



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item # 12

REQUESTED ACTION: Approval of the attached priorities recommended for the 2012 legislative session.

On January 25, 2002, the House of Delegates approved a report by the Special Committee on Legislative Advocacy. A section of that report pertained to the goal of refining the NYSBA's "message" to the Legislature and the establishment of a steering committee to accomplish that goal. Accordingly, the Steering Committee on Legislative Priorities, comprised of the President, the President-Elect, the Chairs of the Committee on Legislative Policy and the Committee on Federal Legislative Priorities, and the Executive Director, met to consider issues that should have the greatest priority regarding advocacy activities during 2012. The accompanying memorandum sets forth a list of priority issues recommended by the Steering Committee. (Also attached as background material, please find a copy of legislative priorities for 2011.) The Executive Committee is requested to approve the list of recommended legislative priority issues.

This item will be presented by Hermes Fernandez, Chair of the Committee on Legislative Policy and John Nonna, Chair of the Committee on Federal Legislative Priorities, both member of the Steering Committee on Legislative Priorities.

To: Executive Committee
From: Steering Committee on Legislative Priorities
Date: October 26, 2011
Re: NYSBA Legislative Priorities -- 2012

NYSBA LEGISLATIVE PRIORITIES FOR 2012

The process to select legislative priorities for 2012 began in July with a letter from President Doyle 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. In response to this outreach, several recommendations were submitted for consideration.

The initial review of issues in the Association's priority-selection process began with the Committee on Legislative Policy, which met on September 23, 2011, and the Committee on Federal Legislative Priorities, which met on September 14, 2011. 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 to the Steering Committee for its consideration. The Steering Committee on Legislative Priorities met on October 11 to consider recommendations.

Recommended State Legislative Priorities

Set forth below are the recommendations for the Association's 2012 **State Legislative Priorities**:

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 faces the challenges and limitations presented by a down economy, the Governor and Legislature must ensure that adequate resources are provided so that the courts can meet their essential role.

The Association has traditionally advocated that State policymakers appropriate adequate funding for the State's Unified Court System. The unprecedented elimination of \$170 million from the Court System's 2011-12 budget resulted in layoffs of hundreds of court employees. Because of this funding crisis, there is serious concern over the ability of the courts to perform their constitutional function and provide access to justice. In order to provide true access, the courts must have well-trained personnel, operate on a full-time basis, and maintain all necessary facilities to ensure that society attains justice. Due to continuing projections of a budget deficit that must be confronted during the next budget cycle, funding for the Judiciary will continue to be a very high priority for the Association.

For the courts to properly meet 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. 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 the 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 Judiciary's proposed 2011-12 budget recognizes the substantial unmet need for civil legal services throughout the state and includes \$25 million to begin implementation of recommendations to address the need. The investment of resources to promptly protect individual rights will save substantial dollars that would otherwise be spent by government for social services, housing and other programs.

Further, in too many areas of the state, the current public defense system has not served the criminal justice system well. 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, the Office of Indigent Legal Services should be properly funded in order to carry out its mission.

Wrongful convictions cast serious doubt on a fundamental assumption of our criminal justice system - - that the innocent are protected, the guilty are punished, and the public's trust and confidence in the criminal justice system is maintained. The Association has drafted a package of bills intended to address this topic, including a bill to amend the Criminal Procedure Law to require electronic recording of custodial interrogations. This item should include the amendment of the Family Court Act, to highlight due process for children and to provide for the audio and video recording of any interrogation of children while in custody at a facility designated by the chief administrator of the courts.

Further, the age of criminal responsibility should be increased. New York is one of only two states in which 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 in Family Court and hence not convicted in a criminal court.

Business Law Section proposal re State Non-profit Corporation Law. This proposal developed out of a process initiated by the Business Law Section's Corporation Law Committee to review and reform of the current Not-for-profit Corporation Law and to establish the "Non-profit Corporation Law." The proposal seeks to improve selected provisions of the law, especially in light of the dramatic changes in corporate governance throughout the sector in response to the Sarbanes-Oxley Act. The non-profit sector in New York State is enormous and wide-ranging, consisting of foundations and charities, health care organizations, service agencies, clubs and neighborhood groups, cultural institutions, religious organizations, research and educational centers, chambers of commerce, economic development corporations, and more. The impact of the sector, and even certain of the entities within it, is vital to the people and economy of the State of New York.

This proposal is intended to adopt policies and practices commonly used throughout the United States, and to eliminate outdated idiosyncratic provisions of New York's law.

Reorganization of the State Court System.

The Committee on Court Structure and Operations recommends that the Association serve as a catalyst for implementing re-organization of the state courts, according to the policy adopted by the House of Delegates in 1998. The Committee report states that, "to make the case for reform to the governor, the Chief Judge, and the leaders of the Legislature, it will be important for NYSBA to provide concrete details about the impact re-organization will have on the State, including, at a minimum:

- "A credible case for actual and significant savings to the State budget;
- "Specifics as to how the new model would operate, and not just high-level organization charts; and,
- "Which important stakeholders and communities support the effort and where further outreach and effort is needed to bring others along. "

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, promote affirmative legislative proposals that benefit the profession, and oppose those proposals that would burden it. The Association will work to ensure that attorneys are able to protect their clients' interests and effectively engage in the practice of law.

Recommended Federal Legislative Priorities

Set forth below are the recommendations for the Association's 2012 **Federal Legislative Priorities**:

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, the following items are included within this category: i) Funding and elimination of restrictions on funds for civil legal services; ii) protection of the attorney-client relationship; and, iii) Support rule-making process according to the Rules Enabling Act and maintain Rule 11 of the Federal Rules of Civil Procedure.

Funding and elimination of restrictions on funds for civil legal services. The Legal Services Corporation (LSC), created in 1974 to ensure that all Americans have access to a lawyer and the justice system for civil legal issues regardless of their ability to pay, provides grants to independent local legal services programs to ensure that these goals are met. The Association has consistently called for adequate funding in New York State, to address the "justice gap" between the need for legal services by the indigent and the funds necessary to fulfill the need. Congress should adequately fund LSC and eliminate uneconomical restrictions that have been imposed by the federal government on the use of private, state, and local funds.

In particular, Congress should eliminate the restriction placed on LSC-funded providers that prohibits how they can spend the funds received from non-LSC sources. The result of this unreasonable and uneconomical restriction is that millions of dollars from state and local governments, private donors, and other non-LSC sources are restricted as if they were LSC funds. This prevents legal service providers' clients from having access to the full range of legal tools available to clients of private attorneys. The Association supports appropriate funding of legal services and the elimination of restrictions on the use of funds.

Protection of the Attorney-Client Relationship. As important as the ability to access our system of justice system is, so too is the assurance that a client's conversations with his or her attorney are guarded by the staunchest protection. The Association has consistently expressed concern over encroachment on the attorney-client privilege by policies of the United States Department of Justice. Those policies encourage organizations to waive their attorney-client privilege and related attorney work-product protection, to refuse to pay counsel fees to employees suspected of impropriety, and to fire employees who assert constitutional or other privileges. The attorney-client privilege is an essential element of the American system of justice, permitting the candid discussion of the facts and the law between client and counsel. The Association has actively supported the Attorney-Client Privilege Protection Act and other proposals to protect the attorney-client relationship.

Support rule-making process according to the Rules Enabling Act and maintain current Rule 11 of the Federal Rules of Civil Procedure ("FRCP"). The Lawsuit Abuse Reform Act of 2011 (LARA) would amend Rule 11 -- 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 LARA would constitute bad public policy in that it would restore a regime 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 LARA 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.

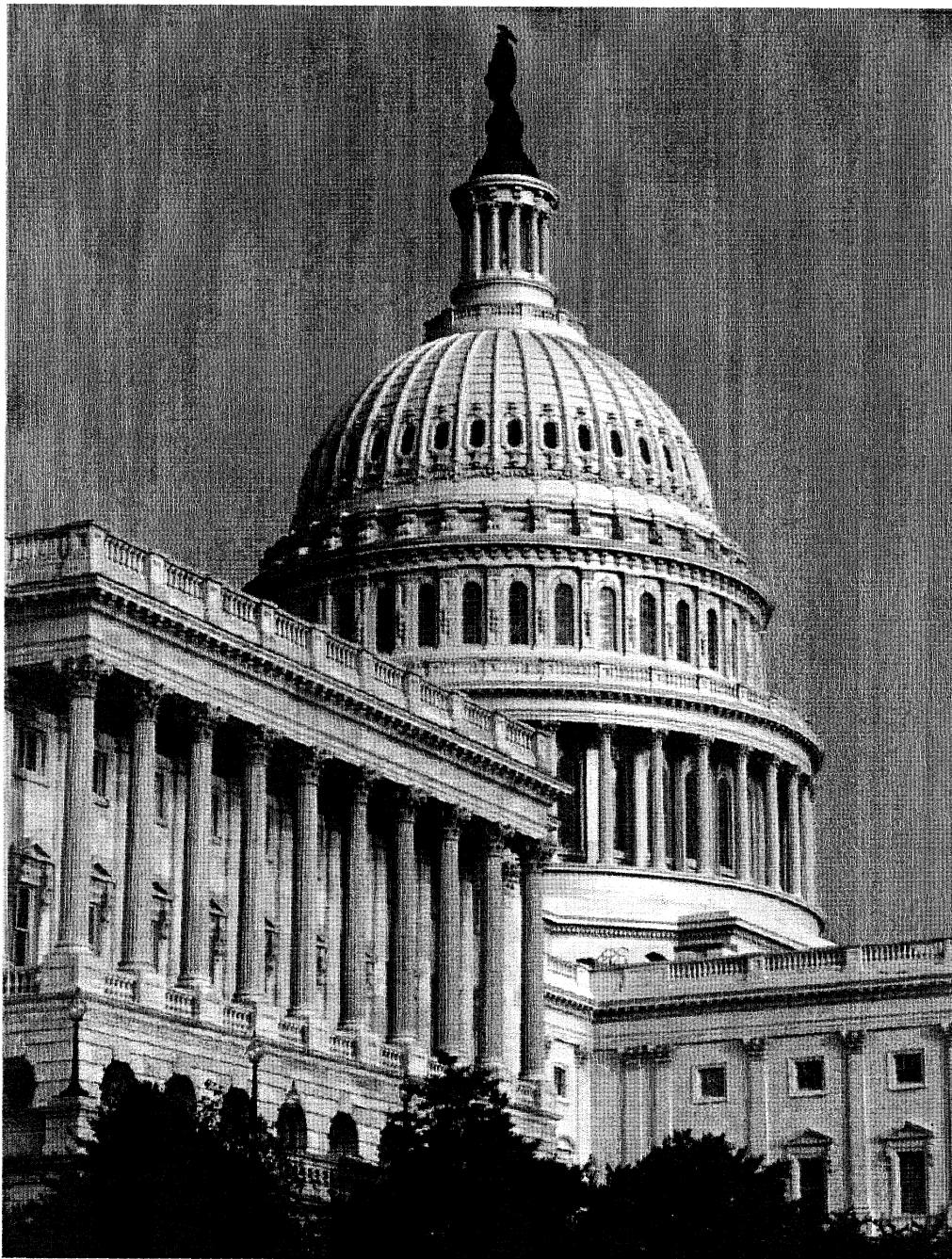
Repeal of the Defense of Marriage Act (DOMA). DOMA prohibits federal recognition of same-sex marriages, which are legal in a few states. The Association supports legislation that would extend federal recognition to same-sex marriages and repeal the Defense of Marriage Act—"DOMA." The law should grant 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.

The Association supports equity for same-sex couples and objects to discrimination against individuals on the basis of their sexual orientation. People in same-sex relationships should have the same legal rights and responsibilities as opposite-sex couples. The Association, therefore, urges repeal of DOMA.

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.

Support Legislation and Funding to Enhance Civic Education Programs. The Association supports federal programs developed to promote civic education and responsibility among the nation's elementary and secondary students. Such programs augment the mission of the Association's Law, Youth and Citizenship (LYC) program, which was established in 1974 to promote law-related education in New York's public and private schools. The LYC program assists educators in preparing students, pre-kindergarten through 12th grade, for their active, engaged roles as citizens who have the knowledge, skills, and the civic attitudes fundamental to a healthy democracy.

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, promote affirmative legislative proposals that benefit the profession, and oppose those proposals that would burden it. The Association will work to ensure that attorneys are able to protect their clients' interests and effectively engage in the practice of law.



NEW YORK STATE BAR ASSOCIATION

FEDERAL LEGISLATIVE PRIORITIES 2011



NEW YORK STATE BAR ASSOCIATION

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, the following items are included within this category: i) Funding and elimination of restrictions on funds for civil legal services; ii) protection of the attorney-client relationship; and, iii) creation of federal judgeships and swift confirmation of nominees.

Funding and elimination of restrictions on funds for civil legal services. The Legal Services Corporation (LSC), created in 1974 to ensure that all Americans have access to a lawyer and the justice system for civil legal issues regardless of their ability to pay, provides grants to independent local legal services programs to ensure that these goals are met. The Association has consistently called for adequate funding in New York State, to address the "justice gap" between the need for legal services by the indigent and the funds necessary to fulfill the need. Congress should adequately fund LSC and eliminate uneconomical restrictions that have been imposed by the federal government on the use of private, state, and local funds.

In particular, Congress should eliminate the restriction placed on LSC-funded providers that prohibits how they can spend the funds received from non-LSC sources. The result of this unreasonable and uneconomical restriction is that millions of dollars from state and local governments, private donors, and other non-LSC sources are restricted as if they were LSC funds. This prevents legal service providers' clients from having access to the full range of legal tools available to clients of private attorneys. The Association supports appropriate funding of legal services and the elimination of restrictions on the use of funds.

Protection of the Attorney-Client Relationship. As important as the ability to access our system of justice system is, so too is the assurance that a client's conversations with his or her attorney are guarded by the staunchest protection. The Association has consistently expressed concern over encroachment on the attorney-client privilege by policies of the United States Department of Justice. Those policies encourage organizations to waive their attorney-client privilege and related attorney work-product protection, to refuse to pay counsel fees to employees suspected of impropriety, and to fire employees who assert constitutional or other privileges. The attorney-client privilege is an essential element of the American system of justice, permitting the candid discussion of the facts and the law between client and counsel. The Association has actively supported the Attorney-Client Privilege Protection Act and other proposals to protect the attorney-client relationship.

Creation of Federal Judgeships and Swift Nomination and Confirmation of Nominees. Once an individual accesses the justice system, their claim should be resolved in a reasonable time-frame. Therefore, the Association supports legislation that would create new judgeships to address the increased caseloads that burden federal courts. Furthermore, the Association urges the swift nomination and confirmation of new federal judges to alleviate delay in the courts caused by increased caseloads.

Stephen P. Younger, *President*
Vincent E. Doyle, III, *President-Elect*

FEDERAL LEGISLATIVE PRIORITIES FOR 2011

Repeal of the Defense of Marriage Act (DOMA). DOMA prohibits federal recognition of same-sex marriages, which are legal in a few states. The Association supports legislation that would extend federal recognition to same-sex marriages and repeal the Defense of Marriage Act—"DOMA." The law should 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.

The Association supports equity for same-sex couples and objects to discrimination against individuals on the basis of their sexual orientation. People in same-sex relationships should have the same legal rights and responsibilities as opposite-sex couples. The Association, therefore, urges repeal of DOMA.

Support for the Reporter Shield Law (Free Flow of Information Act). The Association supports 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 approve such a law modeled on the New York State Shield Law (Section 79-h of the state Civil Rights Law).

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.

Support Legislation and Funding to Enhance Civic Education Programs. The Association supports federal programs developed to promote civic competence and responsibility among the nation's elementary and secondary school students. Such programs augment the mission of the Association's Law, Youth and Citizenship (LYC) program, which was established in 1974 to promote law-related education in New York's public and private schools. The LYC program assists educators in preparing students, pre-kindergarten through 12th grade, for their active, engaged roles as citizens who have the knowledge, skills, and the civic attitudes fundamental to a healthy democracy.

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, promote affirmative legislative proposals that benefit the profession, and oppose those proposals that would burden it. The Association will work to ensure that attorneys are able to protect their clients' interests and effectively engage in the practice of law.

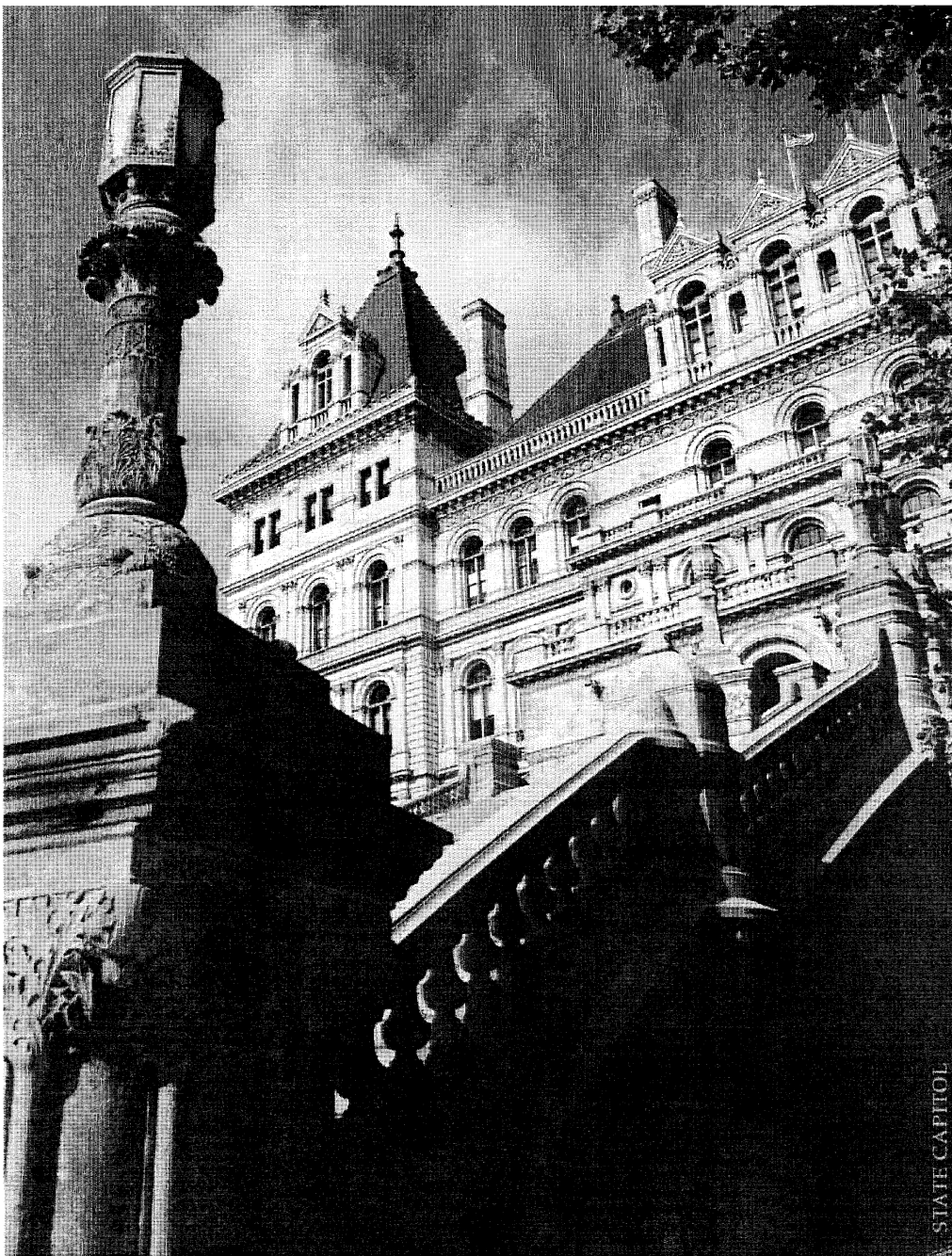


NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, NY 12207

518.463.3200

www.nysba.org



STATE CAPITOL

NEW YORK STATE BAR ASSOCIATION
LEGISLATIVE PRIORITIES
2011



NEW YORK STATE BAR ASSOCIATION

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 faces the challenges and limitations presented by a down 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 properly meet 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. 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 the 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 Judiciary's proposed 2011-12 budget recognizes the substantial unmet need for civil legal services throughout the state and includes \$25 million to begin implementation of recommendations to address the need. The investment of resources to promptly protect individual rights will save substantial dollars that would otherwise be spent by government for social services, housing and other programs.

Further, in too many areas of the state, the current public defense system has not served the criminal justice system well. 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, the recently created Office of Indigent Legal Services should be well funded in order to carry out its mission. Areas to be addressed include the adoption of standards, and evaluation of existing programs and service providers to ensure the fair and efficient operation of New York's public defense system.

Wrongful convictions cast serious doubt on a fundamental assumption of our criminal justice system – that the innocent are protected. Steps must be taken to lessen the likelihood of wrongful convictions. 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. Moreover, the eradication of wrongful convictions is essential to maintain the public's trust and confidence in our criminal justice system.

LEGISLATIVE PRIORITIES FOR 2011

To this end the Association has drafted a package of legislation that, if enacted, would eliminate some of the common causes of wrongful convictions. This legislation addresses the following areas: establishing a procedure for law enforcement to follow when conducting eyewitness identifications; vacating a conviction based on the discovery of new DNA evidence; monetary remedies for those wrongfully convicted; evidentiary treatment of informant testimony; mandating the electronic recordation of custodial interrogations; and the treatment of exculpatory material by the government.

Ethics and New York State and Local Government. All those who serve in or seek to serve in public office should promote and enhance the public's trust and confidence in government by adhering to the highest ethical standards. The Association's Task Force on Government Ethics studied and reported on issues relating to public sector ethics laws, focusing on i) improving the structure of the state's enforcement mechanisms in the area of ethics, consistent with our notions of fairness and due process; ii) enhancing the ability of state prosecutors to bring criminal charges where a public official fails to provide honest services to the public; iii) enhancing the requirements of public disclosure where needed to increase transparency and the public's knowledge of potential conflicts; and, iv) modernizing the ethics laws applicable to municipal government.

The Task Force report, which was approved by our House of Delegates on January 28, 2011, makes recommendations intended to increase the public's confidence in government.

Marriage Equality 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. The Association continues to support legislative resolution of this issue.

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, promote affirmative legislative proposals that benefit the profession, and oppose those proposals that would burden it. The Association will work to ensure that attorneys are able to protect their clients' interests and effectively engage in the practice of law.



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, NY 12207

518.463.3200

www.nysba.org