

**Committee on State Courts of Superior Jurisdiction of
The Association of the Bar of the City of New York**

**Report on the Law Department of the
Supreme Court of the State of New York**

This report reviews the role of the Law Department in the Supreme Court of the State of New York in addressing the large number of motions generated in the courts of this state, with a particular focus on the Law Department in New York County. The Committee recommends, inter alia, an increase in the number of attorneys working in the Law Department and streamlining of the hiring process.

INTRODUCTION

In New York State courts, it is not unheard of for litigants to wait more than six months from submission after argument or the return date for motions that are not argued for a decision on a motion.¹ Of course, with aggressive case management implemented in 1996 and differentiated case management implemented in 2000, the number of such experiences has decreased over time.² The average length of the delays has also declined. With approximately

¹In 1990, the State Commission on Judicial Conduct censured a judge for misconduct arising from failure to timely render decision in nine cases. One decision took nine years to render, and in four of the cases, Article 78 petitions had been filed to compel Justice Greenfield to render decisions. The Court of Appeals later reversed the censure, finding that Justice Greenfield had done his best, and that recently enacted administrative changes would assist judges in the future to track their motions. *Matter of Greenfield*, 76 NY2d 293, 558 NYS2d 881 (1990).

² Compare the *Greenfield* case with *In re Washington*, 2003 NY Lexis 3315 (Oct. 21, 2003), where the Court of Appeals recently sustained the State Commission on Judicial Conduct's determination to remove a part-time City Court judge in White Plains who had 33 decisions which had taken over one year to issue, and seven decisions which had taken over two years to issue, despite administrative efforts to help reduce the backlog. Judge Washington had also filed late, incomplete and false quarterly reports.

3.5 million cases filed in New York State each year³ and only 1,143 full-time judges,⁴ it is not surprising that such delays occur. Increasing the number of judges is an obvious solution, but not an option in the immediate future.⁵ Other alternatives which would decrease delays in deciding motions include increasing the size of judges' staffs, reducing the number of motions, and reducing the number of actions.⁶ However, these too suffer from practical implementation problems. Where would additional staff members work in old courthouses which are already overcrowded?

Therefore, the Committee on State Courts of Superior Jurisdiction (the "Committee") decided to focus on the Law Departments, where a significant amount of the drafting of decisions occurs. Specifically, this report will focus on the Law Department in the Supreme Court, New York County, Civil Term,⁷ because of the high volume of cases there, the fact that

³Report by NYS Unified Court System: Filings in the Court System Trial Courts, Office of Court Research, December 23, 2002.

⁴Daniel Wise, *Elective System Is Put Under Intense Review; But Suggested Reforms Are Likely to be Narrow, Voluntary*, NYLJ, November 12, 2003, p 1. This includes 24 Appellate Division and Appellate Term Judges, but does not include Acting Supreme Court Judges or certified Judges. Judiciary Law §140-a authorized 323 elected Supreme Court Justices in 12 Judicial Districts. According to the 24th Annual Report of the Chief Administrator of the Court, for calendar year 2001, there were 1199 authorized judges (some of which were not full-time) and an additional 2300 Town and Village Justice Courts.

⁵Chief Judge Kaye, State of the Judiciary, January 13, 2003, p. 3-6. Daniel Wise, *Justices Launch New Campaign to Boost Image*, NYLJ, April 4, 2003, at p.1 (noting that increasing the number of judges requires changes to the New York State Constitution, including passage by successive legislatures and public referendum).

⁶Leon Silverman, *Are We a Litigious Society: The So-Called Litigation Explosion*, Arps Lecture, Association of the Bar of the City of New York, Oct. 23, 2003.

⁷The Committee acknowledges that there are certain limitations to focusing narrowly on a single Law Department, although anecdotal evidence suggests that the experience in other counties is similar. The committee therefore encourages the Office of Court Administration to

many committee members practice there (making information gathering easier), and the fact that differences in both court procedures and the collection of data in different counties make it difficult to compare or synthesize data from law departments in different courts and counties.⁸

The purpose of this report is to educate the profession about the Law Department, its important role in the courts, and the challenges it experiences, as well as to recommend changes which will hopefully decrease the time it takes to receive a decision on a motion. As a result of the Committee's study of the Law Department, the Committee concludes that increasing the number of attorneys in the Law Department would be an efficient use of limited resources.

1. BACKGROUND

In Supreme Court, New York County, Civil Term, 24,862 new cases were filed in 2002,⁹ which when added to already-pending actions brought the total of cases pending at the close of 2002 to 40,273. These actions generated 33,139 new motions in 2002, while 34,101 motions were decided, indicating that the large backlog of cases may be beginning to be addressed, for which the Office of Court Administration ("OCA") should be commended.¹⁰ Under CPLR 2219, motions must be decided within 60 days of their submission.¹¹ In addition to their staffs, each

seek further data from other the Law Departments in addressing the issues identified in this Report.

⁸For example, many counties count cross-motions separately. However, in New York County, a motion is given a sequence which is counted as one motion regardless of how many cross motions are made.

⁹This number does not include uncontested matrimonial actions, which numbered approximately 17,426 cases in 2002. Matrimonial Judges do not use the Law Department.

¹⁰The data on motions does not include ex parte applications.

¹¹See Section 4.1 of the Rules of the Chief Judge which requires Judges to submit periodic reports of matters pending undecided for more than 60 days. The 60 day limitation is

consisting of one lawyer¹² and one secretary,¹³ judges in New York state courts are assisted by a pool of lawyers not specifically assigned to any particular judge. This pool is known as the “Law Department.” The Supreme Courts, both civil and criminal, in all five boroughs, except the Criminal Term of the Supreme Court, New York County, have Law Departments which range in size from 3 to 61 attorneys.¹⁴

In 1995, in New York County Supreme Court, there were 47,960 cases pending and 27,580 new actions filed. This compares to 41,141 cases pending in 2003 and 21,231 new cases filed. While the numbers have decreased, the complexity has increased due to the establishment of the Commercial Division in 1993, which is designed to hear larger and more complex cases and has succeeded in attracting more such cases that might otherwise have been filed in federal or other states’ courts.¹⁵

2. THE CURRENT SITUATION IN THE LAW DEPARTMENT OF SUPREME COURT, NEW YORK COUNTY, CIVIL TERM

“directory”, and is not a limitation on a Judge’s authority to decide a motion after 60 days. *Kaminsky v Abrams*, 51 Misc. 2d 5, 272 NYS2d 530 (Sup. Ct., NY County 1965). Additionally, the Canons of Judicial Ethics require judges to dispose promptly of the business of the Courts. 22 NYCRR 100.3[B][7].

¹²Historically, the title of this position has been law secretary, though its salary line is entitled Principal Law Clerk. Judiciary Law §36; Rules of the Chief Judge §5.1. Many people in the position simply refer to themselves as Court Attorneys.

¹³Instead of a secretary, many judges hire a recent law school graduate who makes a commitment for one or two years. The starting salary for this position is \$35,000.

¹⁴In addition, the Court of Appeals, all four Appellate Divisions and Appellate Terms have Law Departments.

¹⁵Tamara Loomis, *Commercial Division: High Profile Case Casts Spotlight on Well-Regarded Court*, NYLJ, June 20, 2002.

This report focuses on the Law Department in the Supreme Court, New York County, Civil Term (the “Law Department”). Fifty judges sit in that court and each manages about 600 cases which yield hundreds to thousands of motions each year depending on the part in which the judge sits. For example, in 2002 over 2,000 motions were made in a Motor Vehicle part while over 1,000 were made in a Commercial Division part.

Lawrence Birnbaum is the Chief Court Attorney of the Law Department. Mr. Birnbaum has held the Chief’s position since 1995, when he succeeded Seymour Bieber who had held the position for 21 years. The Chief Court Attorney reports to the New York County Supreme Court’s Chief Clerk, John Werner. The Chief Court Attorney, Deputy Chief Court Attorney and five Principal Court Attorneys supervise 54 full- and part-time Court Attorney positions¹⁶ and nine Special Referees.¹⁷ Court Attorneys draft decisions on motions and hold discovery conferences for Judges. Special Referees can be appointed under CPLR 4001 to hold evidentiary hearings either to hear and determine under CPLR Article 42 or hear and report under CPLR Article 43. Until 1991, the Law Department consisted of 22 attorneys.¹⁸ It increased to 50 in

¹⁶Three of the Court Attorneys work part-time, two are assigned to the office of the self-represented and one is assigned to the motion support office.

¹⁷On December 5, 2000, Judge Pfau proposed streamlining the structure for the legal series. Currently, there are five separate categories for lawyers, on the budget for the courts, which may create inconsistencies and operational difficulties. Judge Pfau proposed limiting the categories to only two: (1) law clerks who work for judges and (2) court attorneys. Both series would take into consideration up to five years of prior legal experience. Since the “referee” title would be abolished, the referee function would be handled by the higher level court attorneys or clerks. However, implementation of these changes has been delayed due to the budget crisis.

¹⁸Martin Fox, *‘Temp’ Court Attorney Retires After 46 Years*, NYLJ, July 20, 1995.

1995 and by 2001, it had increased to its current level of 61.¹⁹ Today, there are three Court Attorney vacancies for which the Law Department is in the process of hiring.

Court Attorneys come to the Law Department with varied and significant experience. Prior legal experience includes: Law Secretaries to Judges sitting in the Court of Appeals, Appellate Division, First Department and Supreme Court's Commercial Division; major New York law firms; the Legal Aid Society; the Second Circuit's Law Department; the NYS Attorney General's office; and the United Nations. All New York City law schools are represented in the Law Department. On average, Court Attorneys are 18 years out of law school. Currently, the average tenure of a Court Attorney in the Law Department is eight years. Salaries range from \$51,858 to \$116,266. The Law Department offers a flexible work schedule including job sharing, part-time schedules and flexible hours. In addition to competitive medical, dental and vision benefits, court employees begin with four weeks of vacation and generous sick leave policies. One of the benefits of working in the Law Department is that court attorneys work independently. Some Court Attorneys transfer from the Law Department to work for a specific judge, which often translates to a higher salary and more responsibility. Law Department alumni include: Court of Appeals Judge Carmen Beauchamp Ciparick, Deputy Chief Administrative Judge Jonathan Lippman, Appellate Division First Department Justices Betty Weinberg Ellerin and Angela M. Mazzarelli, and John F. Werner, the Chief Clerk of Supreme Court, New York County, Civil Branch.

Court Attorneys are assigned approximately two motions per week and may be assigned

¹⁹Sixty-one budget lines are approved for the Law Department, including lines for the Chief Court Attorney, Deputy Chief Court Attorney, five Principal Court Attorneys and 54 full and part-time Court Attorneys.

“expedites”, which are motions designated by judges as time sensitive and in need of immediate decisions. As a result of the limited number of Court Attorneys, the Law Department limits judges to sending one expedite to the Law Department per week. Approximately 4,000 motions are sent to the Law Department each year, which translates to each Court Attorney drafting about 100 decisions per year. All drafts are reviewed, edited and proofed at least once by more senior Court Attorneys, before being sent to a judge. For two years, training for new hires includes multiple rounds of review and editing. In addition, all Court Attorneys receive 12 hours of CLE training per year, provided and paid for by the OCA.

The hiring process for positions in the Law Department begins with a job posting for 21 days. A recent posting yielded 250 resumes. A committee of six (three members selected by Judge Silbermann, one by Judge Carey, one by Judge Bing Newton and one by Judge Pfau) reviews the resumes and picks approximately 30 candidates for interviews. A new committee is selected for each new posting. After interviews by the full hiring committee, the candidates receiving the most votes are approved for hiring. The committee then submits a list to Judges Carey and Pfau for final approval. Candidates begin their jobs approximately four months after the initial posting. Candidates seeking the position of Principal Court Attorney and referee get two more levels of review in the interview process.

3. CHALLENGES FACING THE LAW DEPARTMENT

It appears that the primary issue facing the Law Department today is a large backlog of pending motions, which results in a prolonged turn-around time in completing any given motion. This backlog was created when a hiring freeze took effect in early 2002. Five positions went unfilled for one year leading to a backlog of over 500 cases. Once the hiring freeze ended, five

new Court Attorneys were immediately hired. Since thereafter no new Court Attorneys were added, the backlog continues. As a result, new motions cannot be assigned to Court Attorneys until 2 weeks to over a month after a motion is sent to the Law Department by a Judge.

Accordingly, it is not uncommon for up to four months to pass after a motion is assigned to the Law Department before a decision is drafted.

It appears to the Committee that the backlog of cases stems in large part from the inadequate size of the Law Department staff and the amount of time it takes to hire new attorneys when vacancies occur. As to staff size, even the addition of a few attorneys would greatly decrease the load on all of the staff members. Moreover, there are almost always open positions within the Law Department, but because the hiring process takes so long, other vacancies are likely to open by the time the current positions are filled, resulting in “rolling” vacancies on the staff.

Procedures for filling open positions are cumbersome and require a great deal of attention from administrators, further impeding the process. The Committee has learned from the Law Department that currently, even when a post is vacant, and there is a viable candidate whom the Law Department wishes to hire, the process of arranging meetings with the committee members for interviews can prove difficult. This logistical issue alone can add to the delay in the hiring process. Such requirements mean the hiring process is approximately four months long and can last longer. In extreme cases, the delay has resulted in losing viable candidates.

In the current economic climate, the Law Department is not having substantial difficulty garnering a pool of qualified applicants for open positions. However, as a logical matter, relatively low salaries, the extended hiring process, and a general lack of awareness about the

Law Department among law students and law firm associates must inevitably result in potential candidates finding employment elsewhere, or not applying for positions in the first instance. The Committee anticipates, and anecdotal evidence supports, that the issue of consistently attracting the quality and quantity of candidates required will remain, and may become more pronounced as the economic conditions improve. The Committee commends the Law Department for maintaining the high quality of its staff in the face of these constraints and believes that more should be done to support these efforts, as discussed in Section Five of this report.

4. IMPACT OF CURRENT CHALLENGES
ON THE ADMINISTRATION OF JUSTICE

The adage “justice delayed is justice denied,” generally attributed to William Gladstone, is based on a nugget of truth. The delay in drafting decisions, on its face, leads to delay for litigants who desire (if not necessarily expect) the swift administration of justice. Obviously, delays in rendering decisions on motions result in delays in resolving cases in their entirety. While the Committee believes that the Law Department has contributed greatly to the efficient and fair administration of justice in the state of New York, the issues raised in the previous section represent unnecessary encumbrances on the system.

Delay can also lead to more expense for litigants, especially if costly discovery is ongoing while a motion is pending. CPLR 3214 stays discovery pending decision on certain motions unless the Court orders otherwise. However, under Rule 12 of the Rules of the Commercial Division of the Supreme Court, New York County, certain discovery continues. Delay can also result in judges having to hold conferences and decide procedural matters when a speedy resolution of the substantive motion would render such effort unnecessary.

5. RECOMMENDATIONS

In general, the Committee has four basic recommendations concerning the Law Department:

A. Commit to Increasing the Staff Size of the Law Department and Increasing Salaries of Employees

The Committee is fully aware of the budget issues facing the judicial system and the State of New York as a whole. However, we strongly recommend that OCA consider working to ensure that the Law Department is fully staffed at all times, and to consider increasing the overall size of the Law Department. In addition, the Committee recommends increasing the salaries of at least some Court Attorneys so some salaries keep up with wage inflation, as this would allow the Law Department to continue to attract high quality candidates and to retain competent Court Attorneys.²⁰ The Law Department continues to have a pressing need for such candidates in order to efficiently prepare the high quality opinions which judges expect. In addition, it must provide incentives for existing employees to stay.

The Committee believes that if the Law Department can offer even slightly increased salaries, particularly to those within the Law Department who provide exemplary work and draft opinions, it will help increase the productivity of the entire Law Department, relieve the burden on judges, and result in improved administration of justice.

Swifter issuance of decisions also may lead to swifter dismissal of unmeritorious cases and swifter resolution (by a summary judgment or otherwise) of other cases which currently linger in the system. For this reason, the Committee believes that a small investment in high quality lawyers assisting the judges to make high quality decisions may result in great dividends

²⁰The Committee acknowledges that Court Attorneys' salaries are limited by the salaries of judges set at \$136,700.

elsewhere.

B. Streamline the Hiring Process for the Law Department

In the case of a particularly strong candidate, or a strong recommendation, the Law Department should be able to hire more swiftly. Dispensing with the expectation of in-person interviewing by all of the members of the hiring committee would greatly facilitate the hiring of quality candidates. Rather than selecting a new hiring committee for each posting, a hiring committee could be selected for a term such as one year with regularly scheduled meetings during which candidates would be interviewed regardless of whether there is one vacancy or several. In addition, the Committee recommends that a meeting of the hiring committee occur annually, regardless of whether there are positions that currently need to be filled, in order to discuss staffing needs and promote a systemized hiring process.

C. The Bar Can Assist in Publicizing and Educating the Law Department

The Committee calls upon members of the bar, law firms (particularly those firms which are accredited providers of Continuing Legal Education), and other bar committees to participate in CLE programs and other events for Court Attorneys, whether sponsored by the Judicial Institute or by OCA, in order to enhance those attorneys' educations. The Committee also recommends that firms and other groups participate in and help publicize the City Bar's current career panels, which include discussions concerning the Law Department, the career opportunities available there, and in particular highlight the close interaction with judges which many Court Attorneys enjoy. This could be the Bar's contribution to enhancing the hiring goals of the Law Department.

We do not recommend that law firms create special CLE programs or sponsor particular

events for Court Attorneys, and in particular strongly discourage any such events located at a particular firm. Such events could create the appearance of impropriety. For example, securities defense firms presenting the current state of the law on dismissal of securities-related claims could be seen as a one-sided attempt to influence decision makers. We nevertheless believe that many other CLE panels may be of interest to Court Attorneys. For example, current updates on procedural issues can only help Court Attorneys. Practitioners should continue to support and attend a wide selection of CLE programs attended by or designed for Court Attorneys. In particular, we believe the New York State Judicial Institute would be an excellent forum in which to provide CLE to Court Attorneys, drawing upon private bar involvement.

D. Examine the Possibility of Funded Internships in the Law Department

The Committee considered whether to pursue a proposal, initially suggested by Justice Herman Cahn, to establish a new system of internships whereby employees of larger law firms would remain on law firm payrolls, but be placed as interns within the Law Department and assigned to the Commercial Division. Some members of the Committee were enthusiastic about this proposal.

However, the Committee concluded that such an intern program would be difficult to administer. Enthusiasm from firms for participation in such an expensive program was not clear, and the apparent conflicts issues presented were too complicated to resolve satisfactorily. In particular, there was concern that a lawyer on the payroll of a large law firm could be viewed as having a bias toward particular types of defendants or plaintiffs, and/or being too closely involved with the particular clients of law firms appearing in cases before the Commercial Division. Many on the Committee believe that such conflicts issues might be resolvable but

agree that it is more problematic to deal with the perception of bias. Consequently, at this stage, the Committee does not recommend creating such an internship program.

OCA's Legal Fellows Program and the Law Department's experience with volunteer summer interns suggest that there are other creative ways in which additional personnel can be brought in to assist the Law Department and its growing body of work. The Committee is interested in whether various charitable foundations which make financial contributions to the administration of justice could, perhaps jointly or with contributions from law firms, create a scholarship fund which could, via its income, pay one or two employees to supplement the staff of the Law Department. This is obviously a long term project, but we believe that the OCA may be pleasantly surprised at the favorable reaction it could receive if an endowment of this type is created.

5. CONCLUSIONS

The Committee has four recommendations to be implemented.

- Recommendations 1 and 2, to increase salaries and streamline the hiring of Law Department personnel, require action by OCA.
- Recommendation 3, which proposes CLE programs and perhaps a panel concerning the Law Department, requires action by bar associations, law firms and lawyers.
- Recommendation 4, concerning the creation of additional internship and fellowship opportunities, requires action by OCA.

The Committee is confident that some additional attention to the Law Department on all sides of the profession can result in significantly increased productivity.

COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION

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Irvin Rosenthal

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Hon. Lewis Bart Stone

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*** Drafters of the Report**