

NEW YORK CITY BAR ASSOCIATION

**NEW YORK
CITY BAR**

NEW YORK STATE LEGISLATIVE AGENDA



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2020 NEW YORK STATE LEGISLATIVE AGENDA

INTRODUCTION

The New York City Bar Association (City Bar), which was founded in 1870, is an independent organization and professional home for over 24,000 members. In 2020, the City Bar marks a century and a half of advocating reform of the law in the public interest, increasing access to justice, standing up for the rule of law, and being a second home to the legal profession. The City Bar’s 150 committees generate dozens of reports over the course of each legislative session. Our **2020 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.¹

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

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THE JUDICIARY AND THE FAIR, EFFECTIVE ADMINISTRATION OF JUSTICE

Reform and Modernize the Administration of Class Actions in New York's Courts

CITY BAR
PROPOSAL

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.² 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.

Simplify New York State's Courts through Restructuring

The City Bar has long supported proposals to simplify 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 more equitable, swifter and less expensive than that which is dispensed via the current patchwork of courts. We see restructuring as an absolutely essential reform for the benefit of both the court system and the public. It will eliminate confusion and waste and create a much more nimble, efficient and user-friendly system. On November 21, 2019, City Bar President Roger Juan Maldonado delivered testimony in support of restructuring before the New York State Senate and Assembly Judiciary Committees that focused primarily on two issues: how court restructuring would benefit, in particular, low-income litigants in New York City Housing Court and how lawyers, judges, court administrators and bar associations need to work together in order to enhance the diversity pipeline into the profession (and, by extension, onto the bench).³ Mr. Maldonado discussed the work of the City Bar's Office for Diversity and Inclusion, the publication of the “Sealing the Leaks: Recommendations to

² See <https://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>.

³ See <https://s3.amazonaws.com/documents.nycbar.org/files/2019605-CourtRestructuringTestimonyMaldonado112119.pdf>.

Diversify and Strengthen the Pipeline to the Legal Profession” report⁴ and the work of the Task Force on Civil Right to Counsel.⁵

Support the Judiciary’s 2020-21 Budget Request, Including Adequate Funding for Civil Legal Services

The City Bar supports the Judiciary Budget Request, including its inclusion of funding for civil legal services. This budget will allow the Chief Judge to implement the laudable goals of the Excellence Initiative and 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. For every dollar invested in civil legal services, the State of New York receives more than ten dollars in economic benefits as a result of reduced social services and other public expenditures, as well as an inflow of federal benefits. Providing counsel to these needy New Yorkers also contributes to the overall efficiency of court proceedings and helps to secure a more just result. 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.

Financial Support for Legal Services for Veterans Seeking Benefits

Veterans in New York receive benefits to which they are legally entitled from the U.S. Department of Veterans Affairs (VA) at a significantly lower rate than do those in states with similar veteran populations. New York’s statewide veteran population is the fifth largest in the country (at approximately 800,000), but New York lags far behind other states in benefits received from the VA. This presents a significant hardship to the state’s veterans, and burdens the state with additional costs when it must step in to make up the shortfall. To help rectify this situation, New York needs qualified lawyers and advocates to assist its veterans in acquiring the federal benefits they deserve. At this time, however, despite the efforts of existing veterans’ counsel, the demand for legal help for New York veterans far exceeds the supply. As a community of lawyers, we urge the state to take action to rectify this gap in legal services, help their veterans receive the services and benefits they need, and shift the source of these benefits back to the federal government where they belong.⁶ There are myriad approaches that should be explored in order to address this issue; we encourage the

⁴ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/sealing-the-leaks-recommendations-to-diversify-and-strengthen-the-pipeline-to-the-legal-profession>.

⁵ See <https://www.nycbar.org/member-and-career-services/committees/civil-right-to-counsel-task-force-on>.

⁶ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-on-the-inadequate-financial-support-for-legal-services-for-veterans-seeking-benefits>.

Governor and Legislature to work with the related state agencies and to dedicate the time and resources necessary to finding a solution.

Permit Nonresident Attorneys to Practice in New York without Maintaining a Physical Office in State

The City Bar supports the repeal of Judiciary Law § 470 in order to permit attorneys to be licensed to practice in New York without maintaining New York residency or office space. Under Judiciary Law § 470, an attorney licensed in New York who maintains an office in state may practice in New York even if they are out-of-state residents. The New York Court of Appeals has explicitly interpreted this rule to mean that a nonresident attorney who wishes to practice in New York must be both licensed to practice in New York *and* have a physical office in New York. At the time of its enactment, the logic behind the rule was that it helped ensure personal service on a nonresident attorney. However, the Court of Appeals has acknowledged there are enough measures already in place outside of Judiciary Law § 470 to ensure proper service on a nonresident attorney, thus rendering Judiciary Law § 470 obsolete. The New York Court of Appeals interpretation has also spawned new motion practice gamesmanship, costing litigants' needless legal expense, wasted time, and no tactical advantage. Moreover, compliance with the current law is financially burdensome for nonresident attorneys and thus, again, increases clients' legal expenses without providing any clear benefit. With modern technology, the presence of a physical office address is not a determining factor of successful or professional representation.

Re-incentivize Art Authenticators and Restore Integrity to Art Transactions in New York

**CITY BAR
PROPOSAL**

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.⁷ 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.

⁷ See <https://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>.

GOOD GOVERNMENT

Bring Meaningful and Comprehensive Ethics Reform to Albany

New York must implement tougher ethics reforms aimed not only at investigating and prosecuting ethics violations, but also at preventing them. To that end, we support:

New York State Government Integrity Commission. The City Bar has spent considerable time studying the efficacy of the current ethics enforcement structure which consists of the Joint Commission on Public Ethics (JCOPE) and the Legislative Ethics Commission (LEC) and we have urged structural reform as well as a strenuous effort by JCOPE and the LEC to rise above the structural deficiencies.⁸ While JCOPE has been reasonably effective in the role of regulating lobbyists, subsequent experience has continued to show the necessity for structural reform in the area of ethics enforcement to allow the public a reasonable measure of confidence that ethics enforcement is taken seriously in Albany. The proposed Government Integrity Commission would combine the enforcement powers of JCOPE and the LEC into a single commission that would function much like the Commission on Judicial Conduct and have jurisdiction over misconduct and campaign finance laws for the legislative and executive branches of government. The Constitution must be amended so that the creation of a single entity with jurisdiction over the legislative and executive branches is beyond constitutional question.⁹

Limit Legislators' Outside Employment. The City Bar recommends that the Legislature impose a cap on income earned by legislators from outside employment, which we hope would eventually be accompanied by a significant salary increase. Additional limits should be placed on the personal use of campaign funds, including a prohibition on the use of campaign funds to pay attorneys' fees and costs associated with defending against investigations or prosecutions alleging violations of law that are not related to the candidate's campaign, and a prohibition on the use of campaign funds for household expenditures (such as clothing).¹⁰

Build upon Reforms to Further Modernize New York's Voting System and Election Law

Voting Reform. The City Bar applauds the Legislature and Governor for passing crucial voting and election law reforms during the 2019 Legislative Session. Providing New Yorkers

⁸ See <http://www2.nycbar.org/pdf/report/uploads/Hope-for-JCOPE-Report.pdf>.

⁹ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-for-the-creation-of-a-nys-government-integrity-commission>.

¹⁰ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/moving-backwards-on-reform-how-the-latest-amendments-to-restrictions-on-personal-use-of-campaign-funds-may-exacerbate-the-problem-of-misuse>.

full access to the voting booth without unnecessary hurdles will ensure they can make their voices heard and support policies that best reflect their beliefs. New York elected officials should continue to build upon the reforms they have adopted. This includes making Election Day a work holiday and providing for felony re-enfranchisement.¹¹ The Legislature will also need to vote on second passage of constitutional amendments to permit “no excuse” absentee voting¹² and Election Day registration in 2021.

Election Law Enforcement Reform. The current Board of Elections (BOE) consists of four members, two Democrats and two Republicans, and most Board employees involved in the registration and election process are chosen by those two parties. That structure was the result of a previous reform that has had the unfortunate result of creating a body that is virtually always at an impasse and, therefore, unable to act effectively. The two-party system for Board members and employees should be abolished and the Board should become a five-member, non-partisan board. In addition, while the Legislature made helpful reforms to the BOE to create a Chief Enforcement Counsel to investigate violations of the Election Law, the statutory procedures currently in place for that office are too limiting. We encourage the Legislature to conduct a broad review of the Election Law and specifically the adoption of comprehensive civil penalties and streamlined enforcement procedures, as well as more reporting of enforcement activity.¹³

EQUALITY OF OPPORTUNITY AND EXPERIENCE

Advance Criminal Justice Reform and Policies That Will Reduce Mass Incarceration

**CITY BAR
PROPOSAL**

Second Chance Amendment. Currently, New York Criminal Procedure Law § 440.20 permits a defendant to make a motion to set aside a sentence on the grounds that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. Although this provision offers an avenue for relief for some defendants, it does not permit a reduction of sentences that are valid but nonetheless excessive in light of the crime and the defendant’s individual circumstances, including evidence of meaningful rehabilitation while serving the initial sentence. Any such claims regarding excessiveness can only be raised on direct appeal. The Second Chance Amendment is designed to give individuals serving sentences of 10 years or more (excluding certain crimes) who are more than two years away from scheduled Conditional Release the chance to prove, part way through their sentences, that they deserve a reduction in sentence. The amendment would allow a motion for

¹¹ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/improving-opportunities-to-vote-in-new-york-state-assembly-hearing>.

¹² See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-for-a-no-excuse-absentee-voting-constitutional-amendment>.

¹³ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/safeguarding-new-yorks-elections-post-moreland-commission>.

reduction or modification of a sentence, only after the individual has served a specified portion of that sentence on the grounds that the sentence was greater than necessary to achieve the purposes of sentencing. It would allow the presentation of evidence regarding the individual's age, personal circumstances, and medical condition, as well as confinement record, including indicators of rehabilitation.¹⁴

**CITY BAR
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Justice Safety Valve Act. This legislation would give judges and prosecutors the ability to impose and recommend sentences that fall below statutory mandatory minimums in cases where there are substantial and compelling reasons, giving due regard to the nature of the crime, history and character of the defendant and his or her chances of successful rehabilitation, such that the imposition of a mandatory minimum sentence would result in a substantial injustice to the defendant and is not necessary for the protection of the public. Under mandatory minimum sentencing, mitigating factors - no matter how compelling - cannot be used to justify a sentence below the statutory minimum because prosecutors and judges have no flexibility to go below the statutory floor in plea negotiations or sentencing. This rigid sentencing structure leads to more people serving longer periods of incarceration which costs taxpayers more money and has not been shown to reduce recidivism.¹⁵

Reexamine Mandatory Court Fees Imposed on Individuals Convicted of Criminal Offenses and Violations. When any person in New York is convicted of a crime or violation, the law requires that a judge impose certain mandatory surcharges and fees, regardless of an individual's ability to pay. The official goal of these surcharges and fees is to generate revenue, not to impose punishment. All proceeds from collection are deposited in the state treasury, making these fines and fees a 'regressive tax' on those who are often least able to pay. Being subjected to fines and fees causes long-term harms to indigent defendants, such as lost wages, damaged credit, and seizure of property. And regulations make it all but impossible for defendants who are incarcerated while subject to surcharges to discharge their debts. Given that the aims of the criminal justice system are in no way advanced by these mandatory surcharges and fees, the Legislature should simply abolish them for all those convicted of a crime or violation, or, at a minimum, restructure them to be imposed on a sliding scale consistent with an individual defendant's ability to pay. If the Legislature is unwilling to make these changes, the law should be amended to make it more equitable for indigent defendants. This includes: (1) allowing sentencing courts to waive fees which would result in hardship, and simplify the process by which courts can defer fees until after incarceration terms are served; (2) excluding youthful offenders and those convicted only of

¹⁴ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/the-second-chance-amendment-report-in-support>.

¹⁵ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/justice-safety-valve-act-report-in-support>.

violations from being subjected to any mandatory court fees;¹⁶ and (3) consolidating mandatory fees for individuals taking a single plea on multiple crimes.¹⁷

Create a System for the Production, Distribution and Adult Non-medical Use of Marijuana in New York

The City Bar supports efforts to create a system for the production, distribution, and adult non-medical use of marijuana. Marijuana prohibition is a costly and ineffective policy that has not succeeded in eliminating marijuana use. The failed policy has devastated families and communities, eroded respect for the law, and strained police-citizen relations. Accordingly, the City Bar supports state and federal legislative and policy changes that reduce or eliminate criminalization of marijuana and that permit, tax, and regulate the production, distribution, and adult use of marijuana. The City Bar offers the following key provisions as essential for inclusion in any comprehensive and effective marijuana regulation policy: (1) provide for the expungement of marijuana convictions; (2) reinvest tax revenue into research, education and those communities most impacted by prohibition; and (3) create a market system that allows for fair access. Any marijuana regulation system should reverse, not exacerbate, inequities, and seek to ensure that individuals and communities that have been harmed historically by enforcement be given fair access to the market and its economic benefits and relief from criminal convictions.¹⁸

Enact the Child-Parent Security Act and Legalize Compensated Gestational Surrogacy in New York

New York should streamline its inconsistent and uncertain approach to donor conception and establish a framework for compensated gestational surrogacy, joining nearly every other state in the U.S. that permits that practice. Currently 48 states and the District of Columbia permit the practice of compensated gestational surrogacy, by statute, case law, or judicial practice. The developments in reproductive medicine, the transition from traditional to gestational surrogacy as the prevailing practice, and the experience of other states lay the foundation for New York to revisit the legal treatment of the practice. The City Bar supports legislation that would: (1) streamline the legal status of children conceived through sperm, egg, and embryo donation and their intended parents by permitting a donor to waive his/her parental rights in writing; (2) permit a family, whether two parents or one, married or unmarried, different-sex or same-sex, to obtain a judgment of parentage clarifying the status of the child, the intended parent(s), and the donor; and (3) replace New York's statutory ban on compensated surrogacy with a comprehensive scheme for recognizing gestational

¹⁶ See i.e. https://s3.amazonaws.com/documents.nycbar.org/files/2019546-Waive_Court_Fees_Minors.pdf.

¹⁷ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/new-york-should-re-examine-mandatory-court-fees>.

¹⁸ http://documents.nycbar.org/files/Marijuana_CorePrinciples_General.pdf;
<https://www.nycbar.org/member-and-career-services/committees/marijuana-legalization-and-regulation>.

surrogacy agreements (i.e., where the surrogate has not provided the egg used to conceive), while protecting the interests of the person acting as surrogate and the intended parents.¹⁹

Promote Comprehensive Sexual Health Education

While New York mandates health education for all students, there is no requirement for sexual health education. It is up to each local school district to decide whether to provide students additional sexual health education instruction and what that education might entail. Age-appropriate training efforts must begin early, before students' ideas become relatively fixed. Comprehensive sexual health education is an important tool in proactively confronting and avoiding sexual harassment, sexual assault and teen dating violence. A common statewide educational module available for K-12 students will create a better understanding of safe, healthy relationships, while helping to prevent violence. A sexual health 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. New York should establish an age-appropriate sexual health education grant program, which includes tracking, reporting and enforcement standards, to ensure all school districts have the resources necessary for these important courses.²⁰

BUSINESS AND COMMERCIAL PRACTICE AREAS

Support Long-Established Practices of Business-to-Business Arbitration Proceedings

The City Bar recommends amendments to pending legislation that would change New York's regulation of business-to-business arbitration proceedings in a way which would disrupt long-established arbitration practices and could introduce considerable uncertainty in the resolution of numerous business-to-business disputes in New York. In particular, we urge the Legislature to support a central pillar of New York arbitration law, i.e., that parties get to decide the contours of their own arbitration process. To the extent policymakers seek to address concerns regarding disparate bargaining power in arbitration, such as in the context of adhesion contracts between companies and consumers, or employment matters, those

¹⁹ See <http://documents.nycbar.org/files/SurrogacyOnePager.pdf>.

²⁰ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/womens-agenda-reproductive-health-and-healthy-relationships-2019-nys-executive-budget>.

situations can and should be addressed in a way that does not disrupt decades of New York jurisprudence promoting party autonomy in business-to-business arbitration.²¹

No Automatic Consent to Jurisdiction by Foreign Businesses Registering 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 does 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.²²

To further explore the 2020 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>.

²¹ See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/legislative-recommendations-on-business-to-business-arbitration-proceedings>.

²² See <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-on-legislation-regarding-consent-to-jurisdiction-by-foreign-businesses-authorized-to-do-business-in-new-york>.