

NEW YORK STATE BAR ASSOCIATION



**NYSBA**

**Current Legal Issues  
Affecting the  
Profession 2010**

A briefing and  
background manual  
29th Edition  
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**Current Legal Issues  
Affecting the Profession 2010:  
A briefing and background manual**

# Reader's Note

*"Current Legal Issues Affecting the Profession 2010"* contains concise summaries of 31 subjects of concern to the legal profession, the organized bar, and the public.

The handbook is divided into two sections, current topics and informational topics. The current topics section addresses issues of immediate concern, while the second grouping examines issues where action may not be imminent, but the subject matter is of sufficient interest to be included in this compendium. The 29<sup>th</sup> edition of "Current Legal Issues" provides background information, and the relevant activity and policy position of the New York State Bar Association concerning each subject.

Information contained in this volume is current through publication on January 1, 2010. Subsequent events, such as changes in Association position, the introduction of legislation, or initiatives proposed by government agencies, may affect information contained in this book. Questions regarding the current status of any particular issue and requests for additional information should be directed to the staff member-author whose name appears at the end of the topic area.

The full text of *"Current Legal Issues Affecting the Profession"* is also available on our Web site at <http://www.nysba.org>

To request additional hard copies contact Tara Messenger at the State Bar Center at 518/487-5561.

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# Current Topics

# Attorney-Client Privilege

## NYSBA Position

In March 2006, the Executive Committee approved the report of the Task Force on Attorney-Client Privilege, calling for the United States Sentencing Commission to remove from the commentary to the Sentencing Guidelines a section relating to requests for waiver of attorney-client privilege and work product protection. In June 2006, the House of Delegates approved a task force report on governmental interference with the right to counsel in corporate investigations for submission to the ABA House of Delegates. In October 2007, the Executive Committee approved a task force report supporting the Attorney-Client Privilege Act of 2007 in Congress. In November 2009, the Executive Committee adopted protection of the attorney-client privilege as a legislative priority at the federal level.

## Background

In recent years, law enforcement agencies and regulatory authorities, particularly at the federal level, have sought waivers of the attorney-client privilege from criminal defendants and entities under investigation as an indication of cooperation with the governmental authority. The rationale for this practice is that it permits the governmental authority to “obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements [and] to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.” (Memorandum from Deputy Attorney General Larry Thompson to Heads of Department Components and U.S. Attorneys, Jan. 20, 2003.) Concerns were expressed that such policies would result in corporations’ failure to confide in counsel because of the potential demand for future disclosure, which would result in otherwise privileged information becoming available to litigants in civil matters. More recently, Deputy Attorney General Paul McNulty issued a memo revising the Department’s policy. On August 28, 2008, the Justice Department withdrew its privilege waiver and employee rights policy outlined in the “McNulty Memorandum” and replaced it with new corporate charging guidelines that expressly bar federal prosecutors from seeking waiver of these fundamental protections during investigations. Unlike previous DOJ policies, the new policy will be incorporated into the U.S. Attorneys’ Manual.

A related issue, brought to the forefront in 2006 in *United States v. Stein*, is governmental requests for corporate entities to refuse to advance legal fees, provide documents or information to counsel, or to discipline, sanction or terminate individuals for exercising the Fifth Amendment right against self-incrimination. In *Stein*, the District Court concluded that requesting a corporate entity to refuse to advance counsel fees for employees under investigation unconstitutionally interfered with the employees’ right to a fair trial and effective assistance to counsel. Legislation introduced in the House of Representatives and United States Senate in 2007 would address these practices if enacted.

## NYSBA Activity

The Task Force on Attorney-Client Privilege was appointed in 2005 to address the issues raised by waiver requests, to review the nature and extent of this practice in New York by state and federal authorities, the reasons for the practice, and whether the practice serves the public interest. During 2006, the task force issued two reports dealing with the issues outlined above; its March 2006 report, dealing with requests for waivers of privilege, was transmitted to the United States Sentencing Commission. The commission, in turn, voted to delete the commentary relating to requests for waivers of privilege. The task force’s June 2006 report, adopted by the House of Delegates, was presented to the ABA House of Delegates. The ABA Task Force on Attorney-Client Privilege joined in this position, and the ABA condemned the practices outlined in the report as an unconstitutional interference with the right to counsel.

Most recently, the State Bar’s task force prepared a report on the Attorney-Client Privilege Protection Act of 2007, introduced in the House of Representatives and the United States Senate, which would protect attorney-client privilege, work product, and the constitutional rights of employees. The report was approved by the Executive Committee and communicated to the New York delegation in Congress. Notwithstanding recent changes in policy by the Department of Justice, the Association continues to support enactment of the Attorney-Client Privilege Protection Act and has made doing so a federal legislative priority for the 2010 Congressional Session.

**Ronald F. Kennedy**

# Code of Judicial Conduct

## **NYSBA Position**

In 1973 and 1993, the Association adopted New York versions of the ABA Model Rules of Professional Conduct. The 2007 ABA Model Code of Judicial Conduct is being reviewed and will be considered by the House of Delegates in April 2010.

## **Background**

The American Bar Association initially adopted a Code of Judicial Conduct in 1972 and thereafter adopted a substantially amended Code in 1990. New York versions of both Codes were adopted by the New York State Bar Association shortly thereafter; in 1993, the Association submitted its proposed Code to the Chief Administrative Judge, who codifies the rules governing judicial conduct in 22 NYCRR part 100.

In 2007, the ABA adopted a new Model Code of Judicial Conduct, which has a format mirroring that of the Model Rules of Professional Conduct with black-letter rules and accompanying commentary. The 2007 Model Code of Judicial Conduct is under study in a number of jurisdictions.

## **NYSBA Activity**

The Special Committee to Review the Code of Judicial Conduct has reviewed the 2007 ABA Model Code of Judicial Conduct and has issued a report recommending the adoption of a modified version of the Model Code in New York. At its November 2009 meeting, the House of Delegates adopted a resolution to govern its consideration of the report at its April 2010 meeting, with a deadline of March 1, 2010 for submission of comments and/or proposed amendments. If the Code is approved, it will be submitted to the Chief Administrative Judge for review and adoption.

**Kathleen R. Mulligan Baxter**

# Diversity in the Profession

## **NYSBA Position**

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In 2007, the House of Delegates adopted a resolution approving the recommendations set forth by the Committee on Minorities in the Profession in its report: “Miles to Go in New York: Measuring Racial and Ethnic Diversity Among New York Lawyers.” These recommendations included the collection of demographic data of New York’s lawyers by the Office of Court Administration and the increase of data being collected by the Association. The collection and reporting of demographic data is defined as encompassing gender, race, color, ethnic origin, national origin, sexual orientation, age and disability.

## **Background**

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In 2004, the American Bar Association issued a seminal report “Miles to Go: Progress of Minorities in the Legal Profession,” which found, among other things, that minority representation in the legal profession was less than half of that found in most other professions.

Currently, New York does not keep demographic statistics concerning lawyers in the state or their distribution among various types of employment. In the spring of 2005, the Committee on Minorities in the Profession embarked on an important research project designed to review and assess existing and available data on the number, status and careers of minority attorneys in the state. The committee’s mission was to produce a comprehensive report and develop recommendations for review by the House of Delegates.

## **NYSBA Activity**

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The goals of “Miles to Go in New York,” authored for the committee by New York Law School Professor Elizabeth Chambliss, were to provide a current and comprehensive picture of the status of minorities in the profession in New York, to measure racial and ethnic diversity among New York lawyers, and to determine where there are gaps and holes in the available statistical data and how best to effectively fill them. The recommendations contained in the “Miles to Go” report call on the Office of Court Administration to collect demographic and employment data through the biennial registration required of all lawyers. In addition, the Association is requested to collect and report similar data as part of its efforts to enhance diversity in the profession.

To implement these recommendations, the State Bar worked with OCA to begin data collection and also added to the annual member census a question designed to gather demographic information on members’ sexual orientation. In 2010, the biennial registration form used by OCA will include questions designed to gather data on the gender and ethnicity of New York’s lawyers.

The State Bar seeks to understand and promote both the unique cultures and the shared interests of minority and ethnic bar associations across the state. In January 2009, minority bar leaders gathered during the Annual Meeting for a program entitled “Miles to Go ... Moving Forward Together: A Summit of Leaders of the New York State Bar Association and New York’s Minority Bars.” Among the program’s goals were to build on shared interests, to provide increased synergies and leadership opportunities, to underscore the need for greater diversity and visibility of minority and ethnic bar associations in the legal profession, and to discuss new strategies to communicate to various publics the importance of a diverse legal profession.

**Kathleen R. Mulligan Baxter**

# E-Filing Task Force

## **NYSBA Position**

In 2007, the House of Delegates approved the report of the Task Force on E-Filing with respect to a uniform, comprehensive statewide system of e-filing court documents.

## **Background**

Electronic filing of documents is intended to improve efficiency by eliminating the need for courts to print and store paper documents and the need to visit courthouses to retrieve them, as well as to provide financial savings for the court system. The Unified Court System has implemented the New York State Courts e-filing system, which permits the filing of papers electronically in certain case types and designated venues.

## **NYSBA Activity**

The Task Force on E-Filing was appointed to analyze the status of e-filing nationwide, gather data from the bar and courts within New York, and make recommendations as to the implementation of e-filing in New York. The task force recognized that in discussing these various e-filing issues with practitioners and with court personnel, there often were strong opinions, which did not reveal a consensus. As a result, the task force conducted a survey of three constituencies: chief clerks of Surrogate's Courts, county clerks and attorneys.

The task force concluded that a mandatory and uniform statewide system, which is comprehensive in scope—i.e. more than a repository of documents—would be beneficial. The final report presented recommendations applicable to all courts of original jurisdiction and made recommendations that were specific to specialized courts, Supreme and County Courts, and Appellate Courts. It also set forth minimum suggested guidelines relating to hardware and software and best practices for attorneys to follow when they participate in e-filing in any courts in which it is available. The final report and the recommendations of the task force were approved by the House of Delegates on March 31, 2007 and thereafter submitted to the Office of Court Administration for consideration.

**Ronald F. Kennedy  
and Kevin M. Kerwin**

# Federal Legislative Priorities

## **NYSBA Position**

Develop federal legislative priorities in order to enhance the presence of the New York State Bar Association in Washington, D.C. and to effectively promote the interests of the legal profession and the public at the federal level.

## **Background**

The Association has long played an active role regarding state legislative issues, taking positions on legislation of interest to New York lawyers. Although the State Bar has taken positions on federal legislation from time to time, the Association's advocacy on federal issues has been infrequent compared to its action on state issues. Moreover, the Association's presence in Washington, D.C. has focused primarily on participation in "ABA Day," the event conducted each year by the American Bar Association.

In June 2008, the Special Committee on Federal Legislative Priorities was appointed and asked to report on the role the State Bar ought to play in federal legislative advocacy on behalf of its members. The special committee met with members of the New York Congressional Delegation, their staff, lobbyists based in Washington, D.C., not-for-profit advocacy organizations, members throughout the Association, and others knowledgeable about the federal legislative process. In its report, the special committee recommended that a new standing Committee on Federal Legislative Priorities be formed to select and recommend to the State Bar's leadership a list of federal legislative priorities.

In April 2009, the House of Delegates approved the special committee's report and recommendations. Accordingly, the Association established a new standing Committee on Federal Legislative Priorities to act in concert with the existing Committee on Legislative Policy, which focuses on state legislative priorities. Each year both committees will recommend to the State Bar leadership issues that will be the primary items on the legislative agenda. By establishing a federal priority list, the Association will build on the resources of its existing staff and the relationships already established with the New York Congressional Delegation and key congressional committees to advance legislative priorities at the federal level.

## **NYSBA Activity**

On November 6, 2009, the Association's Executive Committee established the first complete list of federal legislative priorities, in order to effectively promote positions at the federal level. That list will serve as the basis for legislative advocacy activity by the State Bar leadership during 2010. That list can be found on page 22 of this publication.

**Ronald F. Kennedy**

# Federal Shield Law

## **NYSBA Position**

The Association supports legislation to create a Federal Shield Law closely modeled after New York's law, Civil Rights Law § 79-h, which provides an absolute privilege against the compelled disclosure of a reporter's confidential sources. The adoption of federal legislation would ensure that a free and independent press can continue to investigate and pursue information vital to the functioning of our democracy.

## **Background**

For many years, federal courts in almost every circuit have interpreted the First Amendment to recognize a qualified reporters' privilege, requiring balancing of interests when compulsory process is used to obtain testimony and documents from the press. Recently, however, there has been an increase in the number of subpoenas issued to journalists in federal cases, and courts have become more willing to overrule reporters' claims of privilege. Even when the federal courts have recognized a constitutional privilege, its qualified nature has rendered it ineffectual to block contempt citations against reporters.

## **NYSBA Activity**

The Association is advocating for adoption of a federal privilege providing greater protection to confidential sources. The highly visible efforts by federal courts to compel reporters to divulge their sources serves to intimidate sources and inflicts real harm on the ability of the press to function effectively. The current state of federal law also frustrates the states' prerogative to protect reporters and their sources. Any promise of confidentiality protected by the states is meaningless if the source's identity could nonetheless be compelled through a federal subpoena.

The position urged by the Association recognizes that the federal courts are out of step with a nationwide consensus that the newsgathering process must be afforded some legal protections. At least 31 states have statutes creating a reporters' privilege; another 17 states have recognized the privilege through judicial decision. Over half of the state shield statutes, like New York, render a reporter's privilege not to disclose confidential sources absolute.

A near-absolute privilege is necessary because the very purpose of the privilege—to foster reporter-source communications—is defeated if the parties cannot be certain whether their conversations are, in fact, protected under the law.

The State Bar has contacted New York's Congressional delegation to explain the view that there is a need for a federal shield law to protect journalists from intrusive demands for information and documents obtained in the course of news gathering or reporting. Further, we urged Congress to adopt a federal shield law modeled on the New York State Shield Law (Section 79-h of New York's Civil Rights Law), with provisions substantially similar to those contained in the New York statute.

This issue is among the State Bar's federal legislative priorities for 2010.

**Ronald F. Kennedy  
and Kevin M. Kerwin**

# Funding for Civil Legal Services for the Poor

## NYSBA Position

For the courts to meet properly their essential role, all segments of society must have access to the courts. An independent judiciary is meaningless if the aggrieved cannot come before it. Access to justice for the indigent is fundamental to the operation of our democratic society. Therefore, the State of New York should create a permanent Access to Justice Fund in the state budget in order to provide for civil legal services and identify a state-level agency to assume responsibility for administration and oversight of the Fund.

## Background

Despite the New York Bar's voluntary pro bono civil legal services to the indigent, adequate government funding is necessary to ensure access to the justice system for those who are poor and most vulnerable. Studies have shown that the essential legal needs of up to 85% of low-income New Yorkers are not being met. In this slowing economy, the demand for legal services for the poor can only increase.

## NYSBA Activity

### State

As the State of New York continues to struggle with declining revenue due to the economic recession, the State Division of the Budget has proposed cuts in programs that provide civil legal services to the poor. The Association's leaders have continued to argue that civil legal services programs are critical to New Yorkers of limited economic means and that there should be no further cuts to these programs. Although state policy-makers face a difficult fiscal environment this year and in the future, State Bar leaders have maintained that cuts to the funding for civil legal services would be catastrophic for low-income New Yorkers.

The economic recession and its impact on the housing market and interest rates had a devastating impact on the Interest on Lawyer Account (IOLA) Fund. Real estate transactions have traditionally generated a large amount of the revenue produced for IOLA. Reports have shown that the number of existing single-family homes sold statewide decreased by 23% from 2006 to 2008.

In addition, income paid by banks on IOLA accounts is set according to the Federal Funds interest rate. In 2008, the rate was 4.25 percent. The rate dropped to 0.25 percent, where it has remained throughout 2009. As a result, the Fund revenue declined by roughly 75% from the amount available in December 2008.

In September 2009, State Bar President Michael Getnick wrote to Chief Administrative Judge Ann Pfau, and stated that, "the New York State Bar Association adds its voice to those who have urged the Office of Court Administration (OCA) to propose a temporary, emergency appropriation of \$15 million in the budget of the Unified Court System. Such an appropriation would help address the projected loss of revenue and grants to legal services providers, so that they can continue to provide much needed legal assistance at a critical time for many needy New Yorkers." At the time this article was written, the Judiciary budget included the appropriation in its budget proposal, but it had not been approved by the Legislature.

During 2009 the Association continued exploring the viability of cy pres awards as a means of providing another funding source for civil legal services. When class action lawsuits result in an award for the plaintiffs, in almost every case, there are funds that go unclaimed by the class. These funds are rarely distributed to the members of the class who did file claims. Instead,

they become a residual fund that is available for another use – historically a use that has some nexus with the original purpose of the class action, though today the nexus is often slight. Cy pres is the term for finding another appropriate use for the funds, the next best use.

### **Federal**

The Association leadership has advocated for elimination of federal restrictions on funds for civil legal services. The Legal Services Corporation's (LSC) annual budget is appropriated by Congress as part of the Commerce, Justice and Science appropriation legislation. In 1996, the Omnibus Consolidated Rescissions & Appropriations Act of 1996 imposed numerous restrictions on funds within the LSC budget. That legislation resulted in the enactment of Public Law 104-134.

Each year since 1996, Congress has restricted how LSC grantees may spend both LSC funds and their non-federal dollars through an Administrative Provision attached to the annual LSC appropriation.

These restrictions on providers of legal services for the indigent result in burdens that contradict fundamental American principles and the promise of equal justice under the law. The restrictions imposed on LSC-funded programs in 1996 restrict clients from having access to the full range of legal tools available to clients of private attorneys. Moreover, Congress extended the restrictions to cover non-LSC funded activities of providers who receive LSC funds, so that hundreds of millions of dollars from state and local governments, private donors, and other non-LSC sources are restricted under the same terms as the LSC funds.

Given the range of civil legal problems faced by poor people in New York State and this country, and the need to ensure access to the courts and the legal system, the restrictions on legal services programs do not serve the public interest or the public good.

As Congress considers the appropriations bill, State Bar leaders have reached out to members of the New York Congressional Delegation to advocate on this issue.

**Ronald F. Kennedy**  
**Gloria Herron Arthur**

# Global Warming

## **NYSBA's Position**

The State Bar Association supports efforts to enact state, federal and international programs to reduce greenhouse gas (GHG) emissions.

## **Background**

Climate change is the most prominent and important environmental issue of our time. There is now a general consensus among the scientific community that there is a causal link between increased greenhouse gas levels and temperature, with related climate disruptions. These disruptions include, among other things, rising sea levels, higher temperatures, extreme weather events, and increased precipitation. New York is especially vulnerable to these disruptions given its hundreds of miles of coastline and the fact that a large percentage of its population lives in dense low-lying urban areas such as New York City.

## **NYSBA Activity**

The State Bar has long been active on these issues, having issued one of the seminal reports on the subject in 1994, *The Threat of Global Climate Change—What Can New Yorkers Do? State and Local Strategies to Reduce Greenhouse Gas Emissions in New York State*. Further, the Association played a central role in the New York State Symposium on Economic Development and Climate Change in 1998 and its resulting report, *Recommendations for a Climate Change Agenda for New York State*.

In 2008, State Bar President Bernice Leber established a Task Force on Global Warming to update the prior reports, summarize New York State's existing laws and programs regarding climate change and make recommendations to reduce GHG emissions.

On April 4, 2009, the State Bar House of Delegates approved the report of the task force. Accordingly, the Association has supported legislative and administrative proposals at both the state and federal level to implement programs that would reduce GHG emissions.

**Ronald F. Kennedy**

# Issues Affecting Same-Sex Couples

## NYSBA position

In June 2009, the House of Delegates adopted a resolution calling for legislation to afford same-sex couples the ability to marry, in order to obtain the comprehensive set of rights and responsibilities available to opposite-sex couples. The enactment of such legislation has been designated as one of the Association's 2010 legislative priorities.

## Background

In recent years, a number of jurisdictions have begun to address the extension of certain rights and obligations to people in same-sex relationships. Same-sex marriage has been permitted since 2004 in Massachusetts, and in 2008 Connecticut began permitting same-sex marriage. In 2000, Vermont enacted legislation permitting same-sex couples to enter into civil unions, which provide the same benefits and protections as are afforded to married couples. Several other jurisdictions have since enacted similar measures. A number of local jurisdictions, including New York City, also have adopted domestic partnership registries. At the same time, a number of states have adopted legislation specifically defining marriage as a union of "a man and a woman," and in 1996 the U.S. Congress passed the Defense of Marriage Act, which grants states the right to refuse to recognize same-sex marriages entered into in other jurisdictions.

In July 2006, the New York Court of Appeals in *Hernandez v. Robles* held that the New York Constitution does not compel recognition of same-sex marriages; rather, such recognition is a question to be addressed by the Legislature. A bill authorizing same-sex marriage was passed by the State Assembly in 2007 and twice in 2009. The bill came to a vote in the Senate in late 2009, but with 32 votes need for passage the measure was defeated by a margin of 8 votes, 24 yea - 38 nay.

## NYSBA Activity

In November 2004, the Special Committee to Study Issues Affecting Same-Sex Couples released a report containing a detailed discussion and analysis of the legal and constitutional issues surrounding same-sex couples, an examination of the steps that have been taken to address these issues, and a series of conclusions about ways in which the New York State Legislature might address this subject. The above-referenced resolution was adopted with respect to these conclusions by the House of Delegates in April 2005, and the report was transmitted to the Legislature. In June 2009, the Association's Special Committee on LGBT People and the Law, created in 2008, released its report, which it undertook to research developments affecting the legal rights of same-sex couples since the issuance of the 2004 report. The 2009 LGBT Committee Report recommended, and the House of Delegates adopted, a position that the Association endorse marriage legislation that provides full marriage equity to same-sex couples on the basis that marriage is the only option that provides full equity under the law. The 2009 report was transmitted to the Legislature. The Association also has been working with the ABA to adopt a policy in favor of the repeal of the Defense of Marriage Act (DOMA).

**Kevin M. Kerwin**

# Judicial Compensation

## NYSBA Position

The New York State Bar Association supports the legislative proposal submitted by the State of New York Unified Court System to create a permanent mechanism for the regular salary review of officials in all branches of government. This proposal would increase the compensation of judges of the state of New York to restore them to parity with judges of federal district courts.

The Association also supports the key concept contained in the proposal to establish a Quadrennial Commission on Executive, Legislative and Judicial Compensation. This commission would prescribe cost of living adjustments for the four-year period following its deliberations.

## Background

New York State judicial salaries were last adjusted in 1999, when they were brought into parity with federal district court judicial salaries. Since then, New York's judicial salaries have fallen far behind those of federal judges and other public servants.

Judges are society's vehicle for delivery of justice in our system of government. Judicial salaries reflect the value that society places on the important work judges perform. The current judicial salary structure needs reform so as to not impose financial limits upon the field of prospective judges. Such limitations may deter high-quality individuals from seeking judicial office. Reform also is needed to ensure that our judges are fairly compensated on a regular and ongoing basis. The federal government and other states have identified effective mechanisms to provide regular salary reviews for public leaders.

There are three lawsuits pending on this issue, *Maron v. Silver*, filed in 2006, *Larabee v. New York State*, filed in 2007, and *Chief Judge v. Governor*, filed in 2008.

## NYSBA Activity

This issue has been among the Association's top legislative priorities since 2006. Consequently, the resources of the Association—including the advocacy activities of State Bar leadership and general membership, staff and consultants—repeatedly have been utilized to promote judicial salary reform.

For example, the State Bar has mobilized its members, urging them to contact their state legislators and the Governor to advocate for enactment of judicial salary reform legislation. That activity was in addition to the action taken in recent years by past presidents of the Association, in the form of letters to state policy-makers, letters to newspaper editors and opinion-editorial pieces, testimony before legislative committees, and countless meetings and phone calls with legislators and the Executive Chamber.

State Bar officers have consistently worked to persuade the Governor and legislative leaders to agree to raise judicial salaries. While there was some legislative activity on this issue, judicial salaries remain at their 1999 level.

**Ronald F. Kennedy**

# Law Practice Management Committee

## **NYSBA Position**

The State Bar Committee on Law Practice Management (LPM) exists to investigate, evaluate, develop, and promote the use of techniques that will assist lawyers in the management of their practices to help them excel in a competitive marketplace.

## **Background**

LPM is the one activity that touches every member of NYSBA because all lawyers must manage their practices in order to be successful. Regardless of what kind of practice they pursue, their experience, and their geographic location, lawyers encounter management issues every day, involving the management of work flow, subordinates, clients, time, technology, finances, and information. Legal malpractice carriers report that more professional error is caused by management error than by lack of substantive legal knowledge.

## **NSYBA Activity**

The LPM Committee has grown substantially over the past few years and now has over 60 members. The committee is divided into five subcommittees: Law Firm Management and Finance, Personal Management Skills, Solo and Small Firms, Corporate and Institutional Practice and Law Practice Continuity.

The committee is primarily responsible for providing direction, information, and support for members of the legal services delivery team by focusing the committee's resources on achieving lawyer professionalism through competent, effective, efficient, economical, and innovative law practice management.

The committee has been producing continuing legal education programs in a variety of formats, developing a best practices guide for attorneys, and expanding its publications. The committee also has worked with the State Bar News and the Journal to promote the importance of Law Practice Management to members.

The committee publishes two electronic newsletters that are distributed to all members – the LPM quarterly newsletter and the monthly LPM T-News (technology). The committee is responsible for the LPM Web site ([www.nysba.org/lpm](http://www.nysba.org/lpm)) and the Solo/Small Firm Resource Web site ([www.nysba.org/solo](http://www.nysba.org/solo)).

The committee offers an annual career development conference that is widely attended. The program topics include current career topics, such as transitioning in a tough economy, alternative careers for attorneys, marketing yourself and maintaining a positive attitude in difficult times. The event offers a networking opportunity following the program.

The LPM Committee continues to provide leadership and direction to the Association in the area of law firm management

**Pamela McDevitt**

# Lawyers in Transition Committee

## **NYSBA Position**

The Lawyers in Transition Committee exists to develop initiatives to enable lawyers to remain connected to other lawyers and the profession before and during a career interruption, and to help lay the groundwork for future re-entry.

## **Background**

The Committee on Lawyers in Transition was initially formed to address the challenges faced by attorneys who have left the workplace temporarily, for brief or extended periods, on maternity or paternity leave, or because of family or other obligations, and then wish to return to the workforce after such absences. With the growing number of lawyers finding themselves in “transition” not by choice, the committee’s immediate focus is now on attorneys who have been laid off.

## **NYSBA Activity**

With the economic downturn, the number of projects and initiatives of the Committee on Lawyers in Transition has significantly increased. The committee has sponsored nine free webcasts open to all attorneys and one webinar. Over 3,500 attorneys have participated in the series and additional programs are planned for 2010.

Links of interest, articles and resources are continually added to the Lawyers in Transition Web site and blog – [www.nysba.org/LawyersinTransition](http://www.nysba.org/LawyersinTransition). Archives of the webcast programs also are posted online and available for downloading. The committee also developed a new clerkship program with OCA that provides lawyers seeking employment with the opportunity to clerk for judges on a pro bono basis in courts throughout the state, including the Appellate Divisions.

**Katherine Suchocki**

# Medicaid Compact for Long-Term Care

## **NYSBA Position**

The current Medicaid system should be reformed to provide a fair and equitable way to finance long-term care for elderly and disabled persons. The “Compact for Long-Term Care” has been designated as one of the Association’s legislative priorities for 2010.

## **Background**

In 2005, in response to the Governor’s budget proposal, which significantly reduced the Medicaid reimbursement in New York, the Elder Law Section developed an alternative plan for financing long-term care, called the “Compact for Long-Term Care.” The basic purpose of the Compact is to create a private/public partnership between long-term care recipients and the government wherein those recipients would pledge and pay a fair share of their long-term care services, and the government would provide a subsidy after the individual has paid that fair share. Unlike the current Medicaid system, this subsidy would not require that an individual be impoverished before qualifying for assistance. This proposal seeks to address the problem of long-term care financing by providing incentive for the elderly and disabled to maintain responsibility for their own community-based care and still maintain the safety net that Medicaid was intended to provide.

## **NYSBA Activity**

Based on the State Bar’s report and recommendation, in February 2008 the American Bar Association’s House of Delegates approved a resolution urging government to develop “innovative long-term care programs” like the Compact as a reasonable and fair solution to long-term care financing.

**Ronald F. Kennedy**

# Medical Malpractice Reform

## **NYSBA Position**

The Association recognizes that in order to enhance the operation of the civil justice system, review and periodic changes to components of the system are needed. Appropriate and reasonable legislative initiatives should be aimed at making the system more workable and at striking a balance that will ensure the needs and protections of all parties. As with other issues related to the “tort system,” policy-makers should weigh all the facts as to proposals on medical malpractice and consider the views of the State Bar, as the statewide bar association consisting of members who represent differing interests and who hold a wide range of views.

In 1995, the Association’s House of Delegates overwhelmingly rejected federal intervention in the area. The position was based on the premise that such federal activity would erode common-law doctrine that has evolved at the state level for more than two centuries and on the recognition that systemic problems can be dealt with most effectively at the state level.

## **Background**

In the mid-1990s, the Association established the Task Force to Consider Tort Reform Proposals (now a standing committee: the Committee on the Tort System), which is comprised of Association members whose practices involve mostly civil personal injury litigation. The roster was intended to strike a general balance between members who represent mostly plaintiffs and those who are primarily “defense” or “corporate” counsel.

## **NYSBA Activity**

The Association has contacted federal and state officials to voice the State Bar’s views on particular legislation and the broader issue of tort and medical malpractice reform.

**Ronald F. Kennedy**

# NYSBA 2010

## Federal Legislative Program

### NYSBA Position

In 2002, the House of Delegates approved a recommendation from the Special Committee on Legislative Advocacy to establish a legislative steering committee, the Steering Committee on Legislative Priorities, to select the key legislative issues that will be championed by the Association in a given year.

In April 2009, the House of Delegates approved the creation of the Standing Committee on Federal Legislative Priorities, whose chair is now also a member of the Steering Committee.

In November 2009, the Executive Committee established the first complete list of federal legislative priorities.

### Background

The establishment of clear legislative priorities enhances effective advocacy on behalf of the Association. A specific list of priorities promotes consistency and coordination, and an organized method of involvement of Association entities, members and staff. Accordingly, the Steering Committee on Legislative Priorities was established to consider issues that should be given the greatest priority regarding advocacy activities for each legislative session. The Steering Committee is comprised of the President, the President-elect, the chair of the Committee on Legislative Policy, and the Executive Director. (Note: Some, but not all, of the priorities listed below are covered by separate articles in this edition of Current Legal Issues.)

### NYSBA Activity

On November 6, 2009 the Executive Committee received the recommendations of the Steering Committee on Federal Legislative Priorities and approved the following list of legislative priorities for 2010:

**Repeal of the Defense of Marriage Act (DOMA).** The State Bar supports legislation that would extend federal recognition to same-sex marriages and repeal the Defense of Marriage Act—"DOMA"-- (PL 104-155), which was signed into law in 1996. DOMA prohibits federal recognition of same-sex marriages, which are legal in a few states. The bill would grant federal recognition to same-sex marriages entered into in any state that allows them, regardless of the couple's state of residence. Such recognition would include any federal law involving a question of marital status, such as the tax code or Social Security.

**Support for the Reporter Shield Law (Free Flow of Information Act).** In 2006, the Association approved a position calling for a federal shield law to protect journalists from intrusive demands for information and documents obtained in the course of news gathering or reporting. Congress should adopt a federal shield law modeled on the New York State Shield Law (Section 79-h of the state Civil Rights Law), with provisions substantially similar to those contained in the New York statute.

**Reduction of Global Warming.** In April 2009, the House of Delegates approved a report by the Task Force on Global Warming, relating to the implementation in a timely and cost-effective fashion to reduce greenhouse gas (GHG) emissions and prepare for the inevitable impacts of climate change. Although specific actions may be taken by state and local governments, the most important legislative steps must be accomplished by the federal government.

**Integrity of the Justice System (Federal Issues).** At all levels of government an independent,

well-functioning judicial system, accessible to all, is a bedrock principle of our democracy. The courts, more than any other arm of government, are the bulwark of liberty. Accordingly, the following items are included within this category: i) Funding and restrictions on funds for civil legal services; ii) Protection of the Attorney-Client Relationship; and iii) Creation of Federal Judgeships.

**Support for the Legal Profession**

A core mission of the New York State Bar Association is to represent the interests of the legal profession. In that regard, the Association will work to protect the independence of the judiciary, enhance access to the courts, and promote affirmative legislative proposals that benefit the profession. The Association will review actions and proposals by the state and federal governments that have an impact on the profession. Some actions and proposals unfairly target or burden lawyers. The Association will oppose any such efforts and will work to ensure that attorneys are able to protect their clients' interests and effectively engage in the practice of law.

The Association will take the appropriate steps to promote and achieve these legislative priorities during 2010.

**Ronald F. Kennedy**

# NYSBA 2010 State Legislative Program

## NYSBA Position

In 2002, the House of Delegates approved a recommendation from the Special Committee on Legislative Advocacy to establish a legislative steering committee to select the key state legislative issues that will be championed by the Association in a given year.

## Background

The establishment of clear legislative priorities enhances effective advocacy on behalf of the Association. A specific list of priorities promotes consistency and coordination, and an organized method of involvement of Association entities, members and staff. Accordingly, the Steering Committee on Legislative Priorities was established to consider issues that should be given the greatest priority regarding advocacy activities for each legislative session. The steering committee is comprised of the President, the President-elect, the chair of the Committee on Legislative Policy, and the Executive Director. (Note: Some, but not all, of the priorities listed below are covered by separate articles in this edition of Current Legal Issues.)

## NYSBA Activity

On November 6, 2009 the Executive Committee received the recommendations of the Steering Committee on Legislative Priorities and approved the following list of legislative priorities for 2010.

### **Integrity of New York's Justice System.**

An independent, well-functioning judicial system, accessible to all, is a bedrock principle of our democracy. The courts, more than any other arm of government, are the bulwark of liberty. As the State of New York now faces the challenges and limitations presented by a slowing economy, the Governor and Legislature must ensure that adequate resources are provided so that the courts can meet their essential role.

For the courts to meet properly their essential role, all segments of society must have access to the courts. An independent judiciary is meaningless if the aggrieved cannot come before it. For this reason, the State Bar will continue to urge the appropriation of adequate funds to support civil legal services for the poor. An independent judiciary also relies upon effective counsel. Despite the many pro bono hours attorneys provide to the indigent each year, adequate government funding is necessary to ensure access to the justice system for those who are poor and most vulnerable. State supported **funding for civil legal services for the poor** remains inadequate. Adequate funding provided by a dedicated revenue stream is necessary and prudent. The investment of resources to promptly protect individual rights is necessary and cost effective.

Further, in too many areas of the state, the current system of appointive counsel has not served the criminal justice system well. Due to limited funding and the lack of statewide standards for handling cases, the current indigent defense system is under severe pressure. The right to the effective assistance of counsel is guaranteed by both the federal and state constitutions. Because of concerns that constitutional standards are not being met in all circumstances, an **independent Indigent Defense Commission** should be established, with broad powers to adopt standards, evaluate existing programs and service providers, and generally supervise the operation of New York's public defense system

Similarly, the State Bar will continue to urge the adoption of **judicial salary reform** as part of a program to provide adequate resources for the justice system.

Any **wrongful conviction** erodes the public's confidence in our state's criminal justice system. It is equally clear that these improper convictions diminish our system of justice – punishing innocent persons, and allowing the true criminals to remain at large in society. The Association has identified several areas that if addressed would lessen the likelihood that individuals would be wrongfully convicted. These areas involve: government practices, identification procedures, forensic evidence, false confessions, jailhouse informants, and defense practices.

#### **Equal Legal Rights for Same-Sex Couples.**

Under the current state law, there are significant differences in the legal treatment of marital relationships and committed same-sex relationships in a wide range of matters such as property rights, financial support, responsibilities to children, health care, social security, long-term care, domestic violence, access to the court system, and other issues. Consistent with the policy adopted by the House of Delegates in June 2009, the Association recommends that the state Legislature enact legislation affording same-sex couples the ability to obtain the comprehensive set of rights and responsibilities now available to opposite-sex couples through marriage.

#### **The Compact for Long-Term Care.**

The proposal would provide a fair and equitable way to finance long-term care for elderly and disabled persons in New York, in contrast to the current “all-or-nothing” approach that requires individuals to be impoverished before they qualify for Medicaid. The Compact would promote personal responsibility on the part of the elderly and chronically disabled for a fair share of their long-term care costs. After payment of that fair share by the individual, the government would provide a financial subsidy for additional long-term care services, without requiring that the individual be impoverished. This initiative is designed to increase use of private funds for long-term care, but still maintain the safety net that Medicaid was intended to provide.

#### **Uniform Mediation Act.**

The Uniform Mediation Act (UMA) establishes a standard process for mediation. Under the UMA, mediation would remain voluntary. Most important, the UMA would resolve any question regarding the confidentiality of mediation and, therefore, protection of attorney-client confidentiality. Current law provides for mediation confidentiality in some circumstances. For example, confidentiality is protected by the Community Dispute Resolution Centers Program, Judiciary Law, Article 21-A, and offers to compromise, CPLR 4547, but these rules are specific to the particular proceedings. The UMA is expected to increase the use and usefulness of mediation by standardizing the process and, most important, protecting confidentiality. The increased use of mediation would reduce the costs of disputes for individuals and businesses in New York, and demand upon the courts.

#### **Support for the Legal Profession.**

A core mission of the New York State Bar Association is to represent the interests of the legal profession. In that regard, the Association will work to protect the independence of the judiciary, enhance access to the courts, and promote affirmative legislative proposals that benefit the profession. The Association will review actions and proposals by the state and federal governments that have an impact on the profession. Some actions and proposals unfairly target or burden lawyers. The Association will oppose any such efforts and will work to ensure that attorneys are able to protect their clients' interests and effectively engage in the practice of law.

The Association will take the appropriate steps to promote and achieve these legislative priorities during 2010.

**Ronald F. Kennedy**

# Power of Attorney

## NYSBA Position

In December 2009, the Executive Committee approved recommendations from a Working Group for an affirmative legislative proposal intended to amend the law relating to the statutory power of attorney, Chapter 644 of the Laws of 2008.

## Background

Chapter 644 of the Laws of 2008 enacted far-reaching changes to the state law relating to the power of attorney. The law was originally scheduled to take effect on March 1, 2009; however, due to the efforts of the Association's Elder Law Section and Trust & Estates Law Section, the law's effective date was extended to September 1, 2009. The two sections urged the Legislature to extend the effective date so that "the bar and public, including affected sectors such as banks and other financial institutions, can be properly alerted to, and educated about, the necessity to use the new statutory short form...."

In addition to the efforts by the New York State Bar Association and others to distribute information and conduct seminars about the new law, the Legislature introduced a bill during the 2009 regular legislative session in order to make certain technical corrections to the law. The technical-correction legislation has not been passed into law during 2009, in part because of new questions and issues arose about the impact of the statute.

## NYSBA Activity

The Association has for several years promoted limited changes to the law covering the statutory short form power of attorney. The State Bar's long-standing affirmative legislative proposal would have amended the General Obligations Law to permit annual gifts by a formula in connection with the federal annual gift tax exclusion rather than in a fixed amount, to amend the statutory form to specify the manner by which additional powers may be added, and to adjust the definition of financial institutions.

After receiving input on the new law from Association members throughout the state, President Michael E. Getnick formed a State Bar Working Group on issues relating to the new power of attorney law. Former State Bar President Kathryn Grant Madigan was appointed to serve as chair of the Working Group, comprised of members from the Business Law Section, Elder Law Section, Health Law Section, Real Property Law Section, Senior Lawyers Section, and the Trusts and Estates Law Section.

The Association will submit to the Legislature and the Governor legislative proposals intended to improve the current General Obligations Law provisions on power of attorney.

**Ronald F. Kennedy**

# Pro Bono/Civil Gideon

## NYSBA Position

In November 2008, the House of Delegates approved a white paper entitled “Toward a Right to Counsel in Civil Cases in New York.” The white paper identified the limited types of civil cases where the right to counsel is currently recognized by statute and set forth a compelling argument for the enhancement and extension of the right in the areas of shelter, sustenance, public benefits, child custody and domestic violence.

## Background

Even when times were good, legal services providers turned away more than one million people annually. The underserved now include more and more members of the middle-class. They, along with low-income individuals, are feeling the full brunt of the current economic crisis in the loss of jobs and homes. Not surprisingly, established legal services programs are overwhelmed by the sharp increase in the numbers of those who need free legal assistance and their dwindling financial resources and lack of sufficient staff to meet this need. Consequently, now more than ever before, volunteer lawyers are desperately needed to augment the availability of free legal services.

## NYSBA Activity

In an effort to significantly increase the ranks of available volunteer attorneys, NYSBA signed on as a supporter of the American Bar Association’s initiative establishing the first National Celebration of Pro Bono, which was held during the week of October 25-31, 2009. The goal of the week-long celebration was three-fold: (1) to recognize the significant contributions made by the scores of attorneys who already participate in pro bono; (2) to educate the public and the legal profession about the ever-growing unmet legal needs of low-income people and others who have been hard hit by the economic downturn; and (3) to encourage more attorneys to volunteer.

In preparation for National Pro Bono Week, in September the State Bar provided free MCLE training in the areas of wills, health care proxies, debtor/creditor issues and bankruptcy to approximately 57 attorneys who agreed to accept at least three pro bono case referrals from a local legal services provider.

The State Bar is also mindful that civil legal programs frequently lack sufficient resources to provide necessary on-going training to staff. In an effort to address this need, in June 2009 the State Bar provided a free, day-long seminar, entitled “Mandated Representation in Family Court: Practical Guidance for Parents’ Attorneys.” More than 100 attorneys who represent low-income and indigent parents were trained in a variety of cutting edge issues that frequently arise in Family Court proceedings. The training was videotaped and has been made available for legal services and volunteer lawyer projects to use in their recruitment of new volunteers.

In addition to adopting the white paper, in November 2008, the House of Delegates adopted a resolution urging the Legislature to provide a right to counsel for vulnerable low-income people facing eviction or mortgage foreclosure; to expand the existing right to counsel in unemployment insurance cases to provide representation to claimants where employers challenge an award of benefits before the Unemployment Insurance Appeal Board; and to increase the existing \$500 statutory cap on attorneys fees so as to encourage more lawyers to accept these cases.

**Gloria Herron Arthur**

# Quality Representation for Indigent Clients

## **NYSBA Position**

In April 2005 the House of Delegates approved statewide standards for the provision of mandated indigent criminal defense representation. Thereafter, in June 2007, the Association endorsed the recommendations of the Chief Judge's Commission on the Future of Indigent Defense Services, including the establishment of a statewide, state-funded, independent public defense commission.

## **Background**

Historically New York State has left it to localities to fashion criminal and civil defense services for indigent clients. This has resulted in varied competency standards for counsel, training requirements, and evaluative methodologies for gauging the effectiveness of legal services providers and individual public defenders. Consequently, the quality of legal representation has varied widely, not only among offices, but also within an office.

## **NYSBA Activity**

At the request of then-Chief Judge Judith S. Kaye, the Commission on the Future of Indigent Defense Services examined New York's county-based indigent defense system. The commission concluded that there is "a crisis in the delivery of defense services to the indigent throughout New York State and that the right to effective assistance of counsel, guaranteed by both the federal and state constitutions, is not being provided to a large portion of those who are entitled to it." Because of concerns that constitutional standards are not being met in all circumstances, the commission recommended the restructuring of the delivery of indigent defense services by establishing a statewide defender office, which would include an Independent Indigent Defense Commission, Chief Defender, and Regional and Local Defender Offices.

In 2009, the Association made support of an Indigent Defense Commission one of its legislative priorities. It also was one of the recommendations of the Task Force on Wrongful Convictions, which was approved by the House of Delegates in April 2009. The issue remains a legislative priority in the 2010 session.

Additionally, during 2009 the Association focused on Family Court proceedings in cases involving child custody, abuse and neglect. In an effort to ensure that the mandated legal services providers who represent clients in such proceedings are well-trained, the Association sponsored a five-credit MCLE training program in June 2009. The free seminar, entitled "Mandated Representation in Family Court: Practical Guidance for Parent's Attorneys," focused on those areas where there exists a limited right to counsel. The program, which was attended by 100 mandated service providers, also was videotaped and has been made available to legal services programs and volunteer lawyers' projects to use in their recruitment and training of new volunteers.

**Gloria Herron Arthur  
and Richard Rifkin**

# Recording Custodial Interrogations

## **NYSBA Position**

In June 2004, the House of Delegates adopted a resolution concerning the electronic recording of custodial interrogations, which urged the Legislature to enact laws requiring the videotaping of custodial interrogations in the most serious cases.

## **Background**

Currently, no law in this state requires the police to videotape or audiotape their interrogations of suspects in custody. The Association's Criminal Justice Section and the New York County Lawyers Association raised convincing arguments that such interrogations should be videotaped in order to assure the integrity of the fact-finding process, improve the quality of police interrogation and prevent both the ill treatment of detainees and the lodging of false complaints of physical or psychological abuse.

Following the passage of the 2004 resolution, the issue was placed on the Association's legislative priority list for the following legislative year. A small working group was assembled to draft proposed legislation. The State Bar's bill was subsequently introduced in both houses.

## **NYSBA Activity**

The Association slightly altered its legislative efforts and began pushing to establish a pilot program to provide funds to selected counties for the equipment to videotape custodial interrogations. It is expected that a pilot program will demonstrate that the practical difficulties can be overcome, and that prosecutors and law enforcement officials will have positive experiences with videotaping.

Funding for the Association's pilot project was ultimately attained in both the 2006-2007 State budget and again in the 2007-2008 budget.

The Association's working group administering this pilot project was charged with determining how to distribute funding and developing "protocols" for operation of the projects, including guarantees that participating district attorneys would provide the State Bar with data that would be the basis of a later report to the Legislature on the projects. As of the fall of 2010, pilot projects have been funded and are on-going in Schenectady, Broome, Greene and Westchester Counties.

**Kevin M. Kerwin**

# Rules of Professional Conduct

## **NYSBA Position**

In November 2007, the NYSBA House of Delegates approved New York Rules of Professional Conduct prepared by the Committee on Standards of Attorney Conduct, contingent upon their adoption by the Appellate Division of State Supreme Court.

## **Background**

Until 2009, New York retained the Code of Professional Responsibility, initially adopted in 1970, as the set of rules governing the professional conduct of attorneys. In December 2008, the Appellate Division of State Supreme Court announced the adoption of Rules of Professional Conduct to replace the Code, effective April 1, 2009. The Rules of Professional Conduct are published as part 1200 of the Joint Rules of the Appellate Division.

## **NYSBA Activity**

The NYSBA Committee on Standards of Attorney Conduct is charged with ongoing review of the rules governing the legal profession in New York State. In 2005, the committee completed a comprehensive review of the New York Code and the ABA Model Rules of Professional Conduct; the Committee's resulting report recommended that New York adopt the format of the Model Rules of Professional Conduct and proposed a set of Rules of Professional Conduct for adoption in New York. Pursuant to a schedule adopted by the House of Delegates in November 2005, the House considered and approved the format change in April 2006. The House then proceeded to consider the individual rules at a series of House meetings commencing in June 2006 and concluding in November 2007, at which time the House approved the rules for submission to the Appellate Division. The rules were submitted in February 2008 and, as noted above, in December 2008 the Appellate Division announced the adoption of the Rules of Professional Conduct, effective April 1, 2009. In adopting the Rules, the Appellate Division adopted much of what had been proposed by the State Bar, although a handful of proposals were not adopted.

The Appellate Division adopted only the black-letter rules; the court did not adopt the accompanying Commentary that was prepared by the Committee on Standards of Attorney Conduct and adopted by the Association. Following the Appellate Division's announcement of the new rules, the committee reviewed the Commentary and made revisions to harmonize it with the rules as adopted. The Rules of Professional Conduct with the accompanying Commentary have been published on the State Bar Web site and in the form of a printed book.

**Kathleen R. Mulligan Baxter**

# Standards for Pleading in Federal Litigation

## NYSBA Position

There is no position at this time.

## Background

The U.S. Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), have generated a great deal of discussion. Some commentators have stated that the decisions should be seen as the latest steps in a long-term judicial trend that has favored increasingly early case disposition in the name of efficiency, economy, and the avoidance of abusive and frivolous lawsuits. Some members of Congress have disagreed with that assessment. Senator Arlen Specter of Pennsylvania was the first to introduce legislation on the topic, when he made the following statement: "The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the Federal courts and, with it, any legal redress for their injuries. I think that is an especially unwelcome development at a time when, with the litigating resources of our executive branch and administrative agencies stretched thin, the enforcement of Federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants." Senator Specter's legislation would provide that federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the less restrictive standards set forth by the Supreme Court in *Conley v. Gibson*, 355 U.S. 41 (1957).

Legislation on this topic also has been introduced in the House of Representatives by Congressman Jerrold Nadler of New York.

## NYSBA Activity

In 2009, President Michael E. Getnick and President-Elect Stephen P. Younger established the State Bar Special Committee on Standards of Pleading in Federal Litigation, comprised of representatives from the Antitrust Section, Business Law Section, the Commercial and Federal Litigation Section, the Trial Lawyers Section, the Torts, Insurance and Compensation Law Section, and the Committee on Civil Rights. The committee is in the process of examining issues relating to standards for pleading a cause of action in federal litigation according to the Federal Rules of Civil Procedure in order to submit a report and recommendations to the State Bar leaders.

**Ronald F. Kennedy**

# State of Our Courthouses

## **NYSBA Position**

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As a statewide association comprised of and representing attorneys, all of whom are officers of the Court, the State Bar has a direct interest in assessing the condition of our courthouses and in making recommendations for improvements where improvements are needed. In June 2009, the House of Delegates approved a report and recommendations on the state of New York courthouses.

## **Background**

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Historically, local governments have been responsible for providing facilities for New York courts. Over time, there has been an increasing state role in overseeing and assisting the performance of this local responsibility, as well as increasing state financial assistance to local governments. This process has had mixed results. Many local governments failed to meet their court facilities obligations adequately in the 1980s. In response to this crisis, the Legislature enacted the Court Facilities Act of 1987, which reaffirmed the principle that the provision, maintenance and operations of city- and county-level trial court facilities in New York remain a responsibility of the cities and counties. To assist—and prod—local governments in meeting this responsibility, the Act established a capital planning process, provided state aid in the form of a subsidy (ranging from 10% to 25%) of maintenance and operations costs, and provided, at local option, technical and financing assistance from the State Dormitory Authority. State aid programs established by the statute were to be funded by various user fees and fee increases deposited into a new state special revenue fund, the Court Facilities Incentive Aid Fund, to be administered by the Judiciary subject to appropriations. Since 1988, the Court Facilities Act has been amended at various times. For example, in 1996, the state assumed (subject to a four-year phase-in) responsibility for reimbursing local governments 100% of the approved expenses for court cleaning and minor repairs.

This state support notwithstanding, there are reports of courthouse conditions in a few locales that are substandard and not conducive to the orderly administration of justice. Crowded conditions, lack of areas where attorneys and clients can meet privately, premises that are not clean or are in a state of disrepair, and even situations where certain aspects of the facility are inaccessible to those with handicaps or unsafe in general, are some of the more grievous complaints occasionally lodged. To be fair, it is also true that some courthouses are clean, modern, and ideal to conduct the court's business. Most courthouses are adequate, but could be improved. Many courthouses are of older vintage and, although clean and in good repair, are not well-equipped for the use of modern technology.

## **NYSBA Activity**

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In June of 2008, the Task Force on the State of our Courthouses was appointed to examine the physical attributes of courthouses throughout the state, including such characteristics as access, amenities, food service, ADA compliance, security, lighting, acoustics, state of repair and cleanliness of the facilities. Courtesy (or lack thereof) on the part of court staff, and access to technology, including the use of e-filing, were also examined. The task force visited courthouses throughout the state, and conducted surveys of attorneys, judges, court personnel and jurors.

The recommendations proposed by members of the task force included the following:

- Commissioning the OCA to study and implement the means to monitor, simplify and expedite maintenance and repair of courthouse facilities throughout the state;
- Reconfiguring existing space, wherever feasible, to create private conference space and planning to include private conference space in all future courthouse renovations and new construction;

- Including food service (cafeterias, vending machines, etc.) in new or renovated courthouses and upgrading such services in existing courthouses;
- Upgrading all facilities to allow complete accessibility for persons with disabilities;
- Providing electronic filing (E-filing) in all courts with electronic access to court filings;
- Installing wireless (WiFi) computer access to the Internet throughout all courthouses; and
- Soliciting the input of local bar associations and court personnel to improve existing and new courthouse facilities.

The task force also recommended that the president of the State Bar take steps through the task force or a new special committee to engage in dialogue with the courts, local bar associations, OCA and municipalities, and to collaborate with the Fund for Modern Courts, to follow up on the recommendations outlined in the report. Additionally, the task force called upon this special committee to report back to the State Bar Association in three years on progress made in implementing the report's recommendations.

To view the full report of the Task Force on the State of Our Courthouses, please visit [www.nysba.org/2009CourthouseReport](http://www.nysba.org/2009CourthouseReport).

**Terry J. Brooks  
and Mark Wilson**

# Wrongful Convictions

## **NYSBA Position**

In April 2009, the House of Delegates approved a report submitted by the Task Force on Wrongful Convictions. The report contained numerous recommendations that were intended to reduce the risk of wrongful convictions in the criminal justice system. They covered government practices, identification procedures, forensic evidence, defense practices, false confessions, jailhouse informants and compensation for those wrongfully convicted. Prior to this action, the House, in 2004, had adopted a resolution urging that custodial interrogations be videotaped in many circumstances. The Association has since obtained grants to fund pilot projects in Schenectady, Broome, Greene and Westchester Counties.

## **Background**

While notions of fairness and due process have been the underpinnings of our criminal justice system from the earliest days of our nation and state, there always have been individuals who were convicted of crimes they did not commit. In recent years, this reality has been brought to the public's attention, mainly due to the development of the use of DNA as evidence. There also have been several recent well-publicized studies, and headlines were generated by the convictions of the defendants in the so-called Central Park Jogger case based on confessions that were later demonstrated to have been false.

## **NYSBA Activity**

In May 2008, the Task Force on Wrongful Convictions was created and charged with "identifying the causes for wrongful convictions, and to attempt to eliminate them." The task force examined about 50 identified cases where an individual had been convicted and was later exonerated by a court. Using these cases, as well as additional research, the task force proposed numerous reforms—which included legislation, court rules, modification of the practices of law enforcement officials, more resources and assistance for defense counsel, new training requirements and other recommendations—to significantly reduce the likelihood of wrongful convictions in the future. It submitted a preliminary report to the House of Delegates in January 2009, held two hearings and then submitted a final report with its recommendations at the April 2009 meeting of the House, where it was approved. The task force is now working to implement its recommendations, and anticipates submitting to the Executive Committee a number of bills which, if approved in January, will be submitted to the Legislature in its 2010 session.

In addition, in 2009, Westchester was added to the counties receiving funding for the purpose of videotaping custodial interrogations.

**Richard Rifkin**

# **Informational Topics**

# Balanced Lives in the Law

## **NYSBA Position**

The State Bar is committed to promoting practices that help practitioners balance their personal and professional lives and recognizes the importance of encouraging a well rounded existence where work and private life are in balance.

## **Background**

In 2006 the State Bar Balanced Lives and the Law Committee found that attorneys are challenged to achieve a balance between professional work and personal lives. This issue has sometimes been characterized as a women's issue, because women attorneys are often forced to choose between family responsibilities including having children and career advancement. In actuality, life-work balance is a broader issue that affects both male and female lawyers. The American Bar Association Task Force on the Renaissance of Idealism in the Profession, for example, reported in 2007 that the average number of billable hours per lawyer had increased each year since the 1970s, which contributed to a withdrawal of attorneys from participating in community and public service activities. The requirement of law firms for associates to bill 2,200 hours or more each year left little time for personal activities. Anecdotal evidence suggests that professional burnout is a common affliction of attorneys, and that many leave the practice of law to pursue other, less stressful careers. Thus, the issues of balanced lives continue to have viability.

## **NSYBA Activity**

The committee's mission was to study the work lives and expectations of members of the legal profession in their various work settings and the challenges they confront in striving for a balance of professional and personal responsibilities, given changing societal and professional needs and demands.

The committee submitted a report and recommendations to the Executive Committee and House of Delegates in April of 2008, which were unanimously adopted. The report identified ways to promote discussion and increase awareness of the issues and possible actions that could be taken by individuals, law offices, bar associations, law schools and other entities to promote balanced professional and personal lives for members of the profession. The full report is located at [www.nysba.org/balancedlives](http://www.nysba.org/balancedlives).

The ongoing work of the Balanced Lives Committee was assigned to the Law Practice Management Committee, which, along with the Lawyers in Transition Committee, continues to examine the effects on attorneys of increased time pressures and client demands, difficult economic conditions, the highly competitive market for legal services, advances in communication tools and other technology, client development, law firm billing practices, work expectations and procedures in attorney hiring, retention and advancement. Both committees have been providing programs and resources to help attorneys deal with the pressures of practicing law and widely promoting practices that assist attorneys in their quest for a balanced life.

**Pamela McDevitt**

# Children and the Law

## Revised Standards for Attorneys Representing Children in Juvenile Delinquency

### NYSBA Position

The revised standards for attorneys representing children in juvenile delinquency were adopted by the Executive Committee in June 2009.

### Background

Standards for representing children were initially developed for a New York State Bar Association Law Guardian Study in 1984 (Law Guardians in New York State: A Study of the Legal Representation of Children). Subsequently, the Committee on Children and the Law (formerly known as the Juvenile Justice and Child Welfare Committee) concluded that Bar Association adoption and distribution of the standards would prove beneficial to the bench and bar. The preparation of standards and commentaries represent an important aspect in improving representation, and in assisting the large number of attorneys who appear before the Family Court.

### NYSBA Activity

In 2009, the committee updated the Standards for Attorneys Representing Children in Juvenile Delinquency Proceedings, revising the standards that were issued in 1996. These standards apply to all attorneys representing children in juvenile delinquency proceedings. Because of the complexity of the statutory and case law applicable in juvenile delinquency proceedings, the substantial liberty interests at stake, and the imposing and intimidating presence of a Government prosecutor possessing substantial resources that can be brought to bear against the child, these Standards, unlike the Standards governing other types of proceedings, include a substantial amount of statutory and case law, as well as detailed discussions regarding defense strategy. The Standards do more than provide standards of practice; they are also designed to be a day-to-day practice resource.

The term “law guardian” is not used because the October 17, 2007 Administrative Order of the Chief Judge of the State of New York indicates that “attorney for the child” means a law guardian and because the term “attorney” reflects the current understanding of the function of the child’s representative.

The Executive Committee approved the standards at the June 2009 meeting. The standards have been published and are available online at [www.nysba.org/ChildrenandtheLaw](http://www.nysba.org/ChildrenandtheLaw).

## Attorney for the Child

### NYSBA Position

The Association supports the replacement of the term “law guardian” with “attorney for the child.”

### Background

The 1962 Family Court Act provided for the representation of children through a state funded program, establishing the first system in the United States for representing our most vulnerable citizens. Under the Act the attorney for the child has been called a “law guardian,” a term which is confusing and misleading. Although the derivation is obscure, the term is statutorily defined as an attorney who represents a child. During the past several years a consensus has evolved to discontinue the opaque title and substitute the present legal

definition of “attorney for the child.” That consensus is reflected in an official position of the New York State Bar Association, the Report of the Miller Commission on Matrimonial Law, the Chief Judge, and other officials and organizations throughout the State.

An October 17, 2007 Administrative Order of the Chief Judge of the State of New York indicates that “attorney for the child” means a law guardian and the term “attorney” reflects the current understanding of the function of the child’s representative.

### **NYSBA Activity**

The Committee on Children and the Law submitted a Memorandum in Support of Bill S546-a/A7805-a, which if enacted would change the term “law guardian” to “attorney for the child.”

## **Jurisdictional Age of Juvenile Delinquency in New York**

### **NYSBA Position**

In November 2008, the Executive Committee approved a resolution to, in part, recommend a study of whether the general juvenile delinquency jurisdictional age should be raised to 18.

### **Background**

New York is one of only two states in which children who are age sixteen and over cannot be prosecuted as juvenile delinquents, and must consequently be prosecuted criminally as adults. In the overwhelming majority of states most children cannot be charged criminally as adults until they attain age eighteen.

The New York Family Court Act’s establishment of age sixteen as the threshold of adult criminal jurisdiction was deemed to be “tentative” by the relevant Constitutional Convention Commission and subject to change. Recent research has proven conclusively that children under the age of eighteen have significantly diminished judgmental capabilities. Children in New York sixteen years and over could benefit greatly from programs and services available only for children found to be delinquent in Family Court and hence not convicted in a criminal court.

### **NYSBA Activity**

The Committee on Children and the Law submitted a resolution to the Executive Committee requesting that the New York State Legislature and the Governor of the State of New York establish and fund a commission or task force to consider and recommend whether the general juvenile delinquency jurisdictional age should be raised to age eighteen, and that the commission or task force report their findings and recommendations to the Governor and the Legislature on a timely basis. The Executive Committee passed the resolution at its November 2008 meeting.

## **Recording Interrogations of Children**

### **NYSBA Position**

In November 2008, the Executive Committee approved a resolution supporting an amendment of the Family Court Act to govern the recording of custodial interrogations of children.

### **Background**

There is a growing trend throughout the country to audio-visually record the interrogation of adults in custody, a practice supported by prosecutors as well as defense attorneys. There is widespread recognition that custodial interrogations can result in false confessions, which not only deprive the innocent of their liberty, but undermine public confidence in law enforcement and our system of justice. These concerns are particularly acute when the subject of police

interrogation is a child. Awareness of the pitfalls surrounding juvenile interrogations is reflected in statutes and court rules designed to protect children.

By statute, interrogations of juveniles must under most circumstances take place at facilities designated by the Chief Administrator of the courts as suitable places for the questioning of children. Deploying audiovisual recording equipment at the same designated facilities where juvenile interrogations must now be conducted should be required.

The juvenile justice subcommittee of the Committee on Children and the Law considered the current statutory scheme found in Family Court Act § 305.2 with respect to the custodial interrogation of children and believes that this section of the law should be expanded to provide for the audio and video recording of any interrogation of children while in custody.

#### **NYSBA Activity**

The Committee on Children and the Law, by resolution passed at its June 11, 2008 meeting, recommended an amendment to the Family Court Act requiring that any custodial interrogation of children at a place designated by the Chief Administrator of the Courts for the questioning of children be recorded audio-visually in its entirety. The Executive Committee approved the resolution at its November 2008 meeting.

**Katherine Suchocki**

# Civil Rights Agenda

## **NYSBA Position**

In June 2008, the House of Delegates adopted a resolution based on the report of the Committee on Civil Rights applauding the decision of the United States Supreme Court in *Boumediene v. Bush*. This decision granted the right of habeas corpus to those detained at the naval base located at Guantanamo Bay, Cuba. The House of Delegates directed the committee to supplement its report by examining how the rights granted by the decision should be defined and implemented.

## **Background**

After the attacks on September 11, 2001 in New York City and Washington, D.C., the United States Government converted its military base at Guantanamo Bay into a detention center. It eventually held hundreds of individuals without judicial process. In 2006, Congress enacted the Military Commissions Act, providing for the prosecution of those detained by military commission and denying them any right of habeas corpus. The Committee on Civil Rights examined this Act and, in June 2008, presented a report to the House of Delegates entitled "Report on Executive Detention, Habeas Corpus and the Military Commissions Act of 2006."

## **NYSBA Activity**

In January, 2009, Barak Obama became President and pledged to close Guantanamo Bay by January 2010. Based on the policy adopted at its June 2008 meeting of the House, the Association co-sponsored a resolution at the meeting of the House of Delegates of the American Bar Association held in February 2009. The resolution was adopted, and called for specified rights to be given to detainees based upon their status. For those charged with violations of the criminal law, the resolution called for prosecution in Article III courts unless the Attorney General certifies that they cannot be so tried, in which case they should be tried in another forum in a manner that comports with fundamental notions of due process. After the United States Attorney General decided in November that Khalid Shaikh Mohammed and several other detainees will be tried in the Southern District of New York, the President of the Association issued a press release noting that this comported with the ABA resolution that the Association had co-sponsored.

**Richard Rifkin**

# Code of Conduct for Administrative Law Judges

## **NYSBA Position**

In April 2009, the House of Delegates approved a Code of Conduct for Administrative Law Judges as proposed by the Committee on Attorneys in Public Service.

## **Background**

At the present time, there is no statewide code of conduct for administrative law judges in New York. While the New York Code of Judicial Conduct, adopted by the Chief Administrator of the Courts for members of the judicial branch, provides useful guidance, it is not tailored to the specific needs of administrative law judges.

## **NYSBA Activity**

The Committee on Attorneys in Public Service, through its Subcommittee on the Administrative Law Judiciary, prepared a proposed code of conduct for administrative law judges. The proposed code is based in large measure on the New York Code of Judicial Conduct and also incorporates provisions from the Rules of Conduct for Administrative Law Judges and Hearing Offices of the City of New York, the ABA Model Code of Judicial Conduct for State Administrative Law Judges, and the National Association of Administrative Law Judiciary's Model Code of Judicial Conduct for State Administrative Law Judges. The proposed Code was approved by the House of Delegates in April 2009 and it has been forwarded to state administrative agencies for evaluation and adoption.

**Kathleen R. Mulligan Baxter**

# Judicial Selection

## **NYSBA Position**

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The Association has long supported numerous proposals relating to the selection of New York State judges that are designed to enhance public trust and confidence in the legal system. In 1973, the House of Delegates first approved a court reorganization plan, which would have reformed the process for selection of judges. The House revisited the issue and reaffirmed its support for reform in 1979. More recently, in 1993, the Association adopted a “Model Plan for Implementing the New York State Bar Association’s Principles for Selecting Judges.”

## **Background**

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Judicial elections and their impact on the public’s perception of the court system have in recent years been the focus of considerable attention by the media, state policy-makers, and bar association leaders. In 2003, then-Chief Judge Judith S. Kaye announced the establishment of the Commission to Promote Public Confidence in Judicial Elections, chaired by former Dean John D. Feerick of the Fordham University School of Law. On June 29, 2004, the “Feerick Commission” issued the second of three reports, proposing a package of reforms, including state-sponsored independent screening commissions for judicial candidates.

In December 2004, the Association approved a report in favor of establishing a judicial election qualification commission in each judicial district to review the qualifications of judicial candidates.

Also in 2004, Judge Margarita Lopez Torres, along with other individual voters and judicial candidates, brought an action in the United States District Court (EDNY) against the New York State Board of Elections for declaratory and injunctive relief under 42 U.S.C. § 1983. The action challenged the constitutionality of New York’s convention system for the nomination of party candidates for state Supreme Court justice and sought permanent injunctive relief to replace the convention system with a primary system. The district court granted the plaintiffs’ motion for a preliminary injunction, and the U.S. Court of Appeals for the Second Circuit upheld the district court’s decision. The U.S. Supreme Court granted certiorari, and the Association joined with the City of New York, the Association of the Bar of the City of New York, and the Fund for Modern Courts to submit a brief as amicus curiae in support of the Respondents, Margarita Lopez Torres, et al. In its January 16, 2008 opinion, the Court held that New York’s system for choosing political party nominees for State Supreme Court does not violate the First Amendment to the U.S. Constitution.

## **NYSBA Activity**

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Reform of the law to require a commission-based process for the selection of judges remains the Association’s objective. That process, whereby a non-partisan commission would recommend a limited number of candidates for selection by the appointing authority, would eliminate the influence of partisan politics and ensure that competence, temperament and integrity are the primary factors regarding selection of judges. However, until that goal is achieved, the Association recognizes and supports the need for improvements in the operation of judicial conventions to address the practical and constitutional infirmities that exist.

**Ronald F. Kennedy**

# Privacy in the Profession

## **NYSBA Position**

The House of Delegates approved the report of the Task Force on Privacy at its April 2009 meeting. The report identified privacy issues that impact layers and their clients, provided suggestions for best practices, and identified the most important and pressing issues in privacy law.

## **Background**

The Association is concerned about protecting the privacy rights of both lawyers and clients. The landscape of privacy law is constantly and rapidly changing. In this era of technological innovation, it is difficult, if not impossible, to be continuously aware of the current state of the law and what the rights and obligations are of both businesses and individuals with respect to personal and private information. Consequences of invasions of privacy are far-reaching, especially considering the possible invasions of the attorney-client privilege.

## **NYSBA Activity**

In 2008, a Task Force on Privacy was created to identify areas of privacy for lawyers and those they represent in relation to Internet, health and financial information.

The task force examined privacy concerns in specific areas, such as litigation, employment law, health law, intellectual property law, business law, and criminal law.

The task force first presented its report to the House of Delegates in January 2009. The House acknowledged the report as an interim report and directed the task force to further explore the privacy issue and include input from all sections, as well as local and specialty bar associations. To this end, the task force held a Privacy Summit on March 5, 2009 and invited representatives from all sections, local and specialty bars, and other privacy experts to participate. The information gathered from this Summit was incorporated into the revised report and presented at the April 2009 House and Executive Committee meetings.

The House of Delegates adopted a resolution that included recommended best practices for lawyers such as: steps should be taken to avoid or mitigate the risk that the client information obtained in the course of legal practice is accessible to unauthorized persons and that agencies should strive to commit adequate resources to enforce compliance with existing privacy laws. Additionally, the resolution included pressing privacy law areas that CLE programs should address. Medical Information Technology, Employment, and Record Retention and Destruction are just three of the eight areas identified. The full report and resolution can be found at: [www.nysba.org/privacypolicy](http://www.nysba.org/privacypolicy).

**Stacey Whiteley**

# Town and Village Justice Courts

## **NYSBA Position**

In 2001, the Association's House of Delegates approved a report by the Special Committee on Public Trust and Confidence in the Legal System, which recommended that town and village justices should be lawyers.

In February 2008, the House of Delegates approved the report and recommendations of the Task Force on Town and Village Justice Courts, relating to the removal of barriers for lawyers to serve as justices, upgrading technology and physical facilities, providing additional training and education for court personnel.

In January 2009, the House of Delegates acted on the report of the Special Committee on Court Structure and Judicial Selection, in response to the report entitled Justice Most Local: The Future of the Town and Village Courts in New York State, by the Chief Judge's Special Commission on the Future of New York State Courts.

## **Background**

Questions surrounding access to justice at the town and village justice court level are not new. However, recent media accounts have highlighted allegations of inappropriate conduct on the part of some justices, the substandard condition of many town and village courtroom facilities, and serious concern over the general administration of justice in the town and village courts.

## **NYSBA Activity**

The Association's Task Force on Town and Village Justice Courts was created to develop recommendations for the State Bar to consider with respect to addressing access to justice in the town and village courts in the state. It reviewed the prior work and currently stated positions of the Association and analyzed the Office of Court Administration's Action Plan and the proceedings of the Special Commission on the Future of New York State Courts, chaired by Carey R. Dunne (Dunne Commission) regarding this issue. Following the August 2007 issuance of task force's final report and recommendations, members undertook additional deliberations with representatives from the New York City and Nassau County Bar Associations, both of which also had recently issued similar reports. (After completion of its report, the task force was merged with the Special Committee on Court Structure and Judicial Selection.)

On September 18, 2008, the Dunne Commission's final report made several recommendations; however, a proposal requiring that town and village justices are lawyers was not among those recommendations.

The State Bar's Committee on Court Structure and Judicial Selection prepared a report and recommendations, which supported most of the recommendations made by the Dunne Commission. On January 30, 2009, the House of Delegates approved the report, with the exception of the section relating to a criminal defendant's right to "opt out" of a proceeding before a non-lawyer judge. The House separately voted to endorse the Dunne Commission's proposal allowing criminal defendants appearing before a non-lawyer judge the opportunity to have the matter heard by a lawyer-judge.

The Association has submitted to state officials its position set forth above, including the position in support of legislation that would amend the Uniform Justice Court Act to provide that criminal defendants may have their cases heard before a judge or justice admitted to practice law in New York.

**Ronald F. Kennedy**



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