

Legislative Program 2011



The Legislative Program Guide is a summary of significant state legislative issues that are of particular interest to the New York City Bar Association (the “City Bar”). The City Bar, with over 23,000 members, functions through 150 committees, many of which regularly report on issues of law and public policy. This summary represents only a 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 committee reports, please visit the Legislative Affairs Department website at <http://www.nycbar.org/nycbar/index.php/legislative-affairs/overview>. 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 New York City Bar Association (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 150 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

For years, the City Bar has been at the forefront in calling for reform that would help deal with 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 rules reforms that took place during the 2009/10 session. However, we believe there is more to be done. We encourage both houses to hold public discussions of their operating rules and ways they can be improved, in a manner that takes into account the public's interest in having a Legislature that is transparent, deliberative and accountable to the citizens of the state. Now is the time to consider additional reform measures that will continue to strengthen and optimize the functioning of the Legislature as an institution so that individual legislators — from both the majority and minority — can advance the issues they care about and help shape legislation through careful public deliberation.

The reforms enacted in the Senate during the 2009/10 session have had the effect of: (1) making it easier for individual senators to bring their bills to a committee vote or to the floor without leadership approval; (2) making the distribution of member resources more equitable; (3) imposing term limits on leadership; and (4) increasing transparency in the chamber by making the proceedings public and accessible via the Senate website.

Although the City Bar applauds these changes, we urge the adoption of new rules that will: (1) limit legislators 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; (5) explicitly provide each committee with control over its own budget; and (6) institutionalize conference

committees, so that when bills addressing the same subject have been passed by both chambers, a conference committee will be convened at the request of the prime sponsor from each chamber or the Speaker and Majority Leader. We are of the belief that these reforms, which are modeled on best practices from other states, will make for a more open and democratic Legislature, which is crucial to address the challenges we face in these difficult times.

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 took the initiative to develop legislation in this area during the 2009/10 session. However, we are concerned that the structure proposed by the Legislature last session - a substantial decentralization of regulation, with three new commissions and two new enforcement offices - would result in dispersed oversight and investigatory authority and possible overlaps and gaps in their operations. We propose a different approach, based on the following five core principles:

- 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.

In addition, our study of the bills which were given prime focus in the Legislature last session¹ yielded several serious concerns – concerns which we urge the Legislature to consider when contemplating legislation in this area:

- The Legislature's proposed Executive Ethics and Compliance Commission only imposed 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 Legislature’s proposed 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 excluded 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 included 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.

Moreover, just as procedural safeguards within the act will be an important determinant of how well ethics requirements are truly reformed, we believe the procedures followed on the road to ethics reform are also important. The potential transformative effect that sweeping ethics reform could have would, in our view, be greatly reduced if the public saw such reform enacted without hearings, opportunities for public comment, and other steps to ensure transparency, accountability, and openness. Accordingly, we recommend that these changes be a fundamental step on the road to ethics reform.

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 explicitly assigning this criterion to the lowest importance in the ranking.

Campaign Finance Reform and Limits on Gifts and Fundraisers

After years of advocacy 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 advocate 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 in a 4-3 decision, which upheld former Governor Paterson’s appointment of Richard Ravitch under the Public Officers Law. Mr. Ravitch was 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.

No-Excuse Absentee Voting

As a matter of policy, the City Bar believes that voting should be an easy and common practice, and thus any reform to expand the franchise and make voting more convenient for those who otherwise have difficulty doing so is worthy of serious consideration. The City Bar therefore supports the enactment of a no-excuse absentee voting system in New York, which would remove from the Election Law any requirement that voters provide an excuse before being issued an absentee ballot.² Currently, voters requesting an absentee ballot are required to provide an excuse for their inability to vote at their designated polling place. Acceptable excuses include unavoidable absence from the county of residence due to duties, occupation, business, studies, or vacation and inability to vote due to illness or physical disability. Any voter with an excuse to vote absentee other than those listed in the current Election Law are not entitled to an absentee ballot.

In evaluating whether New York's electoral process would benefit from implementing no-excuse absentee voting, the City Bar has considered several policy factors:

- *Necessity to modernize, ease voting experience and increase voter participation:* New York's voter turnout has historically ranked among the lowest in the nation. Removing barriers to voting absentee would allow more people to vote in the manner most convenient for them. New York's current absentee voting laws also have the potential to disproportionately benefit those with high socioeconomic status;
- *Impact on poll site lines and administrative burden:* A no-excuse absentee voting system is likely to reduce both poll lines and the administrative burden on election officials, thereby decreasing the total cost of administering elections;
- *Propensity for fraud:* People are as likely to provide a false excuse on an absentee ballot under the current system as they are to obtain a ballot when no excuse is required; and
- *Effects of no-excuse absentee voting on election litigation:* Removal of the requirement that a voter provide an excuse for not voting at the polls removes the principal basis for challenging absentee ballots, therefore the number of challenged and litigated ballots will decrease.

The City Bar believes that no-excuse absentee voting requires a constitutional amendment, as the state constitution currently precludes the Legislature from enacting no-excuse absentee voting by statute.

Alternatives for Ballot Access

Candidates seeking public office, particularly those who are insurgents, face many barriers when attempting to get on the ballot. One such barrier is the nominating petition requirement. Due to the disparity of the enrollment figures in the political parties in New York State, so-called 'minor' parties have a disproportionately more difficult task in

obtaining signatures to place their candidates on the ballot. In addition, the signatures candidates collect are often subjected to intense legal scrutiny from opposing candidates. Petition challenges can easily cost a candidate tens of thousands of dollars in legal fees and weeks of uncertainty until a final judicial determination as to whether he or she is on the ballot. Thus, even a candidate who survives a ballot challenge may find his or herself unable to effectively compete in the election.

To combat these issues, the City Bar proposes that New York adopt a filing fee alternative to the designating or nominating petition requirement for placement on the election ballot. An additional alternative is to guarantee a place on the ballot to candidates who have met the qualifying threshold for public funding by New York City's Campaign Finance Board. The two approaches are not inconsistent. The filing fee proposal has the advantage of being applicable to all candidacies and all public offices in New York City and New York State. A filing fee of \$2,500 would cost far less than the money required for a successful petition drive, even if a challenge was avoided. The amount of money and volunteer time to petition could easily be applied to raise the filing fee cost if necessary. More importantly, once the fee is paid, the candidate is assured a place on the ballot and can go on to the next phase of the campaign. An added benefit would be the money saved by the courts and Board of Elections, each of which spend countless hours on petition challenges; indeed, instead of wasting administrative and judicial resources, the filing fees would add to the Board or court's coffers.

Executive Orders

One important tool of any new Governor is the authority vested in him by the Constitution and laws of the State of New York to review and evaluate all Executive Orders and amendments previously issued and currently in effect before determining which shall remain in full force and effect until otherwise continued, modified or revoked, as well as the authority to issue new Executive Orders. Many Executive Orders set the tone for a new administration and establish important policies and procedures for the Executive branch of the government. While the issuance of Executive Orders is clearly within the province and sole discretion of the Chief Executive, we encourage the Governor to provide an opportunity for the public to comment on proposed orders that are not time-sensitive and will have a significant impact on the way the Executive branch conducts the public's business. This simple mechanism to promote a deliberative and transparent process should help engage our citizens and secure public support for those policies and procedures that are a priority for the new administration.

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.

In addition, the total caseload of the courts statewide has risen dramatically, with more than double the number of foreclosure filings in 2010 than in 2005, and with caseloads in New York City Civil Court and courts outside the city nearly doubling in the past decade, mostly due to the growth in consumer debt filings. The combination of increased caseloads with more individuals lacking legal representation not only adds to the burden on judges and staff, but also represents a fundamental imbalance in the justice system.

In May 2010, Chief Judge Jonathan Lippman convened a task force on access to civil legal services in New York. Consistent with the conclusions reached by the City Bar, the task force's findings highlighted the need for an increase in civil legal services representation:

- 99% of tenants appearing in eviction proceedings in New York City are unrepresented, as are 98% of such litigants outside of New York City;
- 99% of borrowers are unrepresented in the hundreds of thousands of consumer credit cases filed each year in New York City;
- 99% of parents appearing in child support matters in New York City are unrepresented, as are 95% of such litigants in the rest of the state;
- 45% of homeowners appearing in foreclosure cases throughout New York State are unrepresented; and
- More than 2.3 million New Yorkers are currently unrepresented in civil legal proceedings in New York State courts.

Funding legal services for the poor is a modest investment that yields benefits which we will need during this economic climate. We applaud and support Chief Judge Jonathan Lippman's inclusion in the proposed 2011-2012 Judiciary Budget of \$25 million to fund civil legal services for the poor. This funding would provide essential representation to those who have been hit hardest by the economic downturn.

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 approve the proposed 2011-2012 Judiciary Budget and provide civil legal services funding for those who need it most.

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.³ We urge support for this legislation for several reasons. First, allowing motivated students to pursue and complete baccalaureate and advanced degrees provides a demonstrated 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, composed of lawyers and nonlawyers, 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.⁴ 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. 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.

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.⁵ 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. 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 the years since 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 clear 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 2010 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 2011 session.⁶

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.⁷ This legislation is long overdue and should be re-enacted. Three 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. 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.⁸ 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 individuals with criminal records 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 Reentry Faced by Persons with Criminal Convictions

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, persons with criminal convictions are unable to meet their basic needs and fully reintegrate into society.

The City Bar therefore supports an amendment to Article 23 of the Corrections Law which 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.⁹ 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 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.¹⁰ Poor health care can be another collateral consequence of serving time in prison.

Sealing Criminal Records

Mere records of arrest and charges, even for violations and petty offenses, can have significant consequences for defendants. These records can limit defendants in their efforts to obtain some of the most vital tools to subsistence and advancement. As the New York City Police Department continues to utilize quality of life arrests as a tactic to prevent more serious crimes, more people are coming into contact with both law enforcement and, therefore, the criminal justice system. In light of these collateral but highly significant consequences, the City Bar has re-examined the existing statutory framework for the sealing of court records and, as set forth below, sees the need for balanced legislative change in three areas:

- The first change would allow for complete sealing for a defendant whose case was dismissed at arraignment (or earlier) pursuant to Criminal Procedure Law §§ 140.45 and 150.50 where the accusatory instrument was legally insufficient.
- The second change applies to youths ages 16 to 18 and permits a youthful offender adjudication for those convicted of a petty offense (i.e. a violation or a traffic infraction) and which permits an automatic, complete sealing of such adjudications upon the defendant's 19th birthday, as is currently the case for youths convicted of misdemeanors.
- The third change applies to defendants convicted of a petty offense (presumably someone who is 19 years old or older), and would allow for a defendant to apply to the sentencing court, upon notice to the District Attorney's Office, for complete sealing of such petty offense conviction following two years from the date of sentence.

These changes would be reasoned steps towards addressing the indisputable problems of collateral consequences. The proposals create a procedural avenue of relief that also takes into consideration both the public safety concerns of prosecutors and the operational concerns of the courts. At their essence, all three of these proposals are meant to curtail the increasingly widespread and harmful effects of arrest, court and prosecutions records.

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 him or herself 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. Any legislation should also allow the defendant to vacate the plea if the advisal was not given.

Identity Theft and Related Crimes

The City Bar supports amendments to the Criminal Procedure Law (CPL) regarding geographical jurisdiction for crimes closely related to to identity theft.¹¹ 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 related 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 that is part of the same criminal transaction, prosecutors could join offenses, therefore promoting efficiency without sacrificing fairness to the defendant.

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.¹²

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 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. We recommend, however, that adequate consideration be given to the lead-in time that court, police and prosecutorial agencies will need in order to equip their offices and train personnel to comply with the statute.¹³

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.¹⁴ 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 recent actual abolishment of the death penalty in our neighboring State of New Jersey 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.

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.¹⁵ 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. Such 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;¹⁶ (2) provide a victim with notification that an ex parte order of protection has been served;¹⁷ (3) prohibit housing and employment discrimination on the grounds of domestic violence victim status;¹⁸ (4) allow incarcerated persons who are victims of domestic violence and are able to prove their abuse was a substantial factor in causing them to commit the crime to be eligible to earn merit time;¹⁹ (5) require education on the dangers of teen dating violence to the broadest number of New York students; and (6) institute school safety policies to help ensure the safety of targets of dating violence.

VIII. Health Care Law

The Anatomical Gift Act

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.²⁰ 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 Persons Previously Incarcerated

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.²¹ 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.²² 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.²³ 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 incarcerated persons in New York State are significantly higher than those in the general population, and far exceed the national average for incarcerated persons 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 by directing the Department of Health and the Department of Correctional Services to support and enhance proven effective harm reduction methods. These methods include peer distribution of sterile syringes, and ensuring 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.

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 legislation²⁴ 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, Estates and Taxation Issues

Lifetime Trusts

The City Bar has proposed an amendment to the Estates, Powers and Trusts Law ("EPTL") 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.

Trust Principal

Section 10-6.6(b) of the EPTL codifies decisional law that permits a trustee who has authority to invade the trust principal to exercise that power by creating new trusts. The potential use of this statute compels the enactment of a New York statute that is expansive rather than restrictive in nature, one that permits more flexibility and liberalizes the current statute. To achieve this, the City Bar has proposed a significant revision to Section 10-6.6(b) and recommends that the statute be restated in its entirety as a new section to the EPTL, 10-6.6-A.

The proposed provision makes a number of notable clarifications and changes to the existing statute. First, the proposed provision permits a trustee to pay over the principal of a trust to a new trust even if the trustee does not have absolute or unlimited discretion to invade the principal of the trust. Second, there is no requirement to file the instrument exercising the power to appoint with the clerk of the court having jurisdiction over the trust. Third, the proposed provision clarifies the operation of the statute in the context of a multi-beneficiary trust. Fourth, the proposed provision protects certain tax results that could otherwise be lost.

The proposed provision retains the concept that the exercise of the power to invade the principal of the trust is considered the exercise of a special power of appointment. Most important, the proposed provision retains the ability of the settlor of the trust to override the application of this statute in the trust agreement. The proposed provision also retains the present law provision that the statute not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument or under any other provision of law or under common law or as directed by any court having jurisdiction over the invaded trust. The proposed statute also retains the present law that a trustee may not exercise a power to decrease or indemnify against a trustee's liability and further provides that the appointed trust cannot eliminate a provision in the invaded trust granting another person the right to remove or replace the authorized trustee exercising the power.

New York pioneered the realm of powers to appoint by enacting Section 10-6.6(b) in 1992. It is time again for New York to act as a vanguard and update and improve the statute, incorporating important provisions enacted by the other states or being considered by states, as well as adding significant, thoughtful, and creative elements, that are useful to practitioners but do not undermine the tenor of the statute.

Pour-Over Wills and Revocable Trusts

The City Bar also supports an amendment to EPTL 3-7.7. The proliferation of the use of pour-over Wills and revocable trusts mandates the need for a change to New York's long-standing rule against incorporation by reference. The judicial exceptions to the rule create uncertainty for estate planning practitioners. Permitting incorporation by reference of the terms of a pre-existing inter vivos trust (including a revocable trust) will help to further the intent of the testator in cases where such trust is later revoked, terminated or not in existence at the date of testator's death. We propose that any such legislation should take effect upon enactment, provided, however that the amendment would apply only to the estates of decedents who die on or after such effective date.

Office of the Taxpayer Rights Advocate

The City Bar supports continuing the operation of The Office of the Taxpayer Rights Advocate within the New York State Department of Taxation and Finance (the "Tax Department"), and ultimately, legislation that would formally codify the ombudsman position within the Tax Department. The Office of the Taxpayer Rights Advocate (the "Office") is an independent organization within the Tax Department that was administratively created in 2009 to assist taxpayers in resolving problems with the Tax Department, identify problems and legislative solutions, and work with the Tax Department to improve processes. The Taxpayer Rights Advocate is an employee of the Tax Department and reports to the Commissioner of Taxation and Finance. The Office is currently divided into two units, the Case Advocacy Unit that assists individuals and business taxpayers with case-specific tax problems, and the Systemic Advocacy Unit that addresses broader issues that adversely affect multiple taxpayers, including instances where Tax Department procedure has failed to produce the intended result. The Office

also educates taxpayers on their responsibilities with respect to audits, protests and reviews of adverse decisions.

We believe that the New York Taxpayer Rights Advocate is serving a vital role in advocating on behalf of New York taxpayers and resolving disputes with the Tax Department in a cost-effective manner and identifying systemic issues that affect the Tax Department's ability to perform its primary function of collecting revenue. In doing so, the Taxpayer Rights Advocate is helping to reduce the high costs to the Tax Department and taxpayers of litigation and formal dispute resolution, as well as promoting sound tax administration that encourages taxpayers to live, work and employ their capital in the state. The City Bar encourages the Governor and Legislature to codify the Office within New York's Tax Law.

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 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.

Secure Communities

On May 10, 2010, New York enrolled in the "Secure Communities" program when the New York State Department of Criminal Justice Services signed a Memorandum of Agreement with Immigration and Customs Enforcement (ICE). Secure Communities allows state and local law enforcement and ICE immediate access to the criminal and immigration history of an individual being booked into jail, regardless of whether the individual is ever convicted of a criminal offense. Under Secure Communities, state and local law enforcement authorities check the biometrics of an individual against Department of Homeland Security immigration databases. ICE and local law enforcement are automatically notified when an arrested person is matched to records indicating an immigration violation.

Under Secure Communities, police officers are permitted to check an individual's information in immigration databases upon booking. This is an invitation for police officers to engage in racial profiling, perhaps unwittingly, because they will be more likely to check the immigration database for those individuals who, by appearance or language, appear to be foreign-born. The risk of such consequences can create fear in immigrant communities, leading to a reluctance to report crimes or to engage with local law enforcement on important matters of public safety. By participating in Secure Communities, New York local law enforcement agencies are also expending limited resources in enforcing federal immigration law, which prevents utilization of those resources in ways that better address our communities' needs.

The program also carries severe negative consequences for individuals with no criminal history or those arrested for minor violations. According to one study of Fiscal Year 2010 data, only 15% of the 248,000 biometrics matches identified immigrants charged with a high-level offense, while 85% of the matches identified immigrants charged with more minor offenses. In the event that ICE issues a detainer against an individual who has been booked into jail, the detainer may prolong the individual's detention and may limit his or her ability to access counsel or to effectively fight criminal charges.

For these reasons, the City Bar believes that New York should decline to participate in the Secure Communities program.

Equal Rights for Same-Sex Couples - Marriage Equality

The right to a civil marriage, regardless of a spouse's sex, is essential for full equality for all New Yorkers. Indeed, a majority of New York voters have recognized this necessity and, according to recent polls conducted by Siena College and Quinnipiac University in January 2011, have shown their support for legislation allowing same-sex couples to marry.

New York's more than 50,000 same-sex couples, like their opposite-sex counterparts, confront life's challenges. Many have modest incomes. Approximately 20% are raising children under age 18, and more than 25% have one disabled partner. 32% of individuals in these couples are nonwhite. The inability of these long-term couples to marry has devastating real-world consequences. In death, without inheritance rights, the surviving partner can be thrown out of the family home. Upon relationship dissolution, without a clear right to maintenance, custody or visitation, the lives of a partner and the couple's children may be turned upside down.

Instead of its traditional leadership in the area of equality and civil rights, New York lags on marriage equality. Five states, the District of Columbia, Canada and nine other countries have full marriage equality. More jurisdictions are proceeding rapidly toward it. Yet New York's domestic laws deny same-sex couples at least 1,324 legal rights and duties that married different-sex couples currently receive.

The City Bar does not advocate for civil unions or California-style domestic partnerships. In reality, states with civil unions and domestic partnerships have found these marriage imitations are poorly understood, erratically recognized and viewed as second-class by government officials and the public. Even if technically equivalent rights exist, if one same-sex partner is suddenly hospitalized and the other denied visitation and other next-of-kin rights, a later lawsuit is cold comfort, particularly when some courts simply refuse to give civil unions and domestic partnerships effect.

While New York grants opposite-sex couples who marry, whether in this state or elsewhere, a full, clearly established set of rights and duties, same-sex couples face a confusing array of relationship recognition rules outside New York, and selective recognition within New York. Same-sex couples are not adequately protected by New York's piecemeal recognition of same-sex relationships over the last two decades by statutes, executive orders and regulations, and court decisions. Despite the efforts of governors, state officials, local executives and legislators of both parties up to this point, the lack of equal marriage rights will generate decades of litigation, complex private domestic partnership agreements, and scattershot legislation and regulations meant to establish inheritance, divorce, child custody, pension and tort rights under a range of relationship recognition rules. Even as lower-income same-sex couples are priced out of the legal services that are needed to obtain recognition for their relationships, and talented workers grow to perceive our state as discriminatory and unwelcoming, New York will

incur enormous expenses in determining these rights. In contrast, full marriage equality is projected to add \$210 million to New York's economy in the three years after enactment.

Marriage equality applies only to government-granted civil marriages. It will *not* affect opposite-sex couples and their personal marriage choices, and will *not* affect religious beliefs or worship. No church, synagogue, mosque or temple will be required to marry same-sex couples or endorse their relationships. New York must follow the example of a growing number of U.S. states and foreign jurisdictions and grant same-sex couples equal marriage rights.

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.²⁵ 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.

Service Animals

Under the Americans with Disabilities Act (“ADA”), all that is required for an animal to be considered a “service animal” is that it be “individually trained to do work or perform tasks for the benefit of an individual with a disability”. In addition, a “private entity ... may not insist on proof of state certification before permitting the entry of a service animal to a place of public accommodation.” However, several New York State laws are inconsistent with these ADA definitions, creating confusion and the potential for unlawful

discrimination against persons using such service animals under federal law. For example, the New York State Human Rights Law definition of service animal includes that the animal must be trained “by a recognized guide dog training center or professional guide dog trainer.” However, New York State does not “recognize” any such “training centers” (even presuming “recognition” is to be by the state, rather than by one who might be accused of discriminatory conduct), nor does the state license “professionals” in such categories. Moreover, even were New York State to accord such “recognition” and/or “professional” licensure, it would make the provisions to be repealed no more worth enforcing since, in virtually all instances, the ADA and the New York City Human Rights Law prohibit discrimination against people with disabilities using service animals. Under the current State Human Rights Law, the proprietor or employee of a restaurant, store or other place of public accommodation, or a public employee, might be misled to believe an inquiry as to training or certification is permissible – resulting in a violation of the rights of the person with a disability and a valid complaint under the ADA and/or New York City Human Rights Law against the restaurant or other entity.

As a result, the City Bar has proposed revisions to several New York State laws to make them consistent with the definition of “service animal” under the ADA that is applicable throughout New York State.

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 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.²⁶

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).²⁷ 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.

Educating New Mothers about the “Expressing at Work” Bill

In 2009, the Legislature passed the Breastfeeding Mother's Bill of Rights (“BMBOR”). The BMBOR requires maternal health care facilities to provide information to mothers who have recently given birth about the benefits of breastfeeding and their rights to breastfeed. The bill does not, however, explicitly require the dissemination of information about the rights of nursing mothers to pump breast milk in the workplace pursuant to the 2007 Expressing at Work Law. If New York State truly wants to increase breastfeeding rates, this information is critical and must be disseminated. The Expressing at Work Bill amended the New York State Labor Law to require employers to “provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for her nursing child” and to “make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in privacy.”

Breastfeeding is critical to the health and wellbeing of children and their mothers because breast milk is the best and most complete source of nutrition and immunity-building for infants and breastfeeding has important health and economic benefits for mothers. The City Bar remains committed to supporting the implementation of and public education around the Expressing at Work Bill, in particular for low-income women, among whom breastfeeding rates are far lower than for middle and upper-income women and for whom, if they are working in non-professional jobs, it may be even more difficult to pump breast milk without access to private areas or unrestricted break time.

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.

In 2005, the Legislature passed a crucial bill for children, known as “the Permanency Bill.” Protracted stays in foster care can have lasting, detrimental effects on children. The Permanency Bill’s objective was to ensure that children did not linger in foster care longer than necessary and that they receive all of the services they need while they are dependent on the family court. To this end, the law requires that the family court hold a substantive hearing on each child’s situation every six months (twice as often as under prior law).

If implemented as designed, the law would speed reunification for children who can return home safely and adoption for those who cannot. In practice, however, the state’s failure to provide the necessary resources to implement the law has jeopardized the system’s ability to process cases efficiently and results in children spending longer periods in care. In particular, the failure to increase the number of Family Court judges to address the increase in the number of hearings required by statute has contributed to the present crisis in New York’s family courts.

Timely and effective permanency planning is vital to a child’s well-being. As such, we urge the Legislature to enact legislation that would extend permanency planning to include children who enter the family court system as Persons in Need of Supervision, Juvenile Delinquents, and Destitute Minors (defined as a child who, through no neglect on the part of its parent or guardian, is destitute, homeless, or without a place of shelter where supervision and care are available). In addition, when child welfare financing (Social Service Law Section 153-k) expires in June 2012, New York should consider a new funding model that better supports foster care than the current Foster Care Block Grant (which is also used to pay for private juvenile justice placements).

In addition, the City Bar recommends that the Legislature ensure that New York comes into full compliance with the federal Fostering Connections to Success Act of 2008, which added new requirements for state child welfare agencies to provide educational stability for children in foster care. Further state action is necessary in order to eliminate multiple school transfers for many children in foster care whose emotional, social, and academic development are severely compromised when their educational progress is so frequently disrupted. Specifically, the law now provides for the provision of reasonable transportation costs to keep a child in their school of origin after placement in care, unless after careful consideration by all of the stakeholders it is determined that remaining in his or her school of origin is not in the best interests of the child. Unfortunately, many local districts interpret this mandate to apply only to a child's initial placement in foster care and do not provide for school stability when a child changes foster care placements after his or her entry into care. Maintaining a stable school placement while the rest of their lives are in flux is critical to the well-being of children in care in New York, and should be a priority for the new administration.

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

As part of the New York State Fiscal Year 2010-2011 Adopted Budget, Article VII legislation was passed enacting Subsidized Kinship Guardianship in New York, effective April 1, 2011, but without agreement with regard to funding the state's share. The City Bar has supported the addition of this permanency option, which will offer children in kinship foster care - and their relatives - an important new option where the children cannot be reunified with their parents and their relative foster parents do not want to adopt and/or the child does not want to be adopted. Subsidized kinship guardianship will enable these children to achieve permanency, allowing these families the security of no longer having an open child welfare case.

The children who leave foster care to subsidized kinship guardianship should be supported much like the state supports children who leave foster care through subsidized adoptions. Such adoption funding has always remained outside of the Foster Care Block Grant and the City Bar urges the Governor to resolve funding for kinship guardianship in the same way. This would avoid diverting the limited resources intended to benefit foster children in state and local custody to those children outside of the foster care system.

Reform of the Juvenile Justice System

As was documented in the Department of Justice Report in 2009, Citizens' Committee for Children's Report in 2009, the Governor's Task Force in 2010, Governor Cuomo's Urban Agenda, and numerous other reports and media coverage, New York State's Juvenile Justice system is in urgent need of reform. The New York State Office of Children and Family Services (OCFS) facility placement system, which typically places children far from their families and communities, is expensive (costing approximately \$220,000 per child annually) and exposes young people to physical and psychological harm, abuse, and a woeful lack of education and mental health treatment, which results in a stunningly high recidivism rate (there is an 81% recidivism rate for boys).

Youth returning home from placement face barriers to enrolling in school and keeping the credits they earned in placement, face enormous challenges to reintegration with their families, and struggle to access supportive services and preparing for adulthood.

Community-based alternatives, in contrast, which provide intensive services to children and their families while they remain at home and in school, have much lower recidivism rates and cost far less in dollars than incarceration. Alternative to placement programs are not only cost-effective but more humane. They avoid the additional trauma of breaking children apart from their families, serve children better than incarceration, and serve our state as well.

The City Bar recommends that Governor Cuomo continue the reforms begun in the prior administration and implement the recommendations in the Governor's Task Force on Juvenile Justice. Specifically, we urge implementation of the following reforms:

- Close additional underutilized facilities;
- Eliminate the 12-month waiting period to close facilities;
- Reinvest savings into community-based alternative-to-detention and alternative-to-placement programs that produce better outcomes at considerably less cost;
- Increase oversight of educational support and credit transfer for youth in facilities and re-entering the community;
- Ensure youth in placement receive mental health services and substance abuse treatment when warranted;
- Establish a taskforce to review New York's age of criminal responsibility;
- Work with the counties to ensure a fair and equitable cost-sharing structure for both OCFS facilities and private placements; and
- Ensure that there is an independent oversight mechanism in place for both OCFS facilities and private placement facilities.

The City Bar has also proposed legislation which would grant judges more discretion in awarding Youthful Offender ('YO') status on teenagers who commit criminal acts. In order to give more Youthful Offenders the opportunity to rehabilitate and lead successful lives, the City Bar's proposed bill would delete those subdivisions of the YO statute that require a judge to find mitigating circumstances before conferring Juvenile Offender status on youth convicted of armed felony, leaving only sex crimes as requiring a finding of mitigating circumstances. The proposed bill makes no changes with respect to those crimes that are barred from YO consideration.

For the same reasons that the City Bar has proposed new legislation expanding judicial discretion to award YO status, we also oppose several pending bills (the "YO bills") aiming to do just the opposite by reducing judicial discretion to award YO status.²⁸ Given the experience that Youth Part judges have in dealing with violent teens, and their knowledge of the services available to troubled youth, the Legislature should defer to the expertise of Youth Part judges to identify adolescents who are capable of reform and to maximize their potential to become law abiding citizens. By limiting the discretion of

judges to give violent teens a chance at reform, the YO Bills conflict with the widespread understanding that teenagers lack the tools for decision making and impulse control that older defendants are expected to have.

XIII. Property

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, former Governors 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.

Title Insurance

New York is the center for the closing of major real estate transactions wherever real property is located. Multi-state transactions are handled by New York based title insurance companies and their agents who rely on a network of contacts in the various states to clear title and prepare the policies to be issued based on local laws, and to record closing documents. In New York, the title insurance service industry has a unique position in rationalizing title and related issues, and their role goes well beyond the mere issuance of title insurance policies. The City Bar opposes legislation which would establish a state-run title insurance entity, as it would engender great uncertainty in this industry, threatening public and private industries' confidence in real estate transfers, and would endanger the stability of marketable land transfers.²⁹ The argument advanced that the cost of title insurance is too high is currently within the control of the state to regulate, through the New York State Insurance Department. The ability to furnish title insurance services effectively and on a timely basis is crucial to the functioning of the real estate industry. Delays and the lack of flexibility in the title process would impair the efficient closing of real estate transactions, risking the expiration of mortgage commitments, increasing the cost of the transaction and potentially reducing the tax revenue collected.

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.³⁰ 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.³¹ This will better implement debt collection laws and ease the burden on the civil courts which have become overwhelmed with consumer debt cases.

In the same vein, the City Bar opposes legislation which would undermine longstanding efforts to combat “sewer service” - the practice of failing to serve court papers and filing false affidavits of service with the courts - in debt cases and other litigation.³² In recent years, New York courts have been deluged by a massive wave of consumer credit litigation. The victims of these cases are overwhelmingly low- and moderate- income New Yorkers, many of whom are elderly or disabled and nearly all of whom are unrepresented by counsel. As a result, each year hundreds of thousands of New Yorkers are deprived of their due process right to be heard before judgments are issued against them. The City Bar opposes changes to the law that would permit a finding of valid service if a server successfully completes *only one* of the two forms of service under CPLR 308(2) or 308(4) - that is, service of process can be completed by simply mailing the summons, apparently without attempting to undertake a more reliable form of service. This weakened requirement will lead to increased inaccuracies, shoddy practices, abuses and “sewer service,” as many servers will simply mail a summons without complying with the additional requirements, increasing the likelihood that defendants will not receive timely notice or understand the critical importance of responding to a summons and complaint because they only receive court papers in the mail. To upend longstanding New York law concerning the due process rights of defendants to receive proper service of an action against them at a time when process service abuses are only increasing, is insupportable.

Finally, the City Bar urges the enactment of the Consumer Credit Fairness Act³³ which would establish a three 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.

To help deal with the aforementioned issues, the City Bar supports legislation which will finally allow for the seating of eleven additional judges in New York City Civil Court.³⁴ In 1993 the Legislature authorized for the addition of eleven judgeships, but did not establish how these additional judgeships should be apportioned among New York City's five counties, leaving the positions unfilled for the past eighteen years.

With monetary jurisdiction up to \$25,000, New York City Civil Court handles cases primarily involving low-income litigants, 99% of whom are unrepresented. These cases pertain to, among other things, consumer credit, labor and services, medical services and personal property. New York Civil Court filings have tripled since 2001. In recent years, consumer debt cases in particular have skyrocketed: 241,195 consumer debt cases were filed in 2009. Judicial dockets are so overburdened that many unrepresented defendants in these cases are urged to waive defenses, not challenge "sewer" service, and settle cases that might otherwise be dismissed if heard on the merits.

It is a fundamental precept of our judicial system that all litigants have the opportunity to be heard. This simply cannot happen when there are not enough judges. The Legislature recognized its responsibility to provide equal access to justice when it initially passed legislation to increase the number of New York City Civil Court judges. This bill simply provides the mechanism for that to happen by identifying how many judges will come from each county.

Non-Profit Organizations

New York's unique system for categorizing non-profits can at times act as an obstacle for organizations attempting to gain non-profit status. 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.³⁵

Benefit Corporations

The City Bar supports the concept of legislation that would authorize the incorporation of benefit corporations. A "benefit corporation" would have a "general public benefit" purpose, which is defined as a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits. While the concept of a benefit corporation is supported, the City Bar recommends a number of changes be made to current benefit corporation legislation before it is enacted.³⁶ Such changes include:

- Clarifying the potentially conflicting duties of a director of a benefit corporation. Directors of benefit corporations must consider the effects of any actions on

various constituencies - including shareholders, employees, customers, the community, and the local and global environment – while at the same time having the “fiduciary duties of a director of a business corporation that is not a benefit corporation except to the extent those duties are inconsistent” with the provisions of the legislation;

- Allowing shareholders to determine which public benefits should be pursued by the benefit corporation (as expressed in its certificate of incorporation), notwithstanding the fact that those purposes may not fit neatly within the confines of an approved “third-party standard”; and
- Revisions to the definition of “minimum status vote”.

XV. 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.³⁷ 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.

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 for years the law fulfilled its purpose of requiring a thoughtful consideration of environmental impacts.

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.³⁸ 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. Legal Issues Pertaining to Animals

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.³⁹

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.⁴⁰

Protection of New York's animals also includes ensuring that no animal is put to death if there is a responsible alternative in the form of a reputable humane or rescue organization. While the City Bar supports this concept, it opposes proposed legislation which would require public shelters or pounds, authorized humane societies and societies for the prevention of cruelty to animals, to release animals to any "nonprofit, as defined in section 501(c)(3) of the internal revenue code, animal rescue or adoption organization" that requests possession of them.⁴¹ As written, the legislation does not contain sufficient anti-cruelty and anti-hoarding provisions; fails to consider the Mayor's Alliance for New York City's Animals or the potential for other collaborations or transfer agreements in New York State; and could jeopardize New York State's breed-neutral dangerous dog law. The City Bar suggests that further analysis be done before proceeding with such legislation

In addition, the City Bar supports legislation which would: (1) require that restitution be paid in the case of wrongfully seized animals;⁴² (2) require the education of humane animal treatment in schools;⁴³ (3) prohibit tethering a dog for more than 6 hours in a day;⁴⁴ (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;⁴⁵ (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;⁴⁶ (6) limit trapping prohibitions;⁴⁷ (7) create an animal population control fund and animal population control program;⁴⁸ and (8) prohibit the tail docking of cattle.⁴⁹

XVIII. 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 regulating the use of funds from disposed items.⁵⁰

Art Consignments

The City Bar proposes amendments to address certain deficiencies in provisions of the New York Arts and Cultural Affairs Law ("NYACAL") that are applicable to consignments of works of art to art merchants by artists, their heirs and their personal

representatives. Artists rely on sales of their work to earn a living, and art galleries are an important outlet for such sales. Galleries are compensated for selling artists' works usually by taking a percentage of the sales proceeds as a commission, but at times compensation may be in the form of a fixed fee or any amount the gallery receives for a work of art above a specified price agreed to by the artist and the gallery for the sale of a particular work of art. Many galleries do not segregate the portion of the sales proceeds that belong to the artist from the portion of the sales proceeds that is owed to the gallery. Instead, many galleries place the total sales proceeds in a single account that is also used to pay for the gallery's regular operating expenses.

When galleries that commingle funds encounter financial difficulties, they at times are unable to pay artists the sales proceeds they are owed because the galleries used those proceeds to pay the gallery's operating expenses. As a matter of law, the sales proceeds are property of the artist and galleries do not have discretion to use those proceeds for their own purposes. The existing provisions of Article 12 of NYACAL recognize this principle by providing that sales proceeds "are trust funds in the hands of the consignee for the benefit of the consignor." The existing NYACAL provisions, however, do not include any measures to enforce the trust funds principle and do not include penalties for galleries' failure to treat sales proceeds as trust funds. The lack of such measures and penalties enables galleries to continue using consignors' sales proceeds to pay the galleries' own operating expenses. When these galleries fail financially, the artists lose the money to which they alone are entitled.

The City Bar's proposed amendments are intended to give teeth to the existing trust property and trust fund provisions of Articles 11 and 12 of NYACAL by ensuring that children and heirs of an artist in certain cases qualify for the protections governing consignments and making it explicit that works of art consigned by artists, craftspeople, their heirs and personal representatives to art merchants are not, and shall not become, the property of the art merchant, or the art merchant's bankruptcy estate. In addition, the proposed amendments will provide clarity to prevent unintended interpretations of certain provisions from interfering with the intended application of these provisions.

XIX. 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.⁵¹

XX. 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. 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."⁵² We also oppose legislation which would ban the sale or rental of video games to minors "in contravention of the rating affixed thereto."⁵³ We believe that both bills are unconstitutional. 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. 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.

Right of Publicity

The City Bar opposes legislation which would create a brand new "right of publicity" for deceased persons by amending the Civil Rights Law. The bill would prohibit the use "for advertising purposes" or "for the purposes of trade" of the "persona" – defined as the "name, portrait, voice and/or picture" – of any person who died in the 70 years before the effective date of the legislation or who dies on or after such effective date without the written permission of such person's heirs, estate or licensees.⁵⁴ These rights would be granted retroactively to persons who are already dead and would last for 70 years after death. The City Bar urges caution in this area - not only is New York a state in which free speech and press have traditionally been a treasured value, but sections §§50 and 51 of the Civil Rights Law were crafted and have been applied for many decades with an eye towards serving both the needs of citizens living in the state to protect themselves from being used in advertising for products and services and the needs of citizens to enjoy the benefits of free speech and press. There are a number of issues with the current legislation, most notably the retroactive application of rights. Not only would the bill create a new class of complainants, but it would apply to uses created years before enactment of the

legislation, making previously permissible activities suddenly subject to liability and interfering with rights created under existing contracts. In addition, there is no time period within which rightsholders must register their claim of rights, making it difficult to determine who owns rights and can grant consent, placing an almost insurmountable burden on those who wish to use images and other identifying information of deceased individuals. Any amendment to Civil Rights Law §§ 50 and 51, laws that have generated over 100 years of precedent, should be made only for the most compelling reasons, which are not present in pending legislation.

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- ¹ S.2794, S.877, and S.6157 (2010)
 - ² S.1563
 - ³ A.2471/S.2323
 - ⁴ A.309
 - ⁵ A.5221
 - ⁶ A.8957-A/S.5968-A (2010)
 - ⁷ S.2904
 - ⁸ A.1756/S.683
 - ⁹ S.969
 - ¹⁰ A.810
 - ¹¹ S.885
 - ¹² A.1135/S.1020
 - ¹³ A.1373/S.1400
 - ¹⁴ S.5848 (2008)
 - ¹⁵ *See, e.g.,* A.3079/S.2630
 - ¹⁶ A.10492/S.7411 (2008)
 - ¹⁷ A.9641/S.6906 (2008)
 - ¹⁸ A.1055-B/S.936-A (2010)
 - ¹⁹ S.329
 - ²⁰ A.6966/S.4488 (2010)
 - ²¹ A.6439 (2010)
 - ²² A.590/S.1207
 - ²³ A.655
 - ²⁴ A.2063
 - ²⁵ A.5039/S.2873
 - ²⁶ S.2524
 - ²⁷ A.808
 - ²⁸ A.4523, A.4945 and S.2836
 - ²⁹ A.4168 and A.2015
 - ³⁰ A.3779/S.686
 - ³¹ A.1028/S.1439
 - ³² A.4928
 - ³³ A.633/S.677
 - ³⁴ A.4987/1780
 - ³⁵ S.3698 (2010)
 - ³⁶ A.4692/S.79
 - ³⁷ A.5275/S.1456
 - ³⁸ A.3279
 - ³⁹ A.1843/S.3153
 - ⁴⁰ A.311/S.558 (2008)
 - ⁴¹ A.9449-D/S.6412-D (2010)
 - ⁴² A.9400/S.3155 (2010)
 - ⁴³ A.427/S.3177 (2010)
 - ⁴⁴ S.1239
 - ⁴⁵ A.1928
 - ⁴⁶ A.2368
 - ⁴⁷ A.3816/S.2698
 - ⁴⁸ A.6158-A/S.4278 (2010)
 - ⁴⁹ A.1893
 - ⁵⁰ A.3957
 - ⁵¹ A.8398/S.5636 (2010)
 - ⁵² A.9310-A and A.11717/S.6401-A (2008)
 - ⁵³ S.5888-A (2008)
 - ⁵⁴ S.3217

* *Unless otherwise indicated, bill numbers are from the 2011/12 legislative session.*