

NEW YORK  
CITY BAR

2017



# NEW YORK STATE LEGISLATIVE AGENDA

NEW YORK CITY BAR ASSOCIATION



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### INTRODUCTION

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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’s committees generate dozens of reports over the course of each legislative session. Our **2017 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.<sup>1</sup>

### Support efforts to bring meaningful and comprehensive ethics, rules and election law reform to Albany

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**Ethics Reform.** 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 that JCOPE is not acting with sufficient vigor and, in certain circumstances, JCOPE is hampered by legislatively imposed limitations.<sup>2</sup> 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.

**Rules Reform.** 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

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<sup>1</sup> To further explore the agenda, please visit <http://www.nycbar.org/issue-policy/issue/new-york-state-legislative-agenda>. To learn more about all of our policy positions, visit <http://www.nycbar.org/issue-policy>.

<sup>2</sup> “Hope for JCOPE”, available at <http://www2.nycbar.org/pdf/report/uploads/Hope-for-JCOPE-Report.pdf>.

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.<sup>3</sup>

**Campaign Finance Reform.** 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 also supports closing the "LLC Loophole," which allows large donors to circumvent contribution limits and disclosure requirements put in place to protect election integrity.

**Election Law Reform.** The City Bar supports: 1) a single primary for both federal and state offices and party positions, which would maximize voter turnout for the primary (which has been decidedly – and dangerously – low in recent election cycles) and cut the costs of running additional separate primary elections;<sup>4</sup> 2) no-excuse absentee voting to allow New York registered voters who find themselves unable to appear at their local poll site on Election Day, regardless of the reason for their absence, to vote in advance of the election using an absentee ballot;<sup>5</sup> and 3) amendments to the provisions governing personal use of campaign contributions, which are vague as drafted and could be interpreted so that virtually any personal use of campaign contributions can be justified.<sup>6</sup>

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<sup>3</sup> See reports under the "Legislative Rules Reform" subject area here: <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports>.

<sup>4</sup> See [http://www2.nycbar.org/pdf/report/uploads/9\\_20072588-NewYorkPrimaryDay.pdf](http://www2.nycbar.org/pdf/report/uploads/9_20072588-NewYorkPrimaryDay.pdf).

<sup>5</sup> See <http://www.nycbar.org/pdf/report/uploads/20071936-NoExcuseAbsenteeBallotReport.pdf>.

<sup>6</sup> See <http://www2.nycbar.org/pdf/report/uploads/20072971-RestrictionsPersonalUseofCampaignFundsGovtEthicsReportFINAL4.12.16.pdf>.

## Advance criminal justice reform and policies that will reduce mass incarceration<sup>7</sup>

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**Raise the Age of Criminal Responsibility.** The age of criminal responsibility in New York should be raised to 18 years old for all crimes because that change will protect the well-being of our youth, reduce recidivism and improve public safety.<sup>8</sup> Under current law, New York stands nearly alone in prosecuting all 16- and 17- year-olds in the adult criminal justice system, regardless of the severity of the alleged crime. If young people are detained or incarcerated because of a criminal court order, they are confined in adult prisons and jails, saddling them with the lifetime consequences of a criminal conviction despite the fact that young adult brains do not have the same decision-making capacity as adult brains. New York remains stubbornly behind the national consensus on this issue; it is one of only two states (the other being North Carolina) that prosecutes all youth as adults once they turn 16. Youth are safer and fare better when held in age-appropriate facilities which implement a child welfare model and other best practices, such as trauma-informed care. New York needs to change the way it handles youth in the criminal justice system.

**Enact Comprehensive Sentencing Reform.** We support efforts to review New York's sentencing laws and reform them in a way that is fair and effective while also maintaining public safety:

- Repeal or reduce mandatory minimum sentencing provisions where possible and reduce the sentences recommended by sentencing guidelines and similar laws for non-violent offenses.
- The Domestic Violence Survivors Justice Act, which would provide greater discretion to judges when sentencing defendants who are survivors of domestic violence.<sup>9</sup>
- The One Day to Protect New Yorkers Act would reduce the maximum sentence for class A misdemeanor offenses from one year to 364 days, thereby mitigating the disproportionate consequences facing immigrant New Yorkers—including lawfully present permanent residents (green card holders), asylees, and victims of domestic violence – who may face deportation for a single minor conviction.<sup>10</sup>

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<sup>7</sup> See “Mass Incarceration: Where Do We Go From Here?” to learn more about the issues throughout this section. Available at <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/mass-incarceration-where-do-we-go-from-here>.

<sup>8</sup> See <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/statement-on-raising-the-age-of-criminal-responsibility>.

<sup>9</sup> See <http://www2.nycbar.org/pdf/report/uploads/DVSurvivorsJusticeDVReportFINAL6.16.11.pdf>.

<sup>10</sup> See <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-the-one-day-to-protect-new-yorkers-act>.

- The City Bar will be advancing a “Second Chance Act”, which would allow certain individuals to apply for reduced sentences with their sentencing judge. Petitioners would be allowed to present evidence about good behavior and achievements while incarcerated, as well as information about their age, personal circumstances, and medical condition. Permitting this mid-sentence reset opportunity would incentivize good behavior and participation in educational and vocational programs.
- Expand the sentencing alternatives to prison including drug programs, mental health programs and job training programs.

**Decriminalize small amounts of marijuana.** The City Bar supports efforts to reform New York’s drug laws to address the problems inherent in the current marijuana enforcement regime, which often results in the over-prosecution and jailing of non-violent offenders.

**Eliminate or Reduce the Financial Conditions of Pretrial Release.** Incarceration at the pretrial stage, even for a few days, has terrible downstream repercussions for individuals, disrupting lives and leading to a higher likelihood of further incarceration, for longer periods and also higher rates of rearrest. Posting bail, even a “low” amount of \$500 or \$1,000, may be challenging for some individuals. On any given day in New York City, approximately 400 individuals are detained on bail of less than \$2,500. As long as New Yorkers who have not been convicted of any crime are jailed simply because they are too poor to pay bail, the need for reform is undeniable. Judges should be encouraged to use all facets of the current bail system to reduce unnecessary incarceration and should set bail amounts only after taking into account an individual’s ability to pay. The City Bar also opposes efforts that would require judges to consider public safety as a factor in setting bail.<sup>11</sup>

**Support Programs and Policies that Allow Incarcerated Individuals to Successfully Reenter Society.**

- 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.
- Seal or expunge criminal records in certain circumstances so that individuals do not face the kinds of collateral consequences that create virtually insurmountable barriers to successful reentry into their communities.
- Advance legislation that would help those with criminal records find employment, such as a statewide “Fair Chance Act” and a uniform “Certificate of Rehabilitation” in lieu of the current Certificates of Relief from Disabilities and Good Conduct.

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<sup>11</sup> See <http://www2.nycbar.org/pdf/report/uploads/20072490-BailLegislation.pdf>.

- The Fair Access to Education Act, which would prevent discrimination in the college admission process for individuals previously convicted of one or more criminal offenses.<sup>12</sup>

## Support the Judiciary's 2017-18 Budget Request, including adequate funding for civil legal services

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The City Bar continues to advocate for an adequate funding of the civil legal services and supports the Judiciary Budget Request for 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.<sup>13</sup> 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.

## Support the full funding of indigent legal services

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The right to counsel in criminal proceedings is guaranteed by the U.S. Constitution, the New York Constitution and state law; and in Gideon v. Wainwright, the Supreme Court held that states are required to provide counsel to any person charged with a crime who cannot afford a lawyer. However, New York's County Law 18-B makes the 62 state counties responsible for providing indigent defense services, and has resulted in a patchwork of services that falls short of the constitutional mandate. The need for a unified approach to indigent defense has been shown in the findings of the 2004 Kaye Commission study on the effectiveness of indigent criminal defense services across the State and the 2014 settlement of Hurrell-Harring v. State of New York, which required that adequate criminal defense funding and quality standards be provided to five underfunded counties. The City Bar supports legislation that would require the state to reimburse every county for the full amount of its expenditures on indigent defense services and which would establish statewide standards and regulations for such representation.<sup>14</sup>

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<sup>12</sup> See <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-the-fair-access-to-education-act>.

<sup>13</sup> See <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-the-state-judiciarys-2017-18-budget-request>.

<sup>14</sup> See <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/letter-to-governor-cuomo-urging-the-enactment-of-legislation-to-provide-for-the-full-funding-of-indigent-defense-services-in-new-york>.

## Promote comprehensive reproductive health policies and age-appropriate sexual education

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**Comprehensive Sexual Education.** While New York mandates health education for all students, there is no requirement for sex education. It is up to each local school district to decide whether to provide students additional sex education instruction and what that education might entail. A sex education program can only be considered comprehensive when it is medically accurate, age-appropriate, free from bias, and includes information about contraception in addition to abstinence. A program that contains all of these elements is the most effective way to help young people learn relationship and decision-making skills, postpone intercourse, reduce their number of sexual partners, decrease their chance of facing an unintended pregnancy, and reduce their chance of contracting a sexually transmitted infection. Comprehensive sex education is also an important tool in combating dating violence. New York should establish an age-appropriate sex education grant program to ensure all school districts have the resources necessary for these important courses.

**Access to Contraception.** The City Bar urges the Legislature to support legislation and policy initiatives to give oral contraceptives over-the-counter ("OTC") status.<sup>15</sup> Beyond the critical role that contraception plays in supporting women's ability to participate equally in the social, political and economic life of our nation, there are sound scientific and medical bases for making oral contraceptives available without a prescription. The prescription requirement bars access to these medications for many women and puts those women at greater risk of unintended pregnancies and poor health outcomes.

**Reproductive Health.** New York should enact legislation that will uphold 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. The City Bar 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.

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<sup>15</sup> See <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/letter-to-state-leaders-and-lawmakers-urging-otc-status-for-oral-contraceptives>

## Amend the Arts and Cultural Affairs Law to re-incentivize art authenticators and restore integrity to art transactions in New York

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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.<sup>16</sup> An increasingly hostile, litigious environment has raised insurance costs and created levels of risk that have driven people from the field. While in the course of rendering opinions authenticators are often sued to call into question their findings. Although experts nearly always prevail under the law, the costs of vindication are great: thousands of hours and dollars spent on legal defense. Even carrying liability insurance (which can be particularly burdensome to an individual authenticator) does not always guarantee protection. The proposed legislation 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.

## Reform and modernize the administration of class actions in New York's courts by amending Article 9 of the Civil Practice Law and Rules

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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.<sup>17</sup> In 1975, New York enacted its current Article 9 for class actions, but the statute has not been materially changed since. 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.

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<sup>16</sup> See <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-on-legislation-to-help-re-incentivize-art-authenticators-and-restore-integrity-to-art-transactions-in-new-york>.

<sup>17</sup> See <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-the-enactment-of-the-uniform-voidable-transactions-act-in-new-york>.

## Enact the Uniform Voidable Transactions Act, which would modernize New York’s laws related to fraudulent conveyances

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The City Bar supports enactment of the Uniform Voidable Transactions Act (the “UVTA”), promulgated by the Uniform Law Commissioners in 2014.<sup>18</sup> The UVTA would replace the current provisions in Article 10 (§§ 270-281) of the Debtor and Creditor Law, which are based on the Uniform Fraudulent Conveyance Act (the “UFCFA”), which was enacted in New York in 1925. The UVTA provides remedies available to creditors injured by what traditionally have been referred to as “intentional” or “constructive” fraudulent conveyances or transfers—property transferred or obligations incurred (a) by a debtor with actual intent to hinder, delay or defraud its creditors or (b) for less than fair consideration by an insolvent or undercapitalized debtor. New York’s Fraudulent Conveyance Law has not been updated significantly in 90 years and is based on a “model” statute promulgated in 1918. Only New York and Maryland retain the UFCFA. The proposed legislation would modernize the New York statute to reflect 100 years of developments in commercial law, legal terminology and practice and resolve many open questions under the UFCFA. It would also bring New York’s law in line with Federal law and the law of most states; current inconsistencies lead to confusion and disparate results depending on what law is applied while also fueling costly litigation over choice-of-law issues.

## Provide that communications between a consumer of legal services and a legal referral service or lawyer referral service be deemed to be privileged

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Along with the New York State Bar Association, the City Bar supports amending the New York Judiciary Law to provide that communications between a consumer of legal services and a legal referral service or lawyer referral service (collectively “LRS”) be deemed to be privileged on the same basis as those provided by law for communications between attorney and client.<sup>19</sup> This privilege could be waived only by the consumer of legal services. The law currently 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. 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.

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<sup>18</sup> See <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-legislation-to-reform-and-modernize-the-administration-of-class-actions-in-new-yorks-courts>.

<sup>19</sup> See <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/proposed-amendments-to-the-nys-judiciary-law-regarding-confidentiality-protections-for-consumers-of-legal-services-contacting-a-legal-referral-service-or-lawyer-referral-service>.

## 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

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The City Bar has extensively 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.<sup>20</sup> The American Bar Association'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. By modernizing its public construction procurement laws, New York can best allocate and protect its significant investments on the horizon.

**To further explore the 2017 New York State Legislative Agenda and learn about the related reports and legislation, please visit our agenda webpage at <http://www.nycbar.org/issue-policy/issue/new-york-state-legislative-agenda>**

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<sup>20</sup> See <http://www.nycbar.org/member-and-career-services/committees/construction-law-committee/built-environment-series-recap-and-materials>.