

2016 NEW YORK STATE LEGISLATIVE AGENDA

NEW YORK CITY BAR ASSOCIATION



NEW YORK
CITY BAR



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INTRODUCTION

The New York City Bar Association (the “City Bar”), which was founded in 1870, is an independent organization and professional home for over 24,000 members dedicated to facilitating and improving the administration of justice and to promoting reform of the law. The City Bar accomplishes this mission by harnessing the expertise of the legal profession to identify and address legal and public policy issues. Our 160 committees focus on specific practice 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.

The City Bar’s committees generate dozens of reports over the course of each legislative session. Our **2016 New York State Legislative Agenda** represents only a portion of those positions. It focuses on issues that are relevant to the current legislative debate or of particular importance to the City Bar, as well as legislative proposals drafted by our committees.*

SUMMARY

- Support efforts to bring meaningful ethics, rules and campaign finance reform to Albany.
- Support the Judiciary’s 2016-17 Budget Request, including adequate funding for civil legal services.
- Advance policies and reforms that will reduce mass incarceration, starting with raising the age of criminal responsibility to 18 years old for all crimes, enhancing alternatives to incarceration, and allowing for sealing of criminal records under certain circumstances.
- Support legislation that would allow New York to recognize equivalent out-of-state occupational licenses for military spouses.

* To view a complete listing of our policy positions, visit <http://www.nycbar.org/issues-and-policy/overview>.

- Extend Temporary Disability Insurance benefits to cover family care leave from the workplace.
- Building on the progress achieved through last year's enactment of much of the Women's Equality Act, support efforts to: 1) permit the award of reasonable attorneys' fees, costs and exemplary damages to a prevailing plaintiff in all cases involving unlawful discriminatory practices under the New York Human Rights Law, not just in cases of gender discrimination; and 2) recognize a woman's fundamental right to make decisions regarding her reproductive health, and 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.
- Modernize New York's public procurement construction laws to provide public owners with a wider variety of procurement and delivery modes, as necessary and appropriate, to reduce costs, speed delivery and improve quality and safety.
- Support access to justice initiatives, including proposals to consolidate the state's major trial courts and requiring judicial appointments by a commission of lawyers and non-lawyers.
- Advance City Bar-drafted bill to amend the Arts and Cultural Affairs Law to enhance protections under the law for art authenticators.
- Support legislation to reform and modernize the administration of class actions in New York's courts by amending Article 9 of the Civil Practice Law and Rules.
- Advance legislation, along with the New York State Bar Association, to amend the Judiciary Law to provide that communications between a consumer of legal services and a legal referral service or lawyer referral service be deemed to be privileged on the same basis as the privilege provided by law for communications between attorney and client.
- Advance City Bar-drafted legislation to amend the Real Property Tax Law to coordinate the treatment of three types of tax transparent entities eligible for real property tax abatements.
- Oppose legislation concerning jurisdictional consent by foreign business organizations authorized to do business in New York.

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Support efforts to bring meaningful ethics, rules and campaign finance reform to Albany

The City Bar is concerned that the public overwhelmingly perceives that a person's access to and influence on state government and its policymakers is directly proportional to the amount of money that person can contribute to an elected official's campaign coffers. The ever-present spectre of "money in politics" combined with ethical scandals and a veil of secrecy around some legislative activities erodes public trust and disincentivizes the public from participating in the democratic and electoral processes. A scandal-weary public is ready for change. We support three main areas for reform: strengthen existing ethics laws and truly empower the agency that enforces them; provide greater transparency in the way the legislative process works; and create a public campaign finance system for all New York elections. We recently [applauded](#) Governor Cuomo's inclusion of some of these issues in his proposed 2016-17 Executive Budget; however, we urged him to strengthen the proposal by making a few key 30-day amendments.

Ethics Reform. With the convictions of both legislative leaders last year, questions about the source, influence and disclosure of outside income, particularly in cases of attorney-legislators, will continue to be scrutinized by the press and the public. Last year's budget language enhanced the disclosure requirements for legislators receiving outside income and, if followed in both letter and spirit, more legislators will disclose more information about their sources of outside income than in the past. The final budget deal also included a procedure whereby legislators can seek exceptions to disclosure, guided by a series of factors. We hope that those factors will be interpreted in a way that favors disclosure and that exceptions will be granted only where the need to keep a client's identity confidential truly outweighs the public's right to transparency.

The value of legislator disclosures is only as good as the agency that enforces them. The City Bar has long championed the need for a single independent agency that would be principally responsible for overseeing and enforcing ethics laws for the Executive, the Legislature and lobbyists alike. After careful analysis of the work undertaken by the Joint Commission on Public Ethics (JCOPE) since its inception in 2011, the City Bar and Common Cause [concluded](#) in a 2013 report that JCOPE is not acting with sufficient vigor and, in certain circumstances, JCOPE is hampered by legislatively imposed limitations. Although JCOPE recently has demonstrated willingness to issue advisory opinions on complex issues, many of the recommendations in the report remain outstanding. These changes could be undertaken immediately – without legislation - in order to strengthen JCOPE, along with the following legislative recommendations: 1) eliminate the express political test for gubernatorial appointments; 2) reduce gubernatorial appointments to four; 3) reduce legislative leader appointments to a total of six; 4) add appointments by the Chief Judge, the Attorney General and the Comptroller; 5) make the size of the Commission an odd number, namely thirteen; and 6) eliminate the political party component of the special vote requirement for enforcement decisions. Making changes to strengthen JCOPE would signal to the public the Legislature's true commitment to ethics reform.

Rules Reform. It is in the public's interest to have a Legislature that is transparent, deliberative and accountable to the citizens of the state. 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. 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.

The City Bar also [supports](#) legislation requiring that the proceedings and voting records of committee and session activities conducted by both houses be posted online. New Yorkers should be able to easily navigate the legislative websites and find information. In this digital age, travel to Albany should no longer be a prerequisite to information-gathering about the legislative process and a particular bill's activity.

Campaign Finance. The City Bar supports public campaign financing in New York elections. We believe that, as guiding principles, campaign finance reform can be best achieved through: 1) the voluntary public financing of political campaigns at levels designed to attract candidates into the public financing program; 2) stricter limits on political contributions; 3) enhanced disclosure of campaign contributions and expenditures; 4) more effective enforcement of campaign financing laws; 5) curbs on transfers by legislative party committees; 6) effective regulation of "independent" expenditures on campaigns that are coordinated with a candidate and 7) stricter controls over the use of funds raised for campaigns. The City Bar [supported](#), with recommendations, the Governor's proposal in his Executive Budget to extend public campaign finance to candidates seeking election as delegates to the next Constitutional Convention, should the voters decide in November 2017 that a convention should be held.

Support the Judiciary's 2016-17 Budget Request, including adequate funding for civil legal services

The City Bar has long been committed to providing fair and equal access to justice, which we address both through policy initiatives and providing direct legal assistance. We continue to advocate for an adequate funding of the federal Legal Services Corporation and have supported each of the increases in legal services funding presented in recent State Judiciary budgets. Most recently we [supported](#) the Judiciary Budget Request for a \$15

million increase in civil legal services funding to help ensure equal access to justice for low income New Yorkers facing housing, consumer debt and other legal problems pertaining to the essentials of life. Adequately funded legal services help domestic violence victims, senior citizens, and the formerly incarcerated seeking reentry into society, as well as other vulnerable individuals and families. The fact that nearly two million people continue to enter New York courthouses every year to fend for themselves without counsel is testimony to how much more we need to do. The combination of increased caseloads with more pro se litigants not only adds to the burden on judges and staff, but also represents a fundamental imbalance in the justice system. Civil legal services provide an essential safety net to those New Yorkers most at risk and limits hardships that are often more burdensome on government in the long run.

Advance policies and reforms that will reduce mass incarceration, starting with raising the age of criminal responsibility to 18 years old for all crimes, enhancing alternatives to incarceration, and allowing for sealing of criminal records under certain circumstances

The United States has the highest rate of incarceration in the world. With only 5% of the world's population, we incarcerate 25% of the world's prisoners, translating into 2.3 million people behind bars. While no one doubts that incarceration is generally appropriate to protect society from those who commit violent offenses, it has, unfortunately, become the default remedy for a host of non-violent offenses in instances where other more effective remedies are available. While the adverse effects of this approach have been felt by many, our country's massive and reflexive use of incarceration as the solution to all criminal problems has had a disproportionate (and devastating) impact on African-American and Latino young men. Studies have also shown that our current levels of incarceration are shockingly expensive, costing taxpayers billions and billions of dollars each year. Over-incarceration has other extraordinarily damaging effects, including contributing to the poverty rate and long-term unemployment, and stigmatizing those who have served time in prison in numerous ways.

The City Bar [supports](#) efforts, both through legislation and other initiatives that will reduce mass incarceration, enhance the fairness of our criminal justice system, reduce racial disparities in sentencing, and, at the same time, protect public safety:

- [enact](#) legislation to raise the age of juvenile jurisdiction from 16 to 18 years old;
- repeal or reduce mandatory minimum sentencing provisions;
- reduce the sentences recommended by sentencing guidelines and similar laws for non-violent offenses;
- expand the sentencing alternatives to prison including drug programs, mental health programs and job training programs; and, in cases of incarceration, expand the availability of rehabilitative services, including counseling and

- educational opportunities, during and following incarceration so that individuals can successfully reenter society and avoid recidivism;
- eliminate or reduce financial conditions of pretrial release; and
- provide opportunities for individuals with misdemeanor and non-violent felony convictions to [seal](#) those records to prevent employment and other discrimination.

Support legislation that would allow New York to recognize equivalent out-of-state occupational licenses for military spouses

The City Bar [supports](#) legislation which would allow New York to recognize equivalent out-of-state occupational licenses for military spouses. Enactment of this legislation would remove a significant and unnecessary burden for military families ordered to New York by eliminating the need for a military spouse to redo licensing requirements they completed in another state. Licensure constraints represent one of the most significant financial hurdles for military families. Allowing spouses who already have an out-of-state license that meets or exceeds New York's standards to begin working sooner would assist military families and the overall state economy. Every other state in the country has passed similar legislation. It costs no money, removes no sources of state revenue, requires adherence to New York's licensing standards, and leaves authority regarding licenses with the same department secretaries. Moreover, the New York Board of Law Examiners has already made a similar accommodation for military spouses with out-of-state law licenses. There is no reason that a similar provision should not be made for the 100-plus other professions that require a license.

Extend Temporary Disability Insurance benefits to cover family care leave from the workplace

New York's workers' compensation law and insurance law should be amended to provide partial wage replacement to workers who need time off to care for a seriously ill family member or to bond with a new child. This program could work in conjunction with New York's existing Temporary Disability Insurance (TDI) program. At present, TDI covers leave related to a worker's own illness or injury, including pregnancy and childbirth, but does not cover any form of leave related to the care of others. With a TDI structure already in place, New York is in position to expand the program to provide limited wage replacement for individuals who need to take a family leave from the workplace. Legislation permitting wage replacement for family leave has passed in California, New Jersey, Rhode Island and Washington.

Providing family care leave is critical to the health, wellbeing, and economic security of New York's working families. Family and work patterns have shifted dramatically over the past several decades, creating an urgent need for more robust family leave policies. The federal Family and Medical Leave Act (FMLA), which was enacted in 1993, guarantees

up to 12 weeks of unpaid, job-protected leave for employees of covered entities. However, because FMLA guarantees only unpaid leave in workplaces with 50 or more employees, many eligible workers who need to take family leave are not able to do so. The lack of family leave benefits as well as job protection for persons employed by uncovered entities means that a significant percentage of the U.S. workforce cannot effectively balance work and family responsibilities. These issues are even more confounding for women, who continue to be the primary caregivers for sick, elderly and disabled family members and low-income workers, who are less likely to have employer-provided family leave benefits.

It is time for New York to provide a meaningful way for employees to fulfill their work and family responsibilities. Providing family leave benefits will promote economic security and support family wellbeing. For these reasons, the City Bar [urges](#) the Legislature to pass legislation extending TDI benefits to provide partial wage replacement to all New York employees who need to take family care leave from the workplace, along with job protection upon return from leave.

Support efforts to: 1) permit the award of reasonable attorneys' fees, costs and exemplary damages to a prevailing plaintiff in all cases involving unlawful discriminatory practices under the New York Human Rights Law; and 2) recognize a woman's fundamental right to make decisions regarding her reproductive health

Building on the progress achieved through last year's enactment of much of the Women's Equality Act, the City Bar supports efforts to 1) permit the award of reasonable attorneys' fees, costs and exemplary damages to a prevailing plaintiff in all cases involving unlawful discriminatory practices under the New York Human Rights Law, not just in cases of gender discrimination; and 2) recognize a woman's fundamental right to make decisions regarding her reproductive health, and 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.

Legislation providing for an award of attorneys' fees only in cases of sex discrimination under the State Human Rights Law (SHRL) was originally part of the omnibus Women's Equality Act, but was ultimately enacted as a standalone bill. In our view, the award of attorneys' fees in only one class of cases is arbitrary and inequitable; the City Bar therefore [supports](#) an approach in which attorneys' fees are recoverable in all proven cases of discrimination under the SHRL, not just one subset. Plaintiffs subject to, for example, race-based or disability-based discrimination in places of public accommodation should have equal opportunity to pursue their claims to a successful outcome as are individuals subject to sex-based discrimination. Moreover, discrimination does not always fall neatly into one category, and women may experience discrimination on account of both their sex and other unlawful factors. Limiting attorney's fees to sex discrimination ignores the complexity of discrimination and will create potential new obstacles, such as

arguments that a plaintiff is only entitled to a portion of her attorney's fees because her claims involved sex and other forms of discrimination.

The City Bar urges the Legislature to uphold the principles of individual liberty and privacy enunciated in Roe v. Wade, 410 US 113 (1973), as was originally proposed in the Women's Equality Act. 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 recognizes a woman's fundamental right to make decisions regarding her reproductive health, and 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.

Modernize New York's public procurement construction laws to provide public owners with a wider variety of procurement and delivery modes, as necessary and appropriate, to reduce costs, speed delivery and improve quality and safety

For the past ten years, the City Bar has reviewed the statutory scheme for New York's built environment, focusing primarily on those laws that regulate construction for public projects. The result of this review is clear: New York needs to address its outdated, inefficient and inflexible built environment laws. The ABA's Model Procurement Code for Public Infrastructure Procurement (MCPIP) provides an excellent basis for statutory language. With the MCPIP as a foundation, the state should convene a reform commission that brings all related stakeholders to the table to establish a new procurement code that is both modern and reflective of New York State's particular history and construction markets. We urge that the commission be given a deadline to complete its work, so that this necessary reform can be accomplished without too much additional time passing. By modernizing its public construction procurement laws, New York can best allocate and protect its significant investments on the horizon. With the wide range of infrastructure projects the state will be undertaking in the coming term the time to reform New York's built environment laws is now.

Support access to justice initiatives, including proposals to consolidate the state's major trial courts and requiring judicial appointments by a commission of lawyers and non-lawyers

Core to the City Bar's mission is ensuring the fair and effective administration of justice. Court simplification and requiring commission-based judicial appointments of judges and are two ways to achieve those goals.

The City Bar has long supported proposals to consolidate the state's major trial courts, in the 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](#) that would consolidate the state's major trial courts 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.

To make court consolidation truly effective, we believe it should be bolstered by changes to our state's judicial selection system to provide for a commission-based appointment system. A commission-based appointment system would reduce the role of politics and lead to a more qualified judiciary. Under this approach, broad-based, diverse, and independent judicial qualifications commissions, composed of lawyers and non-lawyers, would recommend a limited number of candidates per vacancy to the appointing authority, and that person could appoint only from among those candidates. The candidates for appointment would be evaluated on intellectual capacity, integrity, independence, experience, temperament, fairness. The limit on the number of candidates who can be released from the commissions will ensure that only the most meritorious are proposed instead of all who are adequate.

[Advance City Bar-drafted bill that would amend the Arts and Cultural Affairs Law to enhance protections under the law for art authenticators](#)

The City Bar [supports](#) legislation which addresses certain deficiencies in provisions of the New York Arts and Cultural Affairs Law: namely, the absence of protections under the law for authenticators in rendering independent, good-faith opinions about the authenticity, attribution and authorship of works of fine art. The art market is peculiarly vulnerable in that the value of works of art is dependent upon their authenticity. Although authenticity is in large part the driver in art transactions, authenticity can be difficult to determine. Not surprisingly, in view of the necessary imperfections of the authentication process, authenticators must practice their profession at their own risk. They have been sued in the course of rendering opinions in good faith about the authenticity, attribution or authorship of artworks on a variety of theories, such as negligence, negligent misrepresentation, fraud, product disparagement, defamation, as well as on antitrust grounds. Usually, under the law, the expert prevails, after having spent thousands of hours and dollars on a legal defense rather than practicing his or her profession.

Acknowledging authenticity's unique role as a driver in the art market, the vulnerability of the market to fakes and forgeries flooding the stream of commerce and, consequently, the considerable legal exposure of authenticators who practice their

profession in good faith, this proposal defines with clarity that segment of the art market that should be encouraged to practice its profession, and provides a mechanism through which authenticators can do so and thereby promotes legitimate commerce in New York's thriving art market.

Support legislation to reform and modernize the administration of class actions in New York's courts by amending Article 9 of the Civil Practice Law and Rules

The City Bar supports amending Article 9 of the Civil Practice Law and Rules to reform and modernize the administration of class actions in New York's courts. In 1975, New York enacted its current Article 9 for class actions, but the statute has not been materially changed since. In 2003, significant changes were made to Rule 23 of the Federal Rules of Civil Procedure, some of which have been adopted in the proposed amendments to Article 9. Generally, the amendments would: 1) permit class certification for actions demanding a statutory penalty or minimum measure of recovery; 2) amend language which disfavors class actions against governmental entities; 3) adopt language stating that motions for class certification be made "at an early practicable time" rather than within 60-days; 4) provide guidance with specified factors to be considered in appointing class counsel; and 5) provide a more flexible notice provision concerning discontinuance, dismissal or compromise of the class action. The City Bar believes the proposed amendments are appropriate to improve the administration of class actions and to continue to restore New York to a leadership role in commercial litigation.

Advance legislation to amend the Judiciary Law to provide that communications between a consumer of legal services and a legal referral service or lawyer referral service be deemed to be privileged on the same basis as the privilege provided by law for communications between attorney and client

Along with the New York State Bar Association, the City Bar proposes amending §498 of the New York Judiciary Law to provide that communications between a consumer of legal services and a legal referral service or lawyer referral service be deemed to be privileged on the same basis as those provided by law for communications between attorney and client. This privilege could be waived only by the consumer of legal services. Section 498 establishes immunity from civil action for an LRS that provides a referral without charge and as a public service, without malice, and in the reasonable belief that such referral was warranted; however, the statute does not contain a confidentiality provision. By explicitly ensuring that such services do not carry the risk of a lawsuit, Section 498 was enacted in recognition of - and in order to encourage - the important service provided by LRS's. This legislation would further that section's original intent. Annually, hundreds of thousands of New Yorkers - as well as consumers of legal services

from other states and countries – rely upon our local LRS's to help find an appropriate lawyer or be directed to an appropriate agency, government entity, non-profit program or organization, or other resource. The proposed amendment will resolve any potential question about the confidentiality of communications between the 20 LRS's in New York and the hundreds of thousands of people who rely on them for help.

Advance City Bar-drafted legislation to amend the Real Property Tax Law to coordinate the treatment of three types of tax transparent entities eligible for real property tax abatements

The City Bar has proposed amendments to the Real Property Tax Law to coordinate the treatment of tax transparent entities eligible for real property tax abatements. Tax transparent entities are not taxed either in a representative capacity or in their own capacity as a tax paying entity, but the tax is levied on the investors, in their domicile, on their share of income in the entity. This proposal builds on recommendations suggested by the City Bar to legislation enacted in 2013. The 2013 legislation provided that tax abatements could be granted to a cooperative or condominium dwelling unit held in trust for the benefit of a person or persons who would otherwise be eligible for the abatement had they owned the unit directly. The proposed amendments would extend this qualification for a real property tax abatement to: 1) legal life estates; 2) single member limited liability companies; and 3) multiple member limited liability companies owned exclusively by spouses.

Oppose legislation concerning jurisdictional consent by foreign business organizations authorized to do business in New York

The City Bar [opposes](#) legislation which would provide that a foreign corporation's application for authority to do business in New York constitutes consent to jurisdiction of the courts of this state and a surrender of such application constitutes withdrawal of such consent. The legislation is being advanced as a way to provide certainty regarding personal jurisdiction over foreign entities, which has been disrupted by recent court cases. The City Bar believes that the policy rationales for the proposed legislation should be subject to further debate. The rationale for the legislation do not seem to justify the potential conflicts with the Due Process and Commerce Clauses of the U.S. Constitution. These constitutional issues are already being litigated in New York and other courts, and it would be prudent to await further judicial clarification before enacting such legislation.