

What to know about the Constitutional Convention vote

By Christina Couto

On the fence about how to vote on New York's November 7 Constitutional Convention referendum? The State Bar's report may help provide the answer.

Pros and cons. Double-dipping by state legislators and the judiciary. Environmental protections.

That's just a taste of the items included in the 33-page report that examines a potential New York State Constitutional Convention.

Although it recommends supporting a Constitutional Convention, reasons both in favor and against holding one are included in the "Report and Recommendations Concerning Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention," which was presented by Henry M. Greenberg (Greenberg Traurig LLP) of Albany, chair of the State Bar's Committee on the New York State Constitution, in Cooperstown on June 17.

The report was approved following discussion by House of Delegates members (see article on page 1).

Among its findings, the report cites the opportunity to overhaul the "byzantine" structure of the state courts (a longtime Association goal), enhance voter participation and streamline and modernize the state Constitution.

"In the end," the committee concluded that the state "should not forfeit this rare, generational opportunity to modernize and significantly improve the Constitution that forms the foundation of state government. Accordingly, the committee recommends that the State Bar support the convention call, primarily because a convention

presents the one practical opportunity this generation will likely have to modernize and restructure New York's court system."

Opposition in '97

The State Constitution mandates that every 20 years, New York voters be asked whether there should be a convention to revise and amend the New York State Constitution.

The last time voters considered one was in 1997. The answer was "no."

Prior to that vote, the State Bar's Executive Committee expressed its opposition to a Convention over concerns about delegate selection.

According to the report, other issues included worries that multi-member district elections of delegates would violate the Federal Voting Rights Act, concerns about interest groups and legislators dominating the convention and dual compensation for legislators and judges (double-dipping).

Although the same issues could plague a potential 2019 convention, which would be comprised of 204 delegates (three per Senate district and 15 at-large delegates), the report notes that "these concerns do not outweigh the potential benefits from holding a convention, although they should nevertheless be addressed."

Delegate selection

To improve the delegate selection process, following a convention call, "consideration should be given to favoring or requiring reform of voting procedures to ensure Voting Rights Act compliance and avoid undue partisanship prior to any convention delegate elections in 2018," according to the report.

It also recommends

avoidance of "undue partisanship" prior to any convention delegate elections and suggests that campaign finance proposals are worth "serious study and consideration."

Dual compensation by delegates

The state Constitution provides that a convention delegate receive the same compensation as members of the Assembly. However, legislators and sitting judges have salary guarantees that prevent any reduction of their pay during their time in office, and receive pension credit based on their highest salary. The report suggests that the State Bar support measures that prohibit or provide "disincentives for double-dipping" by public officials.

Preparatory commission

The State Bar should urge policymakers to establish a preparatory commission as soon as possible, the report states. If a convention is approved by voters in November and there is not yet a preparatory commission, there will be "relatively little time to undertake the preparations necessary for an effective convention in the spring of 2019."

The State Bar first urged state leaders in November, 2015, to create a nonpartisan preparatory commission to educate the public about the state Constitution and the process for changing it. It also recommended a comprehensive study of the Constitution and proposals for change and simplification; research on how past conventions were conducted; and preparation of impartial background materials for the 2017 voters—and delegates, if a convention is held.

New York voters have



Query—Delegate Mira B. Weiss poses a question during the discussion over whether to support a Constitutional Convention, during the House of Delegates meeting on June 17 in Cooperstown. [Photo by Marty Kerins, Jr.]

approved a total of nine Constitutional Conventions, including three in the 20th Century—1915, 1938 and 1967—which have "accounted for almost every single right—individual and collective" in today's Constitution, the report notes.

The State Bar report also offers a primer of arguments for and against a convention.

Pros and cons: Arguments in favor

Proponents in favor of a Constitutional Convention say that it could "streamline and modernize" the state Constitution, which includes provisions that are outdated or obsolete. Bonds, for such things as removal of railroad crossings at a grade retired during the 1987–1988 fiscal year and bonuses for World War II veterans (the debt of which expired in 1958), for example, have long been retired, the report notes.

Fix court structure

Basic structural problems with state govern-

ment—particularly New York's court structure—could be fixed, through a Constitutional Convention, the report suggests.

"New York's byzantine court system is not merely a matter of academic concern . . . inefficiencies cost the state, litigants, employers and municipalities approximately \$502 million in unnecessary spending annually," according to the report, which cites a 2007 report by the New York State Special Commission on the Future of the New York State Courts, "A Court System For The Future: the Promise of Court Restructuring in New York State."

Unlike other states, New York's Constitution contains no provision to protect municipalities from unfunded mandates. The Local Government Article, added in 1963, was intended to give local governments autonomy over their own affairs and limit the state's power to pass special laws on matters of local concern without the consent of the

impacted municipality, but it "has not realized its potential," the report notes.

Rights

A convention could also allow for the inclusion of same-sex marriage and reproductive rights, which have been recognized by the U.S. Supreme Court. And although the state Constitution safeguards certain voting rights, the State Bar has long called for the modernization of voting registration procedures, which, according to the report, would increase voter participation.

"A convention would provide an opportunity to enhance existing positive rights or propose new ones that the Constitution's framers did not envision."

Alternatives?

The report suggests that a Constitutional Convention is the best answer to enact needed reforms. Although the Legislature could propose Constitutional amendments, "there is

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Understand risks, benefits of social media: CommFed Section issues updated social media guidelines

By Christian Nolan

With the use of social media networks like LinkedIn, Twitter and Facebook growing exponentially, lawyers continue to face new challenges.

For instance, what sort of attorney-client privilege issues can arise when conversing through Twitter? What's the appropriate way to respond to a bad review on Yelp? Or perhaps you just need help understanding what various social media platforms are, like Reddit, Periscope or Venmo.

To help lawyers navigate these issues, the Commercial and Federal Litigation Section of the State Bar has updated its Social Media Ethics Guidelines to assist lawyers in understanding these social media challenges. The original edition was released in 2014.

"Whether you are a litigator, transactional attorney, in-house counsel or attorney who uses

social media to communicate, blog, or solicit business, you should know the risks and benefits of social media use," said Mark Berman (Gan-

in case law and ethics opinions from around the country. The latest version also aims to help lawyers by providing a new appendix of key

monitoring could an attorney engage in concerning jurors.

"There were no comprehensive ethical guidelines by any bar associa-

these Guidelines was to make it easier for attorneys to comply with the various ethics opinions, which have been issued over the past 10 years addressing social media," said Grande, who now co-chairs the Social Media Committee with Ronald J. Hedges (Dentons). "We are proud of the impact that the Guidelines have had not just in New York, but throughout the country."

Revisions

The newest version, the first since the 2015 update, added revisions to the following topics:

- attorney competence to reflect that a growing number of states have adopted duties of competence in technology;
- attorney advertising to address such issues as potential conflicts created by attorney posts on social media;
- communicating with clients to reflect recent ethics opinions relating to whether and how an attorney can

respond to a client's online review; and

- the addition of an appendix reflecting popular social media terminology and a listing of some of the more popular social media platforms.

Hedges said these various ethical obligations cannot be reduced to "one-stop shopping."

"Those obligations derive from various rules, case law and ethics opinions, all of which should be consulted frequently by attorneys," said Hedges. "The Guidelines offer a practical means by which attorneys can recognize how a new source of electronic information—social media—can affect their practice and can point them in the right direction."

The Guidelines, which are advisory, are available at <http://www.nysba.org/SocialMediaGuidelines17/>. ♦

Nolan is NYSBA's senior writer.

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fer & Shore), immediate past chair of the section. "The latest edition of the Guidelines continues to lead the New York State Bar Association efforts in this regard."

The third edition of the Guidelines follows the structure of its predecessors, and contains new guidance on attorney advertising, responding to online reviews, and potential conflicts regarding an attorney's social media posts.

The new edition reflects and references, both in revised text and footnotes, developments

social media terms and descriptions of popular social media platforms.

Brainstorm

Berman recalled how the Guidelines came to be. A busy commercial litigator, who at the time was a co-chair of the section's Social Media Committee, got a brainstorm and thought that there was a lack of guidance for lawyers when it came to social media. He wondered how lawyers could use Facebook friends to obtain social media evidence in cases and what kind of social media research and

tion in the United States," said Berman. "I said 'Let's get to work.' We did it. It took a while. People loved it. It went viral."

The section's original 2014 version received national recognition and has been cited in ethics opinions of other bar associations. That alone made all the effort worthwhile for Berman and the members of the Social Media Committee that was co-chaired by Ignatius Grande (Hughes Hubbard & Reed LP).

"The original intent of our committee in issuing

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no reason to believe the Legislature is willing to address the State's Constitutional deficiencies in a comprehensive way, or will be able to resolve in the next 20 years, the problems not fixed over the past several decades."

Pros and cons: Arguments against

Those opposed to a Constitutional Convention say there is the potential to put established protections and provisions at risk, "by opening up the entire Constitution, without limitation, for extensive modifications," the report states. If rights with no equivalent in the

U.S. Constitution, such as the mandate to aid the needy, are weakened or removed, they could be lost for "at least the next 20 years, if not longer."

On the flip side, provisions could be added to the Constitution that are controversial and divisive or harmful to responsible government, and there is no way to control or limit the delegates' ability to propose changes, according to the report. Amendments could lead to unintended and "deleterious" consequences for the state, it adds.

Political hurdles

Others argue that a convention would face

the same political hurdles that hinders the Legislative process and a convention's outcome would be constrained by a partisan and possibly even unlawful delegate selection process under New York state and federal campaign and election laws.

In addition, the financial influence of special interests could "undermine the ability of delegates to serve the public interest," allowing special interests to command "excessive influence" over a convention, which antagonists say happens in the Legislature.

'Double-dipping'

The report says that

legislators and judges serving as delegates would receive double salaries due to the constitutional provision preventing a reduction in legislators' and judges' salaries.

Citing a New York City Bar Report from 1997, the report notes that double-dipping "would significantly undermine the public confidence in the integrity of the process."

In addition, it "is wrong for an elected official or any person to be paid two annual salaries for public service in the same year."

Finally, dual compensation would give sitting legislators and judges an

"inappropriate financial incentive and motivation to serve as delegates."

Unnecessary/cost-prohibitive

Saying that the risks associated with a convention cannot be justified, opponents argue that the Constitution can be amended by the Legislature, which has been done more than 200 times in the past 100 years, according to the report.

The 1967 Constitutional Convention cost taxpayers nearly \$15 million (about \$108 million in 2017 dollars), according to the report. "The cost of a convention in 2019 would likely

"dwarf" that figure, with the largest expense being salaries for delegates and staff, the report says.

The committee, in the report, agrees that "[T]his is a significant amount of money, but even at \$108 million . . . represents less than one-tenth of 1 percent of the State's 2017-2018 budget . . . [t]his is a good investment if it leads to a better functioning State government."

The report is available at: www.nysba.org/constitutionreport0617. ♦

Couto is NYSBA's State Bar News editor.