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**COURT RESTRUCTURING**

*1998 Warren M. Anderson Legislative Breakfast Seminar Series*

**FEBRUARY 11, 1998**



80 New Scotland Avenue  
Albany, NY 12208

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**Marc Bloustein**

*Office of Court Administration*

**Hon. John T. Buckley**

*New York State Supreme Court Justice, Oneida County*

**Gary Brown**

*The Fund for Modern Courts*

**Joan Byalin**

*Counsel to the Hon. Helene Weinstein, NYS Assembly*

**David Gruenberg**

*Judiciary Committee, New York State Senate*

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## **WARREN M. ANDERSON**

Warren M. Anderson is a distinguished alumnus of Albany Law School and an active member of the Government Law Center Advisory Board. Having served in the New York State Senate for thirty-five years, he is perhaps best known for his leadership during his tenure as President Pro Tem and Majority Leader from 1973 to 1988.

Warren Anderson began his legal career as an Assistant County Attorney in Broome. He then joined the law firm of Hinman, Howard & Kattell where he is currently practicing law. Throughout his career he has received numerous honors and awards.

## **PROGRAM DESCRIPTION**

In furtherance of its mission to serve as a resource to all levels of government in the resolution of specific problems, the Government Law Center is pleased to present the seventh annual Warren M. Anderson Breakfast Seminar Series. Monthly breakfast programs feature experts addressing the legal aspects of a variety of policy issues pending before the Legislature. The seminars are designed to provide access to current legal information on a given topic. The Government Law Center welcomes your suggestions for future programs.

# 1998 HONORARY CO-HOSTS

The Government Law Center is grateful to the Leadership of the New York State Senate and Assembly for serving as honorary co-hosts of the 1998 Series:

**Honorable Joseph L. Bruno**  
*Senate Majority Leader*

**Honorable Sheldon Silver**  
*Speaker of the NYS Assembly*

**Honorable Martin Connor**  
*Senate Minority Leader*

**Honorable John Faso**  
*Assembly Minority Leader*

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## **INTRODUCTORY REMARKS**

**PATRICIA E. SALKIN, ESQ.**

**Associate Dean & Director, Government Law Center  
Albany Law School**

I would like to welcome our friends, old and new, to the 7th Annual Warren M. Anderson Legislative Breakfast program.

The Government Law Center of Albany Law School celebrates its 20th Anniversary this year. We are pleased to provide this Series and other beneficial programs during this commemorative year.

The Government Law Center was established at Albany Law School in 1978 to facilitate multi-disciplinary study of government and the problems facing government, to introduce law students to methods of policy analysis and to public service, and to serve as a resource to government at all levels in the resolution of specific problems. It is this last role which brings us here today.

This breakfast program was designed to provide policy makers and law makers with current information on the state of the law and its practical applications in New York and across the country. Each month the Government Law Center presents a discussion focusing on legal and policy aspects of an issue which is awaiting legislative action here in New York.

The Series is named in honor of former Senate Majority Leader Warren M. Anderson who is not only a distinguished alumnus of the New York State Legislature but also an alumnus of Albany Law School and a member of the Government Law Center Advisory Board. Senator Anderson is particularly pleased that the four legislative leaders agreed to serve as honorary co-hosts of the 1998 Breakfast Series. Albany Law School is proud and honored to have this bipartisan support.

We are pleased to make the contents of this year's Anderson Series available to a wider audience through this publication. Within it, five major issues before the New York State Legislature—Court Restructuring, the Sexual Assault Reform Act, School Reform, Brownfields, and Computers & Technology in the Year 2000—are examined. It is our intention that the information will serve as an effective resource to law makers and policy makers throughout the State, as the debates on these consequential topics continue in the months ahead.

# **COURT RESTRUCTURING**

**February 11, 1998**

## **PANELIST**

**MARC BLOUSTEIN, ESQ.**

**Legislative Counsel**

**Office of Court Administration**

The year is 1986 and it is late in the legislative session. It is about 5:30 p.m. on July 2—what proves to be the last evening of the session. The Chief Administrator of the Courts at the time was Joseph Bellacosa, now an Associate Judge of the New York Court of Appeals. Judge Bellacosa gets a phone call. It may have been from Senator Anderson, Speaker Fink, or someone from the Governor's Office. Who it was from is not important now. What is important is that the substance of the conversation went something like this. "Are you folks in the Judiciary still around? Good. We've decided we'd like to give first passage to a constitutional amendment merging the courts before we go home tomorrow. Please send someone to the Governor's Office to help with the drafting."

I was the lucky guy.

When I got to the second floor, I met with the Counsel to the Chairs of the Senate and the Assembly Judiciary Committees and with the Governor's Counsel. Together, we were virtually locked in a room for the next ten or eleven hours in our own mini-Constitutional Convention. All of us had had some past experience in formulating court reform proposals, which certainly helped. Even so, ours was a very tough job. There had been no serious discussions of court merger in the current session or even the one before; we, thus, had little guidance in what we were doing. All the same, fortified by coffee and by frequent reminders from the outside that two hundred and ten legislators were sitting around waiting for us to finish our job so they could approve our handiwork and go home, we put together a passable modification of the Constitution's Judiciary Article. And, sure enough, somewhere between six and eight o'clock in the morning,

that is just what happened.

The following year was very different. In 1987, our hastily drawn constitutional amendment was presented to the legislature where it was heavily criticized and left to die unpassed and unmourned.

I am retelling this story because I feel it dramatically illustrates the differences between the present efforts at court reform and those of the past. Over the years many have regarded court merger, reunification, consolidation, or restructure—it really does not matter how you want to refer to it—as a kind of holy grail, an elusive magical thing that only promises good results. I suggest to you that court restructuring is anything but a holy grail. And certainly it is anything but magical. There is no quick fix to making a billion dollar court system work. Not with courts in sixty-two cities and sixty-two counties, spread from the tip of Suffolk County to the Niagara Peninsula, and with over 1,000 judges and 14,000 court employees who do their work in almost 290 different court facilities.

But we cannot ignore the reality that our court structure is long overdue for an overhaul. We have too many courts, too much jurisdictional and procedural redundancy, too many artificial jurisdictional and procedural obstacles, too few women and minorities serving as judges of our major trial and appellate courts, far too small an allocation of attention and resources for our family courts and housing courts, and an appellate structure that defies understanding in its arrangement. Since our court structure largely dates from the 19th century, this can hardly be surprising.

I do not imagine there are many people who work in or around our courts who do not believe they are in need of substantial repair. The disagreement, of course, is over just what kind of repair. Because of the complexity of the issues, it helps us to work together in an effort to find a reasonable consensus for particular changes. In 1986 that was decidedly not what was done. It was four people sitting in a room late at night putting their vision of court reform down on paper. In earlier years, there had been similar efforts: a Senate vision of court reform in the early 1980s and a Governor's vision in the late 1970s.

What we have under Chief Judge Kaye's plan is certainly something different. It is a proposal that was announced early, that has been actively aired across the State, that has been studied and reviewed for many months, and that, most recently, has been the subject of bipartisan hearings in the Legislature intended to make an extensive record of the positions of all corners of the justice community on the court reform issues. It is a plan that has stimulated a process of self examination and institutional evaluation

the likes of which we have not seen in many years.

That is precisely what we need.

Now, as the Legislature takes up the matter of first passage later this session, it will be far better informed on the issue of court reform than it has been in the past. Its members will have been visited by lobbyists from all corners of the justice system and beyond. Its staff will have developed a body of knowledge on court-related issues such as it has not had before.

What we did in 1986, with all due respect to those involved, mocked the process and those with interest in our Judiciary. Today, thanks primarily to Chief Judge Kaye's foresight and the strength of her plan, and to an extraordinary willingness of the State's three great governmental branches to collaborate, we stand on the threshold of the most significant court reform in New York in over a century.

Thank you.

## **PANELIST**

### **HON. JOHN T. BUCKLEY**

**Justice, NYS Supreme Court, Oneida County  
Association of State Supreme Court Justices**

I am here representing the Association of Justices of the Supreme Court of the State of New York.

We are for Court Reform. We are for a constitutional amendment removing the limitation on the number of Supreme Court Justices, and for another amendment creating an Appellate Division, Fifth Department. Moreover, we are for the common-sense legislative principle that whenever possible a legislative solution is preferable to a constitutional amendment. It is more timely, certain and effective. To this end, we suggest the following legislative proposals:

- A bill requiring that once a matrimonial action commences, the Supreme Court shall take jurisdiction of custody, visitation, support and maintenance, and dispose of all issues between the parties, thereby relieving Family Court Judges of these matters;
- A bill creating additional Family Court Judges with sufficient support staff and resources to meet the increasing demands on the court;
- A bill authorizing Supreme Court to remove and consolidate tort cases before the Court of Claims involving a private defendant and the State Supreme Court cases, for trial in Supreme Court to avoid the expense, delay and potential for inconsistent results of the present duplicitous process;
- A bill decentralizing judicial administration by establishing in each judicial district administrative boards of representatives of the various courts selected by the judges to formulate policies and advise the Administrative Judge, as presently exists in the federal judiciary;

- A bill limiting the assignment of a judge to a courthouse within his or her Judicial District, unless the judge and the Administrative Judge of the Judicial District consent to the transfer or assignment of the judge to sit in another Judicial District; and
- A bill providing pay priority for County level judges equal to Supreme Court pay.

We are for the principle of Separation of Powers of the three branches of government, and therefore, against OCA usurpation of legislative prerogative. No constitutional amendment should give OCA the power to recommend the method of selecting successors to acting Supreme Court Justices; the power to determine the boundaries of the Fifth Department; or the power to determine the number of new justices needed in New York City. These excessive powers would be granted to OCA under its proposed constitutional amendment.

We are for judicial independence. It is the shield which protests, defends, and preserves the fair and impartial delivery of justice. There is a natural tension between a traditionally independent judiciary and an administrative, bureaucratic entity, which relentlessly strains to become larger, more powerful and more efficient so that "the train runs on time." Consider the contrast between the federal court judges who cannot be ordered from place to place, and the state court judges who, today, can be assigned to any county courthouse throughout the state; and tomorrow, under the OCA proposal, the state court judges also could, in the future, be assigned from one division of court to another throughout the state.

We are for the Unified Court System, the last court merger, created thirty-six years ago by constitutional amendment. Under the Unified Court System, the Supreme Court was continued as a court of general jurisdiction, while other, discrete, specialized courts of limited jurisdiction were retained or created to accomplish, in a timely manner, their important, specialized work. The court system is working well. It isn't broken, so don't fix it.

We are for the preservation of the constitutional guarantee of the election of judges contained in Article 6 of the Constitution. At the present, the Constitution requires that the people elect the Supreme Court Justices, Family Court Judges outside of New York City, County Court Judges, Surrogate Court Judges, City Court Judges, District Court Judges and Civil Court Judges. The OCA proposal, on the other hand, would have the legislature determine the manner of selection when new judgeships are

created. This is the thin end of the wedge, aimed at the elimination of the election of judges.

Before 1848, all judges were appointed. The procedure of electing judges was first adopted during the Jacksonian Reform of the 1840s. Thereafter, a constitutional convention submitted to the people the question of whether the judiciary should be appointed or elected. The vote, in 1873, was almost three to one to retain elective judgeships; and so, New York State has had elected judges for 150 years. My best training, experience and preparation for being a judge was running for and serving as a member of the Assembly. In my opinion, running for an elected office is a broadening educational experience. It forces one to better learn about the mores, goals and aspirations of the people, i.e. what is in their minds and hearts. For judges must not only do justice, but also be seen to do justice.

We also oppose the OCA proposal because it would cost about \$50 million annually without improving the timely delivery of justice or adding a single judge or courtroom; because the merger of five courts into nine or more divisions is not "simplification," but rather is micro-management; and because it violates the voting rights act (42 USC Sec. 1973) by compromising the ability of the people to choose judges from the local community.

## **PANELIST**

### **GARY BROWN**

#### **Executive Director**

#### **The Fund for Modern Courts**

Marc Bloustein talked about the events of an early morning on July 2, 1986, and the failure of the then-called “merger proposal.” One of the things that we are pleased about in Chief Judge Kaye's proposal, Senator Lack's proposal in the Senate, and Assembly member Weinstein's very similar bill in the Assembly, is that they have stirred a discussion. We did not have a breakfast like this at anytime during the last ten years. As someone who has come to Albany regularly for the last three years to discuss merger and court structure, I saw there was very little serious debate going on. If nothing else, the proposals have raised awareness of the issue. They brought us to the table for the first time in ten years, and that is a very good thing.

Our perspective is “What is best for the people who use the courts?” We recognize that judges and court employees need to be treated fairly, but we disagree on a very essential level with Judge Buckley about whether or not the system is broken. It is a wonderful court system, but there is much about it that is broken. If you ask a victim of domestic violence who has to go to two or three different courts to seek relief on the issues arising from her case, she would tell you the system is broken. If you ask a litigant who has to go to two different courts, the Court of Claims and the Supreme Court, he or she would tell you the system is broken. If you ask a litigant in New York City who has to go to the Housing Court—which is not even a real court under our constitutional system, and which essentially functions like “the black hole of Calcutta” for lack of a better expression—the individual would tell you the system is broken. Our court monitors, who observe proceedings in 17 counties around New York State, and who have no preconceived opinions about these issues one way or the other, consistently report that the fragmented system which exists in New York poses many unnecessary obstacles to people seeking justice. On a very basic level, there are things that are broken about the system and they need to be fixed.

There are substantial problems with the court system, many of which are addressed by this proposal. One of the four departments in the Appellate Division

handles about fifty percent of the State's appellate case load, with resulting difficulties. One of the key issues for Modern Courts is judicial selection. Modern Courts has advocated for merit selection for many years. Although we still firmly support merit selection, it is not likely to happen anytime soon and, realistically, anything that is linked legislatively with merit selection is destined for failure. We made a strategic decision not to advocate consideration of merit and merger on a joint basis, although we would urge that they be considered separately. We are very pleased that Chief Judge Kaye built that into her proposal.

I do not really see this proposal as changing the method of judicial selection or as posing a threat to those who favor the elective system. The proposal essentially would provide for merger where the judges who would be elected would continue to be elected. The judges who are now appointed would continue to be appointed. The real open issue is how the newly-created judgeships would be selected. There are some differences between the two plans. The Assembly plan would provide that all of the new judges be elected. The Senate proposal leaves this to be decided later by recommendation of the Chief Administrative Judge or by the Legislature.

I can certainly understand the concern on the part of the Legislature. They do not want a court official making a decision of this magnitude. As one legislator said, "It would be analogous to the legislature telling the Court of Appeals it had thirty days to decide a case and, if it does not decide it by then, the Legislature would do so." Obviously, the Court would not like that. I could see why the Legislature would not like that either. This is an issue that can be resolved during the legislative process.

Another issue, significantly different from the proposal last time around, is that this will create a two-tiered court system: a statewide Supreme Court and a statewide District Court. The early proposals were for a one-tiered system. There would certainly be some bifurcation of cases that would result in a two-tiered system. Criminal cases would start in a District Court. If they were felonies, they would later be heard before the Supreme Court. Some domestic violence cases may still have to go to two courts. But a two-tier proposal may have a better chance of passage.

Perhaps the single most important benefit of this proposal would be the consolidation of the Family Court and the Supreme Court. I know that there are a number of Family Court judges in attendance this morning who experience on a first hand basis every day how difficult it is for litigants to obtain justice in a court that is not given the resources it deserves. The Family Courts, despite the excellent judiciary, are forced to operate in some ways as second-class courts. This proposal would eliminate

that second-class status by elevating the Family Court to the Supreme Court, which would not only consolidate jurisdiction of family issues in Supreme Court, but would also send a very important message that family cases are as or more important than any other cases in our system and will be treated accordingly. If Exxon sues Mobil for \$25,000, we send them to the Supreme Court, which has the most resources. If a family is in crisis, we send them to Family Court, which has the least resources.

Whenever a proposal of this magnitude is introduced, there will be criticism. Some of the criticism here is certainly legitimate and there are issues that need to be addressed. We urge the public and the Legislature to consider what is best for the users of the court. What can we do to make the court system more efficient for those who go to court every day seeking justice? We think that this proposal would do a lot to improve the court system for all New Yorkers.

Thank you very much.

## **PANELIST**

### **JOAN BYALIN**

#### **Counsel to the Hon. Helene Weinstein New York State Assembly**

The issue that is before the Legislature is “What is needed to reform our judicial system so that it fairly delivers justice to all of New York’s residents and inspires confidence in the people of New York?” The Assembly has taken a more “holistic” approach to this issue. We are looking at the judicial system both from the point of view of courts and litigants, and also from the point of view of the general public. Chief Judge Kaye’s court restructuring proposal is an effort to make trial courts more understandable and therefore more accessible to litigants. What the Assembly has done is to look at other issues that also need to be addressed if we are to truly achieve this goal and ensure judicial access and confidence to New York State’s citizens.

Among the provisions in our proposal, in addition to court restructuring which the Assembly also endorses, is the need for additional judicial resources. Case loads are burgeoning and we need more judges. Thus, we propose the addition of 160 trial court judges.

The second facet of our proposal is the adoption of screening panels for all appointed judges. We believe that this is needed to inspire public confidence in the nonpartisan quality of our judges.

The third facet is a review of the current judicial discipline process. Our proposal addresses this issue, as does Senator Lack’s.

The fourth prong of the Assembly proposal, perhaps the most important, is equal access to justice: making the process fairer by ensuring that litigants are able to obtain counsel. No amount of judicial resources or changes in court structure can make up for the disadvantage that litigants face when they have to go into court by themselves because they cannot afford counsel. The Assembly proposal recognizes the great need for lawyers to help low-income people in both civil and criminal cases. This is a crucial factor in making the judicial system fair.

The increasing number of people who have to navigate the judicial system without counsel also increases the burden for the judges and the court system in

general. A 1993 State Bar Association survey showed that only 14 percent of the legal needs of low income people were being met. Since that time, there has been a federal cutback of one-third in legal services funding. In addition, the IOLA (Interest on Lawyer's Accounts) funding has decreased due to dropping interest rates by about \$13 million per year. This combined loss of funding has created a worsening situation since the 1993 study. To address this shortfall, we are looking at the establishment of a permanent funding stream for legal services. We propose that \$40 million be put into this funding stream as an additional amount of money for IOLA to administer the legal services program.

In addition, we are looking to raise 18-B counsel rates and law guardian rates around the State. Currently law guardians and 18-B counsel are being paid at the rate of \$25 for out of court time and \$40 for in court time, which I think everyone here would agree is totally unacceptable. We believe that consideration should be given to raising the rates to \$75 for law guardians and for 18-B counsel. A large part of the problem in doing this is that localities have to come up with the additional money for 18-B counsel. This is a legitimate concern and, therefore, we propose the State help defray the cost to localities in raising these rates.

In summary, the Assembly believes that court restructuring alone is not sufficient to meet the needs of our people as we go into the twenty-first century.

Thank you for inviting me to speak here today.

## **PANELIST**

### **DAVID GRUENBERG**

**Counsel, Judiciary Committee**

**New York State Senate**

In the Senate Judiciary Committee, Senator Lack has introduced Chief Judge Kaye's bill in the format she presented it. Introducing a bill in the Legislature does not necessarily mean you endorse every concept in the bill. You put it out there for discussion. The bill may succeed for a number of reasons, which today's other speakers have addressed. It removes the political problems of previous court reform efforts which have included what we like to call the "so-called merit selection process." That process of judicial selection has basically been taken out of the bill.

As Marc Bloustein pointed out, this proposal has two levels of trial judges instead of one. One level for all matters across the State is a waste of judicial resources. Judge Buckley seemed concerned that the Legislature is giving too much power to OCA in a number of cases. I think the Legislature is as zealous in protecting its own turf as the judiciary is in staking its independence. There are a number of things in Chief Judge Kaye's bill that probably were specifically included because the judiciary did not want to take a position on how something should be done.

Take, for instance, the part of Chief Judge Kaye's proposal for a Fifth Department which would make a new appellate department out of a portion of the Second Department. That has been very important to the Senate for as long as I have been around, because the Second Department—consisting of part of New York City, Long Island and the northern suburbs of New York City—currently has about one-half of the appeals of the State. There have been various proposals to break out the Fifth Department. In the Chief Judge's proposal, the Legislature would do it and, if the Legislature did not do it, then the chief administrative judge would. This will never happen. Any constitutional amendment that is finally adopted will include a definition of where the Fifth Department is, and what judicial districts and counties it includes.

I also want to address another issue that Judge Buckley raised which is the alleged cost of \$50 million for this new proposal. I do not think that is a valid figure at all. Judge Lippman testified at the budget hearings last week that OCA believes the

burden to this system will be between \$2.3 and 2.7 million. He presumably would not publicly be stating these figures without substantial back up which he will be providing to the Houses at our request. I believe the \$50 million is based on a estimate which was done for the 1986 proposal, prepared for the supreme court justices by Peat Marwick & Mitchell with the number increased for inflation. There was not much of a basis for it back then and I think there is less of a basis for it now. Presently, county judges can have full-time clerks who are paid at a similar rate as the supreme court clerks. If you already have many full-time clerks for county judges, you are not going to have to have a big increase over the current budget levels.

One of the other concerns that has been raised at our hearings is how employees will be handled. Most employees are handled by unions. The unions came to our hearings to voice their concern over the language in the proposed constitutional amendment. The amendment provides that employees be generally retained or kept in their current positions to the extent practicable. The unions feel uncomfortable with that, perhaps because of their experience in 1977 where there was similar language in the court merger amendments at that time. Both Assembly member Weinstein and Senator Lack have assured the unions we are going to do what we can to tighten that language to protect employees so that, if there is a merger or restructuring, the employees will not be put in an unfair position based simply on the organization of the courts.

Similar to the Assembly, we also have a proposal for judicial discipline and increasing assigned counsel rates for lawyers although, as mentioned, that is difficult because of the financial impact on the localities.

One of the more interesting issues is the political impact of this proposal. This is "merger in place." If you are a family court or a county court judge now or by January 1, 2000, you will be a supreme court justice, but you will be elected in the same jurisdiction in which you were originally elected. A family court judge will be a supreme court justice but will only have to run in that county instead of that judicial district. Supreme court judges will sit together, some who have been elected judicial district-wide for fourteen years and some who have been elected county-wide for ten years. This will have some political impact on how people gauge their political careers.

Thank you.