



LEGISLATIVE
PROGRAM

2010





The Legislative Program Guide is a summary of significant legislative issues that are of particular interest to the Association of the Bar of the City of New York (the “City Bar”). The City Bar, with over 23,000 members, functions through nearly 160 committees, many of which regularly report on issues of law and public policy. This summary represents only a small portion of the issues that we have analyzed or plan to review.

The City Bar is keenly aware of the ongoing budgetary constraints facing the State. We will continue to keep this in mind as our committees analyze and report on legislation this session. The fiscal crisis may present an opportunity, however, to advance important legislation that does not have a negative fiscal impact on the State or perhaps offers the chance for increased cost savings or revenue generation over the long term. At the same time, the City Bar will continue to support legislation and advocate for programs that serve the most fundamental needs of all New Yorkers, including the need for legal services. This time of economic crisis affects many New Yorkers, but it is worse for those living in poverty.

We hope that you find the information useful and that it will assist you during the legislative session. For more information on the City Bar’s legislative agenda and its reports, please visit the Legislative Affairs Department website at <http://www.nycbar.org/legislativeaffairs/index.htm>. If you would like more information regarding any of these issues, please contact Maria Cilenti, Director of Legislative Affairs, at (212) 382-6655 or mcilenti@nycbar.org.

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I. Introduction to the New York City Bar

The Association of the Bar of the City of New York (the “City Bar”), which was founded in 1870, is an independent organization of over 23,000 lawyers and judges dedicated to facilitating and improving the administration of justice and to promoting the study of law and the science of jurisprudence. The City Bar’s nearly 160 committees focus on specific areas of law, the courts and the legal profession; they regularly issue reports and policy statements, submit amicus curiae briefs, draft public policy proposals, provide comments on pending legislation and testify at hearings on issues of public concern at the city, state and federal levels. The City Bar has earned its reputation as a public-spirited bar association by speaking up strongly for integrity in the political process and a fair and effective judicial system.

II. State Government and Election Law Reform

Rules Reform

As in 2009, the 2010 session represents an opportunity for the Legislature to enact further rules reform. For years, the City Bar has been at the forefront in calling for reform of the legislative breakdown that has been crippling our state government. Absent further change, the legislative process in Albany will remain almost exclusively in the control of the Governor, Assembly Speaker and Senate Majority/Conference Leader. Rank and file representatives often have little say in legislative policy, effectively disempowering the New Yorkers who voted for them.

The City Bar commends the Legislature for establishing a Temporary Committee on Rules and Administration Reform to address the serious operational issues in the Senate. Over the past year, the Committee established a number of reforms aimed at making the legislative process more transparent and more inclusive to all members of the Senate. These reforms will be closely monitored during the 2010 session in order to ensure that they are fully implemented. While we applaud the Committee for making many of the changes suggested by the City Bar and others, there is still much to be done, and certain reforms do not go far enough to ensure true change.¹

The reforms which are to take effect in 2010 have removed some of the procedural impediments of the current committee structure by making it easier for sponsors to move their bills through the committee process and to compel a vote by the full Senate.² Three new options are available to bill sponsors: a motion for Committee Consideration, a motion for Chamber Consideration and a Petition for Consideration. These new procedures should increase individual Senator accountability and make it harder to avoid difficult votes. Unfortunately these new measures do not prevent a bill from being referred to other committees, and thus starting the process all over again, and certain time restrictions are in place which would prevent these actions late in the session.

The City Bar also supports new term limits that limit the temporary president, the majority and minority leaders and the chairs and ranking members of committees to 8-year terms. We also commend efforts to make the committee process more accessible to the public by requiring that all committee membership attendance be made public as well as requiring that all committee meetings be recorded and broadcast on the Senate website. The new Rules will make it easier for committee members to invite people to speak at meetings and to petition for a public hearing.

While the City Bar supports these measures to reform the committee process, more needs to be done. Having robust committees carefully examine and develop legislation is the reform with the greatest likelihood of increasing the Legislature's effectiveness and improving its standing with its constituents. The City Bar urges the adoption of new rules that will: (1) limit Senators to serving on a maximum of three committees in any given time period; (2) require committee members to be physically present to have their votes counted; (3) require that all bills must be accompanied with the appropriate fiscal and issue analysis before receiving a vote and that all bills voted out of committee be accompanied by committee reports showing the work of the committee on the bill; (4) mandate a 'mark-up' process for all bills before they are voted out of committee; and (5) explicitly provide each committee with control over its own budget.

Government Ethics Reform

The City Bar shares the objective of proponents of ethics reform legislation to meaningfully improve the quality of ethics oversight in New York and we applaud those who have taken the initiative to develop legislation in this area. However, we are concerned that the bills which have been given prime focus in the Legislature do not accomplish the level of ethics reform needed in our legislature.³ Although there are aspects of this legislation that would provide meaningful reform to the current system, we believe the following issues raise serious concerns:

- The proposed Executive Ethics and Compliance Commission would only impose penalties for “knowingly and willfully” violating Public Officers Law §73, §74, and Civil Service Law §107, in contrast to the current “knowingly and intentionally” standard. We believe that the substitution of “willfully” for “intentionally” would heighten the showing of *mens rea* needed to establish a violation and impede the finding of a violation because “willfully” requires “specific intent” to violate the law.
- The Joint Legislative Commission on Ethics Standards would be exempted from key requirements of the State Administrative Procedure Act (“SAPA”). We believe there is no justification for such an exemption in legislation that is designed to improve transparency and accountability in the area of government ethics.
- The proposed bills would exclude attorney-legislators from financial disclosure regulations. The City Bar believes that lawmakers should be required to disclose sources and amounts of outside income, including the identity of paying clients, and provide a description of the services rendered. Such disclosures would not violate the rules governing attorney-client privilege and confidentiality, as a client

would have to give written consent for disclosure before being represented by an attorney-legislator. The City Bar also recommends that an independent commission be established to determine whether an exception to such disclosure is warranted under particular cases or whether certain information should be kept confidential in a case of extreme hardship that would not violate the public interest.

- The proposed bills include a “sunset” provision in which certain provisions would expire four years after the effective date. We oppose a system that will have to be revisited in such a short time.
- The creation of three new oversight commissions with an even number of commissioners is an invitation for inaction because it could lead to determinations that are supported by half of the members and opposed by the other half. We recommend that every commission have an odd number of commissioners to prevent tie votes. In addition, commissioners should serve fixed terms longer than the Governor’s, and should be removed only for cause.

We also submit that more consideration should be given to the scope of what is being proposed in these bills – a substantial decentralization of regulation, with three new commissions and two new enforcement offices with dispersed oversight and investigatory authority and possible overlaps and gaps in their operations. We believe that the following five core principles are key to any meaningful ethics reform:

- Creating a single independent ethics agency that would be principally responsible for overseeing and enforcing ethics laws for the executive branch, the Legislature and lobbyists alike;
- Safeguarding the independence and integrity of the ethics agency by designating a commission to appoint it, with input from multiple elected officials; only appointing former elected officials or lobbyists after a substantial cooling-off period; appointing agency officials for fixed terms longer than the governor’s term; and ensuring due process for individuals investigated by the agency;
- Safeguarding the strength and effectiveness of the agency by giving the agency powers to subpoena, impose civil sanctions, make criminal referrals, audit, and issue advisory opinions;
- Providing for full and meaningful disclosure of legislators outside income, including that of legislators who are also attorneys (with limited exceptions); full disclosure of such income on the web; and express forbiddance of the use of public resources for private endeavors; and
- Assuring that Senators and Assembly Members are no longer the principal police of their own ethics, by assigning that role to the independent ethics agency.

Redistricting

A crucial element of a properly functioning democracy is that elected officials are directly responsible to the people they have been chosen to represent. Yet New York has for far too long experienced repeated cycles of self-interested redistricting that protects the majority in each house from electoral challenge, leaving legislators more beholden to their leaders for re-election purposes than to their constituents. This form of incumbency

protection produces noncompetitive elections, permanent legislative deadlock, and a Legislature unresponsive to the will and interests of the voters. A constitutional amendment is necessary to mandate redistricting criteria and to guarantee a process for decennial redistricting that will foster electoral competition and promote more responsive government.

The City Bar believes that true reform can occur only when the authority over redistricting is removed from the Legislature, whose members have an inescapable personal interest in the redrawing of the district from which they seek re-election. We therefore recommend an amendment mandating a permanent districting commission whose members would be appointed by each of the four legislative leaders and must not be sitting legislators or judges. After significant study, the City Bar recommends a bi-partisan approach, seeking not to suppress, but to channel the energy of opposing political passions into a fair, even-handed redistricting framework. With each of the four legislative leaders having equal authority to appoint two members of the commission and a chairperson selected by a supermajority vote of the other commissioners, the configuration would force a bi-partisan approach, with the chair in the center forging a deciding majority.

Any plan must be based on certain standards and the City Bar proposes a rigorous set of criteria to be applied in a given order. Population equity, contiguity of districts and fair representation of minority groups, as required by the U.S. Constitution and federal law, should be given the most weight. The criteria also include preserving the integrity of borders of counties and local subdivisions, compactness, recognition of communities of interest, and promotion of the efficient administration of elections. Incumbency protection should be given the lowest weight, acknowledging that it will be considered but assigning this criterion to the lowest importance in the ranking.

Legislation was introduced in 2007 which included many of our recommendations and establishes a strong foundation for a redistricting commission.⁴ We applaud this effort as a good step toward ending New York's gerrymandered districts by placing redistricting authority in the hands of a bipartisan commission.

However, the City Bar recommends various revisions to the bill. Among the revisions we propose are first, removing the bar to commission service for relatives of judges and people who had conflicts of interest in the recent past, but no longer do, and secondly, replacing the 2% population deviation standard between the most and least populous senate or assembly districts in the bill with a 5% deviation standard, in the absence of a study of the effect of a 2% deviation on minority representation.

Campaign Finance Reform and Limits on Gifts and Fundraisers

After years of lobbying by the City Bar and a variety of advocacy organizations, legislation expanding the ban on gifts to legislators from those over \$75 to all gifts, with certain limited exceptions, was signed into law in 2007. Yet there is still much more work to be done. The City Bar is concerned that the public overwhelmingly perceives that a person's access to and influence in state government and its policymakers is directly proportional to

the amount of money that person can contribute to an elected official's campaign coffers. We will therefore continue to lobby for legislation that will prohibit fundraisers in the Albany area while the Legislature is in session, while also supporting stricter limits on campaign contributions which were not addressed in the 2007 law.

In that same vein, the City Bar believes that campaign finance reform can be best achieved through:

- the voluntary public financing of political campaigns at levels designed to attract candidates into the public financing program;
- stricter limits on political contributions;
- enhanced disclosure of campaign contributions and expenditures;
- more effective enforcement of campaign financing laws;
- a prohibition of soft money contributions;
- curbs on transfers by legislative party committees; and
- effective regulation of "independent" expenditures on campaigns that are coordinated with a candidate.

Succession Procedures

The resignation of former Governor Spitzer in March 2008 and the ascension of Lieutenant Governor Paterson to the Governor's position with three years remaining in the term exposed a gap in the statutory and constitutional framework governing vacancies. When there is a vacancy in the offices of Governor, Lieutenant Governor, Attorney General or Comptroller, there is no special election to fill the vacancy. Attorney General and Comptroller vacancies are filled either by gubernatorial appointment or by the Legislature. The sitting Lieutenant Governor fills a gubernatorial vacancy, with no special election. Thus, a new Attorney General, Comptroller or Governor may serve for several months or as much as a full four year term without the voters' direct choice in the matter.

Until 2009, the question of how to respond to a vacancy in the office of Lieutenant Governor went largely unanswered. Although the subject of some debate, the City Bar had concluded that there was no express constitutional or statutory provision that permitted the Governor to appoint someone to fill a vacancy in that office, and we supported legislation to fill that gap. The issue was ultimately decided by the Court of Appeals last year. In a 4-3 decision, the Court upheld the Governor's appointment of Richard Ravitch under the Public Officers Law, making Mr. Ravitch the first Lieutenant Governor appointed in State history.

While mindful of the Court of Appeals decision, the City Bar believes that New York should enact legislation which would permit the Lieutenant Governor who ascends to the Governor's position to select a new Lieutenant Governor. The Governor's selection would then have to be confirmed by a majority vote of the two houses of the legislature by joint ballot. This model would ensure a more broad-based process. The City Bar further believes that the filling of a vacancy in either the Attorney General or Comptroller position should be affected by a "replacement" election at the next regularly scheduled general

election. The City Bar suggests that the Governor appoint an interim Attorney General or Comptroller to fill a vacancy in either office until an official replacement can be selected during a replacement election at the next scheduled General Election, provided that the vacancy occurs prior to September 20th. For vacancies occurring on or after September 20th, the replacement election would be held at the following year's regularly scheduled General Election. A replacement election would give voters an opportunity to be involved in the process and have their voices heard.

III. Access to Justice and Social Welfare Issues

Adequate Funding For Legal Services

The current economic crisis has been difficult for many New Yorkers, but particularly for individuals who depend most on the "safety net" of government resources to limit their hardships and prevent tragedies – tragedies which are often more burdensome on government in the long run. A crucial part of the safety net is legal services. People in poverty cannot afford the cost of legal services, no matter how necessary they are to avert homelessness, preserve families, protect domestic violence victims, secure benefits and alleviate crushing debt. Failing to provide the full extent of necessary legal services to this population leads not only to their greater hardship but also higher social and economic costs for all of us.

Funding legal services for the poor is a modest investment that yields benefits which we will need during this economic climate. The \$1 million of general civil legal services funding included in the 2009-2010 Executive Budget was a major decline from 2007-2008, when over \$15 million was provided. The hope that New York's Interest on Lawyer Account (IOLA) Fund would make up the difference in funding through revised rules designed to increase income generated by those accounts has proven to be a false promise, as the economic downturn and plummeting interest rates have sharply reduced the amount of IOLA funds generated. Therefore, it is particularly important this year that there be sufficient funding for legal services to preserve the safety net in New York.

We urge that IOLA receive an emergency infusion of \$15 million in the 2010-2011 Fiscal Year, as provided in the Judiciary Budget. If interest rates remain low and IOLA Account transactions remain at reduced levels, we recommend that another emergency allocation to IOLA be considered for the 2011-2012 Fiscal Year.

Civil legal service providers can attest to the benefits reaped by all New Yorkers when those who cannot afford lawyers are nonetheless able to obtain the legal help they need, in the form of maximizing benefits and food stamps, avoiding evictions and job loss, and keeping cases out of court. We urge the Governor and the Legislature to provide civil legal services funding for those who need it most.

Anti-Poverty Measures

The City Bar believes that Article XVII of the New York State Constitution requires the establishment of fair and humane programs to deliver benefits and services to all children who are needy and to all adults who are in need and who comply, when feasible, with reasonable work requirements.

We are concerned that federal and New York State welfare policies, despite some commendable provisions, create untenable risks and increase the likelihood that needy children and adults will fall through an evaporating and increasingly inequitable safety net, with disastrous consequences for the society at large. The welfare reforms of the past decade have dramatically reduced the welfare rolls, but have not significantly reduced poverty in this state. Therefore, we urge the Governor and the state Legislature to act promptly to:

- maintain adequate cash benefits levels for all needy New Yorkers;
- ensure that welfare recipients have access to appropriate education and training to enhance their employment opportunities;
- provide reliable day care and job-related transportation to all social service recipients in either work or education programs;
- require that the state and localities protect access to benefits and services by those with disabilities; and
- improve the operation of existing social programs through expanded training and supervision of state and local personnel.

Furthermore, the City Bar believes that other anti-poverty measures could be improved, including the Earned Income Tax Credit program (EITC), which we currently believe to be an effective tool in combating poverty. The EITC aids the needy and rewards work by effectively acting as a subsidy to wages by reducing or eliminating the tax burden on low-income working people. However, the way that it is currently structured, the EITC program contains several ‘income cliffs’ – points where a rise in income causes a loss in benefits that discourages work. The City Bar supports new legislation that would remove the income cliffs and therefore ensure that New Yorkers aren’t penalized while working their way out of poverty.

Advanced Degrees and Work Participation

The City Bar continues to support passage of legislation that will bring New York State into conformance with federal regulations concerning participation in education and training for public assistance recipients.⁵ We urge support for this legislation for several reasons. First, allowing motivated students to pursue and complete baccalaureate and advanced degrees provides a proven path off of government benefits and out of poverty. Moreover, by adding to the number of activities that participants may engage in, the legislation strengthens the State’s ability to meet federally mandated work participation requirements without any additional cost. Given the significant increase in participation

rates required by the federal Deficit Reduction Act and the substantial financial penalties associated with States' failure to meet these rates, this legislation is crucial.

IV. The Judiciary and Court Operations

The Need for Commission-Based Judicial Appointments

For over a century, the City Bar has advocated for changes in our state's judicial selection system to ensure the high quality of our state judiciary. Yet, in Albany, despite a vocal advocacy effort from a variety of good government groups, the demand for reform has been left unanswered.

Although the Supreme Court found, in Lopez Torres v. N.Y. State Board of Elections, that New York's judicial convention process is constitutional, it by no means lauded the process. In his concurring opinion, Justice Stevens was clear to emphasize the distinction between constitutionality and wise policy. Nothing in the decision prevents New York's legislature from providing reform, and the City Bar urges the Legislature to enact changes and establish a commission-based appointment system.

Proponents of the current judicial convention system argue that although candidates are chosen through party conventions instead of primaries, the voice of the people is still paramount because the public has the final say in the general election. However, the truth is that few citizens know anything about sitting jurists and even less about the candidates who aspire to sit on the bench. Unlike legislators or other public officials, judicial candidates have no platform on which to run and, because of the rules of judicial ethics, cannot address how they would decide issues that might come before them. In short, the lack of an intelligent dialogue on issues leaves a befuddled electorate with little, if any, information to choose between the aspiring candidates. With scant information available on judicial candidates, voters usually select judges simply on party affiliation. That gives the party bosses ultimate control over the make up of much of our state judiciary. These political leaders, who are not accountable in any meaningful way to the public, have used the judiciary as an important source of patronage.

While many Supreme Court Justices are truly fine jurists, the system is in no way designed to guarantee that, or to assure the voters that quality, rather than party loyalty, is the major selection criteria.

A commission-based appointment system would reduce the role of politics and lead to a more qualified judiciary. The City Bar is confident that this system is the best means through which to select our state's judiciary. Under this approach, broad-based, diverse, and independent judicial qualifications commissions would recommend a limited number of candidates per vacancy to the appointing authority, and that person could only appoint from among those candidates. The candidates for appointment would be evaluated on intellectual capacity, integrity, independence, experience, temperament, fairness – in short the qualities New Yorkers expect and have a right to see in their judges. The limit on the

number of candidates who can be released from the screening committee will ensure that only the most meritorious are released instead of all who are adequate. In fact, the City Bar opposes legislation that would direct the Commission on Judicial Nominations to forward to the governor “all well qualified candidates” for associate judge and/or chief judge of the Court of Appeals.⁶ Such legislation would be a setback both regarding the quality of the selection process and its diversity.

The City Bar offers clear guidelines for the composition of these screening committees:

- Elected officials from both parties, the Chief Judge and appropriate justices shall appoint 15-21 law schools, non-profit, civic and community organizations and bar associations to act as non-governmental appointing authorities for each committee. Each one of the chosen organizations shall in turn appoint one member of the screening commission;
- The appointing authorities shall give consideration to achieving a broad representation of the community; and
- A statewide committee should be established to function as a policy body and oversight mechanism for all of the commissions.

The Importance of Judicial Diversity

The City Bar is committed to a judicial selection process that effectively promotes a diverse judiciary and ensures that a broad array of views and experiences are brought to the bench. Yet after reviewing a large variety of data, empirical studies and articles, we realized that the data did not allow us to conclude whether, on the statewide level, the appointive or elective system better promotes diversity. Instead, we concluded that the following improvements must be made to one or both systems in order to achieve a more diverse bench:

- Provide public financing for all judicial elections so that candidates are not barred due to financial considerations. [The City Bar has also advocated for public financing so that judicial candidates are not forced to seek contributions – often large contributions – from the very lawyers and parties who appear before them, which only diminishes the public’s confidence in the judiciary as an impartial arbiter.];
- Codify the requirements that screening commissions be independent and diverse and that the nominating authorities, when viewed as a whole, be diverse;
- Educate the public on the need for a diverse judiciary;
- Reduce the number of delegates to the judicial district convention in order for all candidates to be able to succeed with fewer votes and;
- For the appointive system, encourage the appointing authority to commit to the importance of diversity.

Expanding the Pool of Appointments to the Appellate Division

The City Bar recommends broadening and diversifying the pool of justices who are

eligible for appointment to the Appellate Division. The present system, which limits the field of potential Appellate Division candidates to elected justices of the Supreme Court, excludes hundreds of highly qualified judges who sit in trial level courts other than the Supreme Court.

The City Bar's Council on Judicial Administration evaluated the issue of eligibility for appointment to the Appellate Division and concluded that it would be highly desirable to broaden the pool of candidates eligible for gubernatorial appointment. If the pool of eligible candidates included a broader range of trial court judges, the Appellate Division bench would better reflect the full breadth of talent, experience and diversity of New York's bench and bar.

High Quality Judiciary/Judicial Salaries

The citizens of New York must have access to the high quality judges they deserve and expect. An important step to ensuring that access requires the Legislature to increase salaries for state judges. The City Bar supports increasing the salaries of all state judges, including housing court judges, who had been excluded in past proposals.

Our State's hard-working and dedicated judges adjudicate citizen disputes on a daily basis and handle many of society's most pressing concerns. Yet they have not received a salary increase since 1999, and many judges are compensated at a level less than the salary of first year law firm associates. While we cannot expect judges to be paid the top dollars they could earn in the private sector, we must provide enough compensation to attract outstanding lawyers and retain them as judges, and to make clear the respect with which we hold this branch of government. By contrast, our current approach does not even provide salary increases that match inflation.

In addition, the City Bar advocates for a set mechanism to periodically review and increase judicial salaries. It is of benefit to no one to continue to have this degree of uncertainty regarding judicial salaries. To force judges to lobby the Legislature after going years without an increase, before eventually receiving an increase that may not even make up for past years, is neither an effective nor efficient manner to determine judicial salaries.

Town and Village Courts

The City Bar supports legislation that allows criminal defendants appearing in Town and Village Courts to elect to appear before a justice or judge who is admitted to practice law in New York State.⁷ This is necessary in order to protect the due process rights of defendants while ensuring that those hearing and deciding criminal matters fully understand the complexities and ethical considerations of each case.

Court Restructuring

The City Bar has long supported proposals to consolidate and restructure the state's major trial courts and has predicated its efforts on a firm belief that a truly unified court system

will be more efficient and will result in justice that is better, swifter and less expensive than the current patchwork of courts. We see consolidation as an absolutely essential reform for the benefit of both the court system and the public. We urge the Legislature to pass legislation to this effect proposed by the Special Commission on the Future of the New York State Courts.

Citizens not only find our current court system frustrating, inconvenient and difficult to understand, but they are often forced to pursue relief before multiple judges in different courts. This is particularly true for victims of domestic violence who frequently must appear in Family, Criminal and Supreme Court before finding refuge from abuse.

Due to rigid jurisdictional boundaries the courts are incapable of reacting to shifts in volume, type and complexity of cases filed. This rigidity leaves the court administration hamstrung, unable to redistribute caseloads or effectively respond to changing needs.

New York's citizens deserve better. The City Bar, therefore, wholeheartedly reaffirms its belief that a significant restructuring of the court system must be accomplished. We believe that the state's major trial courts should be consolidated into either one tier comprising all of the state's courts of record or a two-tier structure consisting of (1) Supreme Court with specialized divisions, and (2) a District Court with jurisdiction over misdemeanor cases, housing cases, and civil cases involving less than \$50,000. This consolidation would eliminate confusion and waste and would create a much more nimble, efficient and user-friendly system.

We understand that the Special Commission's consolidation approach would not affect how judges are selected. However, we are aware that there have been consolidation proposals that would reduce the number of New York judges currently chosen by appointment. As the City Bar supports the use of a commission-based appointment system for selecting judges for all courts of record, we oppose changes that would shift the balance toward having more elected versus appointed judges. We would not want to see a court consolidation that results in a system even more dependent upon judicial elections than in the current system.

The City Bar supports eliminating the present constitutional limit of one justice of the Supreme Court for every 50,000 people in a judicial district. The current number is inadequate to cope with the Court's caseload, and has necessitated stopgap measures such as the assignment of Acting Supreme Court Justices. The number of Supreme Court judgeships should not be fixed in the constitution, to allow for the provision of enough justices to adequately handle the workload as it evolves.

Moreover, the City Bar advocates elevating to constitutional judicial status, within the District Court, judges who preside in the Housing Courts of the City of New York.

Creating a Fifth Judicial Department

The City Bar supports proposals that would establish a fifth judicial department as a means

to reduce the workload of the Second Department. The Second Department now encompasses approximately 50% of the state's population and decides approximately 42% of all statewide appeals filed.

For many years the Second Department has decided more appeals than the Third and Fourth Departments combined. In order to handle the increased workload, the Second Department was forced to reduce the size of its appellate panels from five to four justices and the number of judges authorized for that court has been fixed at twenty-two. Unfortunately, this necessary dispersal of judicial resources has reduced the consistency of the Department's opinions and has resulted in a court that may be too large to yield a coherent body of precedent.

The City Bar supports initiatives that would preserve the Legislature's authority to determine the boundaries of the new fifth department, but also supports proposals that would authorize the Chief Administrative Judge to make such a determination if the Legislature fails to set those boundaries within a reasonable amount of time.

Additional Judges and Resources for Family Court

With the important goal of reducing the time that children are kept in foster care, New York's Permanency Legislation was passed in 2005. This legislation sought to achieve faster placement into permanent homes for children in foster care by providing more frequent and continuous judicial and agency review of a family's situation. One of the key provisions of the act was to require a permanency hearing once every six months, rather than every twelve months as under prior law. The permanency legislation also provided for continuing family court jurisdiction over parties after a child enters foster care until after final adoption of that child, continuous legal representation for children and parents in these cases, and inclusion of 18-21 year old children voluntarily placed in foster care.

Over three years after the enactment of the permanency legislation, the evidence indicates that Family Court, the Administration for Children's Services, advocates for parents and children, and New York City's numerous foster care agencies are trying in good faith to meet the objectives of the legislation. However, it is evident that these efforts are being undermined by a lack of resources that leaves the system stretched too thin. Additional resources are needed to meet these challenges and to meaningfully fulfill the objectives of the legislation.

In addition to the difficulties of managing permanency cases, New York City has also seen an increase in domestic violence cases under the 2008 "intimate partner" law, and an increase in abuse and neglect cases in the aftermath of the tragic child-abuse related death of seven year old Nixzmary Brown in 2007. The always overburdened and under-funded Family Court is now facing crushing caseloads and a lack of resources that are leaving society's most vulnerable citizens, including children and victims of domestic violence with unacceptable court delays. After the Senate passed legislation in 2009 which would increase the number of Family Court judges throughout the State, the City Bar hopes that both Houses will vote in favor of this important legislation during the 2010 session.⁸

Audio-visual Coverage of Judicial Proceedings

The City Bar remains in support of legislation authorizing audio-visual coverage of judicial proceedings, which the Legislature long ago allowed to expire.⁹ This legislation is long overdue and should be re-enacted. More than two decades ago, the City Bar helped spearhead an experimental telecast of New York Court of Appeals arguments, a project which led to a nationally televised program that won an ABA Gavel Award, and eventually to the regular telecasting of the Court's proceedings. The City Bar has consistently backed legislation establishing audio-visual "experiments" in New York's trial courts.

It is our view that the results of these experiments lend powerful support for the adoption of a law which would permanently permit and facilitate cameras and broadcasts of trial proceedings in New York state courts. Having reviewed the results of the experiments as well as the results of other research on cameras in the courtroom, it is our conviction that, with the incorporation of appropriate safeguards, justice is best guaranteed when the public is informed, and it is clear that the public is best informed when it is able to observe the judicial process.

We urge that access to courtrooms by electronic and photographic means be governed by the same standard that allows physical access to the courtroom by the press and public. Such access must, however, remain subject to the ability of every court to exclude cameras and microphones when necessary to protect individual rights as well as to protect individual witnesses who persuade a judge that appearing on camera would have a particularly harmful impact. It must also remain subject more generally to the ability of each judge to control the proceedings before him or her in the interests of assuring a fair and orderly trial.

We disagree with the notion that permanent legislation should include a provision that any counsel in a case may veto audio-visual coverage. Such a provision would undermine the goal of ensuring a public broadly informed about its judicial system.

V. Alternative Dispute Resolution

Revised Uniform Arbitration Act

The City Bar has a long-standing commitment to promoting alternative means to resolve legal issues without resorting to full fledged litigation and is therefore actively advocating for the passage of the Revised Uniform Arbitration Act (RUAA). The statute currently in use to guide arbitration in New York was enacted in 1920 and requires significant modification to bring it up to date.

Most other states use the Uniform Arbitration Act, (UAA) promulgated by the Commission on Uniform State Laws in 1955, yet never enacted in New York. The UAA also is seriously out of date, and like the New York law, is a bare bones statute dealing

only with such basic matters as enforcement of arbitration agreements, appointments of arbitrators, and compelling attendance of witnesses and review of awards. Both the New York statute and the UAA leave much to be worked out in the courts, the rules of arbitration-sponsoring organizations and the agreements of parties to arbitrate.

The proposed RUAA is much more comprehensive. It has been created to codify case law since the UAA went into effect, and to resolve ambiguities in and questions raised by the UAA with which the courts have wrestled, sometimes with differing results. The revised statute deals with such matters as whether the court or the arbitrators determine arbitrability, provisional remedies, consolidation of proceedings, arbitrator disclosure of interests and relationships, arbitrator and arbitration organization immunity, discovery, subpoenaed testimonies, arbitrator authority to order pre-hearing conferences and decide dispositive motions, punitive damages, attorneys' fees and other remedies.

Since enactment of the UAA there has been a tendency for arbitration to become more and more like litigation in court. The RUAA tries - we think, successfully - to incorporate positive aspects of this development while retaining the differences that make arbitration a faster and less expensive alternative. The proposal is the result of much study and hard work and is likely to be very influential in the field of arbitration for many years to come. It may become a model for a revised Federal Arbitration Act and will certainly influence the legislative process at the federal level.

Uniform Mediation Act

As mediation is often a more expedient and cost effective way to solve many of the legal disputes that make their way to our state courts, the City Bar has long encouraged the advancement of this ever-growing field of law. With the reality that at least two-thirds of the civil legal needs of New York's indigent are unmet, pro bono attorney mediators can reduce the negative consequences for needy individuals who appear in court without counsel.

While the use of mediation as an alternative to litigation has grown at a tremendous pace in New York State and around the country, there are currently no laws in this state that protect mediation participants and assure the confidentiality of their mediation communications. This obviously leaves some New Yorkers hesitant to participate in the mediation process, and hinders the openness and candor of those who choose mediation. Unfortunately, this concern has proven to be valid. Recently, the Fourth Department Appellate Decision affirmed in Hauzinger v. Hauzinger a Supreme Court decision that denied a request to quash a subpoena compelling documents relating to a mediation. The Court clearly stated that it would not heed the appellant's urging to treat mediations as confidential as a matter of public policy, because the state has not granted that confidentiality through statute.

The City Bar advocates the adoption of the Uniform Mediation Act (UMA) in New York State to provide the confidentiality that was lacking in Hauzinger.¹⁰ The UMA offers a clear baseline for mediation confidentiality, and requires the disclosure of any conflicts of

interest by a mediator, insuring the integrity of the mediation process. The enactment of the UMA would undoubtedly result in the increased use of mediation with more frank and honest participants. This would allow for better mediation outcomes and lower legal costs to the benefit of New York State's businesses and individuals.

VI. Criminal Justice Issues

Collateral Consequences of Criminal Convictions

An issue at the forefront of the City Bar's criminal justice concerns is that criminal defendants face a host of collateral consequences to their convictions that far surpass the justice system. A prior conviction can jeopardize future employment, housing, education financing and myriad other areas of life, preventing them from being productive members of society. A fair justice system requires that defendants be aware of the charges against them and the potential consequences of a conviction or plea. Yet criminal defendants are often unaware of collateral consequences until their sentences have been served and they are faced with unexpected barriers to their rehabilitation. Failure to address these consequences has imposed unnecessary social and economic costs on those convicted and on their families and has negative fiscal implications for all levels of government.

Barriers to Ex-Offenders' Successful Reentry into Society

The barriers that exist in reentering the workforce are some of the most damaging collateral consequences of a prison stay, and the lack of employment is one of the largest indicators of recidivism. Without employment, ex-offenders are unable to meet their basic needs and fully reintegrate into society.

The City Bar therefore supports amendments to Article 23 of the Corrections Law which would ease wholesale restrictions prohibiting the licensure and/or employment of ex-offenders in certain industries and allow for increased work opportunities for ex-offenders. One such amendment would clarify the definition of "direct relationship" regarding the licensure and employment of persons previously convicted of one or more criminal offenses, strengthening the standard under which employers and licensing agencies consider applicants and employees with criminal records.¹¹ Other legislation would also transmit the mandate of Corrections Law Article 23 by ensuring that *either* a certificate of relief from disabilities ("CRD") *or* a certificate of good conduct ("CGC") will serve to remove statutory barriers to the licensure and employment of people with criminal records.¹² With the lifting of these automatic barriers, licensing agencies will then evaluate each applicant's fitness on an individual basis. This legislation fulfills the dual goals of clarifying state law and, more importantly, reducing recidivism by promoting the employment of people with criminal histories.

The City Bar also supports legislation to increase the likelihood of employers hiring ex-offenders. The first would allow certain establishments licensed to serve alcohol on-

premises (such as hotels, catering establishments and restaurants) to hire a person previously convicted of a felony so long as the appropriate pardon or State Liquor Authority approval is obtained.¹³ This change in the law would greatly increase the number of employment opportunities which can reasonably be made available to ex-offenders, who are otherwise completely barred from working in such establishments.

People who have served a term in prison face enormous barriers to reentry, vocational and otherwise. Currently, the Department of Correctional Services' ("DOCS") web-based Inmate Population Information Search (the "Look-Up") increases those barriers because it is being used for purposes beyond those underlying its creation, to the detriment of job seekers reentering the community, their families, and the community at large. The City Bar therefore supports legislation which would provide that the criminal information of certain persons only be posted on the DOCS website for a period not to exceed five years after completion of the sentence.¹⁴ Despite the fact that the information included on the DOCS website is often incomplete, potential employers often use the Look-Up as a tool to conduct informal background checks on job applicants. As a result, DOCS website searches often result in incorrect matches and facilitate the opportunity for employment discrimination against people with conviction histories.

The City Bar also supports legislation which would include health care facilities operated or supervised by DOCS or local correctional facilities within the definition of hospital so that the health care needs of inmates are adequately addressed.¹⁵ Poor health care can be another collateral consequence of serving time in prison.

Yet another consequence of a criminal conviction is the suspension of one's voting rights. Presently there is great confusion among former prisoners as to their voting rights upon their release. Voting promotes positive behavior and ensures that an individual is invested in the well-being of his or her community. The City Bar therefore supports the Voting Rights Notification and Registration Act¹⁶, which would require that people with felony convictions be notified of their voting rights, and receive assistance with voter registration and voting by absentee ballot.

Identity Theft and Attendant Crimes

The City Bar has proposed amendments to the Criminal Procedure Law (CPL) regarding geographical jurisdiction for crimes attendant to identity theft. While the CPL and the venue amendment of the current geographical jurisdiction statute of C.P.L. §20.40 have helped in the prosecution of identity theft, other crimes - some of a higher felony grade - relying on the same facts do not presently enjoy enhanced venue options. As a result, prosecutions for these attendant crimes are frequently tried in separate counties, which requires a great deal of duplicative work. The City Bar believes that by amending the CPL to allow for the same, greater venue for any offense sounding in identity theft and based on the same underlying facts, prosecutors could join offenses, therefore promoting efficiency without sacrificing fairness to the defendant.

Immigration Consequences in Criminal Cases

Another area of law that has profound collateral consequences for those convicted of even minor criminal offenses relates to a defendant's immigration status. The City Bar is concerned that non-citizen defendants in New York often plead guilty to charges without being told that a guilty plea could have negative immigration consequences, including deportation. Current law requires the court to give an immigration advisal prior to the entry of a guilty plea only when the plea is a felony. But due to the enactment of sweeping immigration law changes in 1996, non-citizens can be detained and deported because of criminal convictions, even when convicted of relatively minor offenses, including many New York misdemeanors and violations. In addition, current law provides no effective mechanism to require that the advisals be consistently given.

Due to the lack of warning, a long-time legal permanent resident with deep family and community roots might be surprised to suddenly find himself in deportation hearings after pleading guilty to a violation or misdemeanor. The interests of justice requires a warning mechanism that puts the non-citizen defendant on notice, so that he or she can make an informed choice as to whether, and to what, to plead guilty. The City Bar therefore strongly supports legislation which would require the court to advise non-citizen defendants of potential immigration consequences of their plea regardless of whether the case is a felony or misdemeanor.¹⁷ It also allows the defendant to vacate the plea if the advisal was not given, a remedy that is not available under current law.

Ineffective Assistance of Counsel Claims on Collateral Review

In New York, defendants can seek relief from a judgment of conviction in two ways. First, they can file, as of right, a direct appeal in the Appellate Division (for indicted offenses) or in the Appellate Term (for misdemeanors). On direct appeal, defendants can only raise issues that are based on facts already contained in the trial record. Second, defendants can file a motion to vacate the judgment pursuant to C.P.L. 440.10 ("collateral review"). That motion is filed in the trial court in which the judgment was obtained and can rely on factual allegations not contained in the trial record. Defendants may not appeal the denial of such a motion as of right, but must seek permission to do so.

As a corollary to these forum rules, under C.P.L. 440.10, New York prohibits a defendant from raising, on collateral review, (1) any claim that the defendant can raise on appeal and (2) any claim that the defendant could have raised on appeal but failed to do so. In other words, record-based claims must be brought on direct appeal and claims that are nonrecord-based must be brought collaterally. These rules currently apply to ineffective assistance of counsel claims ("IAC" claims) – thus, on-the-record IAC claims must be brought on direct appeal and IAC claims that rely on off-the-record facts must be brought collaterally. This dichotomy has led to a great deal of confusion.

The City Bar believes that the interests of justice and judicial economy would be better served by following the lead of the federal system and the majority of other states by permitting all IAC claims to be raised on collateral review. To accomplish this, we support

legislation which would exempt IAC claims from the rules normally governing C.P.L. 440.10 motions.¹⁸

Recording Interrogations

Electronic recording of custodial interrogations not only protects the innocent by guarding against false confessions, but increases the likelihood of conviction of guilty persons by developing the strongest and most reliable evidence possible. It aids investigators, prosecutors, judges, and juries by creating a permanent and objective record of a critical phase in the investigation of a crime that can be reviewed for inconsistencies and to evaluate the suspect's demeanor. Recording entire custodial interrogations significantly reinforces or enhances cases by creating powerful incriminating evidence, which leads to stronger prosecutorial positions in plea bargaining and a higher proportion of guilty pleas and verdicts. It has a concomitant effect of reducing the number of motions filed to suppress statements by defendants and the consequent sparing of prosecutors from the need to refute allegations that interrogators engaged in physical abuse, perjury, coercion or unfair trickery.

For these reasons, the City Bar supports, with suggested modifications, legislation which would provide for oral or written statements of an accused be inadmissible as evidence against such accused unless a recording is made of the interrogation.¹⁹

Wrongfully Convicted Persons

With alarming frequency, we are hearing of cases where innocent men and women have spent years behind bars for crimes they have not committed. In most cases, DNA evidence has been their savior, with firm science finally overriding faulty eyewitness testimony or other circumstantial evidence. However, the final victory of a vacated sentence does little to erase the memories or bring back the years lost to prison.

The City Bar therefore supports proposals that generally would mandate a new commission to review cases of former defendants who were subsequently determined to be innocent after a previous conviction, with the purpose of determining the causes of wrongful convictions so they can be avoided in the future.

Despite the City Bar's belief in the need for such a commission, there have been flaws in previous proposals that need to be addressed. The City Bar does not support a system requiring that a previously convicted individual be "subsequently determined to be innocent" before his or her case will be considered by the commission. This wording leaves out a large segment of cases that are reversed or vacated on other grounds including, insufficiency of evidence adduced at trial, the withholding of exculpatory material by the prosecution, or the erroneous admission of prejudicial evidence. An effective commission should examine any case where a judge believes that there is a real concern that an innocent person has been wrongfully convicted and that commission review would lessen the likelihood of a similar wrongful conviction occurring in the future.

Also of concern to the City Bar are issues of resources and independence. Any proposal must provide the resources necessary to make the commission an effective body that can achieve its goals. To succeed in meeting its responsibilities, a commission would need a sizeable full time staff. The concerns about resources may be somewhat alleviated if the Commission is part of an existing state agency (DCJS) and therefore more likely to be sufficiently staffed and funded. However, the City Bar questions whether as an arm of a law enforcement agency, it would be as aggressive as an independent agency in its pursuit of justice and making recommendations.

Without the proper balance of independence and resources, any “wrongful conviction” commission will be unable to achieve its goal of preventing the injustice that occurs when innocent men and women are forced to waste years in prison. We urge the Legislature to make the necessary adjustments to previous proposals and pass this much-needed legislation.

DNA Collection

As previously mentioned, new advances in DNA technology can sometimes be the long awaited answer to miscarriages of justice. Yet we must be careful that in our zeal to collect it, we do not go overboard and trample on important rights and safeguards.

For example, in the past, the City Bar has raised concerns regarding proposals to expand the DNA database and require DNA samples from everyone convicted of a crime.²⁰ We strongly oppose any provision that would establish a one year deadline for all motions challenging a conviction on grounds outside of the appellate record, unless it is based on newly discovered evidence related to actual innocence. If the evidence should have been uncovered *prior* to trial but was not, due to ineffective assistance of counsel, it would now be subject to a one year bar. Justice is not served when the defendant is barred from using exculpatory evidence due to the ineffective assistance of his or her attorney.

The City Bar also opposes any proposal that would permit the immediate seizure of persons who refuse to give samples when they have not been ordered by the court to provide one, nor had the opportunity to consult with counsel about their legal obligations. The City Bar believes that if a public servant seeks to take a DNA sample from an offender who has not signed conditions of parole mandating a DNA submission, the public servant must explain the legal basis for requiring the sample and offer the offender the opportunity to consult with counsel or appear before a court.

Abolition of Capital Punishment

2004 saw the suspension of the death penalty in New York State with the Court of Appeals’ ruling in People v. Stephen LaValle. In this case, New York’s highest court ruled that New York’s death penalty statute had a constitutional defect regarding jury instructions, which could only be cured by new legislation. The Court was troubled by instructions that potentially coerced juries into choosing the death penalty by warning them that if they could not reach a unanimous decision between life in prison and the death

penalty, the judge would impose a sentence that could result in the defendant one day being released from prison.

This decision, rendered on June 24, 2004, saw at least a temporary cessation to New York's death penalty. Then on October 23, 2007, the Court of Appeals decided the case of John Taylor, the last person remaining on New York's death row. Although the trial judge in this case was mindful of Lavalle and led the jury to believe that the defendant would never be eligible for parole, Taylor's death sentence was still overturned. The Court of Appeals declared that because the original law that reinstated the death penalty had been rendered unconstitutional absent a legislative amendment, any death sentencing stemming from it was also unconstitutional. Unless there is new legislative activity, this decision effectively ends the death penalty in New York State.

The current suspension of the death penalty in New York, and the actual abolishment of the death penalty in our neighboring state of New Jersey, which was signed into law last year, offers an ideal chance to reflect on the viability, practicality and morality of capital punishment. As the City Bar considers the competing arguments for and against the death penalty and any corresponding legislation which could resume the death penalty, it is difficult to see how any fair-minded society could view the death penalty as a functioning element of its criminal justice system. Indeed, of all the Western democracies, only the United States adheres to the death penalty, putting itself in the company of such nations as China and Iran, and distancing itself from those democracies with which it has so much more in common.

We have learned much since the death penalty was re-established in New York in 1995. Studies nationwide have shown there is an alarming rate of wrongful convictions in capital cases, and that number is only likely to rise in light of advances in DNA analysis. Over 120 death row prisoners have been exonerated since the death penalty was reinstated nationwide in 1973. Because the death penalty is expensive, inefficient, irreversible, unfair to minorities and the poor, and not a demonstrated deterrent to future murderers, the City Bar urges the legislature not to pass any legislation that would resume the death penalty. Instead we ask that the Legislature welcome the LaValle and Taylor decisions as an opportunity to permanently end the death penalty in New York State.

Gun Control

The New York State Legislature made some important improvements to gun control legislation in 2005, including reducing the requisite number of guns defining Criminal Possession in the Third Degree from twenty to three. The Legislature matched this change in the law for Criminal Sale of a Weapon, by reducing the required number of guns for a Second Degree offense from ten guns sold to five, and for a First Degree offense from twenty to ten.

The City Bar applauds these changes but believes there is still room for improvement and has made several suggestions to further strengthen New York's gun laws. The critical

points include tougher licensing regulations, reforms to reduce improper access or handling of firearms, and an assault weapons ban:

- Outside of New York City and a few surrounding counties, gun licenses are valid for life. The law should be changed so that licenses need to be renewed every three years, thereby helping law enforcement to track firearms in the state and ensure that gun owners have properly registered their weapons;
- Long guns (rifles and shotguns) are not covered by current licensing regulations outside of New York City. With 21% of gun crimes involving a long gun of some kind, it is vital that gun licensing be expanded to include these weapons;
- While a few counties require gun license applicants to complete a safety course, the City Bar recommends that this practice be expanded statewide;
- Seventeen states have safe-storage laws, preventing children from accessing their parents' guns. A safe-storage law could significantly reduce accidental firearms deaths in the state; and
- 22% of guns used in crimes were obtained in purchases involving more than one gun. Several states have had success by limiting purchasers to one gun per month, and the City Bar urges the Legislature to adopt this restriction.

New York has become the safest large state in the country, but there is still more to be done to assure the security of its citizens. The City Bar believes gun control is a vital component in reducing crime, and these changes could lead to a safer New York.

Internet Gambling

The City Bar opposes any legislation that would expand New York's prohibition against Internet gambling (and gambling in general) to prohibit the mere endorsement of gambling.²¹ We believe that such a prohibition is unnecessary. Present criminal facilitation and aiding and abetting doctrines sufficiently cover conduct directly tied to gambling crimes. The inclusion of mere endorsement is also overbroad and would chill legal speech, thereby raising constitutional concerns.

Advancing illegal gambling activity is already a crime under New York State law. These laws have been successfully used against those who operate or aid online gambling enterprises. There is no evidence that anything that ought to be prohibited is not already prohibited.

On the other hand, it remains legal to discuss online gambling - even to endorse the position that it should be legal. If enacted, new legislation could prohibit conversation regarding one's favorable opinion toward gambling, thereby either illegalizing, or at least chilling, a considerable amount of protected speech. This legislation is therefore constitutionally overbroad and should not be enacted.

VII. Domestic Violence

The City Bar continues to support legislation that protects and vindicates the rights of victims of domestic violence, as well as legislation that acts as a deterrent against the commission of further crimes of domestic violence. To that end, the City Bar wholly supports legislation which would: (1) increase penalties against offenders who repeatedly violate orders of protection;²² (2) provide a victim with notification that an ex parte order of protection has been served;²³ (3) prohibit housing discrimination on the grounds of domestic violence victim status;²⁴ and (4) allow inmates who are victims of domestic violence that are able to prove their abuse was a substantial factor in causing them to commit the crime to be eligible to earn merit time.²⁵

VIII. Health Care Law

Living Wills and The Family Health Care Decisions Act

In an era when sophisticated medical technology permits the miraculous, but sometimes unwanted and unduly burdensome, extension of life, it is critical that we allow well-reasoned and sensitive end-of-life decisions, which reflect the values of the patient. In the current clinical setting, real choices concerning life and death are continuously faced by physicians, patients, families and loved ones. The measure of our compassion and humanity as a society is reflected in the policies and procedures we develop to help facilitate these decisions.

The fundamental right of patients to determine the best balance between the application of technology and the acceptance of inevitable mortality is now broadly accepted. If, however, the unfortunate occurs and the patient cannot actively participate in the medical decision-making process, the previously expressed wishes of the patient should be upheld and respected as best they can be interpreted.

Statutorily authorizing the use of living wills will increase the likelihood that medical treatment corresponds with a patient's wishes. Current New York law expressly authorizes the use of a Health Care Proxy whereby a competent adult can appoint an agent to make health care treatment decisions for him or her in the event that he or she loses the capacity to make those decisions. However, an agent acting under a Health Care Proxy cannot make decisions with regard to the administration of artificial nutrition and hydration unless the agent specifically knows the patient's wishes regarding those measures.

In a time of confusion and sadness, Living Wills can provide clear answers as to whether a patient would have wanted artificial food and nutrition. Yet New York is one of only three states that does not recognize Living Wills by statute. The City Bar therefore supports legislation which would amend Article 29-C of the Public Health Law to provide a clear procedure for individuals to document their wishes concerning life sustaining medical

treatment, including the administration of artificial nutrition and hydration.²⁶ The legislation has passed both Houses and awaits the Governor's signature.

A properly executed Living Will should create a rebuttable presumption of a person's wishes regarding artificial food and hydration. In order to encourage individuals to freely express their wishes, there should not be a statutory form for a Living Will and witnesses should not be required. However, a properly executed Health Care Proxy should still require witnesses and it therefore should not be revocable by a Living Will unless witnesses have signed the revocation.

Unfortunately, in many cases there is neither a Health Care Proxy nor a Living Will in place to guide family members through the dark hours of a loved one's incapacitation. Absent a Health Care Proxy, current law prevents family members from discontinuing treatment or even consenting to non-emergency medical treatment intended to alleviate suffering without proving by clear and convincing evidence that this is what the patient would have wanted. The burden of an uphill court battle should not be added to the already heavy strain and tension carried by those witnessing the sickness and incapacitation of someone they love. Therefore the City Bar supports legislation that would allow those closest to the patient to make the end of life decisions when there is no Health Care Proxy. New York law must be amended to show respect for a patient's wishes and values, as best they can be ascertained; involve his or her family and loved ones in decision-making; and assure protection in cases where the wishes of the patient are unknown and the customary advocates for the patient are absent.²⁷

The City Bar will continue its support of the Family Health Care Decisions Act, which was originally put forth by the New York State Task Force on Life and the Law and is an admirable effort to achieve these ends. The time has come for the State of New York to take up the challenging task of enacting appropriate procedures to safeguard the interests of incapacitated patients, to empower their loved ones and to protect the vulnerable.

The Anatomical Gift Act²⁸

With advances in medicine, organ transplantations are increasingly successful and save many lives. However, a potential organ recipient's access to a donated organ depends upon the current supply of transplantable organs. This supply, in turn, depends upon the number of organ donors. Today, the number of those in need of an organ donation far outnumbers the current supply of organs, which can be donated at a given time. Current New York State law with respect to anatomical gifts, Public Health Law § 4300 *et seq.*, limits the supply of donated organs by limiting means of access to them, i.e., it limits the methods through which a person can become an organ donor. The proposed legislation would help to increase the supply of, and access to, organs for transplantation. It would also bring New York in line with other states, which have passed their own versions of the Revised Anatomical Gift Act, thereby ensuring that regardless of location, organ supply will increase and transplantation will occur rapidly and more frequently.

This bill would improve upon existing New York law in a number of important ways, including: (1) simplifying the process for a potential donor to document his or her anatomical gift; (2) adding several new classes of persons to the list of those who may make an anatomical gift for another individual after that individual's death; (3) establishing standards for donor registries that would better enable procurement organizations to gain access to documentation of organ gifts in donor registries, medical records, and records of a state motor vehicle department; and (4) clarifying and expanding the rules relating to cooperation and coordination between procurement organizations and coroners and medical examiners. The City Bar believes, however, that the legislation would be even stronger with the following modification: the provisions of the bill that would allow parents of unemancipated minors to revoke a minor's anatomical gift or a minor's refusal to make an anatomical gift should exclude minors who are authorized pursuant to state law to apply for a driver's license.

Medicaid Coverage for Ex-Prisoners

The City Bar supports legislation which would ensure immediate access to health care coverage for certain people leaving prison, by permitting eligible people enrolled at pilot projects in selected state prison facilities to complete necessary paperwork for enrolling in Medicaid prior to their release.²⁹ This would ensure that Medicaid coverage would be in place at the time these individuals leave prison, allowing for a seamless transition to community care. It would ensure that Medicaid-eligible people with chronic health needs, such as hepatitis-C, hypertension or mental illness, would be immediately entitled to medications and care without waiting 45 to 90 days, as many now do, to have their Medicaid applications approved. It would also allow those individuals in need of drug treatment to access it immediately upon leaving state prison facilities. Participation in drug treatment programs is sometimes a condition of parole, which makes immediate Medicaid access for eligible persons even more necessary.

Studies show, and common sense dictates, that a seamless transition to Medicaid upon leaving prison will help reduce recidivism and increase public safety. People who lack Medicaid insurance are unlikely to receive medical care they need, making a job search, the search for permanent housing and reentry into the community difficult and in some cases impossible. Because they cannot access substance abuse, mental health and other rehabilitative services without a means to pay for them, people without Medicaid coverage go untreated for any number of chronic conditions or rely solely on emergency room services. For these reasons, the City Bar advocates a change in the law.

Malpractice Reform

Much has been said about rising medical malpractice awards and the resulting need for tort reform. But one of the most obvious and least contentious ways to reduce those payouts would be to minimize the number of medical errors. This would not only ensure that payouts would become less necessary, but it would also put the protection and health of the patient as the paramount concern.

While most doctors provide their patients with the best of care, busy schedules and everyday human fallibility can result in medical errors that affect the health and safety of patients.

The City Bar believes that more openness in the medical peer review process will shed light on some of the mistakes that doctors can make, and lead to changes in procedure so that the same error is not repeated. However, a main obstacle to candid discussion is that communications in peer review are discoverable. Physicians who are the subject of a peer review inquiry often do not attend out of fear that their statements can be used against them in a subsequent lawsuit.

Legislation that will grant a privilege against discovery of the statements made by anyone in attendance at a peer review committee hearing is therefore supported by the City Bar.³⁰ This legislation also includes an obligation on the part of participants to cooperate in good faith with a peer review investigation, which we hope will lead to frank discussion that will result in better patient care.

While the City Bar strongly supports more candidness in both medical review boards and between patient and physician, we are troubled by legislation that would require a doctor to immediately disclose to his patient any error that has caused substantial harm to the patient.³¹ Whether certain medical activity was in error is often disputable and the legislation does not offer clear enough guidance as to what doctors must disclose. Though we appreciate the intent of the legislation, we believe this legislation puts an unreasonable burden on health care professionals, and therefore cannot support it in its current form.

HIV and AIDS

The epidemic of HIV and AIDS continues to grow in the United States, and notably in New York. An estimated 80,000 people in New York are now living with HIV, the largest population of people living with HIV in the U.S., and the number of infections only continues to increase. Moreover, HIV infection rates among New York State prisoners are significantly higher than those in the general population, and far exceed the national average for prisoners living with HIV: 3.9% of New York State prisoners – 4,400 individuals – are living with HIV or AIDS, compared to 1.9% among prisoners nationwide.

Targeted interventions aimed at people who inject drugs – including medication-assisted therapy (for example with methadone or buprenorphine), and the provision of sterile needles and syringes – have proven effective in preventing HIV transmission and other adverse consequences of injection drug use. New York State's Department of Public Health and the New York AIDS Advisory Council, consistent with U.S. and international health authorities, have thus recommended that harm reduction services be provided to prevent HIV and other bloodborne diseases among people who inject drugs, both in- and outside prison.

New York has taken some important measures to improve access to methadone, buprenorphine, and needle and syringe exchange programs, but a number of obstacles to these critical services remain, putting thousands of New Yorkers at unnecessary risk of HIV infection. New York should take urgent action to prevent the spread of HIV, including by:

- Amending the Public Health Law, the Penal Code, and Department of Health regulations to eliminate restrictions on purchase and possession of syringes. The City Bar supports legislation which would de-criminalize possession of a hypodermic syringe or needle that is lawfully possessed under New York's public health laws but contains a residual amount of a controlled substance;³²
- Directing the Department of Health and the Department of Correctional Services to support and enhance proven effective harm reduction methods, including peer distribution of sterile syringes, and to ensure the provision of the full range of health care services for drug users, including viral hepatitis testing and treatment; medication-assisted therapy, including with methadone buprenorphine; and appropriate overdose response education and support; and
- Working with law enforcement to ensure drug users' access to harm reduction services without fear of arrest or punishment.

HIV-Related Testing

The need to increase HIV-related testing is acknowledged by all those involved in the public health community and those treating and working with individuals with HIV/AIDS. Indeed, the three primary legislative proposals³³ being considered by New York policymakers each provide that an offer of HIV testing be made mandatory in certain facilities in New York, a step which would by itself greatly increase the number of people who will be tested for the HIV virus. The concerns of public health officials and of health services providers is that the test be integrated as much as possible into routine medical care, to encourage patients to be tested and facilitate implementation in medical facilities. Although a preventative vaccine or definitive cure for AIDS remains elusive, significant treatment options now are available to persons infected with the virus or the disease. The countervailing concerns are that (1) HIV infection status and AIDS remain conditions which are associated with both stigma and discrimination, in a way different from other diseases that are routinely tested for, and (2) a person's consent to the testing be truly knowing and voluntary.

We are sensitive to both the need to increase and facilitate testing and the concerns that persons are entitled to receive information to consider in deciding whether to be tested. We believe the appropriate balance is as follows:

- There should be pre-test counseling sufficient to provide the patient, in the CDC's words, with "knowledge and understanding" that HIV testing is planned. In our view, understanding requires that the type of pre-test counseling information set forth in the Duane-Gottfried bill be provided.³⁴ This information can be conveyed orally or in writing. The patient should be offered a meaningful opportunity to ask

questions. Even if written consent is not required, we do not believe that the pre-test information should be reduced beyond that set forth in the Duane-Gottfried bill.

- The patient should be offered testing on an opt-out basis.
- There need not be separate written consent to HIV-related testing. However, where the provider uses a general form to obtain a patient's consent to medical care or health services, it should contain a place for the patient to opt-out of HIV testing. Where no general consent form is in use, the health care provider may document in the patient's chart that the patient was offered HIV-related testing, and note whether the patient did or did not opt out.
- If there is a positive test result, counseling and referral must be provided (which all of the bills contemplate).
- Information about HIV transmission and risks should be provided in all cases, even in the case of a negative test result. We believe that, to facilitate testing in a health facility setting, this information could be provided prior to testing, including information regarding avoiding high-risk behavior and that the test may not show the presence of HIV during the period immediately following a patient's initial infection with HIV, a period of several weeks and sometimes longer.
- Follow-up protocols must better ensure that patients receive necessary medical care. Achieving this result has been elusive but it is critical to stemming the spread of HIV regardless of which approach to testing the Legislature ultimately adopts. In addition, there should be reports required, designed to learn the effects of the new law, including the number of tests conducted, the number of people who opt-out of the testing, the number of positive results and the number of complaints regarding involuntary testing and any increase in the incidence of discrimination against persons with a positive diagnosis. Also, efforts should be made to collect information on the effectiveness of follow-up for persons whose tests are positive, to gauge the extent to which those people obtain treatment. The legislature should use the results of the follow-up protocols to determine whether further legislative action is needed, including potentially increased resources to enforce existing laws providing for confidentiality of patient records and prohibiting discrimination against infected persons.

Drugs and the Law

The failure of individuals suffering from a drug overdose to seek medical treatment for fear of prosecution can often have deadly consequences. As most individuals who are in need of treatment for an overdose are usually unable to actively seek that treatment due to the impact of the drug overdose, the City Bar supports legislation³⁵ which would allow those who may be in the company of the overdosing person or those who have knowledge of that person's overdose to call for emergency help, without fearing that their compassionate gesture will cost them arrest, incarceration, a criminal charge, or worse. The bill would prevent prosecutors from using evidence related to the possession of a controlled substance that is obtained during the course of seeking medical attention for an overdose.

IX. Trusts and Estates

Lifetime Trusts

The City Bar has proposed an amendment to the Estates, Powers and Trusts Law that would clarify and correct the existing law to assure there would be no interference with the use of a power of appointment to create a trust, including a trustee's power of decanting, and permit settlors to maintain some level of privacy from outside parties. The proposed amendment would (1) eliminate the need for a creator to sign the trust document when no one is making a disposition into the trust, and (2) when there is a disposition, require the creator's signature on only one of these two documents (the transfer document or the trust instrument).

Pre-Mortem Probate

There recently has been discussion about allowing pre-mortem probate of a last will and testament in the State of New York. The City Bar opposes any change in the law to permit pre-mortem probate in any type of judicial proceeding.

New York law does not permit a person to probate his own last will and testament while he is alive. The issue recently arose in the context of guardianship proceedings under the Mental Hygiene Law. Although recent legislation settles the issue in the context of guardianship proceedings, there presently is no statutory authority for pre-mortem probate in non-guardianship contexts.

There are significant disadvantages to permitting pre-mortem probate proceedings. First, such proceedings would waste precious judicial resources since testators reserve the right to revoke wills granted pre-mortem probate. Furthermore, a testator may die with no estate to distribute, thereby rendering the pre-mortem probate proceeding unnecessary. Additional problems could arise if the distributees of the decedent are different from the persons who were given notice of the pre-mortem probate proceeding, due to either the birth or death of individuals after the proceeding. This could require a new probate proceeding so that the proper parties have the opportunity to object. In addition, it is likely that a person with valid objections to a will might not come forward while the testator is alive for fear of offending the testator (who may then write a new will, disinheriting the objectant). The granting of pre-mortem probate may itself be subject to challenge after the death of the testator if there is a claim that the testator was acting under undue influence at the time of the pre-mortem probate proceeding. Finally, there is no guarantee that, if a testator moves to another state, the state of the testator's residence at death will recognize a decree of another state granting pre-mortem probate.

There are numerous alternatives to pre-mortem probate, such as videotaped wills, self-proving affidavits, testamentary substitutes and *in terrorem* clauses, to discourage disgruntled heirs. While none of these alternatives is fool-proof and each is subject to challenge, they offer a testator several means to achieve the alleged benefits of pre-mortem

probate without incurring its detriments. For these reasons, the City Bar opposes any change in New York law to permit pre-mortem probate in any type of judicial proceeding.

X. Civil Rights

Human Rights Law

As New Yorkers, we are proud of our reputation as the birthplace of modern civil rights legislation. But to remain a true leader in the field of civil rights we must update our state's Human Rights Law. The City Bar recommends that we expand the monetary relief available under the Human Rights Law to include attorney's fees and punitive damages. We also advocate an expansion of the classes protected under the Human Rights Law to prohibit discrimination on the basis of gender identity or expression, citizenship or immigration status, and source of income.

Under the existing terms of the state Human Rights Law, punitive damages and attorneys fees can only be awarded in cases of housing discrimination. This leaves victims of any other type of discrimination with a substantial financial burden, as they must either pay for private counsel or cope with administrative delays. Current law also provides too little deterrent to discriminatory conduct, and fails to acknowledge the independent harm that discrimination imposes on the state and its residents. The addition of damages and fees is a necessary tool to further combat discriminatory conduct. While we applaud the recent change in the law to allow the imposition of penalties in non-housing discrimination cases, we believe the imposition of punitive damages and attorneys' fees is still vitally important.

The City Bar further encourages the extension of the protections of the Human Rights Law to other vulnerable classes of persons. For example, although the Human Rights Law currently prohibits discrimination based on sex and sexual orientation, these categories do not explicitly and adequately protect individuals who are discriminated against because of their actual or perceived gender identity or expression, such as transgendered persons. In addition, immigrants, including asylees and refugees, have become more frequent victims of discrimination in the light of the national debate concerning immigration reform and the rights of immigrant workers. Yet they have no protection against discrimination under the Human Rights Law.

Also left without protection against housing discrimination are victims of violent crime, such as domestic violence or sexual assault, who can face discrimination from landlords just as they are beginning to take the steps necessary to free their lives from abuse. And as the cost of housing remains high in New York City, individuals are often denied public housing or even evicted simply because their income is supplemented with public sources such as Section 8 vouchers.

The City Bar is also recommending changes to the State Human Rights Law so that the definition of "service animal" can be rewritten to comport with federal law and avoid the unintended consequence of excluding dogs that have heretofore well served people with

disabilities in New York. The City Bar is recommending further changes to the Human Rights Law in order to clarify that certain public transportation facilities and terminals are required to reasonably accommodate persons with disabilities, as had been the position of the State Division of Human Rights prior to the law's change in 2007.

As leaders in civil rights, we must not allow discrimination based on stereotypes of victims of violent crime, transgendered individuals, immigrants and those needing public assistance and accommodation, to continue.

Equal Rights for Same-Sex Couples - Marriage Equality

The City Bar believes full equality includes the right to obtain a civil marriage license irrespective of the gender of one's spouse, and that the extension of this right to same-sex couples will not impinge upon the religious freedoms of others. We were extremely disappointed to see the Marriage Equality Bill fail in the Senate, but we applaud the Governor and the Assembly for its continuing advocacy on this issue.³⁶

The City Bar will continue to support efforts to ensure that all New Yorkers, regardless of sexual orientation, sex or gender, receive equal rights under the law, including this most basic right of marriage. We applaud the Court of Appeals for upholding the Fourth Department's decision in Martinez v. County of Monroe, in which the Court decided that valid out-of-state same-sex marriages must be granted recognition in New York, and Governor Paterson's subsequent directive requiring state agencies, consistent with Martinez, to extend full respect to same-sex marriages lawfully entered into outside New York. While the Governor's directive is an important positive step, we believe that the equal treatment the directive requires should also be accorded those who have entered into same-sex civil unions or other legal analogs of marriage which are available in other states. Although the City Bar is supportive of Martinez and the Executive steps taken, we do not believe that the rights of same-sex couples should be accomplished in such a confusing and piecemeal fashion. Instead, we urge enactment of a marriage equality law in New York.

Gender Expression Nondiscrimination Act

The City Bar supports the passage of the Gender Expression Nondiscrimination Act (GENDA) which adds "gender identity and expression" to the list of categories protected under various statutes prohibiting discrimination by the state and/or in employment, education, housing, and public accommodations.³⁷ The bill extends nondiscrimination protections to transgender and gender variant people, and further adds "gender identity and expression" to the list of categories in the hate-crimes statute, making crimes motivated by animus toward a person's gender identity or expression eligible for a penalty enhancement. The bill would greatly help in affording protections to transgender and gender variant people from discrimination, harassment, and assault to the same extent such protections are now provided to other groups under New York law, e.g. racial minorities, as well as those individuals who identify as gay and lesbian.

New York courts have held that existing laws banning discrimination based on sex or sexual orientation do not protect transgender people. Thus, the numerous lawsuits alleging discrimination based on gender identity and expression have been almost uniformly unsuccessful. According to the New York City Gay and Lesbian Anti-Violence Project, the number of reports from transgender people who are victims of a bias-based crime has risen, and yet, under the current hate-crime statute, acts of violence motivated by the victim's transgender or gender variant status are not eligible for a hate-crime penalty enhancement.

We urge the Legislature to pass this bill, and take an important step towards protecting transgender and gender variant people in their employment, housing, and safety. Transgender and gender variant people deserve the same financial and social stability as all other New Yorkers, and should be given the opportunity to become fully integrated and productive members of their communities.

Dignity for All Students Act

The City Bar urges the Legislature to enact the “Dignity for All Students Act,” to amend the New York Education Law to prohibit harassment against students in school, including bullying based on actual or perceived race, color, national origin, ethnic group, religious practice, disability, sexual orientation, gender (including gender identity and expression) and sex, and to prohibit discrimination based on these same characteristics.³⁸ Students should not be prevented from meeting their highest academic standards as a result of bullying and harassment. Negative experiences in school, such as bullying, name calling, or feeling unsafe, contribute to truancy and have been shown to directly impede school engagement and educational aspirations. In order to enhance students' ability to learn and meet high academic standards, schools need to provide an environment that is free from discrimination and harassment, including bullying, taunting or intimidation. The proposed legislation will establish minimum suspension periods for students who continuously disrupt the educational process or substantially interfere with the teacher's authority over the classroom. As of yet, there is no comprehensive statewide protection from bias-based harassment in schools.

XI. Sex and Gender Issues

Reproductive Rights

The City Bar has a long-standing commitment to the principles of individual liberty and privacy enunciated in Roe v. Wade, 410 US 113 (1973.) Roe and its progeny recognize the importance of ensuring that women will be able to make reproductive decisions appropriate for their individual circumstances, in consultation with their doctors and without interference from the State.

We will continue our support of any legislation which (1) recognizes a woman's fundamental right to make decisions regarding her reproductive health, and (2) makes a clear affirmative statement that all New Yorkers have the right to use, or refuse, contraceptives and that all New York women have the right to carry a pregnancy to term or to terminate a pregnancy.³⁹

Healthy Teens Act

The City Bar supports the passage of the Healthy Teens Act, which seeks to establish an age-appropriate sex education grant program, with the goal of reducing unwanted teenage pregnancies and the spread of Sexually Transmitted Infections (STIs).⁴⁰ Currently in New York State, the only funding for sexuality education is provided by federal and state matching programs that prohibit the teaching of any methods to reduce the risk of pregnancy, other than abstinence until marriage. Federal regulations for these "abstinence only" programs permit mention of contraceptives only to highlight their failure rates. By ignoring the reality of teen sexual activity and presenting solely one option to teens, the "abstinence-only" model fails to protect sexually active young people from unintended pregnancy and disease, and acts to perpetuate stereotypes that can be harmful to lesbian, gay, bisexual and transgender students.

Under the Healthy Teens Act, schools would be able to teach about pregnancy and STIs in an age-appropriate, bias-free way that provides accurate information about the benefits and side effects of all forms of contraception and the benefits of abstinence, and further includes education on responsible decision-making in sexual and intimate relationships.

Not only will the emotional and physical health of New York State's young people improve, but the Healthy Teens Act will also reduce New York's health care costs through better prevention against STIs. In addition, less funding will be needed to counter much of the misinformation that often stems from abstinence-only programs.

XII. Children and Families

The Needs of Foster Care Youth

Foster care youth between 18 and 21 are frequently denied essential social services and are at high risk of falling through existing safety nets to ultimately face a life filled with the obstacles of poverty. According to law, foster care youth between ages 18 and 21 are entitled to access to services like medical care, job training and placement. However, in actuality these services are often not provided. Worse still, many foster youths are discharged into homeless shelters before they turn 21. While this is illegal, it is all too common. The City Bar believes that it is necessary to combat this by increasing the oversight from the state to the counties regarding older foster youths, and allocating additional funding for transitional living centers.

We applaud the NYS Office of Children and Family Services for its effort to improve its regulations to ensure the quality of services provided to youth leaving foster care and transitioning to independent living, and to maximize the State's ability to utilize federal funding to support those youth. However, the City Bar does not support measures which would (1) allow local districts to decide what services will be provided in their consolidated services plan; (2) reduce the requirements for post-discharge supervision to unacceptable generalities; (3) give local social services districts the discretion to refuse to accept a young person back into foster care if he or she becomes homeless while on trial discharge; and (4) eliminate prohibitions against discharging a young person to a homeless shelter. Such changes would undermine the goals of securing permanency for children in foster care, finalizing permanency plans for children whose goal is another planned living arrangement with a permanency resource (APPLA), and ensuring adequate and appropriate supervision for young people who are discharged to APPLA, and would lead to an increase in the numbers of young people in our State who transition from foster care to homelessness.

Subsidized Kinship Guardianships

In addition, the City Bar believes that, in light of passage of the federal Fostering Connections to Success and Increasing Adoptions Act (P.L. 110-351), New York State must undertake to maximize funding under the Act, particularly with respect to subsidized kinship guardianships. Subsidized kinship guardianship would create an important permanency option for many children and youth who spend far too long in foster care, by enabling kinship caregivers to become permanent guardians outside the foster care system, while maintaining a subsidy to care for the child without having to adopt. Currently 39 states and the District of Columbia have moved children out of foster care to subsidized guardianship and the City Bar urges New York to do the same.

Lawyers for Children

The City Bar has long supported the need to codify a professional attorney-client model for the representation of children. The use of the term "law guardian," as is currently the practice, has caused undue confusion regarding the role played by an attorney who represents children. Too often, law guardian is believed to be a guardian *ad litem*, meaning that the attorney is expected to merely convey what she believes is in her client's best interest rather than be a zealous advocate for her client. The City Bar therefore supports legislation which would replace the term "law guardian" with the term "attorney for the child" to more accurately reflect the attorney's role.⁴¹ Such legislation will take an important step toward clarifying the role of the attorney for the child as an advocate, bound by all of the legal and ethical obligations owed by any attorney who represents a client.

XIII. Public Construction Contracting Reform

It is critical that legislators think innovatively to replace outdated approaches with ones that enhance efficiency, maximize state dollars, and reduce waste in the public sector. In

this context, the City Bar is urging the amendment of procurement laws that cost the state unnecessary time and money.

First, the City Bar has long advocated repeal of the Wicks Law, which requires four separate prime contracts (electrical, plumbing/gas fitting, heating/ventilation/air condition, and general) in the construction of most New York state public buildings. When the Wicks Law was originally enacted, it was believed that requiring separate contracts would increase competition, eliminate the general contractor's profit and reduce costs. But as construction has grown more technologically complex and fast paced, the need for central supervision and coordination has become more important. Studies have repeatedly demonstrated that rather than meeting its original intent, the Wicks Law instead causes exorbitant delays and substantial cost overruns.

Although the Legislature, Governor and certain municipalities have taken steps to reduce the applicability of the Wicks Law to certain projects, more is needed. Under current law, State and local governments have access to only one service delivery model – “design-bid-build” – with the award going to the lowest competitive bid. This single service delivery methodology embeds delay and exacerbates cost increases for some types of public projects, at a time when New York State can ill-afford it. The current public works statutes for both State and local governments, enacted decades ago, are based on assumptions about construction that are no longer valid. The State, as an economic policy maker, should strive to permit the State and its local governments, as owners and clients, to have flexibility in deciding, like private owners, what service delivery method is appropriate for its various capital projects and what provides the best value to the public.

The lowest price requirement applicable to all public works in New York reduces construction to a standard commodity and is less appropriate and more costly now than when the requirement was adopted. Permitting the State and local governments to award contracts based on best value, instead of lowest cost alone, reflects present day reality while protecting the integrity of the process.

Modernizing the State's public construction law would help the State and its local governments avoid non-productive costs and use their public capital more efficiently. In the absence of reform in a slower economy, fewer projects will be able to be funded and built during a time when government's role as an economic stimulator is most needed. And, the future debt service associated with costs resulting from outmoded practices will divert expense budget resources from programs and services at both State and local government levels. We can no longer afford to use these outdated practices.

Since there are some circumstances when design-bid-build is indeed the most effective procurement method, the City Bar is not advocating its elimination, but rather urges legislation that affords public agencies the ability to use the procurement method best suited to their needs.

XIV. Business/Corporation Law

Uniform Fraudulent Transfer Act

New York has always had laws giving creditors civil remedies in connection with asset transfers by their debtors that are actually or constructively fraudulent, such laws having been part of English common law since the Elizabethan Age. A codification of those laws promulgated in 1918 – the Uniform Fraudulent Conveyance Act (“UFCA”) – was adopted by many states, including by New York in 1925. By the 1980’s, however, the UFCA had become seriously outdated relative to extraordinary changes in business and commerce and substantial changes in bankruptcy and other commercial laws.

In 1984 the National Conference of Commissioners on Uniform State Laws promulgated a complete revision entitled the Uniform Fraudulent Transfer Act (“UFTA”), and it has been adopted by approximately 40 states. We recommend that the UFTA, with minor adaptations, be adopted in New York.

The UFTA adapts the law to modern commercial practices and harmonizes fraudulent transfer law to related bodies of law – principally the Uniform Commercial Code and the federal Bankruptcy Code. Its adoption in New York would promote uniformity with the laws of the vast majority of other states, which is vitally important in an era when so many transactions are interstate and international.

Revised Uniform Limited Liability Company Act

After a three-year drafting and deliberation process, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) approved the Revised Uniform Limited Liability Company Act (“RULLCA”) in July, 2006. The City Bar has reviewed and considered the changes that RULLCA would make to New York law, and recommends that New York enact RULLCA, subject to certain limited changes. The City Bar’s proposed statute is the version approved by RULLCA, except for one change in Section 201 relating to the formation of “shelf” limited liability companies without members.

RULLCA updates the original Uniform Limited Liability Company Act (“ULLCA”) in many respects. New York’s Legislature chose not to enact ULLCA, and instead enacted its own limited liability statute in 1994 (as amended, the “NYLLCL”). New York’s statute may have been preferable to ULLCA at the time of its adoption and has been developed by amendments since then. However, lawyers practicing in New York recognize that the NYLLCL has shortcomings, and, accordingly, many New York practitioners elect to form limited liability companies in Delaware instead of New York.

RULLCA is the product of exhaustive studies by knowledgeable experts and has been designed to improve upon earlier generations of limited liability company statutes, such as the NYLLCL. The City Bar considers RULLCA to be a significant advancement in the development of the law of limited liability companies, and believes that RULLCA would

address many of the shortcomings found in the NYLLCL. Moreover, the City Bar expects that a meaningful body of case law will develop as courts interpret RULLCA, which will further enhance the attractiveness of organizing limited liability companies in states that have enacted RULLCA.

Consumer Affairs and Debt Collection Credit Practices

Unfortunately an ever-growing number of Americans are finding themselves in debt and are struggling to pay their bills. While debt collectors have the right to seek outstanding balances from consumers, they must do so within the law. The New York Fair Debt Collection Practices Act (NYFDCPA) is meant to protect consumers from unscrupulous debt collection practices, but because it lacks a private right of action it is severely hindered in achieving its goal.

The City Bar therefore supports legislation which would amend the General Business Law to allow a private right of action for improper debt collection.⁴² We note that it is important to balance between encouraging plaintiffs with legitimate claims to exercise this right while also discouraging unwarranted claims. Therefore, the legislation should include both the right to award attorneys' fees to successful plaintiffs and the right to award attorneys' fees and costs to defendants where the court has determined that the action was brought in bad faith and for the purposes of harassment.

The legislation should also permit legitimate debt collectors to carry out their tasks consistent with the governing law without unwarranted fear of lawsuits. Therefore, if the Federal Trade Commission creates model collection letters, adherence to those letters should form a safe harbor for compliance purposes as to matters covered by the letters.

The City Bar also supports legislation which requires "passive" debt buyers – entities that buy bundles of debt and then retain third parties to undertake the collection - to be licensed so that consumer protection laws cannot be evaded and abusive debt collection practices can be reported against all involved parties. All debt collection activities should be subject to licensure and government oversight.⁴³ This will better implement debt collection laws and ease the burden on the civil courts which have become overwhelmed with consumer debt cases.

Finally, the City Bar urges the enactment of the Consumer Credit Fairness Act⁴⁴ which would establish a 3 year statute of limitations for commencement of a cause of action arising out of a consumer credit transaction where the defendant is a purchaser, borrower or debtor. This legislation would also establish a notice of lawsuit which must be mailed to the defendant in such a cause of action; and establish certain requirements for the complaint in such an action. We believe that this legislation is necessary to maintain a basic level of fairness and due process with regard to the adjudication of consumer credit disputes in the Civil, City, District, and County Courts of New York. While the City Bar supports this legislation, we believe it is possible that the shorter statute of limitations and enhanced pleading requirements of the bill could be interpreted to apply to private transactions in which one individual makes a personal loan to another. Such an

interpretation could unfairly burden private individuals who are seeking to collect debts legitimately owed to them and the language of the legislation should thus be modified to avoid this interpretation.

Non-Profit Organizations

The ability of non-profit organizations to operate at their full capacity has been severely hampered during the current economic downturn. The reduced value of investments and budgetary issues are preventing non-profit organizations from fully utilizing their endowments. The City Bar supports the enactment of the Uniform Prudent Management of Institutional Funds Act (UPMIFA) which would modernize the existing law (Uniform Management of Institutional Funds Act or “UMIFA”) to better handle this reality. UPMIFA would: (1) provide modern articulation of the prudence standards for the management and investment of charitable funds and for endowment spending; and (2) incorporate certain recent revisions with respect to charitable trusts into the law governing charitable corporations, such that standards for managing and investing institutional funds are the same regardless of whether a charitable organization is organized as a trust, corporation or some other entity.

Another obstacle facing non-profit organizations is New York’s unique system for categorizing these entities. Currently four “types” of not-for-profit corporations exist under the Not-for-Profit Corporation Law (A, B, C and D Corporations). While these classifications can be important for distinguishing certain categories, the hazy dividing lines between Type B and Type C corporations create unnecessary confusion in the formation and regulation of non-profits. The City Bar therefore supports legislation which would remove Type C corporations from the Not-For-Profit-Corporation Law, changing those non-profits that were formed and nonprofits that would otherwise have been formed as Type C corporations to be Type B nonprofits.⁴⁵

XV. Communications and Media Law

Violent Video Games

Thanks to an unprecedented technology boom, we now harness and share information and knowledge from around the globe with remarkable ease and speed. However, increased public use of technology can also have some downsides. Many of the problems of modern society, including our children’s interest in violent material, can find their way into our homes, through the internet, iPods and videogames. The internet is also the perfect place to feed addictions, like gambling, with little oversight. Not surprisingly, elected officials often seek to solve many of the problems that arise with an increased dependence on technology through legislation.

The City Bar is concerned that in an attempt to regulate technology and protect children from violent material, legislation can be introduced that at best is unnecessary and at worst is unconstitutional and in violation of the right to free speech.

The City Bar opposes legislation that would bar selling or loaning video games to minors that include “depictions of depraved violence and indecent images.”⁴⁶ We also oppose legislation which would ban the sale or rental of video games to minors “in contravention of the rating affixed thereto.”⁴⁷ We believe that both bills are unconstitutional. While the City Bar appreciates and shares the concern of protecting our youth, we believe that the better approach is to pursue constitutional measures, such as an educational campaign for consumers and parents about the existing video game rating system.

Video games are fully protected expression under the First Amendment and cannot be regulated on the basis of “violent” content. Regulating videogames that include depictions of depraved violence is a content-based regulation that is subject to strict scrutiny. Violent expressions may only be censored if such speech is “directed to inciting” and is “likely” to cause “imminent” violence. Courts have uniformly held that violent video games do not satisfy that stringent requirement. We urge state lawmakers not to pass this legislation and instead pursue constitutional approaches to protecting our youth, such as consumer and parent education campaigns.

XVI. Environmental Law

A repeated theme throughout the City Bar’s legislative agenda is that citizens who have been wronged or have suffered from the misconduct of others deserve their day in court. This is equally true in the environmental context; whether it is polluted water, the destruction of landmark buildings or extensive noise pollution, New Yorkers should be able to have their concerns reviewed in a court of law. In 1975, the New York State Environmental Quality Review Act (SEQRA) was enacted to address such concerns and the law fulfilled its purpose of requiring a thoughtful consideration of environmental impacts for years.

However in 1991, as a result of an unfortunate court decision, Society of the Plastics Industry. V. County of Suffolk, an onerous new obstacle was placed in front of plaintiffs. While plaintiffs already had been required to show that they suffered an injury that was within the zone of interests meant to be protected by this statute, this case added the requirement that plaintiffs show that they suffered a “special harm that is in some way different from the harm suffered by the public at large.” This new requirement has been unduly restrictive and has closed the court house door on many frustrated plaintiffs, including several who were direct neighbors to harmful environmental activity. This standing doctrine has no parallel in either federal standing laws or the laws in most other states, and thus makes New York one of the most restrictive jurisdictions for environmental plaintiffs. For these reasons, the City Bar supports legislation which would return the standing requirements of SEQRA to its original intention.⁴⁸ Finally, the City Bar will continue to monitor and advocate for changes to the Brownfields Law and its implementing program so that its benefits can be more effectively and equitably accessed.

XVII. Matrimonial Law/No Fault Divorce

The laws that affect families, particularly marriage and divorce, are many people's first major experience with the legal system. When entering a courtroom for a divorce, litigants are often in a state of extreme emotional duress and at a pivotal juncture in their lives. Nearly all states make this transition less difficult by permitting marriages to end without one spouse casting blame on the other. Unfortunately, New York is not one of them.

New York requires that parties seeking a divorce must prove one of several factors before being granted a divorce, including adultery, abandonment, cruelty or dangerousness or that the couple has lived apart under a valid separation agreement for one year. The City Bar is strongly supportive of legislation to establish "no fault" divorce in New York.⁴⁹

The proposed legislation would add grounds for divorce to the Domestic Relations Law that would permit the filing for divorce if there were irreconcilable differences, if the parties lived separately for a year or if the parties have consented under oath to a divorce. All the current divorce grounds would remain. Under the proposal, unless the parties agree otherwise, a "no fault" divorce could not be granted until all attendant economic issues are resolved.

While some may argue that keeping the fault burden inherent in the law deters divorce, the fact that divorce can only be obtained by a finding of fault does not repair relationships that are not working. Instead, forcing parties to develop grounds for divorce and set those grounds into legal documents encourages blame casting, name calling and the inflammation of already tense emotions.

The difficulties of the fault requirement are exacerbated when children are involved. Children obviously fare better when parties sharing custody have an amicable relationship. Yet such an amicable relationship between parents is less likely to occur when the law encourages the parties to find fault with each other. Also problematic in the current scheme is that the spouse who lacks economic resources may be forced to remain in a marriage that is not working for her, while the wealthier spouse has the option of moving to a neighboring state where no-fault divorce is an option.

Current law includes a provision that parties may obtain a divorce by waiting a year after they sign a separation agreement or obtain a judgment of separation. But this is hardly a solution, as it creates a legal limbo for the parties and their children and postpones the finality both parties in that situation seek. Establishing true "no fault" divorce in New York would reduce the emotional and economic costs already attending the end of a marriage and allow former partners to more quickly turn a corner in their lives.

XVIII. Legal Issues Pertaining to Animals

The City Bar recognizes the role that companion animals play in the lives of many New Yorkers, and supports effective ways of enhancing that relationship and its benefits for both animals and people. One important way of facilitating this goal is the enactment of laws protecting renters, particularly those who are members of vulnerable populations, such as the aging or persons with disabilities, from eviction, based solely on their keeping of pets that do not constitute a nuisance.⁵⁰ Another way of enhancing this relationship is by assuring pet owners that their companion animals will be well cared for should the pet owner pre-decease the animal. To that end, the City Bar has proposed and supports legislation which would amend the Estates, Powers and Trusts Law to provide for pet trusts beyond 21 years of perpetuity should the pet owner decide to establish a pet trust.⁵¹

It is also important to protect companion animals in the particularly vulnerable period at the beginning of life before they find a permanent family to care for them. Currently, licensed pet dealers must comply with minimum standards in regards to lighting, flooring, ventilation etc. Yet there are currently no laws requiring fire safety standards in pet stores. This had led to many tragedies including a fire where hundreds of animals were killed in Long Island in December, 2004. The City Bar therefore supports legislation requiring pet dealers to comply with fire safety standards, which should be checked as part of the annual inspection process.⁵²

The protection of all of New York's animals, whether companion or wild, from unnecessary acts of cruelty with the intent to cause extreme physical pain or by conduct that is especially depraved or sadistic is a cornerstone of a humane society. The City Bar is urging that the current law, which calls for felony prosecutions of severe acts of cruelty to companion animals, be extended to all our state's animals, whether dog, peacock, bear or native turtle.⁵³

Finally, the City Bar supports legislation which would: (1) require that restitution be paid in the case of wrongfully seized animals;⁵⁴ (2) require the education of humane animal treatment in schools;⁵⁵ (3) prohibit tethering a dog for more than 6 hours in a day;⁵⁶ (4) prohibit the confinement of breeding sows, calves raised for veal, or egg-laying hens in a manner that prevents them from lying down, standing up, fully extending their limbs, or turning around freely;⁵⁷ (5) limit the number of intact animals over the age of four months a person or business can own, possess, control or otherwise have charge or custody;⁵⁸ (6) limit trapping prohibitions;⁵⁹ and (7) create an animal population control fund and animal population control program.⁶⁰

XIX. Art Law

Deaccessioning of Museum Property

The City Bar commends the Legislature for its intent to make the deaccessioning of museum property more transparent to the public; however, we question whether legislation

is necessary in this area given the rules already in place. If the Legislature ultimately concludes that legislation is necessary in this area, the City Bar supports with suggested modifications a bill which would create rules for deaccessioning of items in a collecting institution's collection and to regulate the use of funds from disposed items.⁶¹

XX. Education

The City Bar has a keen interest in insuring that New York State and New York City provide the federally mandated “free appropriate public education” (FAPE) to all New York City school children with disabilities. Therefore, we oppose legislation related to special education programs and services which would: (1) reduce the statute of limitations from two years to 180 days for due process claims under the Individuals with Disabilities Education Act (IDEA) for unilateral parental placement in a private school; (2) require mandatory mediation prior to commencement of a due process hearing under Education Law 3602-c; and (3) impose limitations on access to special education for students receiving transportation to nonpublic schools outside their district of residence.

XXI. The Legal Profession

Reforming the Attorney Discipline Process

The City Bar has long advocated that Section 90 of the Judiciary Law be amended to allow public access to attorney discipline proceedings once a disciplinary committee has filed formal charges against an attorney.

Section 90(10) of the Judiciary Law provides that attorney disciplinary files must remain private and confidential until after a judicial determination that public discipline is warranted, unless the Appellate Division, for cause shown, determines otherwise. It is one of the most restrictive attorney discipline confidentiality provisions in the United States.

The City Bar believes that an earlier opening of the attorney discipline process will serve the interests of both the members of the bar and the general public. Attorneys will not be injured when baseless, frivolous or vindictive complaints are filed against them, as such complaints will be disposed of long before the point of public access. On the other hand, public suspicion and distrust about attorneys and about the process will be alleviated; consumers will be given valuable decision-making information; and the attorney discipline process will, hopefully, become more efficient and effective, as a result of the increased scrutiny.

We also support the enactment of a seven-year statute of limitations for the commencement of such disciplinary proceedings. Currently, there is no statute of limitations for such proceedings. Specifically, the City Bar supports legislation that would provide that disciplinary charges may not be brought based on attorney misconduct that

occurred prior to the longer of: (1) seven years after a complaint has been filed with a disciplinary committee, or (2) two years following the date on which a disciplinary committee received actual notice of the attorney's conviction of a felony or of a crime involving moral turpitude. If an attorney intentionally misleads a client or a disciplinary committee as to the circumstances constituting the misconduct, however, charges may be brought within seven years after the last act of deception.

Revisions to the Lien Law

The City Bar supports an amendment which would address a deficiency in Judiciary Law Sections 475 and 475-a (collectively, the "Lien Law"), which govern an attorney's ability to attach a charging lien to a client's monetary recovery. This legislation would authorize an attorney to attach a lien to awards and settlement proceeds received by his or her client through alternative dispute resolution or settlement.⁶² The expansion of the Lien Law to include arbitration, mediation and other forms of alternative dispute resolution would allow attorneys to file a charging lien against settlement proceeds obtained prior to or during the course of any proceeding, thereby affording attorneys this added protection for the value of their legal services.

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- ¹ State Affairs [Testimony](#) before the NYS Senate Temporary Committee on Rules Reform, February 2009.
- ² See Bill Review “[Roadmap](#)” Under New Senate Rules.
- ³ A.9544/S.6457 – After being passed by the Senate and Assembly, this bill was vetoed by Governor Paterson on February 1, 2010. For more information on the City Bar’s recommendations regarding ethics reform, please see the Association report “[Reforming New York State’s Ethics Laws the Right Way](#)”.
- ⁴ [S.5940](#) (2008)
- ⁵ [A.1827-A/S.5846-A](#)
- ⁶ [A.3866-A](#)
- ⁷ [A.5899/S.4091](#)
- ⁸ [A.8957-A/S.5968-A](#)
- ⁹ [S.2043](#)
- ¹⁰ [A.8497/S.5422](#)
- ¹¹ [A.8065-A/S.4368-B](#)
- ¹² [A.3664-B/S.4366-B](#)
- ¹³ [A.3770-A/S.4686](#)
- ¹⁴ [A.9382/S.4406-B](#)
- ¹⁵ [A.1747/S.3344](#)
- ¹⁶ [A.2266-A/S.1266-A](#)
- ¹⁷ [A.4957](#) and [A.4963-A/ S.4399-A](#)
- ¹⁸ [A.5170/S.4667](#)
- ¹⁹ [A.5142/S.110](#)
- ²⁰ [S.5848](#) (2008)
- ²¹ See, e.g., [A.3079/S.2630](#)
- ²² [A.10492/S.7411](#) (2008)
- ²³ [A.9641/S.6906](#) (2008)
- ²⁴ [A.1055-B/S.936-A](#)
- ²⁵ [A.4516-D/S.3438-B](#)
- ²⁶ [S.2039](#)
- ²⁷ [A.7729-D/S.3164-B](#)
- ²⁸ [A.6966/S.4488](#)
- ²⁹ [A.6439](#)
- ³⁰ [A.1596/S.2821](#)
- ³¹ [A.1673-A](#)
- ³² [A.8396-A/S.5620-A](#)
- ³³ [A.7757-A/S.4484-A](#), [A.7610/S.3293](#) and [A.7892-A/S.5660](#)
- ³⁴ [A.7610/ S.3293](#)
- ³⁵ [A.8147/S.5191](#)
- ³⁶ [A.7732/S.4401](#)
- ³⁷ [A.5710-A/S.2406-A](#)
- ³⁸ [A.3661-C/S.1987-A](#)
- ³⁹ [S.5808](#)
- ⁴⁰ [A.1806-A/S.3836-A](#)
- ⁴¹ [A.7805-B/S.5461-B](#)
- ⁴² [A.3532-A/S.2458-A](#)
- ⁴³ [A.3926-C and S.4817-A](#)
- ⁴⁴ [A.7558-A/S.4398-A](#)
- ⁴⁵ [S.3698](#)
- ⁴⁶ [A.9310-A and A.11717/S.6401-A](#) (2008)
- ⁴⁷ [S.5888-A](#) (2008)
- ⁴⁸ [A.9480/S.1635](#)
- ⁴⁹ [A.9753/S.3890](#)
- ⁵⁰ [A.2564 /S.3179](#)
- ⁵¹ [A.5985-A/S.3070-A](#)

52 [A.311/S.558](#) (2008)
53 [A.6077-A/S.5144](#)
54 [A.9400/S.3155](#)
55 [A.427/S.3177](#)
56 [A.6046](#)
57 [A.8163](#)
58 [A.7285-B/S.5392-A](#)
59 [A.4777/S.5423](#)
60 [A.6158-A/S.4278](#)
61 [A.6959-A/S.4584-A](#)
62 [A.8697](#)

*Unless otherwise indicated, bill numbers are for the 2009/2010 session.