

2008
LEGISLATIVE
PROGRAM

NEW YORK
CITY BAR

Dear Legislators and State Policy Makers:

Enclosed you will find a summary of significant legislative issues that are of particular interest to the over 22,000 members of The Association of the Bar of the City of New York. Because the Association functions through over 160 committees which regularly report on issues of law and public policy, this summary represents only a small portion of the issues that the Association has analyzed or plans to review.

We hope that you find the information useful and that it will assist you during the legislative session. Please note that all bill numbers listed within are for 2007/2008 unless otherwise noted. All of the Association's Committee reports can be found on our website at www.nycbar.org. If you would like more information regarding any of these issues or any of the Association's research materials, which further discuss pending and proposed legislation, please contact *Jayne Bigelsen, Director of Legislative Affairs*, at (212) 382-6655.

Regards,

A handwritten signature in black ink that reads "Barry Kamins". The signature is written in a cursive, flowing style.

**Barry Kamins
President**

<i>I. Introduction to the New York City Bar</i>	<i>Page 1</i>
<i>II. The Judiciary</i>	<i>Page 2</i>
High Quality Judiciary/Judicial Salaries	
Additional Resources and Judges for Family Court	
Judicial Selection	
Judicial Campaign Finance Reform	
Creating a Fifth Judicial Department	
Judicial Appointments to the Appellate Division	
<i>III. New York's Courts: Operations and Administration</i>	<i>Page 7</i>
Court Restructuring	
Audio-visual Coverage of Judicial Proceedings	
<i>IV. Criminal Justice Issues</i>	<i>Page 9</i>
Collateral Consequences of Criminal Convictions	
Employment Barriers to Ex-Offenders' Successful Reentry into Society	
Immigration Consequences in Criminal Cases	
DNA and Innocence Commission	
DNA Collection	
Rockefeller and Predicate Felony Drug Law Reform	
Abolition of Capital Punishment	
Grand Jury Business Records	
Internet Gambling	
Gun Control	
<i>V. Access to Justice</i>	<i>Page 17</i>
Adequate Funding For Legal Services	
Class Action Reform	
Domestic Violence	
<i>VI. The Legal Profession</i>	<i>Page 20</i>
Reforming the Attorney Discipline Process	
<i>VII. Tort Law</i>	<i>Page 21</i>
Collateral Source Settlement Reform	
<i>VIII. Alternative Dispute Resolution</i>	<i>Page 22</i>
Revised Uniform Arbitration Act	
Uniform Mediation Act	
<i>IV. Business/Corporation Law</i>	<i>Page 24</i>
Uniform Fraudulent Transfer Act	
Consumer Affairs and Debt Collection Credit Practices	
Exempt Income Protection Act	

Security Freeze for Identity Theft Viatical Settlements Act	
<i>X. Civil Rights</i>	<i>Page 28</i>
Human Rights Law Equal Rights for Same-Sex Couples – Marriage Equality Gender Expression Nondiscrimination Act Dignity for Students Act	
<i>XI. Social Welfare</i>	<i>Page 31</i>
Anti-Poverty Measures Children and Families	
<i>XII. Sex and Gender Issues</i>	<i>Page 33</i>
Reproductive Rights Healthy Teens Act	
<i>XIII. Health Care Law</i>	<i>Page 34</i>
Living Wills and The Family Health Care Decision Act Increasing Health Insurance Coverage in New York State Malpractice Reform AIDS Medical Marijuana	
<i>XIV. Communications and Media Law</i>	<i>Page 38</i>
Violent Video Games Right of Publicity for Deceased Persons	
<i>XV. Art Law</i>	<i>Page 40</i>
<i>XVI. Environmental Law</i>	<i>Page 41</i>
<i>XVII. Matrimonial Law/No Fault Divorce</i>	<i>Page 42</i>
Revocatory Effects of Divorce	
<i>XVIII. Animal Law</i>	<i>Page 44</i>
<i>XIX. Reforming State Government</i>	<i>Page 46</i>
Rules Reform Redistricting Campaign Finance Reform Election Law Reform Limits on Gifts and Fundraisers for Elected Officials Public Construction Contracting	

I. Introduction to the New York City Bar

The Association of the Bar of the City of New York

The Association of the Bar of the City of New York, which was founded in 1870, is an independent organization of over 22,000 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 over 160 committees focus on specific areas of law, the courts and the legal profession; they regularly issue reports and policy statements, submit amicus curiae briefs, draft public policy proposals, provide comments on pending legislation and testify at hearings on issues of public concern at the city, state and federal levels. The New York 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. The Judiciary

High Quality Judiciary/Judicial Salaries

The citizens of New York must have access to the high quality judges they deserve and expect. An important step to ensuring that access requires the Legislature to increase salaries for state judges. The City Bar supports a proposal by New York Chief Judge Judith Kaye that would raise the salaries of all state judges, including housing court judges, who had been excluded in past proposals, by approximately 21%.

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

In addition, the City Bar advocates for a set mechanism to periodically review and increase judicial salaries. It is of benefit to no one to continue to have this degree of uncertainty regarding judicial salaries. To force judges to lobby the Legislature after going years without an increase, before eventually receiving an increase that may make up for past years, is neither an effective nor efficient manner to determine judicial salaries.

The City Bar applauds the New York State Senate for recently passing judicial salary increase legislation (S6773). We also commend Chief Judge Judith Kaye and the Office of Court Administration for their leadership on this issue. We urge the Assembly to pass the salary increase for our state's judges immediately.

Additional Resources and Judges for Family Court

NEW FOR 2008 SESSION

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 two years after the enactment of the permanency legislation, the evidence indicates that Family Court, the Administration for Children's Services, advocates for parents and children, and New York City's numerous foster care agencies are trying in good faith to meet the objectives of the legislation. However, it is evident that these efforts are being undermined by a lack of resources that leaves the system stretched too thin. Significant 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 abuse and neglect cases in the aftermath of the tragic child-abuse related death of seven year old Nixzmary Brown. The always overburdened and underfunded Family Court is now facing crushing caseloads and a lack of resources that is leaving society's most vulnerable citizens, including children and victims of domestic violence with unacceptable court delays.

To meet the joint goals of fulfilling the mandates of the permanency legislation and protecting all of New York's children and families from domestic abuse, the time has long come to increase the number of family court judgeships statewide. Chief Judge Judith Kaye has called for 39 new family court judges across New York State, which would include 19 new family court judgeships in New York City. This would help to alleviate the current burden on individual judges and allow for a more timely resolution of cases. The City Bar urges the Legislature to heed Chief Judge Kaye's call and provide Family Court with the judgeships necessary to protect New York's children and families. Additionally, this action should be complemented with an increase in funding for law guardians to reduce current caseloads by one third to one half, an increase in funding for caseworkers and enhanced funding for preventive and diversion services.

Judicial Selection

For over a century, the New York City Bar Association 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 always been left unanswered.

In January of 2006, U.S. District Court Judge John Gleeson issued a ruling that changed the landscape by forcing Albany to pay attention to the issue. *In Lopez Torres v. N.Y. State Board of Elections*, Judge Gleeson ruled that the current judicial convention process for selecting New York Supreme Court Justices is unconstitutional. The decision was affirmed by the Second Circuit Court before being overturned by the US Supreme Court.

While the recent Supreme Court decision found the judicial convention process 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 reform 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. As 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.

THE ULTIMATE FIX – A CONSTITUTIONAL AMENDMENT

Immediately after Judge Gleeson's decision, the City Bar reconvened its Special Task Force on Judicial Selection, which affirmed our opposition to the current convention system while also warning of the dangers of judicial primary elections. Rather than being a solution, judicial primaries would infuse even more politics into New York's elective system and force judges to raise a significant amount of money, often from attorneys who will eventually appear before them.

The Task Force called for a constitutional amendment to provide for a commission-based appointment system. Diverse and independent judicial qualifications commissions would be established to select a limited number of candidates from whom the governor (or mayor in NYC) may choose. 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. 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 DIVERSITY

The Task Force is committed to a judicial selection system 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, the Task Force realized that the data did not allow it to conclude whether, on the statewide level, the appointive or elective system better promotes diversity. Instead, the Task Force 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;
- 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.

Judicial Campaign Finance Reform

The City Bar is particularly disturbed by the growing sums of money thrust into judicial campaigns. As the dollar amount needed to launch a successful judicial campaign continues to increase, judgeships move further out of reach for many skilled and talented attorneys who lack personal wealth or a political party's backing. In addition, the public expects the judiciary to be impartial arbiters entirely removed from the political process. Public confidence is therefore understandably diminished when judges receive campaign donations from the very lawyers and parties who appear before them in court.

While the City Bar has long-believed that a commission based appointment system is the fairest and most effective way to select our state's judiciary, we believe that offering public financing and limiting contributions to judicial campaigns would mitigate some of these problems. With adequate public financing, judicial candidates would no longer feel forced to seek large contributions from parties who may appear before them, and it would be easier for non-wealthy candidates to wage competitive election campaigns. We therefore ask the Legislature to seriously commit to legislation regarding public financing and campaign finance reform.

Creating a Fifth Judicial Department

The City Bar supports proposals that would establish a fifth judicial department as a means to reduce the workload of the Second Department. The Second Department now encompasses approximately 50% of the state's population and decides approximately 40% of the appeals filed.

For many years the Second Department has decided more appeals than the Third and Fourth Departments combined. In order to handle the increased workload, the Second Department was forced to reduce the size of its appellate panels from five to four justices and the number of judges authorized for that court is now twenty-two, with two vacancies. 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.

Judicial Appointments to the Appellate Division

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

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

III. New York's Courts: Operations and Administration

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.

After decades of advocacy that fell on deaf ears, the City Bar was pleased to see Governor Spitzer propose legislation in 2007 that would consolidate our court system (S5827). This legislation was based on the recommendation of the Special Commission on the Future of the New York State Courts appointed by Chief Judge Kaye. Now we ask the Assembly and Senate to pass this legislation.

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 (a) Supreme Court with specialized divisions, and (b) a Circuit 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 New York 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.

Audio-visual Coverage of Judicial Proceedings

The 2007 legislative session saw renewed advocacy in support of legislation authorizing audio-visual coverage of judicial proceedings, which the Legislature long ago allowed to expire. This legislation is long overdue and should be re-enacted. The City Bar has continually supported audio-visual coverage of judicial proceedings. More than two decades ago, we 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.

IV. 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 a successful re-entry into 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.

Employment Barriers to Ex-Offenders' Successful Reentry into Society

NEW FOR 2008 SESSION

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. The unemployment rate of ex-offenders in New York is up to sixty percent after one year of release, and up to eighty-three percent of those New Yorkers who violate the terms of their probation are unemployed at the time of their violation. Without employment, ex-offenders are unable to meet their basic needs and fully reintegrate into society.

The City Bar is therefore proposing legislation to increase the likelihood of employers hiring ex-offenders. The proposed legislation would seek to limit employers' liability from negligent hiring claims when the employer has reason to believe that the offender is rehabilitated and there is no direct correlation between the previous offense and the nature of the position.

Ex-offenders face many barriers when re-entering the workforce, the initial barrier being the employment application itself, which often asks the applicant, "Have you ever been convicted of a crime?" Employers may be forced to ask this question to avoid negligent hiring or other legal claims. The negligent hiring theory, in which an employer's liability arises from failure to take reasonable care in making hiring decisions, creates an incentive for employers to avoid hiring previously incarcerated individuals. In an effort to avoid tort exposure, many employers choose not to hire ex-offenders. Reducing the fear of a negligent hiring claim against employers who hire individuals with a criminal conviction history but who can demonstrate their rehabilitation would vastly increase ex-offenders' opportunities to obtain gainful employment and reenter society successfully.

Immigration Consequences in Criminal Cases

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

Due to the lack of warning, a long-time legal permanent resident with deep family and community roots might be surprised to suddenly find himself in deportation hearings after pleading guilty to a violation or misdemeanor. The interests of justice requires a warning mechanism that puts the non-citizen defendant on notice, so that he or she can make an informed choice as to whether, and to what, to plead guilty. The City Bar therefore strongly supports A5527, which requires the court to advise non-citizen defendants of potential immigration consequences of their plea regardless of whether the case is a felony or misdemeanor. It also allows the defendant to vacate the plea if the advisal was not given, a remedy that is not available under current law.

DNA and Innocence Commission

NEW FOR 2008 SESSION

With alarming frequency, we are hearing of cases where innocent men and women have spent years behind bars for crimes they haven't 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 the idea behind Governor Spitzer's proposed Office of Wrongful Conviction Review and the Assembly's Statewide Commission on Wrongful Convictions. Both proposals 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 are several flaws in both proposals that would negate their effectiveness. Each proposal requires that a person previously convicted 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. We fear that the Assembly bill does not provide the resources 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 are somewhat diminished in the Governor's bill. Under that proposal, the Commission would be 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, a 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 amendments and pass this much-needed legislation.

DNA Collection

NEW FOR 2008 SESSION

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, the City Bar has several concerns regarding Governor Spitzer's proposal to expand the DNA database and require DNA samples from everyone convicted of a crime. (Governor's Program Bill #29/S5848). We strongly oppose the provision in this legislation 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. (CPL 440.10 motions). The proposed legislation assumes that if new evidence comes to light, it will be covered under the 440 section that relates to new evidence and is thus exempt from the time limit. However, if the evidence should have been uncovered prior to trial, but wasn't 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 permitting 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 bill should be amended so 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.

Rockefeller and Predicate Felony Drug Law Reform

It has been over two years since Former Governor George Pataki signed legislation that commenced the process of reforming the Rockefeller drug laws. The legislation reduced steep mandatory minimum sentences that left some non-violent first time drug offenders convicted of the state's highest drug crimes (A-1 felonies) facing 15 years to life. These sentences now range from 8-20 years and the weight thresholds for the most severe possession crimes have been doubled. In addition, legislation was later signed shortening sentences for certain AII offenders.

As an active voice in the call to reform the state's antiquated and unduly harsh drug laws, the City Bar is concerned that the legislation did not go far enough to empty our state prisons of non-violent drug offenders. And with the passage of time, we can see that while the changes in the law were indeed steps in the right direction, there are flaws in both design and practice that limit the benefit of the reforms to a select few.

The change in the law has only had a significant impact on those New Yorkers who are convicted of the state's highest drug crimes. But the vast majority of drug offenders in New York State prisons are convicted of lower level crimes. These offenders saw only minimal relief. And while the initial 2004 legislation was estimated to allow 400 inmates to apply for early release, New York's prisons currently confine more than 18,000 drug offenders, many of whom are low-level offenders with no history of violence in their background.

Not only does the new law fall short in its limited reach of the number of offenders it is designed to help, flaws in drafting have shown it to often be ineffective in reducing the sentences of those it was specifically intended to assist. For example, while AI level offenders can be re-sentenced at any point in their prison term, AII level offenders must be at least three years away from parole eligibility. As the Parole Board is not known for allowing the release of offenders early in their term, an irrational disparity arises, where an AII offender four years away from parole eligibility can be resentenced, while one who is three years away might linger in jail for quite some time.

Even more troubling is that the New York State Court of Appeals recently ruled that it does not have review authority over Rockefeller re-sentencing cases. There are numerous questions percolating throughout the Appellate Divisions involving the interpretation of the reform legislation, and the lack of review authority will add confusion to already flawed legislation. For the sake of clarity and consistency, the City Bar has proposed legislation to provide review authority to the New York Court of Appeals.

The City Bar will continue to lobby for true Rockefeller drug law reform. Specifically, we urge passage of legislation that would: (1) restore sentencing discretion to trial judges in most or all drug cases and abandon conditions of prosecutorial consent; (2) commit up-front funds for alternatives to incarceration including drug treatment; (3)

divert appropriate non-violent drug offenders from prison to treatment; (4) broadly reduce sentences for non-violent drug offenders who are not diverted to treatment; (5) expand retroactivity to more than the most serious drug offenders; and (6) improve drug treatment programs available in prison.

The greater use of drug treatment and the reduced use of prison for nonviolent, low-level drug offenders would lead to a less costly and more balanced criminal justice system as well as a safer, more just society. It would bring hope to the families that have been left emotionally and financially shattered, while reducing the \$590 million it costs the state to imprison these offenders each year.

While Governor Spitzer's silence on Rockefeller drug law reform thus far has been somewhat disappointing, his appointment of a Commission on Sentencing Reform is a good sign. We are hopeful that the Commission will add a powerful and rationale voice to the discussion, so that the Legislature and Executive can work together to achieve drug law reform during the 2008 legislative session.

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.

In each of the past two years, the Senate has passed legislation intending to cure the constitutional defect and resume the death penalty in our state. After holding hearings on the death penalty around New York, the Assembly chose not to pass legislation that would reinstate capital punishment. (S4632/A8157)

The current suspension of the death penalty in New York and the actual abolishment of the death penalty in our neighboring state of New Jersey which was signed into law just this year, offers an ideal chance to reflect on the viability, practicality

and morality of capital punishment. As the City Bar considers the competing arguments for and against the death penalty and the corresponding S4632/A8157, 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. Recent advances in DNA analysis have resulted in the exoneration of at least fourteen death row prisoners in the limited number of cases where the technology was available. Furthermore, a total of 122 prisoners have been exonerated since the death penalty was reinstated nationwide in 1973. The City Bar stands by its belief that unless and until we can know that errors, prejudice, the defendant's economic circumstance and prosecutorial misconduct have no bearing on the outcome of either the guilt or sentencing phases of a capital case, executions should not go forward.

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 enact S4632/A8157 or a future equivalent, and the Assembly to continue to refuse 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.

Grand Jury Business Records

NEW FOR 2008 SESSION

To save both time and expense, without sacrificing justice, the City Bar supports amending the Criminal Procedure Law to admit business records to the grand jury without requiring the testimony of a live authenticating witness. (A3640/S1977)

With certain exceptions, under current law, the rules of evidence in criminal trials apply to the Grand Jury as well. Sensibly, out-of-court statements regarding certain types of forensic and scientific evidence and regarding ownership and valuation of property are some of the exceptions and can be offered to the Grand Jury as sworn statements in lieu of live testimony.

No such exception exists for "business records." This means that in cases such as the investigation of computer crimes, corporate corruption, Medicare fraud, identity theft and many other crimes, live witnesses are required to lay a foundation for the admissibility of documents—even though their admissibility is not seriously in question. Many times records are created and stored in numerous different states, requiring several witnesses and their corresponding travel costs. If this legislation is enacted, both the prosecutorial agency serving as legal advisor to the Grand Jury and the putative witnesses

would save a great deal of time and expense in lieu of giving rote and non-substantive testimony.

The City Bar's approval of this legislation is however conditioned on one amendment. The legislation must be clear that the exception it creates does not include the admission of documents or reports of police and other law enforcement agencies. To garner the City Bar's full support, A3640/S1977 must be amended so we can be assured that it will not be used to circumvent the need for law enforcement officials to testify in the Grand Jury or to admit reports that would otherwise be inadmissible even with a live witness.

Internet Gambling

NEW FOR 2008 SESSION

The City Bar opposes a bill that would expand New York's prohibition against Internet gambling (and gambling in general) to prohibit the mere endorsement of gambling. (A6302/S66) We believe that the prohibitions are unnecessary, as present criminal facilitation and aiding and abetting doctrines sufficiently cover conduct directly tied to gambling crimes. The inclusion of mere endorsement is also overbroad and would chill legal speech, thereby raising constitutional concerns.

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

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

Gun Control

The New York State Legislature made some important improvements to gun control legislation in 2005, including reducing the requisite number of guns defining Criminal Possession in the Third Degree from 20 to 3. The Legislature matched this change in the law for Criminal Sale of a Weapon, by reducing the required number of guns for a Second Degree offense from ten guns sold to five, and for a First Degree offense from twenty to ten.

The City Bar applauded these changes but believes there is still room for improvement and has made several suggestions to further strengthen New York's gun laws. The critical points include tougher licensing regulations, reforms to reduce improper access or handling of firearms, and an assault weapons ban:

- Outside of New York City and a few surrounding counties, gun licenses are valid for life. The law should be changed so that licenses need to be renewed every three years, thereby helping law enforcement to track firearms in the state and ensure that gun owners have properly registered their weapons;
- Long guns (rifles and shotguns) are not covered by current licensing regulations. With 21% of gun crimes involving a long gun of some kind, it is vital that gun licensing be expanded to include these weapons;
- Only Westchester County requires gun license applicants to complete a safety course – the City Bar recommends that this practice be expanded statewide;
- Seventeen states have safe-storage laws, preventing children from accessing their parents’ guns. An aggressive law could significantly reduce accidental firearms deaths in the state;
- 22% of guns used in crimes were obtained in purchases involving more than one gun. Several states have had success by limiting purchasers to one gun per month, and the City Bar urges the Legislature to adopt this restriction and;
- Several classes of guns, including assault weapons and “junk” guns, have such limited use outside of violent crime that the City Bar urges the State of New York to adopt an outright ban or at least, careful regulation of their sale.

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

V. Access to Justice

Adequate Funding For Legal Services

The City Bar strongly believes that the provision of legal services to our state's most needy population is a fundamental obligation of government.

Whether facing eviction in housing court, requesting child support for young children or seeking benefits for survival, poor New Yorkers can face insurmountable obstacles if forced into court without a lawyer. The problems of the poor involve the basic necessities of life many of us take for granted, such as food and shelter, and may require income maintenance, food stamps, unemployment benefits, social security, SSI and veterans benefits. New York, once a leader in legal services for the poor, now lags behind our neighboring states despite a population with more low-income people.

The City Bar was pleased when Governor Spitzer announced new guidelines that called for higher interest rates on the State Interest on Lawyers' Accounts Program (IOLA) to expand state revenue for civil legal services. The change in regulations has already had an extremely positive impact on IOLA earnings, allowing the Fund to grow from providing \$13,000,000 in award funding in 2007 to awarding \$25,000,000 in grants for the 2008 calendar year cycle. However while we are grateful for the new regulations and corresponding increase in revenue, the ultimate dollar amount available from IOLA fluctuates based on a variety of market factors and cannot be guaranteed. Therefore, IOLA funding alone cannot be counted on to address the vast legal needs of New Yorkers who cannot afford representation.

With Governor Pataki's Administration previously refusing to include funding for civil legal services in the Executive Budget, many civil legal service provider organizations were forced to annually lobby Albany for member items to simply stay operational. The City Bar was therefore grateful when Governor Spitzer included over \$15,000,000 for civil legal services in last year's budget. Money designated in the Executive Budget from non-IOLA sources combined with an increase in funding through IOLA is exactly what is needed to make real progress toward reducing the backlog that has resulted from years of increasing need coexisting with decreased funding.

The City Bar was therefore disheartened to see that non-IOLA civil legal services funding has been reduced from over \$15,000,000 in the 2007 budget to \$1,000,000 in the 2008 Executive Budget. We are acutely aware that the economy has left the state with a fiscal shortage. However, it is an unfortunate fact that in times of economic uncertainty, the legal services needs of the poor, which include services such as eviction prevention and bankruptcy assistance, increases exponentially. Therefore while we are encouraged by Governor Spitzer's commitment to civil legal service funding and applaud the new IOLA regulations, we also urge the Governor and Legislature to continue last year's trend of including non-IOLA civil legal services funding in the Executive Budget.

Class Action Reform

For many New Yorkers, particularly those plagued by poverty, class action lawsuits may offer the only realistic way to achieve relief from government wrongdoing. Therefore, the City Bar urges the Legislature to make three reforms designed to make class actions more accessible and equitable:

- Eliminate the presumption that class actions should not be brought against the government (A4131). This judicially created government exception is based on the optimistic, yet often false premise that because the government is a special litigant, dedicated to public trust, it will voluntarily apply court rulings to similarly situated persons. Unfortunately, New York history provides too many examples of government officials ignoring court orders or refusing to extend relief to others suffering the same plight as an individual plaintiff. Under the current rule, New Yorkers experiencing harm from actions of the government, whether they are children poisoned by lead paint or victims of police brutality, can find it unnecessarily difficult to receive class certification and may be denied essential relief;
- Remove the requirement that class certification motions be brought within sixty days after the time to serve a responsive pleading and substitute the “as soon as practicable” standard. This change would align with federal practice and allow for a more complete and accurate record and;
- Require careful judicial scrutiny of all pre-certification dismissals, while eliminating the requirement of mandatory notice of these dismissals. This change is suggested because if the class is not bound by a dismissal, notice may be of questionable value and burden litigants with unnecessary costs.

Domestic Violence

The City Bar supports legislation that would expand the definition of the term “family or household” for the purposes of obtaining an order of protection in family court domestic violence cases (A6060/S6783). Current law fails to adequately protect victims of domestic violence who have “non-traditional” family situations because it only allows family court orders of protection to be issued to people who have a child in common, are married or have a biological relationship. Family court offers a more expedient and less burdensome process to obtain an order of protection than does criminal court and is the only New York State Court to offer civil orders of protection. Yet, it still affords respondents due process by requiring that allegations are supported by a preponderance of the evidence.

Unfortunately, the limited definition of “family” has the effect of denying access to family court to a very large class of people affected by dating violence: dating partners who do not have children together. Studies show that one in five teenage girls are subjected to physical and/or sexual abuse by a dating partner. It is unacceptable that they must wait to have children with their abusers to receive protection from family court. In addition, with non-traditional families on the rise, justice demands that same-sex partners

and adults in non-married romantic relationships have the ability to obtain a civil order of protection. We will advocate for legislation that grants all victims of domestic violence access to protection in family court, while also urging that there be more judges in family court so that the needs of all New Yorker's escaping domestic violence can be handled fairly and expediently.

VI. 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. We applaud Chief Judge Kaye for her endorsement of such legislation.

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.

Moreover, we support the enactment of a seven-year statute of limitations for the commencement of such disciplinary 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.

The City Bar believes that a seven-year statute of limitations period is more than reasonable; it is the same length of time an attorney is required to preserve documents. The limitation is extended when the attorney, who is accused of misconduct, impedes discovery of his wrongdoing.

Finally, the City Bar also believes that increased funding for disciplinary committees is necessary; the resources available today are simply not adequate for the disciplining committees to promptly consider and resolve the volume of complaints they receive.

VII. Tort Law

Collateral Source Settlement Reform

Plaintiffs in personal injury, wrongful death and property damage suits deserve full recovery for injuries caused by another's negligence or wrongful conduct. However, many plaintiffs receive compensation for their injuries from collateral sources, such as health insurance or disability pensions. And it is not in the interest of justice that they be compensated twice, by both the collateral source payor and an award judgment. For this reason CPLR 4545 was enacted to reduce payouts by defendants by preventing plaintiffs from receiving a double recovery.

For the most part this law has worked well as written. However due to a mistake in drafting, public employees do not have to reduce their judgment awards to offset money they will receive from future disability payments. This has left city and county governments paying double amounts at a great expense to taxpayers, while private employers have been spared this burden. The City Bar is supporting legislation that would fix this error. (A2989/S4164) Once passed, employees can expect equal treatment regardless of whether their employer is a public or private entity, and a mistake in drafting will no longer cost cities and taxpayers much needed dollars.

Another difficulty that has arisen in the use of CPLR 4545 is in the context of settlements. When a case proceeds all the way to jury verdict, the collateral source offset procedure is clear; the jury awards an amount and specifies a dollar amount for economic losses. Then there is a separate hearing where the judge reduces the payout for economic losses by the amount of the collateral source reimbursement. However, in the context of settlement, there is not a clear distinction between economic loss, which could be covered by a collateral source, and pain and suffering, which is not. This potential ambiguity has caused some collateral source payors to sue their insured or the defendant for reimbursement after the final settlement. This creates a problem for both the plaintiff, who might be forced to reimburse a collateral source payor for more than he or she has collected for that economic loss, and the tortfeasor who could now be exposed to further liability despite a final settlement. Because this has a chilling effect on plaintiffs and tortfeasors in regards to settlements, the City Bar is advocating for legislation that makes clear that settlements are exempt from any collateral source offset. (S5555/A8114 of 2005)

VIII. 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 is also 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 different 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

NEW FOR 2008 SESSION

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

While the use of mediation as an alternative to litigation has grown at a tremendous pace in New York State and around the country, there are currently no laws in this state that protect mediation participants and assure the confidentiality of their mediation communications. This obviously leaves some New Yorkers hesitant to participate in the mediation process, and hinders the openness and candor of those who choose mediation. Unfortunately, this concern has proven to be valid. Recently, the Fourth Department Appellate Decision affirmed in *Hauzinger v. Hauzinger* a Supreme Court decision that denied a request to quash a subpoena compelling documents relating to a mediation by a witness to that 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 (S1967) to provide the confidentiality that was lacking in *Hauzinger*. 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.

VIV. 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. The City Bar will seek to have the bill introduced in both the Senate and Assembly and work to see it enacted into law.

Consumer Affairs and Debt Collection Credit Practices

NEW FOR 2008 SESSION

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 Assembly bill 1865 which amends the general business law to allow a private right of action for improper debt collection. 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 Assembly bill should be amended to include both the right to the award of attorneys’ fees to successful plaintiffs who bring a private action and an award of attorneys’ fees and costs to a defendant where the court has determined that the action was brought in bad faith and for the purposes of harassment.

The law 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.

Exempt Income Protection Act

NEW FOR 2008 SESSION

To further protect debtors from unfair practices by creditors, the City Bar supports legislation which would correct an anomaly in the Civil Practice Laws and Rules under which New York residents face the restraint of bank accounts containing monies that are statutorily exempt from garnishment under federal and state law. (The Exempt Income Protection Act-A8527/S6203)

Under current federal and state law, numerous types of funds such as Social Security, disability payments, pensions, veterans' benefits, worker's compensation, public assistance and 90% of wages earned from the last sixty days are exempt from collection by creditors. However, payments from these funds are often made to recipients by virtue of direct deposit into their bank accounts, and a loophole in the CPLR allows judgment creditors to freeze debtors' complete bank accounts despite the existence of funds entitled to an exemption. Many of the restrained funds are from taxpayer funded programs-surely an unintended and unfounded result. The debtor receives no notice until after his or her account is frozen. He or she is thus placed in the position of having no money to pay rent and utilities, purchase food and meet everyday living expenses, and is often forced to fall back on emergency programs, thus increasing the burdens on cities, towns, counties and charities.

There is also no clear, effective procedure for a debtor to assert a claim that a restrained bank account contains exempt funds and that the restraint should be removed. Debtors have reported significant difficulty in having restraints lifted, and those who are successful in removing the restraint report being forced to pay hefty bank fees.

A8527/S6203 would exempt from restraint the first \$2500 in a bank account containing exempt funds which have been deposited in the last 45 days. The legislation would also exempt an additional amount equal to 240 times the minimum wage (thus, under the present minimum wage, \$1716). The legislation also adopts a simplified, streamlined approach for resolving questions as to whether funds are exempt. A debtor would be required to submit supporting documentation if he or she wants to declare more than the \$2500 and \$1716 in exempt funds, which the creditor can challenge through an expedited court hearing.

Security Freeze for Identity Theft

New Yorkers per capita are the seventh most likely to be the victims of identity thefts and incidences of the crime have continued to escalate nationwide. Despite broad-ranging attempts to combat it from legislatures and consumer groups alike identity theft remains a serious and growing problem.

Often thieves use an identity to obtain false credit, quickly driving down the victim's credit rating. Pending legislation would allow consumers to put a freeze on credit reporting agencies, preventing them from releasing personal credit information and effectively stymieing an attempt to abuse the account. Several different versions of this bill have been introduced in the Legislature, including A6067.

The City Bar supports legislation that would allow consumers to freeze their credit reports at any time. Other bills would require that a consumer already suspect that he or she is the victim of identity theft before a freeze would go into effect. We question whether the after-the-fact model would be effective; when the consumer learns that his or her identity has been stolen, the damage has been done.

Additionally, the City Bar recommends changes to the law that would expedite the process of implementing a credit freeze beyond the range of current bills. Proposed legislation has required certified mail and gives the agencies five days to implement the freeze. We also believe that secure Internet and telephone options should be available, along with an expedited schedule.

Viatical Settlements Act

With significant modifications, the City Bar supports The Viatical Settlements Act (S5447), which would further regulate sales of life insurances policies insuring terminally or critically ill people prior to death to cover "life settlements", which are sales of life insurance policies to people who are not ill. In particular, the bill would require people who effectuate or negotiate life settlements to be licensed, regulated and subject to examinations by the New York State Department of Insurance (NYID); require contract forms and disclosure statements to be approved by the NYID; regulate practices and procedures by which life settlement providers effectuate life settlement contracts; and provide protections for policy owner privacy rights. The Bill also strengthens enforcement procedures by requiring viatical settlement providers to adopt fraud prevention plans and by defining a new crime of "fraudulent viatical settlement" within the scope of enforcement activities by the NYID's Insurance Frauds Bureau and the New York penal code.

The City Bar welcomes many of the consumer protection provisions that S8166 provides for policy holders. The adoption of legislation regulating life settlements in New York is appropriate in the light of the growing importance of the life settlements market. The enactment of such legislation would reaffirm the status of the state as a leader in the field of insurance consumer protection.

While the City Bar supports the intent of the legislation, it believes that there are a number of provisions in S5447 that vary from similar legislation in other states and unnecessarily and inappropriately restrict viators' rights to sell or otherwise transfer their policies -- a fundamental right long recognized by our law. The Bill also contains provisions restricting the right and ability of licensed viatical settlement providers to transfer ownership of appropriately viaticated policies. We believe these latter provisions

will prevent a secondary market in life settlements from fully developing in our state, thereby depriving viators of the potential market value of their insurance assets and injuring the very consumers whom S5447 is designed to protect. The City Bar will advocate for the modification of these provisions and the ultimate enactment of the Viatical Settlements Act.

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, punitive damages and civil penalties to the state. 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, domestic violence victim status and source of income.

Under the existing terms of the state Human Rights Law, punitive damages, penalties to the state 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, fees and penalties is a necessary tool to further combat discriminatory conduct.

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 after the tragic events of September 11th and in the light of the national debate concerning immigration reform. Yet they have no protection against discrimination under the Human Rights Law.

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

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, to continue. The City Bar will actively advocate for both an increase in fees, damages and penalties in human rights cases as well for the expansion of classes eligible for protection.

Equal Rights for Same-Sex Couples

Marriage Equality

In recent years, the judiciary has begun to play a role in protecting the rights of gays and lesbians around the country. In 2003, both the US Supreme Court and the Massachusetts Supreme Court issued groundbreaking decisions that sent clear messages that people cannot be deprived of their liberty based solely on their sexual orientation. In Lawrence v. Texas, the U.S. Supreme Court ruled that a law prohibiting sexual conduct between two persons of the same sex was unconstitutional. The ruling declared, “The Texas Statute furthers no legitimate state interest which can justify its intrusion into the individual’s personal and private life.” (Pp. 17-18) In Goodridge v. Department of Public Health, the Massachusetts Supreme Court ruled that it was unconstitutional under the Massachusetts constitution to deny the protections, benefits and obligations of marriage to same sex couples. In October 2006, the New Jersey Supreme Court ordered equal rights for same sex couples.

Despite these judicial victories, New York courts have unfortunately taken a different path. On July 6th, 2006 the New York Court of Appeals upheld a decision by the lower court maintaining the state’s prohibition on same-sex marriage. The Court found a legitimate and rational interest in promoting heterosexual marriage, and said that the implementation of same sex marriage would have to come via the legislative, and not the judicial, route.

The City Bar believes full equality includes the right to marry whomever one chooses regardless of gender. We therefore commended Governor Spitzer upon his proposal of legislation offering marriage equality for all New Yorkers (A8590/S5884) and applauded when this legislation passed the Assembly. The City Bar fully supports the Governor’s efforts to ensure that all New Yorkers, regardless of sexual orientation, receive equal rights under the law, including the most basic right of marriage. We urge the Senate to pass A8590/S5884 this legislative session.

Gender Expression Nondiscrimination Act

NEW FOR 2008 SESSION

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. The bill extends nondiscrimination protections to transgender and gender variant people, and further adds “gender identity and expression” to the list of categories in the hate-crimes statute, making crimes motivated by animus toward a person’s gender identity or expression eligible for a penalty enhancement. The bill would greatly help in affording protections to transgender and gender variant people from discrimination, harassment, and assault to the same extent such protections are now provided to other groups under New York law, e.g. racial minorities, as well as those individuals who identify as gay and lesbian.

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

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

Dignity for Students Act

NEW FOR 2008 SESSION

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

XI. Social Welfare

Anti-Poverty Measures

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

We are concerned that federal and New York State welfare policies, despite some commendable provisions, create untenable risks and increase the likelihood that needy children and adults will fall through an evaporating and increasingly inequitable safety net, with disastrous consequences for the society at large. The welfare reforms of the past decade have dramatically reduced the welfare rolls, but have not significantly reduced poverty in this state. We now face an uncertain economy at a time when many New Yorkers have reached, or are rapidly approaching, their lifetime limit on the use of federal funds for Family Assistance, and when many of those in need of public assistance have disabilities, limited literacy and other barriers to employment. This, combined with the scaling back of services by charitable and non-profit organizations due to budget cuts, does not bode well for the future of our most vulnerable citizens.

We urge the Governor and the state Legislature to act promptly to:

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

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

Children and Families

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 18-21 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.

XII. Sex and Gender Issues

Reproductive Rights

NEW FOR 2008 SESSION

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 are therefore grateful for Governor Spitzer's support and recognition of a woman's fundamental right to make decisions regarding her reproductive health and appreciate his legislative proposal that 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. (S5829) The City Bar offers its full support for the proposal's addition of a new Article 12 to the Public Health Law—entitled “Reproductive Health and Privacy Protection”, which affirms that in New York a pregnant woman has a right to an abortion before viability of the fetus and permits licensed and qualified health care professionals to perform abortions under these circumstances.

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.) 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.

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.

XIII. Health Care Law

Living Wills and The Family Health Care Decisions Act

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

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

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

In a time of confusion and sadness, Living Wills can provide clear answers as to whether a patient would have wanted artificial food and nutrition. Yet New York is one of only three states that does not recognize Living Wills by statute. The City Bar therefore supports A8995/S5270 which would amend Article 29-C of the Public Health Law to provide a clear procedure for individuals to document their wishes concerning life sustaining medical treatment, including the administration of artificial nutrition and hydration.

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

Unfortunately, in many cases there is neither a Health Care Proxy nor a Living Will in place to guide family members through the dark hours of a loved one's incapacitation. Absent a Health Care Proxy, current law prevents family members from discontinuing treatment or even consenting to non emergency medical treatment intended to alleviate

suffering without proving by clear and convincing evidence that this is what the patient would have wanted. The burden of an uphill court battle should not be added to the already heavy strain and tension carried by those witnessing the sickness and incapacitation of someone they love. Therefore the City Bar supports legislation that would allow those closest to the patient to make the end of life decisions when there is no Health Care Proxy. New York law must be amended to show respect for a patient's wishes and values, as best they can be ascertained; involve his or her family and loved ones in decision-making; and assure protection in cases where the wishes of the patient are unknown and the customary advocates for the patient are absent (A6993).

Such proposed legislation, which was originally put forth by the New York State Task Force on Life and the Law, is an admirable effort to achieve these ends. The time has come for the state of New York to take up the challenging task of enacting appropriate procedures to safeguard the interests of incapacitated patients, to empower their loved ones and to protect the vulnerable.

Increasing Health Insurance Coverage in New York State

NEW FOR 2008 SESSION

The City Bar is concerned about the ever-growing number of New Yorkers who lack health insurance. While we understand that there are many political and economic obstacles to the realization of universal health care coverage in our state, we believe that this is the time to act. The City Bar applauds the efforts of both Governor Spitzer and Assembly Member Gottfried in committing to work toward achieving uniform health care, so that all New Yorkers regardless of income have access to medical care.

Until the goal of universal health care is realized, New York should at a minimum alleviate the plight of the uninsured by removing unnecessary barriers to coverage for those who are already entitled to public insurance. One half of New York's 2.6 million uninsured are eligible for Medicaid, Family Health Plus, or Child Health Plus, but are not enrolled, or have lost coverage, as a result of administrative obstacles not mandated by federal or state law. Therefore we encourage the Legislature to reduce the bureaucratic hurdles that keep eligible people from enrolling in need-based government health insurance programs, or that complicate these programs with needless disenrollment and re-enrollment requirements. For example, the City Bar advocates that at the time of recertification, adults who provide social security numbers should be able to attest to their income as opposed to being required to provide paper documentation. In addition, if a child becomes ineligible for Medicaid, they should automatically be enrolled in Child Health Plus, if he or she is so eligible.

The City Bar supports Governor Spitzer's proposals for incremental expansion of coverage programs, and advocates for universal health care coverage for children. This could be accomplished by raising the income eligibility level for Child Health Plus and expanding employer partnership programs.

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 also would 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. (A6723/S4642). 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. (A3790) 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.

AIDS

The epidemic of AIDS is still expanding in the United States, and especially in New York, where 80,000 people are believed to be infected. With the public increasingly of the erroneous opinion that AIDS is now primarily a Third World concern, action in New York takes on a new urgency.

One effective way to combat AIDS is by strengthening harm reduction programs for intravenous drug users. Targeted programs that provide sterile syringes have been shown to have an impact on AIDS transmission rates. The state has taken some steps in this direction in the past, but we believe the state can further limit the spread of AIDS by:

- Amending the Public Health Law, the Penal Code, and Department of Health regulations to eliminate restrictions on purchase and possession of syringes;
- Directing the Department of Health to support and enhance proven effective harm reduction methods, including peer distribution of sterile syringes, and to ensure the provision of the full range of health care services for drug users, including viral hepatitis testing and treatment; opiate substitution therapy, including with buprenorphine; and appropriate overdose response education and support;
- Working with law enforcement to ensure drug users' access to harm reduction services without fear of arrest or punishment and;
- Lobbying the federal government to remove restrictions on the use of federal funds for syringe exchange activities.

Medical Marijuana

NEW FOR 2008 SESSION

The City Bar strongly supports the passage of legislation that would permit the manufacture, delivery, possession, and use of marijuana for medical purposes. By allowing marijuana use for critically ill medical patients as recommended by their physicians, thousands of New Yorkers with serious medical conditions could be spared the nausea, diminished appetite, anxiety and pain brought on by critical illness. Enactment of this bill would provide legal recognition to the reality that tens of thousands of Americans currently use marijuana for exclusively medical purposes under medical supervision, and remove the most substantial legal liability these citizens currently face – the threat of state criminal action.

The legislation would allow patients to possess and use marijuana to treat their medical condition if the medical condition or its treatment is “life-threatening,” and other drugs or treatments are not or would not be effective. The bill stipulates that patients must have the written certification of a person licensed in New York to prescribe controlled substances, that the state Department of Health shall issue an identification card to the patient who applies for such a card, or to the patient’s caregiver, and that holders of such cards can grow marijuana, deliver it to a patient, and possess it as long as the quantity does not exceed 2.5 ounces of marijuana, or twelve plants.

The bill does not authorize any use of marijuana outside the limited medical use outlined in the legislation. The New York City Bar recognizes that the legislation is seriously inadequate because many valid medical uses of marijuana will not be permitted under the Bill, i.e. pain reduction for illnesses that are non-life threatening. Even with these limitations, we believe it is a reasonable first step and support its enactment.

XIV. Communications and Media Law

Violent Video Games

NEW FOR 2008 SESSION

The technology boom of the 21st century has allowed us to harness and share information and knowledge from around the globe with remarkable ease and speed. However, increased public use of technology can also have some downsides. Many of the problems of modern society, including our children's interest in violent material, can find their way into our homes, through the internet, ipods and videogames. The internet is also the perfect place to feed addictions, like gambling, with little oversight. Not surprisingly, elected officials often seek to solve many of the problems that arise with an increased dependence on technology through legislation.

The City Bar is concerned that in an attempt to regulate technology and protect children from violent material, reactionary 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 proposed by Governor Spitzer that would bar selling or loaning video games to minors that include "depictions of depraved violence and indecent images." (A9310/S6401) We also oppose legislation which would ban the sale or rental of video games to minors 'in contravention of the rating affixed thereto.'" (S5888) We believe that both bills are unconstitutional. While the City Bar appreciates and shares the concern of protecting our youth, we believe that the better approach is to pursue constitutional measures, such as an educational campaign for consumers and parents about the existing video game rating system.

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

Right of Publicity for Deceased Persons

NEW FOR 2008 SESSION

Current legislation pending in the State Legislature that grants a broad right of privacy and publicity for deceased persons is opposed by the City Bar. A8836/S6005 would criminalize the use of the "name, portrait, voice, signature or picture" for trade or advertising purposes of any person who died on or after January 1, 1938 without the written permission of such person's heirs, estate or distributees.

Due to the staggering breadth of the bill, the City Bar believes that it violates the First Amendment of the US Constitution as well as Article I, Section VII of the New York State Constitution. While the Assembly version of the bill provides an exception for uses that appear in a book, play, magazine or newspaper, the exception does not apply for uses that could constitute an act of advertising. For example, the legislation may well outlaw an advertisement for a newspaper or magazine that contained a picture of a prior edition with a deceased celebrity or politician on its cover.

The overbreadth of the Bill is best illustrated by the fact that it places no time limitation on rights granted and that it is retroactive. As drafted, it would become a crime to sell a famous person's autograph or a letter from a deceased president or historical figure without the permission of the deceased's heirs. This is even true if the material was lawfully obtained by collectors who paid large sums with the understanding that they could sell the items as they please. To sell the material would require consent from the heirs, even if the celebrity died 100 years ago and the heirs were next to impossible to find.

As the Bill is likely unconstitutional, makes little policy sense and poses a number of practical difficulties, the City Bar opposes its passage.

XV. Art Law

Museums across New York State face unnecessary obstacles when making decisions regarding property lent to them years, often decades ago, where they are unable to find the original lender. Many museums have had property literally left on their doorstep with no identification provided as to the previous owner. The City Bar is advocating for legislation that would make it easier for New York's museums to acquire title to abandoned property, while still ensuring lenders' rights to notice and safeguarding the rights of heirs to Holocaust Era paintings (A995/S3593). In addition, the legislation addresses the use of deaccessioning funds from the sale of historic artifacts by prohibiting the funds' use for operating expenses.

With the enactment of this legislation, deaccessioning proceeds for abandoned property can be used only for the acquisition of other antiquities or preservation of the existing collection. While this legislation was repeatedly vetoed by Governor Pataki, the City Bar worked collaboratively with the state Assembly and the New York State Banking Department in 2006 to address prior concerns regarding safeguarding the rights of heirs to Holocaust Era paintings. The City Bar was therefore most surprised when the legislation was again vetoed in 2006 and did not pass the Legislature in 2007. We will continue to work for its enactment to the benefit of all New York State museums.

XVI. Environmental Law

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

However in 1991, as a result of an unfortunate court decision, Society of the Plastics Industry. V. County of Suffolk, an onerous new obstacle was placed in front of plaintiffs. While plaintiffs already had been required to show that they suffered an injury that was within the zone of interests meant to be protected by this statute, this case added the requirement that plaintiffs show that they suffered a "special harm that is in some way different from the harm suffered by the public at large." This new requirement has been unduly restrictive and has closed the court house door on many frustrated plaintiffs, including several who were direct neighbors to harmful environmental activity. This standing doctrine has no parallel in either federal standing laws, or the laws in most other states, and thus makes New York one of the most restrictive jurisdictions for environmental plaintiffs. For these reasons, the City Bar supports A1435, which would return the standing requirements of SEQRA to its original intention.

XVII. Matrimonial Law/No Fault Divorce

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

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

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

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

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

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

Revocatory Effects of Divorce

NEW FOR 2008 SESSION

In recent years, one of the most consistent statistics in America has been the rising divorce rate, with second and third marriages becoming more and more common. At the same time, the use of revocable trusts in estate plans has become increasingly popular. In addition, the use of non-probate assets such as life insurance and retirement plans has come to represent a very significant portion of an individual's net worth.

During or following the divorce process, relations between ex-spouses weaken such that it would be unlikely that a grantor would intend to benefit his or her former spouse with a probate or non-probate asset. Yet divorcing couples, in the midst of struggling to reach an agreement on such pressing issues as child custody, visitation and support, often delay necessary estate planning. Therefore, the EPTL has addressed the effects of divorce and revokes pre-divorce dispositions to a testator's former spouse.

However, the State Legislature has remained silent on extending the revocatory effects of divorce to non-probate assets, such as revocable trusts, life insurance and retirement plans. Given that these assets, which are sometimes referred to in New York as testamentary substitutes, are so often an essential part of any estate plan or even the functional equivalent of a will, they should be treated accordingly under New York State law.

The City Bar therefore supports A8858/S5966 which would amend the EPTL to provide that revocable trusts and non-probate assets that under current law would fall to the divorced spouse would no longer be payable to such spouse.

XVIII. Animal Law

The City Bar recognizes the role that companion animals play in the lives of many New Yorkers, and supports effective ways of enhancing that relationship and its benefits for both animals and people. One important way of facilitating this goal is the enactment of laws protecting renters, particularly those who are members of vulnerable populations, such as the aging or persons with disabilities, from eviction, based solely on their keeping of pets who do not constitute a nuisance (A2539/S785).

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 despite the fact that animal enclosures prevent any means of escape which can cause massive animal fatalities during a fire, 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 A311/S558 which provides that animal housing by pet dealers must comply with fire safety standards, which should be checked as part of the annual inspection process.

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. (A7870/S5206)

The City Bar also supports legislation that would protect New York's wild animals and captive exotic animals, by strengthening the current law banning so-called "canned hunts," which involve the shooting and spearing of captive animals. This law should be expanded to cover canned hunts that involve any kind of animals, rather than those of certain species, and to remove the current 10-acre limitation on the prohibited enclosure.

To further protect animals from unnecessary pain and suffering, the City Bar supports legislation prohibiting traditional animal test methods in cosmetic testing when an alternative method has been validated and recommended by the Interagency Coordinating Committee on the Validation of Alternative Methods and subsequently adopted by the relevant federal agency (A7402/3528). The bill would not apply to animal tests performed for medical research. This legislation would decrease some of the cosmetic tests currently being conducted on animals that often cause intense and unnecessary suffering.

The City Bar is advocating two pieces of legislation to improve the conditions for livestock in New York State. First, it seeks the passage of A3520, a bill that would revoke the license of any slaughterhouse that failed three straight inspections. Second,

the City Bar seeks a modification to A6212/S3330 of 2006, a bill to outlaw force-feeding ducks and geese in the production of foie gras. The bill, as written, would not go into effect until 2016. We believe that eight years is too long to wait to end this cruelty.

XIX. Reforming State Government

Rules Reform

For years, the City Bar has been at the forefront in calling for reform of the legislative breakdown that has crippled our state government. Currently the legislative process in Albany is almost exclusively in the control of the Governor, Assembly Speaker and Senate Majority Leader. Rank and file representatives often have little say in legislative policy, effectively disempowering the New Yorkers who voted for them. An editorial in The New York Times once characterized the process as a “stranglehold” by the legislative leadership. Others have dubbed the state law making process as simply “three men in a room.”

Two years ago a step was made in the right direction. The reform of Albany finally received extensive press attention and as a result, the Assembly implemented rules changes designed to make the legislative process more open and democratic. However, there is much more work to be done.

In order to encourage dissenting points of view, the allocation of resources should not remain in the complete control of the leadership. Instead we recommend the following changes: 1) equal funding for all members regardless of party affiliation or seniority and 2) authorizing committee chairmen to hire their own professional staff.

By providing a ‘voice’ to individual members and committee chairman, the Legislature’s committees can fulfill their proper roles as the crucible in which good public policy is formed. To that end, the City Bar recommends that: 1) all bills reported to the legislative floor be accompanied by a comprehensive committee report; 2) before bills are reported out of committee they are openly considered with an opportunity for amendment; 3) three or more members of a committee may petition for a hearing on a bill or for an agency oversight hearing; and 4) three or more members of a committee may petition for a vote on a bill pending before it.

Compounding the inertia of the current committee structure are two other legislative mechanisms -the discharge motion- and the conference committee. Instead of fostering progress and resolution of legislative issues, they have been transformed into procedural impediments.

To restore their intended use and effectiveness, the Committee proposes that: 1) any member may petition for the discharge of a bill from committee without the sponsor’s approval; 2) discharge motions shall be allowed 20 days after a bill has been referred to a committee and five days before the end of the session; 3) there shall be no limit on the number of discharge motions within a legislative session and, 4) when bills addressing the same subject have been passed by both chambers, a conference committee shall be convened at the request of the prime sponsor from each chamber or the Speaker and Majority Leader.

At the dawn of the 21st century, New York State faces some of the most complex issues it has ever had to face before. To meet these challenges the Legislature must be able to deliberate and thoroughly consider the options and implications of its actions. The above recommendations are an integral part of strengthening the Legislature and making it more representative and deliberative so that it can solve the issues that confront its citizens.

Redistricting

NEW FOR 2008 SESSION

A crucial element of a properly functioning democracy requires 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 criteria and the City Bar proposes a rigorous set of criteria. Population equity, contiguity of districts and fair representation of minority groups, as required by the U.S. Constitution and federal law, should be given the most weight. The criteria also include preserving the integrity of borders of counties and local subdivisions, compactness, recognition of communities of interest, and promotion of the efficient administration of elections. Incumbency protection should be given the lowest weight, acknowledging that it will be considered but assigning this criteria to the lowest importance in the ranking.

S 5940 (Governor's Program Bill 26) includes many of our recommendations and establishes a strong foundation for a redistricting commission. We applaud the Governor

for offering a proposal to end New York's gerrymandered districts by placing redistricting authority in the hands of a bipartisan commission.

However, the City Bar recommends various revisions to the Governor's program bill. Among the revisions we propose are (1) removing the bar to commission service for relatives of judges and people who had conflicts of interest in the recent past, but no longer do, and (2) replacing the 2% population deviation standard between the most and least populous senate or assembly districts in S5940 with a 5% deviation standard, in the absence of a study of the effect of a 2% deviation on minority representation.

Campaign Finance Reform

The City Bar believes that the ever-increasing amount of money injected into the electoral process seriously distorts that process in a way that threatens to undermine the principles of democracy. The appearance of impropriety that results from the contribution of large sums of money by persons and organizations to candidates who, once elected to public office, have the power to regulate and enter into business relationships with those contributors is of great concern to us.

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.

Election Law Reform

It is a fundamental principle in democracy that all eligible voters who wish to vote have the opportunity to do so and an assurance that their vote will be counted. However, the 2000 presidential election directed the nation's attention toward the inadequacies of our national and state voting system. Unfortunately, in many people's eyes, more recent elections did little to return confidence in our voting process. Despite the attention given to voting reform, these elections still left voters in New York facing antiquated voting machines, poll workers who were frequently inadequately trained and polling places that were often inaccessible to the disabled.

Congress passed the Help America Vote Act (HAVA) in response to the 2000 Florida debacle and the law provides state and local governments with millions of dollars to upgrade their voting systems. The New York State Legislature was unable to decide

which election technology to use going forward and delegated the choice of technology to the localities. Now it is up to the county board of elections to choose which voting machines to purchase so long as they are approved by the state Board of Elections. However the state Board of Elections has yet to inform the counties of which voting machines are acceptable.

New York is the only state that has not yet complied with HAVA and was sued by the Justice Department for non-compliance in 2006. A settlement resulted in a promise that there will be at least one voting machine accessible for handicapped voters at each polling place for the 2008 primaries. However according to the plan accepted by the federal judge on this case, all of the state's lever-action voting machines wont be replaced until 2009.

The Legislature does deserve credit for enacting specific recommendations advocated by the City Bar and other public interest groups. These recommendations that are now enacted into law were designed to increase voter confidence and fairness, and included mandates that:

- The machines must have a voter verified paper trail, so that voters can have confidence in an accurate vote count;
- The machines should prevent voters from voting for more than one candidate per office and;
- New voting technology must enfranchise more New Yorkers by making it easier for those with disabilities to vote. The new machines must make it easy for voters in wheelchairs to reach all parts of the ballot, have the capacity for audio interface for the visually impaired and include a hand-held voting device for voters with limited reach and dexterity.

While the City Bar is grateful for the passage of this legislation, New York still lags behind all other states in HAVA compliance.

Limits on Gifts and Fundraisers for Elected Officials

After years of lobbying by the City Bar and a variety of advocacy organizations, legislation expanding the ban on gifts to legislators from those over \$75 to all gifts, with certain limited exceptions, was signed into law in 2007. (A3736/S2876) With lobbying expenses by special interests having grown from \$5.7 million in 1978 to \$149 million in 2007, the passage of this legislation is a step in the right direction.

Yet there is still much more work to be done. The City Bar is concerned that the public overwhelmingly perceives that a person's access to and influence in state government and its policymakers is directly proportional to the amount of money that person can contribute to an elected official's campaign coffers. We will therefore continue to lobby for legislation that will prohibit fundraisers in the Albany area while the Legislature is in session, while also supporting stricter limits on campaign contributions which were not addressed in A3736/S2876.

Public Construction Contracting

It is critical that legislators think innovatively to replace outdated approaches with ones that both enhance efficiency and reduce waste in the public sector. In this context, the City Bar is urging the amendment of two construction laws that cost the state unnecessary time and money. 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. The City Bar is pleased that Governor Spitzer introduced and the Assembly passed legislation that would raise the dollar amount required to trigger Wicks compliance, from \$50,000 to 3,000,000 for New York City projects, \$1,500,000 for projects in Nassau, Suffolk and Westchester Counties, and \$500,000 for projects in all the remaining counties, thereby allowing smaller projects to proceed without separate contracts (S6416/A9204). We now encourage the Senate to do the same so that state dollars can be saved in what is expected to be a difficult year for New York's finances.

In the same vein, the City Bar is also urging enactment of legislation that permits the use of new and innovative methods of procuring public works. Currently New York places major public works projects outside of the mainstream of modern construction practice by requiring the use of traditional design-bid-build (DBB) procurement. Under DBB a public agency must first engage a designer to prepare a completed set of design documents before competitive bidding on the construction contract can begin. Other states and private owners in New York have found that alternative methods of procurement are better suited to building in today's construction environment. Using alternative procurement methods that do not require a completed design prior to the award of a construction contract can significantly reduce the time and expense necessary to complete certain projects. Combining design and construction also provides for a constant interaction of expertise from both fields, potentially improving the design quality and minimizing disputes. Since there are some circumstances when DBB 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.

