

NYSBA LEGISLATIVE PRIORITIES FOR 2016

The process to select legislative priorities for 2016 began in July with a letter from President Miranda to all NYSBA section and committee officers, requesting that they submit recommendations to be considered for the upcoming legislative session. In addition to the President's letter, the Department of Governmental Relations sent a follow-up request to section and committee officers.

The initial review of issues in the Association's priority-selection process began with the Committee on Legislative Policy, which met on October 1, 2015, and the Committee on Federal Legislative Priorities, which met on September 29, 2015. The Committees met to discuss the Association's current list of legislative priorities, review the recommendations submitted to them, and to determine which issues should be recommended for further consideration. The Steering Committee on Legislative Priorities made recommendations to the Executive Committee, which met on November 6 and approved the following priorities for 2016:

State Legislative Priorities for 2016

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 practitioners we have a strong interest in the impact that the Judiciary Budget has on the operation of the court system. The Governor and Legislature must appropriate adequate resources, which should be wisely and clearly administered by the courts, to ensure that they fulfill their essential role. In addition to support for various budget items, NYSBA should support an appropriation of \$100 million for civil legal services via the Judiciary Budget. Further, the Association supports direct state funding to ensure that indigent defendants receive effective legal representation in New York's criminal justice system.

Wrongful Conviction Reform. Wrongful Convictions cast serious doubt on a fundamental assumption of our criminal justice system -- that the innocent are protected. It is essential that our criminal justice system ensure that the innocent remain free and that the guilty are not free to commit more crimes. The eradication of wrongful convictions is essential to maintain the public's trust and confidence in our criminal justice system. Two of the root causes of wrongful convictions -- false confessions and flawed eyewitness identification procedures -- must be addressed. To this end, the Association has drafted legislation that would mandate the electronic recording of custodial interrogations, including juveniles, and establish a procedure for law enforcement to follow when conducting eyewitness identifications.

Increase the age of criminal responsibility. In New York State, children who are age 16 and over cannot be prosecuted as juvenile delinquents and, consequently, must be prosecuted as adults in the criminal justice system. In the overwhelming majority of states, most children cannot be charged criminally as adults until they attain age 18. The New York Family Court Act's establishment of age 16 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 18 have significantly

diminished judgmental capabilities. Children in New York 16 years and over could benefit from programs and services available only for children found to be delinquent, rather than being convicted under current state law in criminal court.

Increased Voter Participation. New York's voter participation rates have continued to decline. In order to reverse that trend, the Association supports changes to the law relating to voter registration and voting practices to make it easier to register and vote. Some of these changes would modernize the registration process, allow pre-registration of 16 and 17 year-olds, allow election-day and same-day registration, and prevent deceptive practices.

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. It is just as important to oppose those proposals that would burden the profession. The Association will work to ensure that attorneys are able to protect their clients' interests and effectively engage in the practice of law.

Federal Legislative Priorities for 2016

Integrity of the Justice System. 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, sequestration, which was imposed by the Budget Control Act of 2011, should be eliminated. The Association will continue to urge federal policymakers to address important fiscal issues so as to prevent impairing access to justice. If sequestration were reinstated, it will cripple the operation of the federal courts and the Legal Services Corporation, thereby limiting access to the justice system for individual New Yorkers and business entities.

Support the Paycheck Fairness Act. The Act would amend the portion of the Fair Labor Standards Act of 1938 (FLSA), known as the Equal Pay Act, to revise remedies for, enforcement of and exceptions to prohibitions against sex discrimination in the payment of wages.

Support Increased Voter Participation. In the United States, voting is one of our most fundamental rights, ensuring our ability to participate in the electoral process. However, the rate of voter participation is of concern throughout the nation. The Association supports the Voting Rights Amendment Act, which responds to the U.S. Supreme Court's decision in *Shelby County v. Holder* regarding protection, under the Voting Rights Act of 1965, against racial voting discrimination. The legislation would provide for a new approach to determining which jurisdictions are "covered" for purposes of Section 5 preclearance.

Support legislative reform to address the state of crisis in immigration representation. The condition of immigrants who face civil immigration detention, removal and likely permanent expulsion from the United States is often undermined by the lack of available competent counsel necessary to navigate the "labyrinthine character of modern immigration law." Without competent counsel in immigration proceedings, a vast majority of noncitizens are ill-equipped to know where to turn for help or how to proceed in an immigration matter. The Association is committed to enactment of a statutory right to appointed counsel to ensure justice for that community of immigrants who are confronted with legal proceedings.

Support for states' authority to regulate the tort system. Laws covering the area of civil justice are truly the province of state legislatures, the judiciary, and voters. For over 200 years the authority to promulgate "tort law", including law relating to liability for medical errors, has rested with the states, which have the experience and expertise with these matters. The federal government should leave it to the states to determine how best to provide access to the courts for the injured to exercise their right to seek compensation for their injuries and to make reasonable adjustments to the system.

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New Federal Priorities for 2016

Support Criminal Justice Reform. There is legislation pending in Congress that would reform many aspects of our nation's criminal justice system. In particular, the Sentencing Reform and Corrections Act of 2015 is the result of a bi-partisan agreement by leaders of the U.S. Senate. (Senate Judiciary Chair Grassley and Senator Schumer are among the sponsors of the legislation.) The bill has been approved by the Senate Judiciary Committee. Although the bill covers a number of issues on which the Association does not have policy, it does include several provisions that address areas about which the Association has policy and, could, therefore, support. Of interest to the Association, the bill includes provisions to: reduce certain mandatory-minimum sentences, provide judges with greater discretion when determining appropriate sentences, limit the use of solitary confinement of juveniles and allow sealing convictions of juveniles in certain circumstances, and preserve cooperation incentives to aid law enforcement in tracking down kingpins.

Sponsors' Summary of Key Provisions in the Bill:

- **Reforms and Targets Enhanced Mandatory Minimums for Prior Drug Felons:** The bill reduces the enhanced penalties that apply to repeat drug offenders and eliminates the three-strike mandatory life provision, but it allows those enhanced penalties to be applied to offenders with prior convictions for serious violent and serious drug felonies;
- **Broadens the Existing Safety Valve and Creates a Second Safety Valve:** The bill expands the existing safety valve to offenders with more extensive criminal histories but excludes defendants with prior felonies and violent or drug trafficking offenses unless a court finds those prior offenses substantially overstate the defendant's criminal history and danger of recidivism. The bill also creates a second safety valve that gives judges discretion to sentence certain low-level offenders below the 10-year mandatory minimum. But defendants convicted of serious violent and serious drug felonies cannot benefit from these reforms;
- **Reforms Enhanced Mandatory Minimums and Sentences for Firearm Offenses:** The bill expands the reach of the enhanced mandatory minimum for violent firearm offenders to those with prior federal or state firearm offenses but reduces that mandatory minimum to provide courts with greater flexibility in sentencing. The bill also raises the statutory maximum for unlawful possession of firearms but lowers the enhanced mandatory minimum for repeat offenders;
- **Creates New Mandatory Minimums for Interstate Domestic Violence and Certain Export Control Violations:** The bill adds new mandatory minimum sentences for certain crimes involving interstate domestic violence and creates a new mandatory minimum for providing weapons and other defense materials to prohibited countries and terrorists;
- **Applies the Fair Sentencing Act and Certain Sentencing Reforms Retroactively;**

- Provides for Prison Reform based on the Cornyn-Whitehouse CORRECTIONS Act: The bill requires the Department of Justice to conduct risk assessments to classify all federal inmates and to use the results to assign inmates to appropriate recidivism reduction programs, including work and education programs, drug rehabilitation, job training, and faith-based programs. Eligible prisoners who successfully complete these programs can earn early release and may spend the final portion (up to 25 percent) of their remaining sentence in home confinement or a halfway house;
- Limits Solitary Confinement for Juveniles in Federal Custody and Improves the Accuracy of Federal Criminal Records; and,
- Provides for a Report and Inventory of All Federal Criminal Offenses.

Support Family Paid Leave. The Family and Medical Insurance Leave Act, S.786 (Gillibrand) would provide workers with family and medical leave insurance benefit payments when a family or medical need arises. It would be funded in a manner similar to the Social Security program.

With more than half of all women in the U.S. workforce today, the rapidly aging U.S. population, and generational workforce shifts, the need for our country to revisit and address family and medical leave is essential. This legislation is a timely, pragmatic and useful strategic solution in the development of a national uniform strategy and business planning approach that supports businesses and the U.S. workforce of today and tomorrow.

Oppose Lawsuit Abuse Reduction Act (LARA). This bill would amend Rule 11 of the Federal Rules of Civil Procedure (“FRCP”) -- via a process that is inconsistent with the Rules Enabling Act, 28 USC sections 2072-74 -- to reinstate a mandatory sanctions provision that was deleted from the FRCP in 1993. The Rules Enabling Act provides that procedural rules should be drafted by the Judicial Conference of the United States, submitted to the U. S. Supreme Court for consideration and promulgation, and then transmitted by the Court to the Congress for its consideration before the rules take effect. That process respects the power of the judicial branch and recognizes the expertise and perspective of judges regarding the FRCP. Circumventing the rule-making process of courts under the Rules Enabling Act would be poor precedent.

Moreover, enactment of this legislation would constitute bad public policy in that it would restore a system that was in effect from 1983 to 1993, and which was thoroughly discredited because it did not allow for ameliorative action by the courts. The bill also would require the imposition of monetary sanctions, including attorneys’ fees, for violation of Rule 11. Such “fee-shifting” is contrary to the American Rule and would have a dampening effect on access to the justice system. Further, the bill would eliminate a provision adopted in 1993 that allows parties and their attorneys to avoid sanctions by withdrawing particular claims, and thereby resolving issues before the matter goes before the court.

If enacted, this bill would significantly multiply satellite litigation, substantially degrade the efficiency of the courts, and greatly increase costs of the litigation process. Changing Rule 11 in this way would poison the relationships between parties and their attorneys, making cases more difficult to settle.