to feel that politics affected their decision (15% versus 37-41%) when their committee was required to

applications, and recommend to the nominating authority a maximum of three most highly qualified candidates for each vacancy.

A recurring criticism of merit selection is that it is elitist. The Task Force believes that, on the contrary, merit selection is the fairest and most accessible method of selecting qualified judges. Nonetheless, the screening committee must operate openly and transparently to ensure that potential applicants and the public at large feel that the process is accessible, and to counter any perception of elitism (as opposed to meritocracy, which is to be encouraged). Similarly, members of the screening committee must be representative of the diverse interests of the public it serves.

The second essential element for effective judicial appointments is a politically accountable appointing authority. Even where a legislative body has the ultimate approval over judicial appointments, the nomination must be made by a single, visible elected executive who has political accountability for his or her decisions. The appointing authority must not dominate the screening committee or have sufficient control of the committee such that his or her nominees are always approved. Likewise the appointing authority must ensure that he or she does not appoint only those who are known to be very close to the appointing authority even if such persons are qualified. Such a process would lead to widespread cynicism about the role of the screening committee and the whole notion of merit selection.[138]

During the appointing process, this Task Force also recommends the use of background checks on candidates to detect any past criminal be-

be bipartisan in composition. See Malia Reddick, Merit Selection: A Review of the Social Scientific Literature, 106 DICK. L. REV. 729 (2002) (citing ALAN ASHMAN & JAMES J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS 76-77 (1974)).

138. For example, although there is widespread agreement that the current merit selection of Court of Appeals judges is preferable to the elective process that preceded it, the merit selection process in the Court of Appeals has recently drawn criticism. See John Caher, Few Appellate Judges Apply for Wesley's Seat: Potential Candidates Say They Presume Governor's Choice is Foregone Conclusion, 230 N.Y. L.J. 1 (Sept. 18, 2003). According to the article:

> Mr. Cuomo appointed three Democrats, three Republicans and one independent. The liberal Democrat used his first pick to appoint Richard D. Simmons, an upstate conservative. He also named a Republican, Sol Wachtler, chief judge and shocked observers when he appointed now-Chief Judge Judith S. Kaye, who had no judicial experience. With Judge Kaye's appointment, Mr. Cuomo appointed the first woman to the Court. He also appointed the first black to a full term, Fritz W. Alexander, and the first Hispanic, Carmen Beauchamp Ciparick.

Id. at 2. In contrast, although two of Governor Pataki's four picks have been women, all of his picks have been white Republicans. In addition, the article points out that "[t]hree were Appellate Division justices. Three had close political connections to the governor." Id.

havior or misconduct. One of the benefits of moving to an appointive system is that background checks may be more easily conducted using the appointive body's law enforcement resources. Such resources are difficult to employ in an elective system.

In New York City, three mayors, from both parties—Mayors Koch, Dinkins, and Bloomberg—agreed not to appoint any judge who had not been approved as qualified by the Association.[139] This has been an effective additional means of ensuring that only well-qualified candidates become judges and of strengthening the independence of the judiciary.

C. Third: Refining the Reselection Process and Retention Elections

Judges in New York do not serve life terms. For most of their tenure, judges take the bench each day knowing that their performance will be subject to review at the end of their term. This system involves a trade-off. On the one hand, it provides an incentive for judges to be hard-working, productive, and fair. On the other hand, the system of reselection can lead to the temptation for judges to decide cases not on the merits, but on how a decision may be reported by the media or viewed by political leaders who are involved in the reselection process. Judges are often called upon to make unpopular decisions, and they should not feel that their jobs may be in jeopardy when they do so.

Under a purely appointive system, judges are reselected through the process of reappointment. In order to balance the competing factors of judicial independence and public accountability involved in this process, the Task Force recommends that, except in cases of corruption or incompetence, the nominating committee should nominate the judge up for reappointment as the only candidate for that position, and the appointing authority should reappoint the judge. Judges should be assured that, so long as they work hard and strive to be fair, they will be reappointed to full terms without the threat of the appointing authority looking over their shoulders.

In this area as well, the organized bar can provide an essential service. The bar should review judges coming up for reappointment to determine whether the judge is qualified to continue. If so, the judge should

139. To the extent bar associations are invited to have "representatives" on a screening commission, we believe the Association should have a designee on the commission, but it should be clear to all concerned that such person is a designee of the Association, not a representative. That is, he or she is acting as an individual expressing his or her own views and in no way speaking for the Association which will express its views as a body when it vets those selected by the screening commission.

be recommended for reappointment. Political leaders should agree to reappoint those judges whom the bar has found qualified to continue in office.[140]

An alternative approach to the reselection of judges through pure reappointment is the use of retention elections. The first merit selection plan for the selection of judges, first adopted in Missouri and often referred to as the Missouri Plan, utilized such retention elections as a compromise between advocates of the elective and the appointive processes:

> After a period on the bench, judges face voters on the question of whether they should be retained in office. Judges who receive the required number of affirmative votes in this uncontested plebiscite earn a full term in office. At the end of each succeeding term, judges again face voters on a retention ballot. If a judge is rejected, the process of appointment is reinstituted.
>
> The Missouri Plan was a practical compromise between the goals of judicial independence and public accountability. The combined system of initial merit selection and subsequent retention elections was designed to obtain quality judges, maintain their independence by insulating them from political influences, and provide public accountability through a mechanism for removal of judges.[141]

Retention elections generally do not present all the problems of initial elections, either in terms of political control[142] or the influence of money.[143] Furthermore, they do not seem to have an adverse impact on minority judges.[144] Additionally, they may increase judicial accountability.[145]

140. This process—or one close to it—is already in place in some areas. For instance, the Mayor of the City of New York has pledged not to appoint anyone to the Criminal Court, Family Court and interim Civil Court judgeships if that person is "Not Approved" by the Association. However, the Mayor has not gone so far as to agree that he will affirmatively reappoint those judges whom the bar has found qualified to continue in office.

141. Larry T. Aspin and William K. Hall, Retention Elections and Judicial Behavior, 77 JUDICATURE 306, 306-07 (1994) (internal citations omitted).

142. Nonpolitical retention elections are to be distinguished from political recall elections such as the one in California in 1986 involving the recall of Chief Justice Bird.

143. See Aspin & Hall, supra note 141, at 309.

144. See Robert C. Luskin et al., How Minority Judges Fare in Retention Elections, 77 JUDICATURE 316, 316 (1994) ("A study of nearly every judicial retention election in the United States from 1980 to 1990 shows no correlation between whether a judge is black or Hispanic and the number of affirmative votes the judge received.").

145. It is unclear, however, how desirable this accountability is in a jurisdiction like New York where there are already mechanisms for removing corrupt or incompetent judges.

The potential adverse effect of retention elections on judicial independence however is very apparent. As already discussed in this section, judges should be allowed to decide cases on the merits without fear that their jobs are in jeopardy when they must make unpopular decisions. Retention elections may stifle this independence (although the requirement that retention be opposed by a supermajority may at least mitigate this effect).

The Task Force does not endorse retention elections as a preferable feature of any merit selection procedure. Nonetheless, it is prepared to accept retention elections if they may help engender the public and political support needed to secure passage of a merit selection system in the place of the current elective system.[146]

Finally, in the interim before the move to a purely appointive system, this Task Force suggests a procedure designed to encourage judicial independence as judges contemplate reelection: If a sitting judge is found satisfactory by the applicable screening committee, the committee should only pass on only the name of that judge for consideration. This practice would ensure that qualified judges are assured renomination.

D. Postscript: "Elevation" of Judges

In New York City, Acting Supreme Court judges are appointed by "elevating" criminal or Civil Court judges. The Chief Administrative Judge decides which judges will, or will not, be elevated. The Chief Administrative Judge can also remove a judge's "Acting Supreme Court" status at any time. This process violates several of our principles as set out above, most notably that under the current system, Acting Supreme Court judges are effectively chosen by an official with limited political visibility, through a process which makes no use of an insulating, independent selection committee. Any comprehensive process of judicial reform will end the appointment of "Acting" Supreme Court judges and provide for an adequate number of regular Supreme Court judges. But in the meantime, at the very least, the Office of Court Administration should agree not to appoint any judge to Acting Supreme Court status if that judge has been found not qualified by this Association or any comparable group providing independent outside scrutiny.[147]

146. We note that in an elective system, it is preferable to have a judge seeking reelection run in a retention election rather than a contested election, so long as the judge is subject to the same screening process as when he or she ran originally for that judgeship.

147. This appears to happen in practice, but it is not an official policy.

A similar issue arises with respect to certification of judges. Starting at the age of seventy, judges must be "certificated" in order to continue their service (up to the age of seventy-six). The Administrative Board of the Courts should agree not to "certificate" any judge found unfit for continued service by this Association or a comparable body.[148]

VII. IMPROVING THE JUDICIAL PROCESS, BEYOND SELECTION

A. Increased Compensation

New York State cannot afford to be at a competitive disadvantage in attracting the best-qualified and ablest people to serve as members of its judicial branch. Historically, the compensation given to judges in the last century has failed to even keep pace with the rate of inflation. Indeed, one of the most comprehensive surveys of judicial compensation reported in 1988 that there had been a 20-year erosion of real purchasing power among New York State judges.[149] That study, published June 29, 1988, by the State of New York Temporary Commission on Executive, Legislative and Judicial Compensation, recommended that judicial salaries be substantially increased. Although small increases in salaries have been legislated, there have been no substantial increases in judicial salaries since the study was published.

While there is no uniformly accepted standard to measure the adequacy of compensation, there are relative criteria that can be used. In comparing state judicial salaries with salaries of those in the corporate sector or in private practice, it becomes clear that New York's judicial salaries risk being so deficient that they erode the dignity and threaten the quality of the judicial system.

Not only are the absolute dollars of compensation inadequate, but, perhaps more significantly, there exists no mechanism for periodically evaluating judicial salaries. Increased compensation is left to the irregular

148. The need for independent assessment in this area was illustrated by a recent letter to the editor of the New York Law Journal, accusing the Office of Court Administration of failing to recertify a Supreme Court judge in part because he was an "outspoken critic of the Office of Court Administration". Kenneth P. Nolan, Letter to the Editor, Why was Judge Garry Not Recertified, 230 N.Y. L.J. 2 (Oct. 8, 2003). An independent screening body could effectively eliminate any such suspicions. By extension of the same logic, there should be independent assessments of judicial hearing officers, who are typically chosen from the ranks of retired judges.

149. New York State Temporary Commission on Executive, Legislative and Judicial Compensation, Report of the New York State Temporary Commission on Executive, Legislative and Judicial Compensation (June 29, 1988).

action of the New York State Legislature, which has often tied increases in legislative compensation to increases in judicial compensation. The 1988 Report of the Compensation Commission recommended that the Legislature should create a permanent Commission on Compensation to adjust levels of compensation for public officials at the top of all three branches of state government.[150] The goal of such a Commission would be to "assure more regular and even incremental adjustments and eliminate the very considerable disadvantages of sporadic compensation which have often necessitated relatively large catch-up adjustments."[151]

That Commission would be charged with making regular reports (perhaps every 3 years) to the legislature and the governor concerning the adequacy of compensation. In evaluating that issue, the Commission would be charged with considering such factors as changes in the cost of living and the general economic condition of the state. There were also recommendations that the Commission should develop a salary system that considered longevity on the court, as well as incremental payments that would be sensitive to the extraordinary costs of living in certain geographical areas of the state.

An important feature of the procedures of the Commission was that the recommendation of the Commission should take effect unless rejected by the governor and the legislature within 90 days.

In order to attract and retain well-qualified judges, judicial salaries must be periodically and systematically adjusted. This Task Force takes no firm position with regard to most of the details of such a Commission, but strongly recommends that a permanent mechanism be created to periodically review judicial salaries and to make specific recommendations that would take effect unless rejected by both the governor and the legislature.

B. Judicial Feedback

As we have stated, the legitimacy of judicial decisions must depend in large measure on the public's confidence in the skills, competence and independence of the judge. The focus on evaluating those credentials by the appropriate individuals or organizations at the optimal time is at the center of most of this Report, but that discussion generally points to evaluations made before the judge is appointed or elected.

The review of qualifications at that time must result in an "up or down" decision as to whether the candidate's qualifications support el-

150. Id. at 24.

151. Id.

evation to the bench. A number of states have taken this further and asked the obvious question: Why shouldn't evaluations be utilized after the judge is on the bench, and has had an opportunity to perform in that role? There is a related question, which has particularly troubled members of the Task Force who have been in the position of evaluating judges for reappointment or reelection: Why should a judge lack the information about an area perceived to need improvement until the screening process, when he or she is seeking a new term? It is clear that those devoting their efforts and lives to public service would want to perform in a manner that reflects well upon the bench. If a judge is perceived as deficient, that judge should be aware of that evaluation. Judges should not be deprived of information that they could use to improve their performance.

Policies that provide for the systematic collection and analysis of information regarding the judge's performance can help the community to ensure judicial competence in a number of ways. Such evaluations can be a very important tool to provide the judge with specific information and feedback as to how to improve his or her performance. Moreover, collecting data and opinions from a large, diverse group can insulate a judge from unfair criticism from the media or public officials, or from the complaints of a handful of unhappy constituents. With the results of the evaluations, unjustified criticism can be countered, or at least put into its proper perspective. Indeed, it will enhance judicial independence.

This Task Force recommends that confidential mid-term evaluations be undertaken to provide feedback to each member of the judiciary. In addition, new judges should be evaluated early in their first term to provide initial feedback and to flag any potential problems before they become entrenched. Both types of evaluations should not be judgmental or critical, but rather supportive and constructive.

It is important that the evaluation is designed and administered so that it promotes positive values and competencies without harming judicial independence. The most essential issue in designing such an evaluation is the selection of areas of performance that are to be evaluated. The Task Force suggests the following performance criteria for each judge (taken from one state's statute): [152]

- *Integrity*, including avoidance of impropriety and appearance of impropriety; freedom from personal bias;
- *Knowledge and Understanding of the law* and judicial branch

152. Kevin M. Esterling, Judicial Accountability the Right Way, 82 JUDICATURE 206, 208 (1999) (citing Utah's Code of Judicial Administration, 1993 Rule 3-111(2)).

rules, including the issuance of legally sound decisions; understanding of the substantive, procedural and evidentiary law of the state;

• *Ability to communicate*, including clarity of bench rulings and other oral communications; quality of written opinions;

• *Preparedness, attentiveness, dignity and control over proceedings*, including courtesy to all parties and participants;

• *Skills as a manager*, including devoting appropriate time to all pending matters; discharging administrative responsibilities diligently;

• *Punctuality*, including the prompt disposition of pending matters, and meeting commitments on time and according to rules of the court.

In the past, this Association recommended, after careful study, that a poll of practicing lawyers be conducted "to obtain their collective opinion as to the ability of sitting judges."[153] At that time in 1977, over 30 bar associations performed such surveys. The recommended plan, while leaving open many details, envisioned sampling only practicing lawyers, with the sampling narrowed only by the geography of the judge's seat. The plan also recommended that the entire poll results be immediately released to the press. That effort was never undertaken.

The Task Force recommendations for judicial evaluation should follow the plan proposed in 1977 with two significant differences. First, in order to encourage frank and open responses, the information should be collected on a confidential basis and a summary released only to the judge being evaluated; and, second, evaluations should be obtained from others beyond practicing attorneys. In other states, judicial evaluation committees interview or send surveys to court personnel, law enforcement personnel, litigants, witnesses, probation officers, jurors and others who may frequently come into contact with the judge. Enlarging the pool of those consulted is likely to make the results more credible for the judge and is also more likely to reveal a more wide-ranging perspective of the judge's performance.

There are a number of additional, specific issues that need to be discussed in order to implement mid-term judicial evaluations, including who should have the responsibility to collect the assessments/data, and

153. Committee on State Courts of Superior Jurisdiction, Judicial Evaluation Poll, 33 THE RECORD 15 (1978).

how are judges to be given the data in a way that is credible but preserves the confidentiality of those that share their perceptions. This Task Force recommends that the mid-term evaluations first be implemented on a pilot basis, with the goal of eventually spreading statewide. The Office of Court Administration would ideally administer the process, and their members—along with members of various bar associations in the community—would sit on the committee which prepares the evaluation report.

Although this Task Force takes no position on whether the mid-term evaluations should later be shared with the Association or other bar associations in conjunction with the review process for the reappointment of a judge, this is an important question to consider. On one hand, restricting the evaluation to use by the judge comports with the objective of a process geared towards encouraging improvement. If the judge improves, as intended, as a result of the feedback contained in the evaluation, then the evaluation should no longer be relevant at the later date that the Association is evaluating a candidate for reappointment. On the other hand, information regarding suggested areas of improvement at an earlier date could be very useful for a committee evaluating a judge's qualifications. Past evaluation can highlight a judge's improvement—or failure to improve—and provide an incentive for judges to take the mid-term evaluations seriously. Members of the Task Force recommend that this, and any other outstanding issues relating to evaluation, be discussed by a special committee that would include members of the bench, members of the bar, and representatives of the Office of Court Administration.

At this time in which public confidence in judicial performance needs to be strengthened, we strongly recommend implementation of mid-term judicial evaluation as an important tool to aid the individual judge, to improve overall judicial performance, and of equal importance, to increase public confidence in the system.

VIII. CONCLUSION

This Task Force recommends the adoption of a merit-based appointment system for all of New York's judges. The basic framework for such a system consists of a politically visible appointing body who is subject to election, and an independent, bipartisan and diverse screening committee to recommend a maximum of three most highly qualified candidates among whom the appointing authority must choose to fill a position. The membership of the screening committee should serve for fixed terms, consist of persons appointed by a broad range of bar and civic organiza-

tions and law school faculties and include nonlawyers as well as lawyers. Although its deliberations will be private, the screening committee must operate in as open a manner as possible. In addition to reviewing and recommending candidates, the members will actively solicit potential applicants. At some point in the process, background checks will be conducted on candidates. Also, the appointing body will not appoint any candidate found not qualified by the Association or a comparable organization. Finally, there will be a presumption of reappointment of judges, except in cases of corruption or incompetence, or where the candidate is found not qualified.[154]

Recognizing that it may take time before the statewide adoption of the merit-based appointive process described above is fully implemented, this Task Force recommends that specific improvements be made to the elective process in the meantime. First, screening committees should be established to forward three names of the most highly qualified applicants for each judicial vacancy to either the judicial district convention delegates—in the case of Supreme Court nominees—or to party leaders. Second, the delegates and party leaders should agree to choose the judicial candidate who will appear on the ballot from one of those three names. In addition, if a judge comes up for reelection and is found qualified by the screening committee, the committee should forward only that one name to the judicial district convention delegates or party leaders to be put on the ballot for that particular position.

The membership and operation of screening committees for the elective process is modeled closely on the guidelines suggested for screening committees for the appointive process: the membership should be diverse and serve for fixed, nonrenewable terms, the procedures and membership of the committee should be open to the public, and the process should include some version of a background check and a solicitation or outreach component. In addition, great care should be taken to ensure committee independence and autonomy from party leadership. This can be accomplished in part by allowing party leaders to choose which organizations will be represented on the committee, but mandating that the organizations themselves choose the individuals who will serve on the committee. All potential candidates will pass through the screening committee, and the decision regarding those candidates by the committee will be final and not subject to appeal by party leaders.

154. The Task Force does not endorse retention elections as a means of weeding out unsuitable judges at the end of their term, but is willing to accept such retention elections if that is the price necessary to engender the support to convert to an appointive process.

For as long as there are judicial elections, this Task Force recommends that voter guides be given to the public in all judicial elections to facilitate informed voting. The voter guides would include a summary of the candidates' qualifications and endorsements, and a statement from the candidate.

Finally, this Task Force recommends several improvements to New York's judicial system, beyond the manner of selecting New York's judges. This Task Force believes that an independent commission should evaluate the compensation levels of judges in this state to ensure that judicial compensation is adequate and also commensurate with the changing cost of living. The commission should periodically review judicial salaries and make specific recommendations that would take effect unless rejected by the governor and legislature.

This Task Force also recommends the establishment of a system for providing feedback to judges currently serving on the bench. Under this system, feedback evaluations should be conducted for all judges halfway through their term. New judges should have an additional evaluation early in their first term. The evaluations should be collected from a wide range of sources, including lawyers, court personnel, litigants, jurors and witnesses. These sources should be kept confidential from the judge and the public, and the final conclusions of the evaluation should be shown to the judge but not to the public.

October 2003

The Task Force on Judicial Selection

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The Task Force thanks Christine K. Kornylak and Jennifer E. Sturiale, an associate and summer associate, respectively, at Cravath, Swaine & Moore LLP, for their help in preparing this report.

APPENDIX

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Law School Debt and the Practice of Law

The Committee on Legal Education and Admission to the Bar

I. INTRODUCTION

The large amount of educational debt assumed by many law students has important effects on both the provision of public interest legal services[1] and the quality of life of debt-burdened practicing attorneys. Some evidence indicates that rising law school debt may affect the ability of public interest and government legal service providers to recruit and retain attorneys to service clients' needs. Evidence also suggests that law school debt constrains law school graduates to pursue more remunerative private practice careers and deters practicing attorneys from transferring out of jobs that are lucrative but otherwise unfulfilling. Both developments should concern individuals and groups interested in either the provision of public interest and government legal services or the quality of life of practicing attorneys.[2]

Although law schools, legal employers, state bar associations and state

1. This report uses the term "public interest" to broadly refer to legal services by 501(c)(3) charitable organizations or by government and the term "public service" to broadly refer to legal services by 501(c)(3) charitable organizations and by government.

2. The cost of attending and completing law school has risen significantly in the last 15 years (see chart infra page). The reasons for these cost increases, the possibility of cutting costs, and possible alternatives in legal education are topics outside the scope of this report.

and federal legislatures have taken some action to ameliorate the effects of law school debt, those efforts have thus far been minimal, have not kept pace with the escalations of costs, and have been focused mainly on attorneys pursuing qualifying public interest careers. These programs offer differing, and sometimes competing, rationales for providing law school debt relief. Law schools boast of the financial benefits that their graduates enjoy from debt relief programs, while bar associations and other advocates extol debt relief programs as a means to encourage public service and to increase access to justice.

The consequences of high law school debt, however, may be felt more in the broader legal services market than in the public service sector. Although debt may not be a controlling factor in the initial career decisions of those motivated to enter public service, it may well divert other graduates from small-firm and solo practices. Because those practices primarily serve the middle and working classes, one consequence of high debt levels and the concomitant upward pressure on legal fees could be a decrease in the practical availability of legal services to those populations. Moreover, financial pressures have been identified as contributing to transgressions of ethical proscriptions and as contributing to the disturbing erosion of professionalism in the practice of law.[3]

None of the current debt-relief programs appear to address these concerns. But even if the effect on public service is the only concern, one must nevertheless assess and account for the effects of debt on private practioners' availability for pro bono and assigned counsel representation.

This report first outlines the consequences of high law school debt. The report next considers the effect of high debt levels that has, to date, received the most attention—the effect on public interest law organizations—and summarizes a variety of existing and developing programs providing law school debt relief. To this end, the report attempts to identify, where possible, structural limitations that should be recognized in, and improvements that could be made to, current and developing debt relief programs, with particular attention to steps that might be taken to assure such debts are repaid with pre-tax dollars. The report then describes effects of high debt levels that have as yet not received very much attention—the effect on lawyers in private practice. The report concludes with five concrete conclusions and recommendations regarding the fu-

3. See, e.g., Leonard E. Gross, The Public Hates Lawyers: Why Should We Care?, 29 Seton Hall L. Rev. 1405, 1419 (1999); Marvin Hirshman, BEWARE! Examples of Conduct Which Will Invite the Attorney Grievance Commission to Inquire and/or Seek Further Investigation, Md. Bar J., April/May 2001, at 59 (listing "Financial problems that affect one's practice").

ture study of the problem and the development of law school debt relief programs.

II. THE CONSEQUENCES OF HIGH LEVELS OF LAW SCHOOL DEBT

Some of the most compelling evidence of the crushing debt incurred by many law school students is found in the stories told by recent law school grads themselves. To those who joined the legal profession before 1990, the experiences of recent graduates must be shocking:

> • Jonathan Sambur, a 2001 graduate of the New York University School of Law, told the *Wall Street Journal* that his student loan debt totals $109,000, with payments of about $1,200 per month. Currently working for the government, Sambur intends to consolidate his loans and extend the repayment term to 30 years to lower his monthly payments.[4]
>
> • Adam Fox and Jessica Gadsen graduated in 1996 from the Cornell Law School with combined student loan debt totaling $200,000. Now married and living in Los Angeles, their monthly student loan payment of $2,500 is only $500 less than their mortgage payment.[5]
>
> • Rebecca Long, a 2000 graduate of the Georgetown University Law Center, has student loan debt totaling $116,000—nearly four times the annual salary of $31,000 she earns representing low-income clients at Utah Legal Services in Salt Lake City. She survives by taking advantage of Georgetown's loan repayment assistance program, which covers 100 percent of her monthly student loan payment if she stays at her job for five years.[6]

Bar association leaders and law school deans have also sounded the alarm about mounting debt burdens on new attorneys. Writing in the New York Law Journal on the occasion of Law Day 2001, Association president Evan A. Davis noted:

> The current economics of law practice not only burdens bar and pro bono work, it also restrains the career options of younger attorneys. Many students graduating from law school face several tens of thousands of dollars of loans. . . .

4. Lynn Asinof, Lean Times Worry Grads With Loans, Wall Street J., Dec. 24, 2001, at C1.

5. Kathy M. Kristof, Money Make-Over: Laying Down the Law on Spending Priorities, Los Angeles Times, Oct. 2, 2001, at C1.

6. Margaret Graham Tebo, The Debt Conundrum, ABA J., March 2001, at 42.

> Some young lawyers end up in places they never intended to be and where they do not intend to stay. The costs of this unhappy situation are significant, as firms experience retention problems, able attorneys grow disillusioned and cynical about the profession, and government and other public service law offices are unable to meet their recruiting needs for diverse, able lawyers.[7]

Steven C. Krane, in an interview with the New York Law Journal given shortly after he became president of the New York State Bar Association, indicated that an initiative to help professionals inclined to work in public service pay off their school debts would be a priority of his presidency.[8] Subsequently, the NYSBA announced the formation of a Special Committee on Student Loan Assistance for the Public Interest charged with the task of developing Krane's "Americorps-like" initiative, which committee is currently developing a repayment assistance program.[9] Additionally, American Bar Association president Robert E. Hirshon announced in the November 2001 issue of the ABA Journal the creation of a new ABA commission to examine the problem of increasing debt and to recommend "concrete solutions."[10] The work of the ABA commission is ongoing, and

7. Evan A. Davis, Work Demands All Our Time, N.Y. L.J., May 1, 2001, at S3.

8. John Caher, New State Bar President Champions Openness, Service, N.Y. L.J., June 11, 2001, at 1.

9. See infra notes—and accompanying text; see also New York State Bar Association, N.Y. State Bar Association Looking to Offer Law School Loan Relief for New Lawyers Willing to Work With the Poor, http://www.nysba.org/media/newsreleases/2001/loanforgiveness.htm (Aug. 31, 2001).

10. Robert E. Hirshon, Graduating Under Pressure, ABA J., Nov. 2001, at 6. Describing the problem, Hirshon wrote:

> If you talk to recent law school graduates, you know of a new dynamic that is threatening the health of our profession. Graduates of the class of 1998 incurred average debt of about $80,000. This debt burden continues to increase. Keep in mind that this doesn't affect just a few. At least 86 percent of the law school class of 1996 borrowed funds to pay their tuitions and expenses.
>
> When I quoted these statistics to a group of students at Tulane University, a private school, most just smiled. Their average debt is in excess of $100,000. Under current amortization rates, they anticipate paying $1,200 to $1,400 per month for the first 10 years of their careers. Admittedly, those graduates didn't claim that they were "economically disadvantaged." They knew that starting salaries in private practice had skyrocketed. But herein lies the rub: Because of debt, more and more graduates find themselves limited to working in large private law firms, thus surrendering any possibility of taking on socially critical and experience-rich positions in government or legal service offices, or other important but lower-paying jobs.

Id.

it is currently focused on "promoting LRAPs and guiding ABA efforts to stimulate more LRAPS and scholarships/fellowships provided by law schools, the federal government, state governments, and other private sources."[11]

Statistics confirm that growth in average law school debt has dramatically outpaced not-for-profit and for-profit salaries, inflation and even tuition. A comparison of the growth in average law school debt, tuition, salaries and inflation from 1987 to 2002 is staggering:

	1987	2002%	Increase
AVERAGE DEBT LOAD (NATIONWIDE)	$16,000	$80,000+	400%
AVERAGE ANNUAL TUITION AT PRIVATE LAW SCHOOLS (NATIONWIDE)	$8,286	$21,000	153%
STARTING SALARY AT CRAVATH, SWAINE & MOORE	$65,000	$125,000	92%
STARTING SALARY AT THE LEGAL AID SOCIETY OF NY	$26,000 (1986)	$42,000	61%
INFLATION (CPI)			58%
MEDIAN SALARY OF ENTRY-LEVEL LAWYERS (NATIONWIDE)	$36,000 (1983)	$45,000 (1998)	25%

Access Group, Inc., a non-profit organization that provides private and federal loans to graduate and professional school students, reports that from 1993 to 1998 average borrowing by law school students that used Access Group's services increased from $47,000 to $69,000.[12] Extrapolating from Access Group's figures, the National Association for Public Interest Law estimates that the total debt of an average 1998 law school graduate was about $80,000.[13] According to U.S. News & World Report, law schools in New York City reported the following average borrowing *for law school alone* among their 1998 graduates:[14]

11. Commission on Loan Repayment and Forgiveness, American Bar Ass'n, Commission Information and Loan Repayment/Forgiveness News, http://www.abanet.org/legalservices/lrap/ (updated May 23, 2002).

12. Rob Anderson, Back to the Books, New Orleans CityBusiness, Nov. 26, 2001, at 6B.

13. National Association for Public Interest Law, Financing the Future: NAPIL's 2000 Report on Law School Loan Repayment Assistance and Public Interest Scholarship Programs 13 (2000) (hereinafter "Financing the Future"). NAPIL arrived at its estimate by taking the average amount of private loans borrowed reported by the Access Group, and adding the maximum subsidized and unsubsidized student loan amount. See id. at 13 & n.*.

14. Data retrieved from U.S. News & World Report Online, Compare Law Schools, http://www.usnews.com/usnews/edu/beyond/apps/gradlaw.htm (last visited January 24, 2002).

LAW SCHOOL	AVG. INDEBTEDNESS (1998)
Brooklyn	$58,900
Cardozo	$70,500
Columbia	$83,788
CUNY	N/A
Fordham	$71,190
New York Law School	$65,193
NYU	$86,706
St. John's	$58,900

The U.S. News figures do not include undergraduate debt, which, in 1998, averaged about $9,500.[15]

Considering the situation of an average attorney accepting public service employment in New York City brings the magnitude of her likely debt obligation into stark relief. Median starting salaries for 1998 graduates entering public service as reported by the seven New York City law schools that provided such information to U.S. News and World Report ranged from $38,000 to $42,000. Assuming a salary of $40,000, a New York City attorney would take home approximately $2400 per month.[16] The monthly payments on $80,000 of student loan debt total approximately $900.[17] Thus, a New York City lawyer with the average debt load who chose to work in public interest would face a job market in which the median salary left the lawyer with about $1500 per month after taxes and student loan payments.

Fifteen hundred dollars per month is *less* than six of the seven New York City law schools calculate as the monthly non-tuition "cost of attendance" for students:[18]

15. See Philip G. Schrag, The Federal Income-Contingent Repayment Options for Law Student Loans, 29 Hofstra L. Rev. 733, 747 n.64 (2001)

16. The calculation assumes the lawyer was single, living in New York City, and took the standard deduction, resulting in $5577 in federal taxes, $2763 in state and city taxes, $2480 in Social Security taxes, and $580 in Medicare taxes per year using 2001 marginal rates.

17. See Financing the Future, supra note 5, at 421.

18. Figures were derived from Cost of Attendance information provided at Benjamin N. Cardozo School of Law, Tuition and Fees, http://www.cardozo.yu.edu/admissions/tuition.html (visited January 31, 2002); Brooklyn Law School, Estimated Expenses, 2001-2002 Academic Year, http://www.brooklaw.edu/finaid/expenses2001.shtml (visited January 31, 2002); Columbia Law School, Admissions: Tuition, Financial Aid, and Housing, http://www.law.columbia.edu/admissions/tuit1.html (visited January 31, 2002); CUNY School of Law, Admission Requirements, http://www.law.cuny.edu/Apply/admission/main.html#budget

LAW SCHOOL	MONTHLY (NONTUITION) COST OF ATTENDANCE
Brooklyn	$1765
Cardozo	$2413
Columbia	$1781
CUNY	$1304
Fordham	$2076
New York Law School	$1736
NYU	$2327
St. John's	$1631

Thus, although law school financial aid offices caution that the "cost of attendance" budget merely "allows for a simple lifestyle, that of a graduate student"[19] and that "[s]tudent costs of attendance are just that, STUDENT costs . . . set to a different lifestyle than that of a New Yorker earning $40,000 a year,"[20] a New York City lawyer earning $40,000 a year and carrying the average debt load would have to live an even *more* spartan lifestyle than that expected of law students. Moreover, the lawyer would have to do so without the benefit of the subsidized housing that some of the City's law schools provide and without payments on their undergraduate loans being deferred (as they are during law school).

Given these fiscal realities, it is perhaps not surprising that lawyers have the dubious distinction of having the highest default rates among students borrowing for graduate studies.[21] In 1995, the *National Law Journal* reported:

> From 1985 to 1995, at a time when salaries and available jobs were largely flat or headed south, borrowing among law students exploded, with average indebtedness upon graduation now rising at a rate of more than 20 percent a year. At the same time, private law school tuition was rising 7 percent to 10 per-

(visited January 31, 2002); Fordham University School of Law, Cost of Attendance, http://law.fordham.edu/htm/fa-cost.htm (visited January 31, 2002); and New York University School of Law, How Much Is the Budget, http://www.law.nyu.edu/finaid/budget.html (visited January 31, 2002), as well as through telephone inquiries to New York Law School and the St. John's University School of Law made on February 4, 2002.

19. New York University School of Law, supra note 18.

20. Fordham University School of Law, Financial Planning, http://law.fordham.edu/htm/fa-finpla.htm (visited January 31, 2002).

21. Dana Coleman, Dubious Distinction: Law Students Top Defaulters, N.J. Lawyer, Jan. 5, 1998, at 5.

> cent a year, now averaging around $15,000. Lawyers today default on student loans more often than doctors, engineers and business school graduates, lenders say. At some law schools, as many as 40 percent of the past decade's graduates have stopped paying their loans.[22]

The default rate among law school graduates nationwide is estimated at between 15 and 20 percent.[23]

On at least one occasion, the default rate at a particular school has led that institution to take measures to restrict the amount its students may borrow. In response to rising default rates, Nova Southeastern University sought to reduce its students' cost of attendance both by reducing the school's calculation of "reasonable" expenses and by limiting tuition increases.[24] Among other things, NSU reduced the housing portion of the "cost of attendance" budget, reasoning that modest housing with a roommate is more appropriate for a student living on credit than the previously assumed "one-bedroom garden apartment (with den or office) in a complex that had a pool and exercise facilities" in a high-rent area close to the University.[25] Second, it eliminated an allowance for traveling home over the semester break, reasoning that NSU students who are Floridians

22. Ann Davis, Graduate Debt Burden Grows; Of All Professionals, Law Grads Have Compiled the Worst Loan Default Record, Nat'l L.J., May 22, 1995, at A1.

23. Id.; see also Coleman, supra note , at 5. Educational loan defaults by law school graduates are of concern to the profession for several reasons. First, private lenders react to high levels of default by making it harder for students to borrow, thus either increasing the costs of a legal education (through higher interest rates) for those students who must borrow to attend law school or effectively foreclosing such students from attending law school. See generally Chris Klein, A Leading Creditor Says It Will Make Student Borrowing Tougher, Nat'l L.J., Nov. 25, 1996, at A16 (describing steps taken by the Access Group in response to high default rates among law school graduates). Second, graduates who default prior to being admitted to the bar may have difficulty passing a character and fitness evaluation. See, e.g., Joseph D. Harbaugh, Legal Education Economics 101: A Primer for Bar Examiners, The Bar Examiner, Nov. 2001, at 26 & n.38; Coleman, supra note , at 5. Third, lawyers already admitted to practice may face disciplinary action—including suspension of their licenses to practice -- as a result of defaulting on student loans. See Notices to the Bar: Rule Proposed to Suspend Licenses of Lawyers Not Repaying Student Loan, N.J. Lawyer, May 14, 2001, at 30; Nancy Ritter, Student Law Deadbeats: Heat's on Lawyers, N.J. Lawyer, Apr. 5, 1999, at 1. Finally, a high default rate simply reflects badly on the profession as a whole.

24. See Harbaugh, supra note 23, at 25. "Cost of Attendance" is defined in federal law, see 20 U.S.C. § 1087II, and serves as an upper limit to the amount students may borrow through educational loan programs. In general, "cost of attendance" includes tuition and fees as well as reasonable living and other allowable expenses as calculated by each school. Id.

25. Harbaugh, supra note 23, at 25 n.31.

(the majority) could drive, and the remainder "could turn to their families for fare assistance."[26] These changes and other in NSU's "cost of attendance" budget reduced the amount an NSU student could borrow by a total of $12,450 over the course of thee years of attendance.[27]

Unsurprisingly, NSU reports that, as a result of these changes and other efforts to educate students about the perils of debt, student borrowing has indeed dipped commensurate with the reduced "cost of attendance."[28] But reductions in the "cost of attendance" such as those enacted by NSU reduce student borrowing not by providing them a legal education at a lower cost, but instead by forcing students who must finance their educations to live more austerely during law school. Taken too far, such a strategy could effectively foreclose some prospective students from attending law school if those students were unable or unwilling to live under the conditions the law school envisions are appropriate for the majority of its students. A single parent, for example, might not wish to live with a "roommate" as envisioned by NSU.

Nor do many law schools have the flexibility to substantially reduce "cost of attendance." As noted above, New York's law schools already consider their "cost of attendance" budgets to provide for "a simple lifestyle." For many law students, then, incurring large debts may be they only way to afford to attend school.

III. THE PARTIAL ANSWER: EFFECTS ON PUBLIC INTEREST LEGAL SERVICE AND THE RISE OF LRAPS

The problem associated with the high debt loads of recent law school graduates that gets the most attention from the bar is the perceived impact on the number of lawyers seeking employment with public service law offices. The effect of debt on public interest organizations was mentioned by each of the bar association presidents quoted above, and it has also been referred to in newspaper articles,[29] radio news features,[30] and

26. Id.

27. Id.

28. Id.

29. See, e.g., Diane E. Lewis, Probably Not in Public Interest: High Debt, Low Pay Drive Young Idealistic Lawyers from Hub, Boston Globe, Aug. 24, 2001, at D1; James V. Grimaldi, The Legal Eagles Are Taking Wing; Agencies Losing Recruiting Fight With Law Firms As Salaries Soar, Wash. Post, May 9, 2000, at A29.

30. See, e.g., Trish Anderson, Lawyers for Poor Face Own Financial Struggles (New Hampshire Public Radio broadcast, July 3, 2001), available at http://www.nhpr.org/content/fullmonty_view.php/974/ (last visited January 15, 2002).

remarks to legislative bodies by leading members of the bench and bar.[31] As Stuart A. Van. Meveren, President of the National District Attorney's Association told a subcommittee of the House Judiciary Committee,

> With school loans frequently in the range of $100,000, aspiring prosecutors and public defenders face a crippling debt burden that, for economic reasons, drives them to other career choices. I suspect that this financial burden hits minority students even harder and makes their choice to enter public service that much more difficult.[32]

In response to this perceived problem, law schools, governments, bar associations and legal employers are increasingly offering a variety of programs to alleviate the debt obligations of attorneys pursuing qualifying public interest employment. As further explained below, these programs vary widely in the amount of benefits offered and the range of employment they seek to support. What they all have in common is that they reflect a choice to alleviate the debt burdens of some lawyers rather than others based on their choice of employment.

A. Law School Debt Repayment Programs

Loan Repayment Assistance Programs are the most common way law schools attempt to alleviate the debt burdens on their students. The National Association for Public Interest Law estimates that about fifty law schools have LRAPs of some form or another,[33] including six of the eight law schools in New York City.[34] Unfortunately, the funding for law school programs is extremely uneven and just six law schools currently award more than fifty percent of LRAP dollars given to graduates.

Typically, LRAPs provide funds to graduates in the form of loans,

31. See, e.g., State Supreme Court Justice Calls for Better Indigent Care, AP Newswire, January 18, 2002, available at Westlaw, 1/18/02 APWIRES 14:33:00 (describing speech by Chief Justice Norman Fletcher of the Supreme Court of Georgia to that state's legislature); Legislative Hearing on H.R. 4167, "The Innocence Protection Act of 2000" Before the Subcomm. on Crime of the House Comm. on the Judiciary, 106th Cong, 152-63 (2000) (testimony of Stuart A. Van. Meveren, President of the National District Attorneys' Association).

32. Legislative Hearing on H.R. 4167, supra note 31, at 162.

33. See Student Organizing Department, National Association for Public Interest Law, Loan Repayment Information < http://www.napil.org/SUB-SO/Lrap/SO-lawschoollrap-FM.html > (visited February 6, 2002).

34. St. John's University School of Law and the CUNY School of Law do not currently offer an LRAP.

which are subsequently forgiven. Providing funds in the form of loans qualifies the programs for favorable tax treatment pursuant to 26 U.S.C. §108(f)(2)(D)(ii): if the recipient is providing legal services to an underserved population, the funds provided are not taxable income. Another common feature is an income qualification, either in the form of a hard ceiling beyond which a graduate is not eligible for the program, a sliding scale that reduces assistance as income rises, or a combination of both.

LRAP programs vary widely in many important respects. These include (1) what loans are covered; (2) what type of employment qualifies a graduate for the program; and (3) how income is calculated. Set forth in Appendix A to this report is a comparison of the LRAPs offered by the Columbia Law School and the Fordham University School of Law, which illustrates the sometimes complex and contingent qualification requirements of these types of programs.

Unfortunately, evidence suggests that the complexities and contingencies associated with LRAPs may result in the inefficient use of LRAP funds. A 1995 study by professors Kornhauser and Revesz posited in part that, on a dollar for dollar basis, LRAP programs were less effective than scholarships in encouraging the pursuit of not-for-profit careers.[35] Based on this preliminary hypothesis, Kornhauser and Revesz launched the Innovative Financial Aid Study (the "IFAS"), which compared the effect of variously structured forms of career contingent financial aid study on the job choices of certain NYU graduates in the classes of 1998 through 2001.[36] Specifically, some students participated in a program structured as a "tuition waiver" whereby all tuition was waived during law school but would have to be repaid if the student did not pursue public interest employment, while other students incurred loans but were eligible for loan forgiveness if they pursued public interest employment.[37] Importantly, the study ensured that there was *no difference in the monetary values of the two financial aid packages*.[38]

Analyzing the data from the IFAS, Erica Field of Princeton University

35. Lewis A. Kornhauser & Richard L. Revesz, Legal Education and Entry into the Legal Profession: The Role of Race, Gender and Educational Debt, 70 N.Y.U. L. Rev. 829 (1995).

36. See Office of Development and Alumni Relations, New York University School of Law, Innovative Financial Aid Study, < http://www.law.nyu.edu/alumni/surveys/financialaid/ > (visited June 1, 2003).

37. See Erica Field, Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School 4-5 (February 2003), available at < http://www.princeton.edu/~emfield/Fieldnyu.pdf > .

38. See id. at 6-7.

found that recipients of the financial aid package styled as a tuition waiver were much more likely to pursue public interest employment than those eligible for loan repayment.[39] Indeed, students receiving tuition waivers had a 32% higher rate of first job placement in public interest law and a 91% higher rate of clerkships than students who paid tuition but were eligible for loan repayment assistance.[40] Field attributes the difference in participation rates to persistent levels of risk aversion or, more accurately, perceived risk aversion among law students.[41] These conclusions are obviously of significant importance to those concerned with the relationship between law school debt and public interest legal services because they suggest a revenue-neutral way to more effectively encourage public service.[42]

B. Government Debt Relief Programs

Although government-funded loan repayment assistance and loan forgiveness programs for medical doctors have become commonplace,[43] such programs for lawyers are rare. Only very limited federal assistance is available, and only one state—Maryland—offers an operational state-run assistance program. This section briefly outlines the federal programs and Maryland's program.

1. Federal Programs

Federal regulations provide that Perkins loans, which are made based on financial need and may total up to $40,000 for students who have completed a post-graduate degree, may be forgiven if a graduate works in qualifying employment.[44] Qualifying employment includes full-time employment for twelve consecutive months in a nonprofit child or family service agency with high risk children from low income families or employment in an agency that enforces criminal law.[45] Loans are forgiven as follows: 15% for each of the first two years of qualifying employment; 20% for each of the third and fourth years of qualifying employment, and 30% for the fifth

39. Id. at 27.

40. Id. at 17-18.

41. Id. at 27-28.

42. See id. at 28.

43. See generally Association of American Medical Colleges, Financing Your Medical Education: State and Other Loan Repayment/Forgiveness and Scholarship Programs, < http://www.aamc.org/students/financing/repayment/start.htm > (visited February 8, 2002) (searchable database of various state and federal programs).

44. See generally 34 C.F.R. 674.1 et seq. (2001) (regulations governing the Perkins Loan program).

45. See id. §§ 674.56(b), (d), 674.57.

year of qualifying employment.[46] Thus, after five years, 100% of Perkins loans may be forgiven.

For graduates with Stafford Loans, the only federal relief available is through the income-contingent repayment option for repayment of direct student loans.[47] Graduates would have to consolidate their federally-guaranteed loans into a new direct loan for this purpose. Under the income-contingent repayment option, a graduate would be required to pay 20% of the difference between her adjusted gross income and the federal poverty level for a family of her size.[48] If the resulting payments are less than the interest payments on the loan, the difference will be added to the loan's principal, until the outstanding balance is 110% of the amount borrowed.[49] After the outstanding balance reaches the 110% level, any difference between payments made and interest due is accounted for, but is not capitalized into the loan balance.[50] In other words, beyond the 110% level, interest does not compound. After twenty-five years, any amounts still due are forgiven.[51]

In an extensive evaluation of the income-contingent repayment option with respect to law school loans published in the Spring 2001 issue of the *Hofstra Law Review*, Professor Philip G. Shrag, Director of the Center for Applied Legal Studies at the Georgetown University Law Center, found that the program as currently structured was not attractive to most graduates.[52] Indeed, he noted that "virtually no law graduates use income-contingent repayment, but 2.8% of all law students take initial jobs as public interest lawyers."[53] Accordingly, he recommended several reforms, primarily including a reduction in the twenty-five year repayment/forgiveness period to fifteen or seventeen years.[54]

The paucity of federal assistance may be changing, however. On May 21, 2003, Senator Richard Durbin introduced S. 1091, the Prosecutors and Defenders Incentive Act, in the United States Senate, and Representative

46. See id. §§ 674.56(d), 674.57(b)(2). During qualified employment, the Federal Government repays the loan to the institution that made it. See id. § 674.63.

47. See generally 34 C.F.R. 685.100 et seq. (2001) (regulations governing the William D. Ford Federal Direct Loan program).

48. See id. § 685.209(a).

49. See id. § 685.209(c)(5).

50. See id.

51. See id. § 685.209(c)(4)(i),(iv).

52. Schrag, supra note , at 774-93, 830-40.

53. Id. at 848.

54. See id. at 840-58.

David Scott introduced an identical Bill, H.R. 2198, in the House of Representatives.[55] The Act would create a federal LRAP for attorneys working as prosecutors or public defenders in State courts.[56] Payments would be capped at $6,000 per year and $40,000 per person, and the initial appropriation would be $20,000,000.[57] The bills are currently pending before the Senate Committee on Health, Education, Labor, and Pensions and the House Committee on Education and the Workforce.[58]

2. Maryland's Janet L. Hoffman Loan Repayment Assistance Program

Maryland's state-funded Janet L. Hoffman Loan Repayment Assistance Program is the only operational state-run LRAP, and it is similar in structure to the law school LRAPs discussed above. The Maryland program provides assistance to attorneys (and other professionals) who are employed full-time in state or local government, or in a nonprofit organization in Maryland that helps low-income, underserved residents or underserved areas in the state.[59] To qualify, a participant's gross salary cannot exceed $50,000, and, if the participant is married, the couple's combined gross salaries cannot exceed $110,000.[60]

Awards are calculated as follows: $3,600 per dependent child under the age of 18 is subtracted from the participant's gross salary, and the result is used to calculate a participant's expected contribution toward loan payments as follows:[61]

GROSS SALARY—DEPENDENT ALLOWANCE	EXPECTED CONTRIBUTION (as a percentage of salary)
under 20,000	0%
25,001 - 25,000	1%
25,001 - 30,000	2%
30,001 - 35,000	4%
35,001 - 40,000	5%
40,001 - 45,000	6%
45,001 - 50,000	7%

55. See 149 Cong. Rec. S6852 (daily ed. May 21, 2003) (Senate); id. at E1040 (House).

56. See S.1091, 108th Cong. § 2(a).

57. Id.

58. Current bill status is available at < http://thomas.loc.gov > by bill number.

59. See Maryland Higher Education Comm'n, State Scholarship Program Descriptions, < http://polar.mhec.state.md.us/SSA/progdesc.htm#LARP > (visited February 8, 2002). For the implementing legislation, see Md. Code. Ann., Education, 18-1501 et seq. (2001).

60. See Maryland Higher Education Comm'n, supra note 59.

61. Telephone Interview with Cis Whittington, Maryland Higher Education Commission, conducted February 21, 2002.

The participant's expected contribution is then subtracted from the total amount of his annual loan payments, and the difference is the amount of the award, up to a maximum of $7,500.[62] There are currently approximately 190 participants, including all eligible professions, in the Maryland program.[63] The number of attorneys participating is not available.[64]

Other states have recently authorized the creation of state administered LRAPs, but have not yet appropriated funds. California and Texas enacted authorizing legislation for statewide LRAPs in 2001 and Georgia enacted authorizing legislation for a statewide program in 2002, but currently all three states' programs are un-funded and non-operational.

In February 2001, members of the New York State Assembly and Senate introduced two identical bills that would have created a state-funded loan repayment assistance program called the "Criminal Justice Loan Assistance Program." The program had bipartisan support, having been introduced in the Senate by Republican Senator Dale M. Volker, and in the Assembly by Democratic Assemblyman Brian M. McLaughlin.

The legislation's "Declaration of Policy and Legislative Intent" states that "attorneys in the public sector often wish to make a long-term commitment to public-service work," but are unable to do so because of "significant student debt" and the "grave difficulty in repaying this debt on a public-sector salary," and that, accordingly, many are forced to leave the public sector.[65] Further, because "the loss of so many capable public-sector attorneys has an adverse impact on the criminal justice system[] . . . it is in the State's best interest to offer financial assistance to eligible criminal justice attorneys."[66]

The program provided "eligible attorneys" annual repayment assistance in the amount of the total annual educational loan repayments due from each attorney, less any amount of repayment assistance the attorney might receive from other sources, up to an annual maximum of $3,400, during "each year of qualified service."[67] "Eligible attorney" was defined as a prosecutor or defense attorney working at an agency providing representation to indigent defendants, in the attorney's fourth through

62. Id.; see also Maryland Higher Education Comm'n, supra note 60.

63. Telephone Interview with Cis Whittington, supra note 61.

64. Id.

65. S.B. 2304, 224th Ann. Legis. Sess. (N.Y. 2001). As noted in the text, Assembly Bill 4430 is identical.

66. Id.

67. Id.

tenth year of employment in such a position, and who has held a law degree for no more than eleven years.[68] Thus, the program required a minimum four year commitment in qualifying employment before an attorney would be eligible, and would provide, at most, $20,400 in benefits over six years.

The "Introducer's Memorandum In Support" noted that the legislation did not present a "radical concept" in that the State's Education Law already provides forgiveness awards to doctors working in underserved areas.[69] The Memorandum further noted that New York and other states offer scholarships and other forms of assistance to dentists, optometrists, teachers and others who provide services which are valuable and necessary.[70]

The bills expired without committee action in the 2001-2002 sessions. Identical bills have been reintroduced, however, for the 2003-2004 Regular Sessions and are currently pending before the Judiciary and Ways and Means committees.[71]

C. Privately Run Statewide LRAPs

Seven states currently have LRAP programs administered by private organizations. Arizona, Florida, Maine and New Hampshire have programs that are administered by the states' Bar Foundations. Minnesota, North Carolina and Texas have programs administered by independent 501(c)(3) organizations. All of these programs were developed relatively recently, with the Florida, Maine, New Hampshire and Texas programs having been developed since 2000. North Carolina's program, the North Carolina Legal Education Assistance Foundation ("NC LEAF") was developed in 1989 and is the oldest privately run statewide LRAP. NC LEAF was developed by students and deans at North Carolina's law schools.[72] As of January 22, 2002, NC LEAF had provided over $700,000 in loan repayment assistance to 116 attorneys since its creation.[73] The eligibility requirements of the NC LEAF program are described in greater detail in Appendix B to this report.

68. Id.

69. Id.

70. Id.

71. See A.B. 2650, 226th Ann. Legis. Sess. (N.Y. 2003); A.B. 7463, 226th Ann. Legis. Sess. (N.Y. 2003); S.B. 1110, 226th Ann. Legis. Sess. (N.Y. 2003); S.B. 2081, 226th Ann. Legis. Sess. (N.Y. 2003).

72. See North Carolina Legal Education Assistance Foundation, North Carolina Legal Education Assistance Foundation, <http://www.ncleaf.org> (last visited February 10, 2002).

73. Id.

Nationwide, bar associations have also taken leading roles in promoting awareness of problems relating to law school debt and in advocating for LRAP programs. As noted above, in August 2001 the ABA created the Commission on Loan Repayment and Forgiveness. Curtis M. Caton, the Commission's Co-Chair says that the Commission's primary focus is on the "access to justice" issues presented by rising debt burdens. "There are vital legal services jobs in impoverished or rural areas that today's law school graduates simply cannot even consider because of their large debt loads" says Mr. Caton. The Commission issued an Informational Report to the House of Delegates in February 2003 summarizing its primary initiatives, including (1) coordinating lobbying for federal legislative and regulatory relief programs; (2) developing model LRAP legislation and working with state legislatures and bar associations to adopt statewide programs; and (3) working with law school administration and alumni to develop more and better law school LRAPs.

In June 2002, the New York State Bar Association's Special Committee on Student Loan Assistance for the Public Interest issued a report that proposed the establishment of a "New York State Loan Repayment Assistance Pilot Program."[74] The proposed program would be structured similarly to the NC LEAF program mentioned above. The State Bar Committee proposed that a not-for-profit corporation created by the NYSBA administer the Pilot Program, review and amend eligibility criteria and program guidelines, and be in charge of fundraising for the Program.[75] The proposal contemplated that the initial sources of funding for the program will be private, including law firms, individual attorneys, bar associations, and law schools. It expresses the hope that ultimately government funds will be made available to support the program.[76]

The State Bar Committee's proposal was approved by the House of Delegates of the New York State Bar Association on June 22, 2002. Since then, the New York Bar Foundation has provided an initial donation of $20,000, and the Committee is developing a program description and loan application packet.[77] The Bar Association expects to release

74. Special Committee on Student Loan Assistance for the Public Interest, New York State Bar Association, Attracting Qualified Attorneys to Public Service (June 2002), available for download at http://www.nysba.org/Content/NavigationMenu/Sections_Committees/Student_Loan_Committee/slapireport3.pdf.

75. Id. at 6.

76. Id. at 9-10.

77. E-mail from Lisa Bataille, New York State Bar Ass'n, to Ellen Lieberman, Committee on Legal Education and Admission to the Bar, Association of the Bar of the City of New York, dated May 22, 2003.

initial materials in Fall 2003 and make its first four awards (of $6,000 each) in 2004.[78]

D. Employer Run LRAPs

Some public service employers offer some sort of debt contingent aid. Groups such as Greater Boston Legal Services and Georgia Legal Services Program offer comprehensive LRAPs that substantially or entirely service law school debt during periods of employment. These programs also serve an important employee retention purpose by conditioning payment on an agreement to remain employed at the organization for a specific number of years and imposing a repayment obligation on attorneys who leave prior to the expiration of their commitment. The Georgia Legal Services Program has improved retention by conditioning debt payment on a three-year employment commitment. "We see increased attrition after three years which suggests that the program does help us retain attorneys" reports Executive Director Jack Webb.

Other employers, such as The Legal Aid Society of New York, offer special grants or fellowships based at least in part on a recipient's debt obligations. The Legal Aid Society awards its Stein Fellowship to newly recruited attorneys based on individualized assessments of merit and need, including consideration of the size of a candidate's debt obligation and the likelihood that the debt obligation will prevent a candidate from accepting employment with the Society. Such programs, therefore, provide employers greater discretion in awarding aid packages than do comprehensive LRAPs that have fixed eligibility criteria.

E. Federal Tax Relief for Qualifying Student Debt

Provisions of the Internal Revenue Code adopted in 1997 potentially allow most attorneys performing public interest work to repay student loans with before-tax dollars.[79] On their face, the application of these provisions appears limited to repayment assistance programs run by governments, public benefit corporations managing hospitals, and schools.[80] As described below, however, at least one public interest organization is taking advantage of these provisions through a foundation set up expressly for this purpose. Depending on tax bracket and applicable state and local income tax rates, this favorable tax treatment could result in

78. Id.

79. See 28 U.S.C. § 108(f).

80. See id. § 108(f)(2).

considerable savings to qualifying attorneys of between 25% and 40% of their annual debt payments.

The provisions concern the tax treatment for educational loan forgiveness to attorneys serving at-need populations.[81] In most commercial settings, loan forgiveness, or "discharge of indebtedness" creates taxable income to the recipient of the forgiveness under the theory that having a loan forgiven is the financial equivalent of being paid an amount that is then used to repay the loan. Prior to 1997, the tax code seemed to provide only a narrow exception to this rule for forgiveness of loans made by a governmental entity.[82] The 1997 legislation broadened the definition of qualifying "student loan" to include any loan made either by an educational institution or other 501(c)(3) that is forgiven pursuant to a program "designed to encourage [students] to serve in occupations with unmet needs or in areas with unmet needs." Importantly, "student loans" also include loans made to "refinance" a loan obtained from another source—for example a loan from a school [or foundation] that is used to pay down bank originated financial aid and that is then forgiven.

Under the interpretation of these provisions adopted by at least one public interest legal organization—Greater Boston Legal Services—virtually any public interest employer could enable its employees to repay student debt with pre-tax dollars. Under this interpretation, public interest employers, working in conjunction with law schools, organize and fund "LRAP Foundations" from which loans to employees are made. The employer makes an annual contribution to the LRAP Foundation in an amount roughly equivalent to the total amount of its employees' annual debt service obligations. The LRAP Foundation then administers the program by making semi-annual or quarterly loans to participating attorneys to pay down their school debt and then, if the employee remained similarly employed at the end of the year, forgiving the loans. Greater Boston Legal Services, working in conjunction with Massachusetts Legal Assistance Corp., currently employs such a structure to make LRAP payments to Greater Boston's attorneys tax exempt.

The savings under such a program would be substantial. For a hypothetical large public interest organization with one hundred attorneys and an LRAP program, the savings could total $300,000 per year if attorneys repaid their debt with pre-tax dollars. If we assume that each attor-

81. See id. § 108(f).

82. See Richard C.E. Beck, Loan Repayment Assistance Programs for Public-Interest Lawyers: Why Does Everyone Think They are Taxable?, 40 N.Y.L. Sch. L. Rev. 251, 253 (1996).

ney pays $500 per month, or $6,000 per year, to service his or her debt, and we assume a marginal tax rate of 33%, then annual income of $9,000, less $3,000 in taxes, would typically be needed to service each attorney's $6,000 debt payments. Under a tax-exempt LRAP Foundation program, there would be a $3,000 tax savings per attorney. This money could be used for additional public interest program services, could be shared with each attorney or could be passed along entirely to each attorney as increased income. Importantly, there is no phase-out or even any income ceiling for the tax benefits provided by Section 108(f), so LRAP Foundation programs would not have many of the administrative complexities that plague other LRAP programs. LRAP Foundation programs, therefore, potentially are an extremely important development in the law school debt landscape. Like re-structuring LRAPs in creative ways to increase participation rates, as discussed above, developing LRAP Foundation programs does not require infusion of any new public or private funds to further the objective of ameliorating the effects of rising law school debt.

Unfortunately, the lack of Treasury Department guidance on the treatment of "foundation" programs under these provisions leaves room for a far less favorable result. Specifically, it is possible that the Internal Revenue Service could disregard the formal structure of such a program (including the considerable loan administration work performed by the LRAP Foundation) and characterize the program as effectively providing a loan from each donor-employer directly to its own employees. Under sub-paragraph 108(f)(3) such a re-characterization would cause the loan forgiveness to become taxable to employees because the sub-paragraph excludes student loans that are forgiven "on account of services performed for" the lending organization. Nevertheless, given the potential benefits of LRAP Foundation programs, it is imperative that this program structure be explored and guidance obtained from the IRS concerning the issues raised by the 1997 legislation.

F. Are These Programs Effective?

Although all of these programs purport to make public interest employment more financially attractive, the relationship between rising debt levels and public interest employment is not as simple as it might seem. It is difficult to draw a direct connection or correlation between increasing law school debt levels and a decreasing attorney candidate pool or rising attorney salary demands. Interviews with recruiting and hiring coordinators at public interest legal organizations confirm that rising debt levels

do seem to have negative effects on not-for-profits' hiring practices, but in ways that are somewhat unpredictable and hard to generalize. As an example, increased debt levels may not uniformly affect different practice areas within the public interest segment. Susan Hendricks, the Deputy Attorney in Charge of The Legal Aid Society's Criminal Division, reports that, in her experience, sustained debt burden is both a cause of attorney attrition and an impediment to hiring a diverse attorney workforce. "For our criminal practice, it is incredibly valuable to hire attorneys who share a similar socio-economic background as our clients. Unfortunately, such attorneys are often burdened with a great debt load that discourages them from accepting an offer of employment." By contrast, Ronald Richter, the Deputy Attorney in Charge of the Juvenile Rights Division of The Legal Aid Society of New York, suggests that debt issues play out a little differently in his Division. "Most attorneys who come to Juvenile Rights know that they want to do this type of work even before going to law school and make financial preparations in advance. Sometimes people go to firms for a little while to pay down debt, but once they come here very few leave because of school loans."

Not-for-profits also report dramatically different experiences concerning the effects that debt has on hiring minority attorneys. Greater Boston Legal Services initiated a loan repayment assistance program (an "LRAP") in 2000 that provides substantial repayment assistance. Jody Sundquist, Greater Boston's Comptroller, reports that in the short time since the program started "it has been extremely effective in attracting minority candidates." This success suggests that, prior to the program's enactment, debt levels contributed to minority candidates' decisions to seek employment elsewhere. In contrast, Georgia Legal Services Program has a well-established and generous LRAP that has not succeeded in attracting minority candidates. Jack Webb, Georgia Legal Services' Executive Director, reports that "the primary beneficiaries of our program are middle class and white and most are women. This is the profile of our applicant pool. The program has basically operated as a middle class recruitment tool." This experience, in contrast to Greater Boston's, suggest that in Georgia Legal's case debt burden is not the primary obstacle to recruiting lower-income and/or minority candidates to public interest employment. Susan Lindenauer, Counsel to the President of The Legal Aid Society, confirms that it may be difficult to assert that LRAPs uniformly confer a benefit, in terms of a better applicant pool or otherwise, upon public interest employers that is distinct from the obvious benefits provided to employees. "Nobody disputes that LRAPs are great for our employees, but certainly there are people

here who say that if the point is to help the Society achieve its mission, the checks should be written directly to us."

The limited amount of empirical research in the area further suggests that law school debt plays a subtle and perhaps secondary role in law students' decisions to pursue for-profit or not-for-profit employment. Indeed, in the 1995 study referenced above, Professor Kornhauser and Professor Revesz found only a weak correlation between lower debt levels and selection of not-for-profit careers—although, interestingly, they also found that debt load played a more significant determinant of career choice for African American and Latino women law students than for other law students.[83] Accordingly, they concluded that "contrary to commonly held beliefs, law school debt does not have a significant effect on attorneys' first job choice" and that the factors with the most significant effect on job choice are "race . . . , career plans, educational performance, and the relative wages in the different sectors of the profession."[84]

In summary, it should not be assumed that LRAPs confer a general benefit upon public interest legal organizations by dramatically increasing the size and composition of the public interest legal workforce. Rather, LRAPs primarily benefit discrete pockets within the public interest community by either successfully motivating a relatively small subgroup of debt-sensitive lawyers to select public interest careers or by granting an economic benefit to lawyers who would have, in any event, chosen to work in public interest law. And although granting economic benefits to public interest lawyers may be a laudable goal in and of itself, it is not the asserted goal of most LRAPs.

IV. THE UNDERADDRESSED PROBLEMS: THE EFFECT OF RISING LAW SCHOOL DEBT ON PRIVATE PRACTICE

Another problem less frequently attributed to the high debt loads of recent law school graduates is that graduates with significant debt might choose employment with a large firm, with a large salary and demands to match, even if they are more suited for—and, in the absence of their debt, would otherwise choose—employment in the private sector at a lower salary but with fewer demands. Most often, this problem is described in terms of lawyer burnout or dissatisfaction. Evan Davis, for example, referred to young lawyers "end[ing] up in places they never intended to be

83. Kornhauser & Revesz, supra note 22, at 915, 925-930.

84. Id. at 957.

. . . [and] grow[ing] disillusioned and cynical about the profession."[85] Similarly, Justice Stephen Breyer, in remarks at the 2001 Annual Meeting of the American Bar Association, noted that the increasing financial pressures of private law practice are "aggravated for younger lawyers by law school loans that may amount to $100,000 or more, which must be paid back from their earning in practice."[86]

In their 1995 study, professors Kornhauser and Revesz found that debt burden had a statistically significant effect on new graduates' choice between "elite for-profit" jobs and "non-elite for-profit" jobs for women, but not for men.[87] More recent research by Robert M. Sauer, an economist at Brown University, concludes that indebtedness does not have a significant effect on graduates' *initial* job choices, but that debt does have an effect on attorneys' willingness to transition to a lower-paying job within the first few years after graduation.[88] It seems safe to conclude, therefore, that even years after graduation from law school, debt levels impel attorneys to stay in jobs that they do not like.

Moreover, it is important to remember that, unlike the graduates of elite law schools studied by Kornhauser and Revesz and by Sauer, many law school graduates do not have the opportunity to take a highly demanding but well-paying job in order to pay off their loans. Thus, these students cannot choose to alleviate their financial stresses by taking (or staying at) a job they dislike. Rather, they must live with the financial pressure of their debt—and all of the constraints that it brings—for the full term of their loans.

With very few exceptions, existing LRAPs do not provide assistance to lawyers in private practice, perhaps because high debt levels among lawyers in private practice appears on its face to be solely a problem for those lawyers, rather than for the profession or for society. Extreme financial stresses, however, may lead a lawyer to take actions he would not otherwise take, such as taking marginal cases out of desperation, "borrowing from" or otherwise misusing client funds, or breaching other ethical duties to clients, such as the duty to avoid conflicts-of-interest and the duty

85. Davis, supra note , at S3.

86. Justice Stephen Breyer, Our Civic Commitment, Address at the Annual Meeting of the American Bar Association (Aug. 4, 2001), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-04-01.html (visited January 4, 2002).

87. Kornhauser & Revesz, supra note 22, at 918.

88. See Robert M. Sauer, Educational Financing and Lifetime Earnings 25-26 (Dec. 2001) (unpublished manuscript, available from the author).

to take only those cases the lawyer will have time to adequately pursue. Financial stresses also may lead a lawyer to avoid taking on pro bono matters that would serve both a particular client in need and the public interest. Unfortunately, the Committee has found no study that has attempted to correlate lawyer educational debt with these potential problems.

V. CONCLUSIONS

Based on the empirical and anecdotal evidence currently available, this report offers five discrete conclusions that should guide the future development and adoption of law school debt relief programs.

1. Take Advantage of Heightened Interest in Debt Relief

Initially, public interest legal organizations should take advantage of the increasing attention to and support for public interest attorney debt relief programs. It is notable that in these difficult economic times there has been support for creating and expanding programs to assist public interest attorneys cope with their debts from both the government and private sectors. Public interest legal organizations should seek to leverage this support in ways that are most beneficial to both public interest attorneys and the organizations that employ them. For example, district attorneys' offices and public defender organizations should lobby in support of the recently-introduced Prosecutors and Defenders Incentive Act.[89]

2. Re-evaluate and Tailor LRAP Goals

The prevailing wisdom frequently expressed by advocates of LRAP programs that debt levels generally deter law school graduates from pursuing public interest careers should be questioned and re-evaluated because it seems to have a stultifying effect on the creative administration of LRAPs. To date, the only empirical study of the issue indicates that career choice is not strongly correlated to debt levels, but is correlated to relative wages and pre-law school career plans. Thus, the common across-the-board structure of LRAPs that aspires to provide a level of partial debt relief to any attorney meeting certain financial eligibility criteria creates risks that the programs are over-inclusive; that is, they may provide debt relief to many attorneys who would have undertaken public service careers anyway and they are not sufficiently targeted to address particularized recruiting needs of public interest organizations.

89. See supra notes—and accompanying text.

It is hardly objectionable for LRAPs to provide a sort of generalized salary enhancement to existing public interest attorneys. However, it should be recognized that this role is different from the more compelling "access to justice" aspirations frequently expressed as necessitating LRAPs. If reducing the supposed deterrent effect of debt on student's pursuit of public interest careers is indeed a primary motivation for a debt relief program, then that program should consider conversion to a scholarship program that grants tuition waivers to students who have pre-law school plans to work in public interest settings.

3. Maximize LRAPs' Attractiveness to Students

LRAPs should be creatively designed to maximize their attractiveness to students. Professor Field's conclusions that students are much more likely to participate in a program characterized as providing a "tuition waiver" over a financially equivalent program characterized as providing "debt relief" teaches the elemental lesson that LRAPs, like other things, must be marketed effectively. Other changes should be considered. For example, the current common practice whereby LRAPs make semi-annual or quarterly lump sum payments to attorneys who then use the payments to make their monthly loan payments, places an unfortunate administrative burden on the attorneys. The program would undoubtedly be more attractive to attorneys if LRAP providers administered loan repayments themselves, so that during periods of qualifying employment attorneys were truly relieved of all debt responsibilities.

4. Take Advantage of Tax Incentives

Programs must be developed to maximize the tax savings permitted under Section 108(f) of the Internal Revenue Code. LRAP Foundation structures similar to that proposed in this report should be adopted. To the extent that the tax treatment of such programs is in doubt, guidance must be sought from the Internal Revenue Service regarding the requirements for complying programs. Maximization of the tax benefits provided by Section 108(f) is of paramount importance because they potentially effectively reduce the financial burden of qualifying loans by thirty to forty percent.

5. Study the Effects of Debt Outside the Context of Public Interest Law

More study and attention should be given by law schools and bar associations to the problem of debt outside the context of public interest

law, to determine whether—and to what extent—law school debt contributes to possible ethical violations, to a reduction in the number of attorneys willing to undertake pro bono representation, and to the pricing of legal services at levels that render such services unaffordable for lower- and middle-income consumers. A lawyer with a $1000 per month debt payment making $50,000 per year in a major metropolitan area is facing heavy financial pressure whether she is working for the Legal Aid Society or for a ten-lawyer firm representing middle-class clients in matrimonial litigation. Moreover, law schools have an obligation to be responsive to the needs of all of their students, and not just those interested in public interest law.

July 2003

The Committee on Legal Education and Admission to the Bar

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APPENDIX A

A Comparison of LRAPs Offered by Columbia Law School and Fordham University School of Law

Columbia's LRAP covers all formal indebtedness incurred by a student for payment of educational expenses, up to the standard student budget.[90] Inasmuch as Columbia currently estimates that the standard student budget is $48,500,[91] the total covered indebtedness could reach up to $145,500. Personal loans, credit card indebtedness, consumer loans, and educational loans taken out by parents are not covered. Undergraduate loans are also not covered, although they are taken into account in calculating eligibility, as noted below.

Fordham has two separate repayment programs. The Revolving Loan Forgiveness Program ("RLFP") covers loans made directly by the school,[92] which can total up to $8,000 per year.[93] The Loan Repayment Assistance Program ("LRAP") covers Stafford loans taken out to fund law school,[94] which can total $55,500. The amount of annual aid under the LRAP, however, is currently capped at $7,000, which is less than the amount of annual payments on $55,500 in loans.[95] No other loans are covered.

To qualify for Columbia's LRAP, graduates must be employed full-time in a position "that makes direct use of [the] graduate's legal education" for a government agency or in legal services for the poor.[96] "Legal services for the poor will ordinarily mean work for a non-profit organization providing legal services to a . . . low income population, but may

90. Columbia Law School, Loan Repayment Assistance Program (LRAP) for Columbia Law School, < http://www.law.columbia.edu/finaid/lrap.html > (visited February 7, 2002) (hereinafter Columbia LRAP).

91. See Columbia Law School, Columbia Law School: Tuition, < http://www.law.columbia.edu/admissions/tuit1.html > (visited February 7, 2002).

92. See Fordham University School of Law, Revolving Loan Forgiveness Program, < http://law.fordham.edu/htm/fa-forgive.htm > (visited February 7, 2002) (hereinafter Fordham RLFP).

93. See Fordham University School of Law, Fordham Aid: Fordham Loans, < http://law.fordham.edu/htm/fa-needl.htm > (visited February 7, 2002).

94. See Fordham University School of Law, Loan Repayment Assistance Program, < http://law.fordham.edu/htm/fa-lrap.htm > (visited February 7, 2002) (hereinafter Fordham LRAP).

95. See Fordham University School of Law, Loan Repayment Assistance Program: Loan repayment Assistance Awards, < http://law.fordham.edu/htm/fa-lrap.htm > (visited February 7, 2002) (hereinafter Fordham LRAP: Loan repayment Assistance Awards).

96. Columbia LRAP, supra note 91.

include private practice where[, in the judgment of the Law School,] the practice is limited to clients comparable to those served by government-supported and non-profit legal services organizations."[97]

To qualify for Fordham's RLFP, graduates must be employed in government service or in a non-profit public interest organization providing legal services to "the poor, disabled, the homeless, the elderly or those deprived of their civil or human rights, or for the betterment of the condition of animals and the environment," which organization has been specifically approved by the Committee administering the program.[98] To qualify for Fordham's LRAP, graduates must be employed full-time "in law practice with an entity that has as one of its primary purposes providing legal services to or on behalf of persons who could not otherwise afford such services."[99] Employment by the government does not qualify for Fordham's LRAP.[100]

The Columbia LRAP annually awards each participant the full amount of her loan payments per year, assuming a ten-year repayment schedule, and has no formal income ceiling.[101] Participants are, however, expected to contribute a portion of their "adjusted gross income" to loan repayment, which contribution is deducted from any award.[102] Specifically, participants must contribute 15% of any income between $25,001 and $40,000, and 34.5% of any income in excess of $40,000, toward loan repayment.[103] Accordingly, the program has an effective cap of about $95,000, as, above that level, a participant's expected contribution would almost certainly exceed his annual debt service.[104]

Columbia calculates "adjusted gross income" by taking adjusted gross income from the participant's federal tax form, adding untaxed income and voluntary retirement contributions, and subtracting undergraduate

97. Id.

98. Fordham University School of Law, Revolving Loan Forgiveness Program: Qualifying Employment, < http://law.fordham.edu/htm/fa-forgive1.htm > (visited February 7, 2002).

99. Fordham University School of Law, Loan Repayment Assistance Program: Qualifying Employment, < http://law.fordham.edu/htm/fa-lrap1.htm > (visited February 7, 2002).

100. Id.

101. See Columbia LRAP, supra note 91.

102. Id.

103. Id.

104. The $95,000 figure is derived by calculating the expected contribution for that income level ($21,225 per year) and comparing it to the sum of 12 monthly payments on loans totaling $145,500 amortized over ten years at 8% ($21,183.84).

debt payments.[105] In the case of married participants, the greater of the participant's income or one-half of joint income is used.[106]

The Fordham RLFP does not give "awards" per se. Instead, it suspends repayment and interest on loans for the first five years of the program, then forgives 1/3 of the total amount of loans at the end of the fifth, sixth, and seventh years of participation.[107] A participant's income must remain below a set ceiling in every year of participation, which ceiling is adjusted annually in accordance with changes in the Consumer Price Index.[108] Income is calculated by taking gross salary, adding income earned from stocks, bonds, and other investments, adding 5% of the participant's gross assets, and deducting education loan repayments, as well as $5,000 for the first minor dependent child and $2,500 for each additional minor dependent child.[109] For married participants whose spouse's income is higher, the average of the couple's incomes is used. For the class of 2000, the income ceiling was $46,675. The Fordham LRAP annually awards each participant the full amount of his Stafford Loan payments for the year, up to a maximum of $7,000.[110] A participant's income must remain no greater than the amount paid by The Legal Aid Society in New York City to an attorney of the same class.[111] In 2001, that amount was $41,973 for 2001 graduates, $43,260 for 2000 graduates, and $45,320 for 1999 graduates.[112] In the case of married participants, the participant's salary must remain below the applicable ceiling, and the couple's combined incomes must not exceed $100,000.[113] In addition, graduates with net assets in excess of $25,000 are ineligible for the program.[114]

The Columbia LRAPs awards are in the form of replacement loans that are subsequently forgiven.[115] The replacement loans are forgiven at a

105. Columbia LRAP, supra note 91.

106. Id.

107. Fordham RLFP, supra note 99.

108. Fordham University School of Law, Revolving Loan Forgiveness Program: Maximum Income Level, < http://law.fordham.edu/htm/fa-forgive2.htm > (visited February 7, 2002).

109. Id.

110. Fordham LRAP, supra note 99.

111. Fordham University School of Law, Loan Repayment Assistance Program: Maximum Salary Level, < http://law.fordham.edu/htm/fa-lrap2.htm > (visited February 7, 2002).

112. Id.

113. Id.

114. Id.

115. Id.

graduated rate, with no forgiveness at all during the first three years of participation, ten percent forgiven after the third year, and an additional fifteen percent each year thereafter until the replacement loans are completely forgiven after ten years.[116] Columbia's program, then, requires a minimum of three years' work in qualifying employment before indebtedness is actually reduced, and a full ten years' employment before it is actually eliminated. Because the program assumes a ten-year repayment schedule, Columbia encourages participants to shorten their repayment schedules for their private loans (which typically have 15-20 year repayment schedules) to ten years so as to maximize benefits under the LRAP.[117]

As described above, Fordham's RLFP suspends interest accrual and repayment obligations for the first five years, after which one-third of a participant's loans are forgiven. An additional third is forgiven each year thereafter, so that the applicable loans are completely forgiven at the end of the seven years.[118] This program, then, requires a minimum of five years' work in qualifying employment below the income ceiling before a participant's indebtedness is reduced, and seven years' commitment until the portion of a participant's indebtedness falling within the program is completely eliminated.

Fordham's LRAP awards, like Columbia's, are in the form of replacement loans.[119] The loans are made twice a year (in January and June),[120] and are forgiven one year after they are issued, provided the participant has remained in qualified employment.[121] If the participant has not remained in qualified employment, the replacement loans will be partially forgiven in proportion to the amount of time the participant spent in qualified employment.[122]

Critically, the Fordham LRAP currently provides benefits for only three years.[123] Thus, while the structure of the program is such that it essentially begins to reduce a participant's indebtedness immediately, the total amount of indebtedness that can be reduced is limited by the three-year time con-

116. Id.

117. Id.

118. Id.

119. Fordham LRAP: Loan repayment Assistance Awards, supra note 99.

120. Fordham University School of Law, Loan Repayment Assistance Program: Disbursement of Funds, < http://law.fordham.edu/htm/fa-lrap4.htm > (visited February 7, 2002).

121. Fordham LRAP: Loan repayment Assistance Awards, supra note 99.

122. Id.

123. Id.

straint. As Stafford Loans are repayable over ten years, participants in the Fordham LRAP will be able to reduce their Stafford indebtedness by at most 21%-24%, depending on interest rates.

* * *

On the whole, the Columbia LRAP provides substantially more assistance and is more flexible than the combined Fordham programs. Participants in the Columbia program can, if they stay in the program for the entire ten years, have over $140,000 in loans forgiven. Participants in Fordham's programs can have a maximum of about $38,000 forgiven, and must pay over three-quarters of their Stafford Loans and all of their private loans without assistance. Such disparities are common among law school LRAPs, and prospective students contemplating a career in public service after incurring law school debt would be well advised to compare programs closely.[124]

124. For an overview of a number of programs, see Financing the Future, *supra* note .

APPENDIX B

Summary of the NC LEAF Program

North Carolina's program began in 1989 with the formation of the North Carolina Legal Education Assistance Foundation ("NC LEAF") by students and deans at North Carolina's law schools.[125] As of January 22, 2002, NC LEAF had provided over $700,000 in loan repayment assistance to 116 attorneys since it was created.[126]

The NC LEAF program is similar in structure to law school LRAPs. To be eligible to participate in the program, attorneys must work in "eligible employment" and have an "eligibility income" below $35,000 in their first year of practice, $38,000 in their second year of practice, and $40,000 in each subsequent year of practice.[127] A participant's "eligibility income" is the greater of either her salary plus any other income, reduced by $5,000 for each dependent minor child and each dependent family member, or one-half of the combined salaries and other income of the participant and her domestic partner, reduced by $5,000 for each dependent minor child and each dependent family member, and reduced by the domestic partner's educational loan payments.[128] "Eligible employment" is employment in North Carolina with a federal, state, or local government agency (excluding judicial clerkships), an organization that provides legal services to the poor, or a 501(c)(3) non-profit organization.[129]

Participants must contribute a percentage of their gross income, ranging from 0% for participants with an income below $20,000 to 10% for participants with a gross income above $40,000, toward loan repayment.[130] Any remaining amount needed to meet a participant's loan repayment obligations is awarded by the program up to a limit of $6,000 per year.[131]

125. See North Carolina Legal Education Assistance Foundation, North Carolina Legal Education Assistance Foundation, <http://www.ncleaf.org> (last visited February 10, 2002).

126. Id.

127. See North Carolina Legal Education Assistance Foundation, Loan Repayment Assistance Program: 2001/2002 Program Guidelines 1 (n.d.), available for download at <http://www.ncleaf.org/Docs/20012002 20012002 Program Guidelines-Denise's.doc> (last visited February 10, 2002).

128. Id. at 2.

129. Id. at 3.

130. Id. at 5.

131. Id.

A participant's award will be reduced dollar-for-dollar for any repayment assistance received from out-of-state programs, and dollar-for-dollar for any repayment assistance over $3,500 received from in-state programs.[132]

Awards are made in the form of replacement loans, which are subsequently forgiven as follows: None of the replacement loans are forgiven for the first two years of program participation. After the third year of participation, the replacement loan received in the third year is forgiven. After the fourth year of participation, the replacement loans received in the second and fourth years are forgiven. After the fifth year of participation, the replacement loans received in the first and fifth years are forgiven. Thereafter, replacement loans are forgiven following the completion of the year in which they are received.[133] The program provides benefits for a maximum of ten years.[134] Accordingly, program participants must remain in eligible employment (below the salary cap) for at least three years to obtain any reduction in their indebtedness, and must remain in eligible employment (below the salary cap) for a full ten years to maximize their benefits.

132. Id. at 4.

133. Id. at 7.

134. Id.

APPENDIX C

Summary of the National Health Service Corps

The National Health Service Corps is a longstanding program of the Department of Health and Human Services that seeks to "help[] medically underserved communities recruit and retain primary care clinicians, including dental and mental and behavioral health professionals."[135] The Corps was established on December 31, 1970, by the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868, 1868-69.[136] In 1972, amendments to the Act authorized scholarships for health professionals in return for service to underserved communities. In 1987, Congress authorized the NHSC Loan Repayment Program, which provides loan repayment assistance to enable the recruitment of clinicians for immediate service to shortage areas.

2. NHSC Scholarships

The NHSC Scholarship program is a competitive program that offers payment of all educational expenses plus a stipend for living expenses in exchange for service in an area defined by the NHSC as "underserved." The program is open to U.S. citizens who are full-time students (at a U.S. accredited school) of allopathic (M.D.) and osteopathic (D.O.) medicine, students of medical dentistry, and students pursuing studies leading to qualification as a family nurse practitioner, as a nurse midwife, or as a primary care physicians assistant.

An NHSC Scholarship pays tuition and required fees for up to four years of education, as well as a monthly stipend. For the 2002-03 school year, the monthly stipend is $1,065. In addition, the scholarship pays a single annual payment to cover all other reasonable educational expenses, such as books, equipment clinical travel, etc.

For each year of support, a recipient incurs an obligation to provide one year of service in an underserved area (with a 2-year minimum com-

135. U.S. Dep't of Health and Human Servs., National Heal Service Corps, <http://nhsc.bhpr.hrsa.gov//> (last visited October 30, 2002).

136. See also Emergency Health Personnel Act Amendments of 1972, Pub.L. No. 92-585, 86 Stat. 1290, 1290-95 (amending program); Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, 90 Stat. 2243, 2268-90 (same); Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 97 Stat. 357, 902-13 (same). For some of the legislative history of those statutes, see S. Rep. No. 1062, 92d Cong., 2d Sess., reprinted in 1972 U.S.Code Cong. & Admin. News 4832; H.R. Rep. No. 266, 94th Cong., 1st Sess. (1975), reprinted in 1976 U.S.Code Cong. & Admin. News 4947; and S. Rep. No. 887, 94th Cong., 2d Sess. (1976).

mitment). A recipient must choose a service site from a list of "high priority" sites in designated Health Professional Shortage Areas (HPSA). identified by NHSC. A recipient is free to negotiate a compensation package with any site on the list; there is no official limit on what a recipient may earn during his or her years of service.

Scholarships are awarded on a multi-year basis. Accordingly, upon the recipients signing of a contract with NHSC, enough funds to pay for the remainder of the recipients education—up to four full years—are immediately set aside. In other words, recipients do not have a year-to-year funding risk depending on the level of funds appropriated by Congress. On the other hand, recipients do undertake some financial risk in the event their professional goals change or they are otherwise unable or unwilling to fulfill their service obligations: in such cases, a recipient is liable for damages of three times the amount of the scholarship plus interest.

In fiscal year 2001, NHSC awarded 365 scholarships at a cost of over $34 million. It anticipates increasing awards to 592 scholarships at a cost of over $57.2 million in fiscal year 2003. The scholarships are highly competitive, with more than seven applicants per award.

3. NHSC Loan Repayment Assistance Program

The NHSC LRAP is similar—albeit more generous—to many of the LRAPs for attorneys discussed above. It is open to U.S. Citizens who have completed training and are practicing physicians, primary care certified nurse practitioners, certified nurse-midwives, primary care physician assistants, general practice dentists, registered clinical dental hygienists, clinical or counseling psychologists, clinical social workers, psychiatric nurse specialists, marriage and family therapists, or licensed professional counselors.

To be eligible for awards, applicants must make at least a two-year commitment to full-time employment in an underserved area. Preference is given to applicants who agree to serve in areas of greatest need (as determined by HPSA scores). In addition, NHSC considers an applicant's "disadvantaged background status" and "Biographical Statement," with the goal of identifying "individuals who demonstrate characteristics that they are likely to remain in an HPSA."

Award amounts are up to $25,000 for each year of service, based upon the recipient's outstanding educational debt balance. If a recipient has less that $50,000 in loans, the program will pay half of the total amount annually, so that all of the recipient's debt is paid by the end of the two-year commitment. Thus, unlike programs where the amount awarded is

limited by an applicant's annual debt service (i.e., payments), the NHSC LRAP is limited to $25,000 a year or by an applicant's *total indebtedness*, whichever is less. All educational loans, whether commercial or governmental, are eligible for repayment. In addition to loan repayments, the program provides tax assistance payments equal to 39 percent of the total amount of loan repayments.

In another contrast to most LRAPs for attorneys, participation is not limited in any way by assets or income. Recipients are free to negotiate for any level of salary and benefits with prospective employers, so long as they serve in a HPSA.

Awards are for two years, although an recipient may seek an amendment to extend his or her participation. As in the case of NHSC Scholarships, recipients do undertake some financial risk in the event their professional goals change or they are otherwise unable or unwilling to fulfill their service obligations: in such cases, a recipient is liable for damages of the amounts paid plus $7,500 per uncompleted month or service, plus interest.

In fiscal year 2001, NHSC made 372 new awards, 305 amendments, and 14 adjustments at a total cost of over $36.6 million. It anticipates making 900 awards in fiscal year 2002 and 1170 awards in fiscal year 2003, at a total cost of over $49.8 million and $74.6 million, respectively.

Statement in Opposition to A Federal Legislative Ban on Therapeutic Cloning

The Committee on Bioethical Issues

The Human Cloning Prohibition Act of 2003 (the "Act"), as passed by the United States House of Representatives in February 2003, would make it a crime punishable by up to 10 years in jail for a scientist in the United States to pursue promising medical research on many currently untreatable diseases using cloning techniques to produce human stem cells. The Act is primarily intended to outlaw the use of cloning techniques for human reproduction ("reproductive cloning"). Although many members of the Committee on Bioethical Issues of the Association of the Bar of the City of New York ("Committee") would support a ban on reproductive cloning, the Committee does not support a ban so broad as to prohibit promising stem cell research that is unrelated to the use of cloning for human reproduction. This research, often referred to as "therapeutic cloning," seeks to apply cloning techniques to derive human stem cells. Stem cell technology, while still in its infancy, holds great promise to cure or treat some of our most tragic and intractable diseases and medical conditions. Cloning techniques could help to realize that promise. It is the strong position of the Committee that the ethical and legal reasons

to ban reproductive cloning do not apply to therapeutic cloning, which should be encouraged and welcomed.

Reproductive cloning found its poster child in Dolly the sheep. Dolly demonstrated the extraordinary and disquieting power of modern biology. A single cell from an adult sheep was used to produce an "offspring" that was an exact genetic replica, a clone, of its sole parent. Dolly the clone was different from every other sheep because all of her genes came from her only parent, without the usual intermixing of genes from a mother and a father.

Dolly's cloning was accomplished by taking a female egg cell, prior to fertilization, and replacing its nucleus. The replacement nucleus can be taken from almost any cell of the adult who is to be cloned. Since the cell nucleus carries the principal genetic information of an organism, the egg with its new nucleus has a full set of adult genes. If the egg can now be induced to begin dividing and growing, it could, if implanted into the womb of a volunteer birth mother, be carried to term, be born and continue growing into an adult with the exact genetic make-up of its sole genetic parent. This is reproductive cloning.

If, however, the egg cell with its new adult cell nucleus could be induced to grow in a laboratory dish through only its first half dozen or so cycles of cell division, it would soon reach the stage where much of its tiny mass consists of very special cells called embryonic[1] stem cells. At this stage the embryo is no larger than the period at the end of this sentence. Stem cells can be taken out of this very early stage embryo and grown separately in a laboratory cell culture. Removing these stem cells destroys the embryo, ending any prospect of a "reproductive" clone. But the embyro's genetic material lives on in the cultured stem cells. The prospect of using cloning to produce embryonic stem cells is what is generally referred to as "therapeutic cloning." While cloned human embryonic stem cells have not yet been reported in the scientific literature, many observers believe the reports could come in the near future. To understand the potential importance of this technology, it is first necessary to understand the scientific excitement surrounding embryonic stem cells.

In November 1998, United States scientists first reported the derivation of human embryonic stem cells.[2] These cells are remarkable. They

1. Throughout this Statement, the Committee uses the term embryo to refer to a fertilized egg before implantation in a mother's uterus and the term "fetus" to refer to the embryo after implantation.

2. Thompson, J.A., Liskovitz-Eldor, J., Shapiro, S.S., Waknitz, M.A., Swiergiel, J.J., Marshall, V.S., and Jones, J.J., "Embryonic stem cell lines derived from human blastoycysts," Science 282: 1145-1147 (1998). A good, short, lay persons account of this technology is set out in Dr.

have the unusual (and perhaps unique) ability to grow in laboratory culture dishes through successive generations without changing. This means that, in theory, a single embryonic stem cell could start a colony that, by exponential growth, soon could generate a virtually unlimited number of exact copies. This property suggests that stem cells can be mass produced in quantities that would be needed for a practical medical therapy.

Embryonic stem cells also have the unique ability to transform themselves into each of the specialized cells that make up an adult human being. Under the right conditions, embryonic stem cells will transform themselves into brain cells, skin cells, bone cells, blood cells, heart muscle cells or any of the other specialized cellular constituents of a human body.

Both theory and early experimental evidence in animals suggest that this property could be useful in treating many currently untreatable diseases and conditions. Stem cells could replace damaged nerve cells in quadraplegics, Alzheimer's patients or Parkinson's patients. Stem cells could provide new insulin producing cells in diabetics and repair heart tissue damaged during strokes by replacing dead heart muscle cells. These possibilities, and others that are discussed further below, are now only dreams, but they are compelling dreams. Science rarely unfolds as predicted. Usually, progress is slower and more difficult than early dreams suggest. Typically, there are unexpected twists, turns, branches or barricades along the path, but pursuing scientific dreams has repeatedly paid enormous social dividends.

Embryonic stem cell research can take place without cloning. Most currently existing cultures of adult embryonic stem cells were derived from very early stage embryos created and stored by in vitro fertilization ("IV") clinics. IV clinics typically create for each fertility patient many more fertilized eggs than are ultimately needed. The embryos are frozen for storage and unfrozen as needed. When patients no longer need or want fertility treatment, the excess embryos can be either discarded or, with the patient's consent, used to create embryonic stem cell lines. Current federal policy precludes federal funding for any research involving embryonic stem cells created after August 9, 2001.

Using cloning to create embryonic stem cells would provide some very significant advantages. Through cloning it is possible to precisely control the stem cells' genetic character. For example, it should be possible to create a stem cell culture that is a precise genetic match of the

Thompson's essay on "Human Embryonic Stem Cells," included in Holland, et al. The Human Embryonic Stem Cell Debate—Science, Ethics and Public Policy pp. 15-26, (2001).

person whose cell nucleus is used. The specialized cells derived from those embryonic stem cells retain this precise genetic match. If those specialized cells are transplanted back into the original nucleus donor, then the clinical problems of immune system "rejection" could be vastly simplified. The transplanted tissue would no longer appear "foreign" to the recipient, since it would be a cloned genetic replica of the recipient's own tissue. Even without fully customizing stem cells to match each individual patient, cloning may permit certain genetic classes or types of stem cells to be cultured that will lessen the tissue rejection problem—much like blood typing and matching is used to avoid adverse reactions to blood transfusions.

Most complex and controversial bioethical issues involve balancing competing ethical principles or concerns. Therapeutic cloning is no exception. The ethical analysis requires us to assess the moral weight of competing considerations—an extremely subjective and imprecise calculation. In performing this balancing process and in using any resulting conclusions to make public policy, it is important to keep in mind that we will be confronted with many very different, real world factual settings. Also as our scientific knowledge increases, we will be confronted with situations and assumptions that we cannot now foresee. Therefore, we should take care in creating sweeping, absolute rules, particularly when those rules inflexibly ciminalize a broadly defined area of science.

The most significant ethical considerations that weigh in favor of therapeutic cloning are the apparent enormous potential to cure disease and suffering, and the related, but not identical, general interest in advancing fundamental scientific knowledge. Weighing against this are two principal arguments. First, some people believe that a full-fledged human life begins at fertilization. For these people destroying even a very early stage embryo is destroying a human life and is, therefore, ethically impermissible no matter how great the potential medical and scientific benefits. Second, some people are, in principle, uncomfortable with creating a human embryo using cloning techniques which they view as too dangerous a scientific precedent and too profound a manipulation of a human life to be ethically acceptable.

The Potential Benefits of Therapeutic Cloning

The most promising benefit of therapeutic cloning is its potential contribution to the development of treatments for currently incurable medical conditions. Therapeutic cloning is envisioned as a branch of embryonic stem research, a field that is also in its infancy. Researchers are able to culture human embryonic stem cells although that technology is

still not well developed. Precursor research on mice and other animal models is further along. It has demonstrated in principle the ability to culture embryonic stem cells, to transform them into specialized cells and, most significantly, to transplant resulting specialized cells into live organisms with some therapeutic effect.

For example, researchers have shown in mice that embryonic stem cells can be transformed to specialized heart muscle cells which, when, injected into mice with damaged heart tissue, can cause some regeneration. This is significant because heart muscle cells destroyed, for example by a stroke, typically do not regenerate by themselves. Very preliminary work has also shown that human embryonic stem cells can be transformed in a laboratory into heart muscle cells. This research, which is in its very early stages, suggests a new and promising approach to treating heart disease.

Work with mice embryonic stem cells has also shown that they can be induced to transform into insulin-secreting cells. When purified and transplanted into living mice with diabetes, the stem cells returned the mice's insulin levels to normal levels.

In another example, mice embryonic stem cells have been transformed into specialized nerve cells which have demonstrated some therapeutic effect in several neurological diseases including treating paralysis by regenerating damaged nerve tissue and curing Parkinson's symptoms by producing dopamine. These experimental findings suggest the potential to treat spinal cord injuries, stroke, Parkinson's and even Alzheimer's disease.[3]

This embryonic stem cell research has not yet involved cloning to control the genetic make up of transplanted tissue. That step, while plausible in theory, remains to be demonstrated in the laboratory. But if it could be demonstrated, it would, as indicated above, suggest a promising approach for dealing with the immune system rejection phenomenon that currently complicates organ and tissue transplantation.

A separate benefit of research on therapeutic cloning is simply the opportunity it offers to expand our fundamental knowledge of biology. Embryonic stem cells and cloning are both developments that create very powerful new tools for designing experiments that will answer important questions about cellular biology and very early stage development of complex organisms. These developments could also provide important avenues for advancing research on contraception and other women's health issues.

If the United States bans this research, there is certainly no guarantee

3. See Okarma, "Human Embryonic Stem Cells: A Primer on the Technology and Its Medical Applications," included in Holland, et. al. The Human Embryonic Stem Cell Debate (2002).

that other countries will follow. The more likely outcome is that research in the United States will fall behind research in other countries that are more welcoming. In addition, the United States will lose its opportunity to develop sensible regulatory approaches and protections.

The Ethical Concerns[4]

The principal ethical issue raised in opposition to therapeutic cloning arises from the fact that, like all embryonic stem cell research, the initial extraction of the embryonic stem cells for culturing involves the destruction of a very early stage human embryo. To some this is the moral equivalent of murder. To others, while not the same as murder, it is ethically unacceptable because it does not accord sufficient respect for an organism that has the potential, if implanted in a birth mother, to develop into an adult human being. Often this ethical debate is posed as asking to what extent a very early stage human embryo, existing in a laboratory, is a "person" entitled to ethical "respect" and legal protection.

4. Several federally appointed national bioethical commissions have published reports on the ethical issues implicated in therapeutic cloning. In 1994, a panel appointed under the auspices of the National Institutes of Health wrote a lengthy report on ethical issues raised by new reproductive technologies that also recommended permitting federal funding for research on very early stage human embryos. National Institutes of Health, Report on Human Embryo Research Panel (Sept. 1994). A fascinating account by a member of that panel of its deliberations and how its conclusions compare to subsequent commissions is set out in Green, The Human Embryo Research Debates (Oxford Univ. Press 2001). In November 1998, President Clinton asked the National Bioethics Advisory Commission, a group he created in 1995, to study stem cell research. In September 1999, the Commission issued a report entitled "Ethical Issues in Stem Cell Research" which recommended that federal funding should be available for research involving the derivation and use of stem cells derived from human embryos remaining after fertility treatment but should not be available for research involving the derivation and use of stem cells from embryos made solely for research purposes, including embryos made using cloning techniques. However, the report recommended that the "progress and medical utility" of research using stem cells from cloned embryos should be "monitored closely" to see if sufficient promise warrants reconsidering the availability of federal funding. Most recently, President Bush's President's Council on Bioethics issued a report in July 2002 with three different views of the bioethical issues. A majority found "cloning for biomedical research" to be, on balance, unethical and recommended a four year moratorium on all research, whether or not federally funded. Two different minority positions disagreed. One minority view found the research ethically warranted with appropriate regulations including a ban on developing research embryos beyond 14 days. Another minority found the research "presents no special moral problems and, therefore, should be endorsed with enthusiasm as a potential new means of gaining knowledge to serve mankind."

Some have sought to answer this question by appealing to biology.[5] Relatively well-accepted biological facts are mustered on each side of the debate. Those who believe that an early stage embryo is entitled to moral and legal respect point out that this embryo, even as maintained in a laboratory, has the full potential to develop into a human being. Further, they argue that the development process is continuous and progressive, from fertilization right up to birth (and after). Proponents of therapeutic cloning respond that the early stage embryo has almost none of the characteristics associated with "humanness." It has no nervous system and thus no feelings or consciousness. It has no distinct organs or body parts. Its development to birth is entirely dependent upon implantation in an adult uterus. It is not yet even associated with a single unique personhood, since the possibility still exists that the single embryo will develop into genetically identical twins. Finally, while the embryo's development would be continuous, there are nonetheless relatively distinct developmental stages that are well established medically.

The Committee finds that these biological facts are helpful in framing more precisely the ethical issues but do not, alone, provide an answer to the ethical question.

More persuasive is the degree of ethical respect or legal protection that we have historically provided or not provided to early stage embryos in other contexts.

Certainly the abortion context is relevant. *Roe v. Wade*, and subsequent cases, have firmly established certain legal principles. One issue that the abortion cases consider is to what extent a woman has a right under the due process clause of the United States Constitution to be free from governmental restrictions if she chooses to undergo an abortion. The starting point of that legal analysis is the legal interest of the woman to control what happens to her body. This liberty interest is "balanced" against state interests that include an interest in protecting an unborn fetus. The liberty interest is not raised in the same fashion by the stem cell research debate because the early stage embryos from which stem cells are typically harvested exist in laboratory dishes—not in any woman's body. However, the abortion analysis is relevant to the stem cell debate in determining the degree of the state's interest. Under the Supreme Court's analysis, the

5. An example is provided in the "Personal Statements" included in the July 2002 report of the President's Council on Bioethics entitled "Human Cloning and Human Dignity: An Ethical Inquiry." (Compare statements for William Hurlbut and Robert George in favor of a moratorium on therapeutic cloning research with the statements of David Foster and Michael Gazzoniga in favor of permitting research to proceed).

state's interest in protecting a fetus depends upon the fetus' developmental stage. During the first trimester, the state's interest is weakest and is outweighed by the woman's right to autonomy and self-determination. Indeed, the state's protective interest is never strong enough to permit the state to impose significant impediments on a woman's choice to seek an abortion during the first trimester.

Applying these same principles to stem cell harvesting suggests that the state's interest in protecting a one-week-old in vitro embryo is quite weak. More importantly, if the relevant state interest is protecting a human life, that interest seems significantly diminished when there is neither intent nor means to implant the embryo into a uterus. Without implantation, the embryo cannot and will not develop further. In short, there is really no prospect of a birth or subsequent life for the state to protect.

Other legal and medical precedents suggest that the state has not generally provided significant protection to very early stage embryos. Birth control methods, such as intra-uterine devices, that work by preventing the subsequent development of early stage embryos are well accepted. Miscarriages that happen naturally within a week or two after conception are generally not considered a major public health problem worthy of aggressive intervention or therapies. Indeed, the routine and widely accepted practice at IV clinics of destroying unneeded early stage embryos reflects this same pragmatic recognition that a very early stage embryo has not yet sufficiently developed human characteristics to be accorded even attenuated rights of personhood.

When these relatively weak ethical claims for protection of a very early stage embryo are balanced against the strong and legitimate claims of the chronically ill and of all who feel compassion for their plight, the Committee finds the ethical balance tips strongly in favor of permitting embryonic stem cell research—including producing embryos through cloning techniques.

In addition to the ethical concerns raised in opposition to therapeutic cloning that views the destruction of early stage embryos as equivalent or analogous to murder, another ethical objection to therapeutic cloning is that it will catapult society down a "slippery slope" to reproductive cloning. This argument is discussed in the next section, below.

Others raise ethical objections to applying cloning techniques to produce human embryos—without regard to whether or not it will somehow lead to reproductive cloning.

One argument objects to any means of creating an embryo for re-

search or therapeutic purposes. The argument distinguishes between embryos created in IV clinics for reproduction (a "good purpose") and embryos created in medical research laboratories for the purpose of curing diseases or learning how to cure diseases (an "unacceptable" purpose). The Committee simply does not agree with this distinction. We cannot understand why enabling an infertile couple to have a child is any more medically worthy than curing or treating a patient dying of Parkinson's, Alzheimer's or other fatal or disabling diseases.

Other commentators are troubled, in principle, by the power and artificiality of cloning—which does exert an unprecedented degree of control over human genes.[6] The Committee recognizes and respects the profound disquiet that accompanies many important scientific breakthroughs—from Copernicus and Galileo to Darwin and in vitro fertilization. However, we hold the view that these breakthroughs should be celebrated, not feared. Their potential includes the potential to do great "good." History has taught us that scientific knowledge will inevitably advance and we do better to engage and harness that knowledge than to fear and avoid it. Of course, where new scientific technologies represent national security concerns—such as biological or atomic weapons—a ban or severe restrictions is appropriate. But the Committee does not see how any of these national securities issues are implicated in therapeutic cloning research.

Therapeutic Cloning Will Not Lead to Reproductive Cloning

Therapeutic cloning that produces embryonic stem cells cannot lead to reproductive cloning. The very early stage embryo is destroyed as the stem cells are removed. And embryonic stem cells, even in animal models, are not yet sufficient to produce an adult organism.[7]

6. A short statement of this position (and the "slippery slope" concern) may be found in a New York Times op-ed piece by Leon Kass, the current Chair of the President's Council on Bioethics, that appeared under the title "How One Clone Leads to Another," January 24, 2003 at p. A23. For example, Dr. Kass writes, " . . . saying yes to cloned embryos, even for research, means saying yes, at least in principle, to an ever-expanding genetic mastery of one generation over the next. Once cloned embryos exist in laboratories, the engenic revolution will have begun."

7. However, very recently reported research suggest that mouse stem cells can be transformed into egg cells, like those produced in a female mouse's ovary. N. Wade, "Pennsylvania Researchers Turn Stem Cells to Egg Cells," N.Y. Times, May 2, 2003 at A28. It has been noted that this, in theory, presents the prospect of generating a nearly unlimited number of human egg cells without resort to the somewhat intrusive harvesting procedures used by IV clinics. The egg cells would be an important benefit to therapeutic cloning where they are needed to accept a cell nucleus. Also, cloned embryos produced in this fashion (or by cloning) do not involve fertilization, which some people regard as the start of an individual human life. This

A more plausible fear is that as the technology to produce cloned embryos develops, someone, somewhere will attempt reproductive cloning.[8] There are several responses to this concern. First, and foremost, reproductive cloning requires implantation of the cloned embryo in a birth mother. This is a distinct event that could be clearly and enforceably prohibited. Implantation is the natural "bright line," the obstacle that prevents therapeutic cloning from leading us down a "slippery slope" to reproductive cloning. While some people may attempt to evade a prohibition against implantation, the same thing can be said about nearly any legal rule. Permitting therapeutic cloning will not make it any more difficult to design and enforce a prohibition against reproductive cloning. Second, reproductive cloning may well occur in some foreign country no matter what legislation the United States enacts. It is simply unrealistic to expect that a ban on United States based research will prevent scientific knowledge and technologies from being developed elsewhere. The best way to prevent reproductive cloning is not to hope against all experience, that the technology needed will never be developed. It is to anticipate its development and put in place regulatory approaches and controls that will prevent its improper use.

CONCLUSION

For the reasons discussed above the Committee strongly urges that no legislation should be adopted that bans therapeutic cloning. The Act that is currently before Congress goes well beyond current public policy in an important respect. Public policy debates on embryonic stem cell research in the United States have for the most part addressed whether or not federal government funding should be available to sponsor research. For example, President Bush's directive regarding using stem cell cultures available on August 9, 2001 but not newly created stem cell lines concerned only the availability of federal funding to sponsor the stem cell

may change their ethical concerns. The *Times* article cited above makes the further point that these extraordinary scientific developments illustrates that any broad bans on research are premature. The article quotes a noted authority on bioethics, Dr. Arthur Caplan, as observing about the Act, "It's as if they were trying to regulate the aviation industry with only the Wright brothers' plane in front of them."

8. For an eloquent statement of this view by a respected bioethisist and chair of the President's Council on Bioethics, see L. Kass, "How One Clone Leads to Another" N.Y. Times, January 24, 2003 A.23 (OpEd) ("Once cloned embryos exists in laboratories, the engenic revolution will have begun").

research. The federal government has historically developed bioethical guidelines in the context of regulating federal funding. It has not typically sought in the first instance to regulate research sponsored by purely private sources.

The Act departs from this pattern by imposing a legal ban on all therapeutic cloning research, whether sponsored by public or private funds. This is a significant extension and a dangerous precedent. Most importantly, it is contrary to the United States' pluralistic tradition of respect for strongly held dissenting views, especially in areas of purely private sponsorship.

September 2003

The Committee on Bioethical Issues

David Hoffman, *Chair*
Caroline S. Fox, *Secretary*

Leslie Bailey
Susanna Brackley
Barbara Finger
Lori Kujawski
John Linville
Nadav Mazor
Coreen McGowan
Stacey Mondschein
Fran Obeid
Linda Farber Post
John Renehan
Madeleine Schachter
Ruth Zuckerman

The Committee adopted this Statement unanimously except that Mr. Renehan abstained. John Linville was the principal author of this Statement.

Formal Opinion 2003-03

Conflicts of Interest; Recordkeeping, Policies, and Systems for Conflicts-Checking Purposes

The Committee on Professional and Judicial Ethics

Topic: Conflicts of Interest; Recordkeeping, Policies, and Systems for Conflicts-Checking Purposes.

Digest: Under DR 5-105(e) of the New York Code of Professional Responsibility, all law firms must keep records and must have policies and systems in place to check for conflicts of interest to the extent necessary to render effective assistance to the lawyers in the firm in avoiding imputed conflicts under DR 5-105(d) based on current or prior engagements. What records the firm must keep, and what policies and systems the firm must implement, depends on a number of factors, including (a) the size of the firm, (b) where the firm practices, and (c) the nature of the firm's practice.

Code: DR 5-105(d); DR 5-105(e)

Question: What records must a law firm keep, and what policies and systems must a law firm implement for checking proposed engagements against current and previous engagements, to comply with New York's mandatory conflict-checking rule, DR 5-105(e)?

Opinion

On May 22, 1996, effective immediately, the Appellate Divisions adopted DR 5-105(e) of the New York Code of Professional Responsibility. In essence, the rule requires every New York law firm to keep records and implement policies and systems that effectively assist the firm in complying with New York's imputed conflicts rule, DR 5-105(d), with respect to conflicts caused by the firm's current and previous engagements.

DR 5-105(e) was drafted by the courts sua sponte. It was not based on any formal proposal by the Bar. It was adopted as part of the package of new and amended rules (also including DR 1-102 and DR 1-104) that made law firms as entities subject to discipline in New York. The requirements of the rule are not well defined or understood. The New York State Bar Association has not adopted any Ethical Considerations to explain DR 5-105(e); not a single court case has discussed the rule; and only one bar association ethics committee opinion has discussed DR 5-105(e) at any length—see N.Y. State Opinion No. 720 (1999), 1999 WL 692571. The rule is unique to New York—no other jurisdiction has adopted a rule anything like it—so other jurisdictions provide minimal guidance. At least one article has been written about the rule—see Roy Simon, Checking for Conflicts Under DR 5-105(e), New York Professional Responsibility Report, November 2002—but little formal guidance is available about the rule and its requirements. Accordingly, this Committee has been asked to render guidance to the Bar regarding the requirements imposed on law firms by DR 5-105(e).

Discussion

The three sentences of DR 5-105(e) (which we quote verbatim below but break into separate paragraphs for greater clarity) provide as follows:

- "A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105(d)."

> • "Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105(d) occurs, shall be a violation by the firm."
>
> • "In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105(d) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105(d)."

The text of DR 5-105(d), to which DR 5-105(e) refers four times, provides as follows:

> While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(a), DR 5-105(a) or (b), DR 5-108(a) or (b), or DR 9-101(b) except as otherwise provided therein.

This opinion will focus only on the first sentence of DR 5-105(e), with particular emphasis on the type and quality of records that a law firm must keep and the policies and systems the law firm must implement for checking proposed engagements against current and previous engagements.

What is a "law firm"?

Because DR 5-105(e) applies only to a "law firm," we begin by briefly exploring the scope of the term "law firm." The New York Code of Professional Responsibility (the "Code") (at 22 N.Y.C.R.R. § 1200.01) defines the term "law firm" as follows:

> "Law firm" includes, but is not limited to, a professional legal corporation, a limited liability company or partnership engaged in the practice of law, the legal department of a corporation or other organization and a qualified legal assistance organization.

This definition of course encompasses large law firms, corporate legal departments, governmental legal departments, and non-profit law firms. We also believe that a solo law practice, whether or not it is organized as a professional corporation or a limited liability company, is a "law firm" within the meaning of DR 5-105(e).

In addition, since the definition of "law firm" in the Code "is not limited to" traditional law firms and legal departments, the term has been applied for conflicts purposes to other practice arrangements. For example,

as this Committee and other ethics committees have opined, lawyers in some practice arrangements must check for conflicts of interest as if they were a single law firm. See, e.g., ABCNY Opinion No. 80-63 (1980) (two firms that shared offices could not represent opposing parties in litigation because of the "strong likelihood" that the separate law firms could not maintain the confidences and secrets of their respective clients); N.Y. County Opinion No. 680 (1990), 1990 WL 677022, *2 ("Even though lawyers who share office space are not partners, they may be treated as if they were partners for some purposes under the Code (particularly the provisions for vicarious disqualification in the event of a conflict of interest)" if they share confidential information.) ABCNY Opinion No. 1995-8 (1995) (when law firms are "of counsel" to each other one-unit conflicts checking is required); ABCNY Formal Op. 1996-08, 1996 WL 416301, *3 ("'of counsel' relationships are treated as if the 'counsel' and the firm are one unit").

We think DR 5-105(e) applies to these "constructive" law firms as well as to more traditional firms. In short, we believe DR 5-105(e) applies to a wide range of practice arrangements. We concentrate the remainder of this opinion on private law firms, but the principles and concepts discussed here apply in some fashion to other types of law firms as well, including the legal departments of corporations and government agencies.

Fundamentals of DR 5-105(e)

The essence of the first sentence of DR 5-105(e) is to require every law firm to do two things: (1) create a record of each new engagement at or near the time the engagement commences; and (2) have a policy implementing a system for checking proposed engagements against current and previous engagements. The rule does not specify what records a firm must keep, or what type of policy and system a firm must implement to check proposed engagements against current and previous engagements. Rather, the rule indicates simply that whatever systems are adopted should "render effective assistance to lawyers within the firm" in complying with their obligation to avoid conflicts that would violate DR 5-105(d).

At a minimum, to assist in complying with DR 5-105(d), we think that all firms should have mechanisms for assisting lawyers in identifying and resolving two types of conflicts arising from current or previous engagements that are expressly covered by DR 5-105(d):

- Conflicts among current clients, whether the conflicts arise before or during the engagement—see DR 5-105(a) and (b); and

• Conflicts with former clients, including the former clients of laterals and their former firms—see DR 5-108(a) and (b).

DR 5-105(d) also embraces conflicts that arise under DR 9-101(b) when a private law firm hires lawyers who formerly served as public officers or employees. However, because conflicts with former government lawyers are complicated by laws and rules governing grand jury secrecy, the secrecy of investigative information acquired by the government, governmental privileges, and other factors that make public officers and employees substantially different from private lawyers, this opinion does not address systems for checking the conflicts of former public officers and employees.

What kind of system is required to check for conflicts with current and former clients will turn on the nature of each law firm. In particular, the specific measures that DR 5-105(e) requires will depend on factors such as: (a) the size and structure of the firm; (b) the nature of the firm's practice; (c) the number and location of the firm's offices; (d) the relationship among the firm's separate offices; and (e) other characteristics of the law firm and its operations. The records, policies, and systems will vary from law firm to law firm. But all law firms, whatever their particular characteristics—large or small, urban or rural, litigation or transactional, governmental or private—must keep certain minimum records and implement certain minimum policies and systems suitable to provide effective assistance to the firm's lawyers in avoiding conflicts arising from current or former engagements and that will be imputed to the firm under DR 5-105(d).

Recordkeeping Requirements

The first sentence of DR 5-105(e) begins with a mandate for recordkeeping. It provides, in part, that a law firm "shall keep records of prior engagements ... made at or near the time of such engagements...." The expressly stated purpose of this recordkeeping requirement is to assist lawyers in the firm in avoiding conflicts of interest that will be imputed to the entire firm under DR 5-105(d) (discussed above). The rule raises a number of questions, which we address one at a time.

1. What are "records"?

To get one preliminary point out of the way quickly, we think the term "records" refers to written or electronic records. Information inside a lawyer's head that has not been written down does not qualify as "records."

Thus, even solo practitioners must keep written or electronic records to comply with DR 5-105(e).

Moreover, those records must be maintained in a way that allows them to be quickly and accurately checked for possible conflicts. Thus, the mere fact that the law firm has information about clients and engagements written down in the individual files pertaining to each matter does not satisfy the "records" requirement. It is simply not realistic to think that a law firm can search through every paper file and folder to look for conflicts each time the firm considers a proposed new engagement. However, if the law firm opens electronic files on all of the law firm's clients and prospective clients, and if those records are electronically searchable (as all word processing programs and law practice management programs appear to be), then those electronic files will qualify as "records" for purposes of DR 5-105(e). In other words, the key characteristic that qualifies information as "records" under DR 5-105(e) is that the information can be systematically and accurately checked when the law firm is considering a proposed new engagement.

2. When must the required records be made?

DR 5-105(e) provides that the required records of prior engagements "shall be made at or near the time of such engagements...." We think this language is largely self explanatory. If the records are made at the inception of a new engagement, that obviously satisfies the rule. If the records are not made at the inception of a new engagement, however, DR 5-105(e) allows them to be made "near" the time the engagement begins. To satisfy that alternative requirement, we think the records must ordinarily be made in time to assist in checking for conflicts by the next time a proposed new engagement comes along. In many law firms, proposed new engagements (including new matters for existing clients) come along every day or every few days. Thus, we think DR 5-105(e) requires that law firms make the necessary records within days, not weeks, after commencing a new engagement. The best practice is to make the records at the time engagements commence, but the rule allows some leeway by using the word "near." In addition, even though it is not required by DR 5-105(e), the best practice would also be to update the records periodically with additional parties or other pertinent information, for example where a complaint is amended to add new parties or where there are other developments with respect to a matter that might create a conflict under another rule. However, the Committee expresses no view in this opinion on whether other rules require such updating.

3. How far back in time must records go?

DR 5-105(e) took effect on May 22, 1996. Since that date, law firms have been obligated to "keep records of prior engagements...." However, nothing in the rule suggests that law firms were required to develop a comprehensive list of prior engagements going backward in time from May 22, 1996. As a practical matter, the rule contemplated only that law firms would begin keeping records of all engagements (including engagements already underway on May 22, 1996) starting on the rule's effective date. With these records in place the firm can determine whether it needs to fill in gaps in past records to provide effective assistance to the firm in avoiding conflicts.

4. How must the records be organized?

Merely recording information about current and previous engagements will not accomplish anything unless the information is readily accessible. The Committee therefore believes that the required records must be kept in a way that permits efficient access to the information they contain. Many methods are possible, but one straightforward method would be to list clients and former clients (perhaps alphabetically) and to list engagements undertaken for each client (perhaps in chronological order) under each client name. Regarding adverse parties, a firm should probably maintain a list, cross-referenced to the client and matter in which the adverse parties were involved. But a law firm may use any method that makes it possible for the firm to check the records in a timely fashion, and the type and organization of the records may depend largely on, among other things, the software and search engine employed to create and check the records.

5. What records must a law firm keep?

Unfortunately, DR 5-105(e) is silent about the type of records that a firm must maintain. It says only that the records are to provide "effective assistance" to lawyers within the firm in avoiding new engagements that would create a conflict of interest based on other current engagements or previous engagements. We therefore now address what records we think DR 5-105(e) requires.

The nature of the records needed to render effective assistance to lawyers in the conflict clearing process will vary depending on the size, structure, history, and nature of the law practice at issue. An example of a law firm near one end of the spectrum is a solo practitioner, concentrating solely in plaintiffs' personal injury matters, who has just begun to prac-

tice law. Such a law firm has relatively few clients and former clients and may need only the simplest written records to jog the lawyer's memory sufficiently to recognize and avoid conflicts. Toward the other end of the spectrum, presenting different and more complex problems, is an established law firm with hundreds of lawyers practicing in multiple domestic and foreign offices. Such a firm typically has thousands or tens of thousands of clients and former clients, many of them large corporate clients with affiliates and subsidiaries and with names that may have changed over time. In such a firm, fairly complex records will be needed to check effectively for conflicts. Somewhere in the middle of the spectrum are law firms with five or ten or twenty lawyers that have been in business for a decade or more. The nature of the records needed to check for conflicts in these mid-sized firms will depend on many factors.

As an initial matter, we note that several options are theoretically open regarding recordkeeping requirements. One option is a standard recordkeeping requirement specifying in detail the precise data that all firms must keep. We reject that option because it would ignore the substantial differences among firms. An alternative option is to adopt a variable recordkeeping requirement so that the nature of the required records depends on the size and nature of the law firm, its practice, and its lawyers. We adopt that option because a variable requirement takes into account the differences among firms and recognizes that firms may have to change the nature of their records as they grow and change. However, this Committee is not capable of specifying in detail the nature of the records that each type and size of firm must keep. Rather, we specify in general terms only the rock-bottom minimum records that we think all law firms must keep, no matter how small or specialized. But we caution that as law firms grow larger and more complex, they will find it increasingly difficult to fulfill their conflict checking duties unless they keep more than the minimum records that we believe are mandated by DR 5-105(e). (We address additional desirable information that might be maintained toward the end of the opinion, when we discuss systems for checking particular types of conflicts.)

Against this background, and for the reasons given below, the Committee believes that the following records are the minimum that any lawyer or private law firm must keep in order to comply with DR 5-105(e):

1. Client names. The full and precise name of each client the firm currently represents.

2. Adverse party names. The precise names of parties involved in a matter whose interests are materially adverse to each party the firm represents.

3. Description of engagement. A brief description of each engagement or prospective engagement.

With this basic information at hand, a law firm should be able to detect most potential conflicts involving clients or former clients before accepting any proposed new engagement. With less information in its records, many conflicts could not be detected. For example, without the client information, the remaining firm data would be useless in assisting lawyers in avoiding conflicts. Without adverse party information, a firm could not determine whether it was already acting adversely to the interests of a person or entity it later might seek to represent. Without a brief description of each engagement, a law firm could not judge whether a proposed new engagement would create conflicts with former clients. Of course, after identifying a potential conflict, a law firm may need to conduct factual and legal investigation to determine whether a prohibited conflict actually exists or is likely to develop. But the basic information outlined above should render effective assistance to most firms in putting them on notice that possible conflicts exist and that further study may be required.

We have not interpreted DR 5-105(e) to require records of the financial, business, property, or personal interests that may create conflicts under DR 5-101(a). Personal conflicts are not current or previous "engagements," so they are not within the scope of DR 5-105(e). We do not address whether any other provision of the Code requires a law firm to check for conflicts arising under DR 5-101.

Regarding records of prior engagements, we note that since March 4, 2002, a new court rule entitled "Written Letter of Engagement" (22 N.Y.C.R.R. Part 1215) has required all New York lawyers to provide written letters of engagement to clients in every matter where fees are expected to be $3,000 or more unless the client has previously paid the attorney for services "of the same general kind" or the matter is a domestic relations matter (in which case a written retainer agreement is required—see 22 N.Y.C.R.R. § 1400.3). For firms that do not have many repeat clients, such as firms that handle personal injury work, the written engagement letters required by Part 1215 will, in the normal course, identify the client and describe the nature of the representation in enough detail to satisfy the basic recordkeeping requirements we have set out above. (The firm will either

have to record adverse parties separately or add that information to the engagement letters, however.) More elaborate engagement letters may also define who is not the client (e.g., "The firm does not represent any of the client's affiliates or subsidiaries" or "The firm represents you but not your spouse even though you and your spouse own your home as joint tenants"). Indexing or cataloging engagement letters may be one way to keep records of prior engagements at or near the time of the engagements. But engagement letters will not provide information about each new engagement if firms do not issue new engagement letters to clients who have previously paid for legal services of the same general kind, or for clients whose matters were never expected to generate $3,000 or more in legal fees.

While much additional information could be maintained to assist in the conflicts research process, it is difficult to argue that DR 5-105(e) requires information beyond the basic information necessary to put lawyers on notice that a potential problem exists. What law firms do with that basic information—what "system" they use to check for conflicts—is a separate and more difficult question, to which we now turn.

Policies and Systems for Checking for Possible Conflicts

In addition to mandating that law firms keep records, DR 5-105(e) requires every law firm to have "a policy implementing a system by which proposed engagements are checked against current and previous engagements," again with the stated aim of rendering "effective assistance to lawyers within the firm in complying with" DR 5-105(e)'s purpose to avoid conflicts arising from current or previous engagements.

1. What is a "system"?

An initial question is: What is a "system" within the meaning of DR 5-105(e)? The wording of DR 5-105(e) is curious: While the rule requires law firms to maintain "records of prior engagements," it does not expressly require the law firm to check those records when checking proposed engagements for conflicts. Rather, DR 5-105(e) simply requires a law firm to establish a policy and system "by which proposed engagements are checked against current and prior engagements..." (We do not believe that the word "policy" adds anything significant to the word "system," so we focus only on the meaning of the word "system.") Taken literally, a "system" for checking proposed engagements against current and previous engagements would not necessarily require checking the written records. No doubt some solo practitioners use a "system" of consulting their memories

alone, and some small law firms (and perhaps even some mid-sized law firms) use a "system" of talking to a partner with a good memory or asking around the firm (orally or via email or memo) to find out whether anyone knows of a conflict with a proposed engagement.

This Committee does not believe that any of those relatively informal methods of checking for conflicts would qualify as a "system" within the meaning of DR 5-105(e). Rather, we think DR 5-105(e) requires that a "system" of checking for conflicts within the meaning of DR 5-105(e) must include systematically consulting the "records" that must be kept to satisfy the opening clause of the rule. Less formal methods of checking for conflicts may of course be used (and may have to be used) to supplement a systematic check against those records, but we think it would be pointless to require a law firm to maintain written "records" but not require the law firm to consult those records as part of its conflict checking "system."

2. Essential elements of a "system"

We have just said that a "system" must include systematically consulting the "records" required by DR 5-105(e). What else must a system include to meet the requirements of DR 5-105(e)?

Because law firms vary in size, structure, practice areas, and history, the systems that will provide "effective assistance" in checking for conflicts within the meaning of DR 5-105(e) will depend on many factors. Sole practitioners and very small firms (five lawyers or less, all practicing in a single location) may not need to do much more than check their records and consult with other lawyers in the firm about any questions triggered by the records. As firms grow larger and build up a larger base of prior engagements, and as their practices grow more diverse, law firms may need to install software systems to check the records for conflicts rather than checking the records in a rudimentary fashion. See Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264 (D. Del. 1980) (law firms should make maximum use of technology to aid in avoiding conflicts). Some firms will be able to use commercial software programs "off-the-rack," but other firms, especially those with larger or more complex practices, may need to seek technical assistance to tailor the software program to the firm's particular needs.

If consulting the records leads to missing too many potential conflicts, and thus is not providing "effective assistance" to the firm in ferreting out conflicts with current and previous engagements, the firm will need to supplement the records check. Small firms may be able to do this through personal communications among key partners (or all partners)

at the firm, either in writing or orally. Larger firms, especially those with more than one office, may need to supplement their records with email, formal written memos circulated throughout the firm, or other communication methods—electronic and traditional—designed to reach lawyers who may have relevant information about possible conflicts.

Many law firms (perhaps most firms) will be able to satisfy DR 5-105(e) by implementing a system that checks only the basic information that the rule requires (client names, adverse party names, and brief description of each engagement), supplemented by other types of communications and records checks to resolve any questions and detect certain types of conflicts not readily discoverable through a records check alone. In larger or more complex practices, however, an effective system will depend not only on a check of the records database but also on the ability of lawyers in the firm to communicate with others in the firm who have relevant information, to gain access to the firm's client files or other information regarding particular engagements, and to obtain more information readily upon request.

We believe that most firms afford access to information relevant to client engagements (except to the extent certain files have been screened off from particular lawyers). We also believe that virtually all large firms make it easy for a lawyer in the firm to communicate with other lawyers in the firm by email or other means. The more difficult question is the third element: What other information must be readily available upon request to supplement the basic records that all firms must keep? We turn to that complex question.

Systems for Checking Particular Types of Conflicts

In this section we discuss special considerations that may affect the system a law firm uses to check for conflicts arising under DR 5-105 and DR 5-108. We note, however, that we believe that the fact that a law firm is disqualified from a matter under these (or any other) rules does not necessarily mean that the law firm violated DR 5-105(e), and, furthermore, that keeping records required by DR 5-105(e) is not, in and of itself, a defense to a disqualification motion under DR 5-105, DR 5-108, or any other rules.

1. Conflicts with current clients

The law is well established in New York that a law firm may not oppose a current client in any matter—even a totally unrelated matter—unless the law firm satisfies the "disinterested lawyer" test and obtains

the informed consent of each client affected by the conflict. See, e.g., DR 5-105; Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976). Moreover, whenever two or more of a law firm's current clients are involved in the same litigation or transaction, even on the same side, the potential for conflict—and for a violation of DR 5-105(d)—is present. The records that include the names of all current clients, plus information available to the person checking the proposed engagement for conflicts, should usually be sufficient. That information will ordinarily be enough to alert the firm to investigate potential conflicts that arise when a law firm is opposing a current client, or when more than one current client is involved in the same transaction or litigation. However, concurrent client conflicts come in so many varieties that no single system of checking for conflicts will detect them all. We therefore address here some special situations that illustrate the practice-specific nature of conflict-checking systems.

(a) Corporate family conflicts

When a law firm desires to oppose an entity that belongs to a current client's corporate family (e.g., an affiliate, subsidiary, parent, or sister corporation of a current corporate client), a concurrent client conflict may arise. Whether such a conflict is disqualifying will depend on many factors, including the relationship between the two corporations and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client's corporate family member. See, e.g., Discotrade Ltd. v. Wyeth-Ayerst Int'l, Inc., 200 F. Supp. 2d 355 (S.D.N.Y. 2002) (granting motion to disqualify); JPMorgan Chase Bank v. Liberty Mutual Ins. Co., 189 F. Supp. 2d 20 (S.D.N.Y. 2002) (granting motion to disqualify); Brooklyn Navy Yard Cogeneration Partners L.P. v. PMNC, 254 A.D.2d 447, 679 N.Y.S.2d 312 (2d Dep't 1998) (denying motion to disqualify); see generally ABA Formal Opinion No. 95-390 (1995) (no automatic disqualification when a law firm opposes a corporate client's affiliate); N.Y. County Opinion 684 (1991), 1991 WL 755940 (attorney may, under certain circumstances, accept employment in a matter adverse to a subsidiary of a corporate client if the adverse action would not materially affect the corporate client's interests).

We would not require a law firm to maintain records showing every corporate affiliate of every current client. However, if a law firm frequently represents corporations that belong to large corporate families, then the firm should have some system for alerting the firm to potential conflicts with the members of the corporate client's family. One possibility is to

explore the corporate family tree of proposed new adversaries to determine whether the adversary is related to other current clients of the firm. This search may require the law firm to maintain its own database of corporate family members; or the firm may decide to use a commercial service for that purpose; or the firm may directly ask its current clients. If the firm discovers a potential conflict with a corporate family member, the firm can conduct the appropriate research to determine whether the current client's consent is necessary. Not all law firms need such a system, but some kind of system will be necessary to render effective conflict-checking assistance to firms whose clients have many affiliates, subsidiaries, and other corporate relatives. (The same research will often be required to determine whether a proposed engagement will create a conflict with a former client—see the discussion of former client conflicts below.)

(b) Corporate constituents

When a law firm represents an entity, DR 5-109(a) provides that the law firm "is the lawyer for the organization and not for any of the constituents." The first sentence of EC 5-18 of the Code is even more explicit: "A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity." Nevertheless, especially when a law firm represents a small or closely held corporation with few shareholders, or when the law firm appears on behalf of individual officers or employees but bills the corporate client for the legal services, an attorney-client relationship does or may develop—intentionally or unintentionally—between the law firm and one or more individual constituents of the entity. See, e.g., Rosman v. Shapiro, 653 F. Supp. 1441 (S.D.N.Y. 1987) (50% shareholder of a closely held corporation was a client of law firm that represented the corporation); Cooke v. Laidlaw, Adams & Peck, Inc., 126 A.D.2d 453, 510 N.Y.S.2d 597 (1st Dep't 1987) (corporate officer was considered client of law firm that represented corporation because law firm appeared on behalf of officer in an SEC proceeding). Accordingly, a law firm that represents corporate clients may need a system for determining whether the law firm has an attorney-client relationship with individual constituents of a client organization and, if so, should add the names of those clients to its records database.

(c) Trade association members

A law firm that represents a trade association ordinarily represents only the trade association and not the members of the trade association.

However, an attorney-client relationship between the law firm and a member may arise if a member provides the law firm with confidential information. In that instance, the law firm will be restricted in its freedom to oppose the member. See, e.g., Glueck v. Jonathan Logan, Inc., 653 F.2d 746 (2d Cir. 1981) (trade association member may be a "vicarious" client); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978) (a client is no longer merely a person who walks through the door); ABA Formal Opinion 92-365 (1992) (whether a lawyer for a trade association also represents members of the association is a question of fact). If a law firm represents a trade association, its conflict-checking system should enable attorneys to determine whether members of the trade association are also clients. If so, the law firm should add the member's name to the records identifying the firm's clients.

2. Conflicts with former clients

(a) The law firm's own former clients

Under DR 5-108(a) (entitled "Conflict of Interest—Former Client"), except with the consent of a former client after full disclosure, or in compliance with the special provisions of DR 9-101(b) for former public servants, a lawyer who has formerly represented a client in a matter shall not thereafter "represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." In short, absent the former client's informed consent, or absent an information screen and other procedures mandated by DR 9-101(b) for conflicts involving former public servants, a lawyer may not oppose a former client in the same or a substantially related matter.

Because conflicts with former clients are common, we think every law firm must have a system for discovering such conflicts. If the law firm consistently maintains its database of clients and former clients, then checking each proposed engagement against that list should be adequate. If a probable adverse party turns out to be one of the firm's former clients, the firm will know that it should look further into the situation to see whether the former client's consent is required.

Unfortunately, it will not always be clear whether a particular person is a current client or a former client. See, e.g., Oxford Sys. Inc. v. CellPro, Inc. 45 F. Supp. 2d 1055 (W.D. Wash. 1999); SWS Financial Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392 (N.D. Ill. 1992); Lama Holding Co. v. Shearman & Sterling, 758 F. Supp. 159 (S.D.N.Y. 1991). This is not the place for a comprehensive discussion of the factors that will enable a law

firm to distinguish between current clients and former clients, or to tell when a current client has become a former client.

However, to provide effective assistance to the firm in avoiding conflicts with current clients, a law firm's conflict-checking system should include some means of determining whether a client remains a current client or has become a former client.

(b) The former clients of laterals

When a lawyer moves from one private law firm to another private law firm, the clients that the lawyer personally represented at his or her prior law firm are potential sources of conflict for the new law firm. See, e.g., Kassis v. Teachers Ins. and Annuity Ass'n, 93 N.Y.2d 611, 695 N.Y.S. 2d 515 (1999) (disqualifying a firm that hired a lawyer who had actively worked on litigation in which the old and new firms were opposing counsel, where the litigation was still pending when the lawyer changed firms); N.Y. State Opinion 723 (1999) (discussing the DR 5-108); (N.Y. State Opinion 720 (1999), 1999 WL 692571, at *2 ("[W]e believe that the intent of [DR 5-105(e)] can only be effected if a firm adds to its system information about the representations of lawyers who join the firm."). Under DR 5-108(b), absent the former client's informed consent, a law firm that hires a lateral may be disqualified from acting adversely to a client of the lateral's former law firm in a matter substantially related to the former firm's representation of that client if the lateral, while at the former firm, "acquired information protected by DR 4-101(b) that is material to the matter," even if the lateral never personally represented the client in question at the former firm.

Accordingly, since DR 5-105(e) specifically applies only to prior engagements of the law firm itself, if a law firm hires lawyers laterally from other law firms, the hiring firm should include in its conflict-checking system a means for determining which clients the lateral lawyer personally represented while at his or her former firm. At the same time, while it is not required under DR 5-505(e), it would be prudent for the firm to consider what, if any, other steps it might take with regard to other matters about which the lateral lawyer acquired protected information while at the former firm. In either event, the information from the lateral's former firm should be obtained only insofar as it is possible to do so in a manner that is consistent with the lateral's obligations to his or her former firm and its clients. See, e.g., N.Y. State Opinion 720 (1999) 1999 WL 692571 (discussing lateral's duties to protect former clients' confidences and secrets, as well as contractual or fiduciary restrictions the lateral may be

subject to regarding the disclosure of information proprietary to the lawyer's former firm).

Types of Conflicts Not Addressed in This Opinion

The subject of conflicts of interest is vast, and we have discussed only a small portion of the field. There are many other areas that we have not discussed but that law firms may have to consider when checking for conflicts pursuant to DR 5-105(e). These include (a) conflicts arising in class actions; (b) conflicts that arise when lawyers in a firm invest in client ventures (either directly or in lieu of fees—see ABCNY Opinion 2000-3 (2000), 2000 WL 33769162; (c) conflicts that arise when lawyers in the firm serve on a client's Board of Directors; (d) conflicts that arise in connection with an insurance triangle; (e) conflicts with nonlawyers (such as paralegals and secretaries), especially those who have previously worked at another law firm (including the legal department of a corporate adversary); (f) conflicts arising from the use of temporary lawyers who concurrently work or have in the past worked at other law firms; (g) conflicts that arise when lawyers represent or are represented by other lawyers; (h) conflicts that arise when a current client is an adverse witness; (i) conflicts involving former public servants; and (j) the special conflict issues that may arise in connection with beauty contests or other business development activities. Each firm should survey the extent to which these special varieties of conflicts are pertinent to the firm's practice and should adopt measures to detect and deal with them.

CONCLUSION

Under DR 5-105(e) of the New York Code of Professional Responsibility, all law firms must keep records and must have policies and systems in place to check for conflicts of interest to the extent necessary to render effective assistance to the lawyers in the firm in complying with New York's rule on imputed conflicts, DR 5-105(d). The records each firm must keep, and the policies and systems each firm must implement, will depend on each law firm's particular nature, structure, practice, history, personnel, and other factors. However, all law firms must keep certain minimum written or electronic records of each new or prospective engagement and must consult those records when checking proposed new engagements for conflicts of interest.

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