## New York State Bar Association

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## Memorandum

To: NYSBA Executive Committee

From: Steering Committee on Legislative Prioritiess

**Date:** October 23, 2012

Re: Recommended Federal Legislative Priorities for 2013

Set forth below are the recommendations of the Steering Committee on Legislative Priorities regarding the Association's 2013 Federal Legislative Priorities:

## I. 2012 Legislative Priorities recommended to be continued in 2013

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.

<u>Funding and elimination of restrictions on funds for civil legal services</u>. 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 for 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.

<u>Protection of the Attorney-Client Relationship.</u> 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 (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.

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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 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 12<sup>th</sup> grade, for their active, engaged roles as citizens who have the knowledge, skills, and the civic attitudes fundament 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.

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## II. New Recommendations for 2013

In addition to the above-mentioned issues, the Steering Committee on Legislative-Priorities recommends that the Association's 2013 <a href="federal">federal</a> legislative priorities include the following:

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- A. "Integrity of the Justice System" should highlight the **sequestration process**, created by the Balanced Budget and Emergency Deficit Control Act of 1985 ("Gramm-Rudman-Hollings"). Because Congress has not produced a plan to reduce the federal budget deficit, the Budget Control Act of 2011 requires \$109.2 Billion in cuts beginning in FY 2013. \$54.7 Billion will come from the non-military/defense programs. The automatic cuts affect both mandatory and discretionary spending with proportionate cuts to both, and take effect on January 2, 2013. The Judiciary's budget would be cut by more than \$500 million below the 2012 level. Such a reduction would cripple the operation of the federal courts. Sequestration would also continue exerting devastating pressure on the Legal Services Corporation and limit access to the justice system for more New Yorkers in need of legal services.
- B. Support concept of federal *Brady* legislation. In *Brady v. Maryland* (1963) the U.S. Supreme Court held that suppression of exculpatory evidence and impeachment evidence by the prosecution violates due process. Legislation on this topic should require attorneys for the government to disclose favorable information to defendants in criminal cases brought by the United States, help

establish uniformity in standards for disclosure duties of prosecutors, and set forth possible statutory remedies for violation of the law.

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