

Civil Practice – 2021 State Legislative Priorities

2021 AGENDA TO ADDRESS INCOME INEQUALITY, POVERTY, HOMELESSNESS; PROTECT LOW-INCOME TENANTS, IMMIGRANTS, WORKERS AND CONSUMERS, AND RESTORE AND INCREASE CIVIL LEGAL SERVICES FUNDING

CIVIL LEGAL SERVICES FUNDING

Restore and increase Civil Legal Services funding. The economic recovery must not be built on the backs of low-income communities of color who have been disproportionately impacted by the consequences of the pandemic and economic fallout. **Civil legal services are an essential part of the recovery.** All cuts are not equal. Restore and increase the Civil Legal Services Allocation in the Legal Services Assistance Fund (LSAF).

COVID RESPONSE

Rent Relief Package

Rent relief finalized in the December federal stimulus bill – \$25 billion distributed to states, a fraction of the \$100 billion proposed nationally – will not be nearly enough to prevent mass evictions and severe rent liability in New York. New Yorkers will owe close to [\\$3.5 billion](#) in rent arrears and some 700,000 New Yorkers are at risk of eviction. Meaningful rent relief will be critical to prevent mass homelessness and severe rent liabilities for low-income families.

Introduce and adopt time-limited changes to preserve and expand access to critical government benefits New Yorkers need to get through the COVID crisis.

Low-income New Yorkers need legislation that helps them meet their most basic needs despite the barriers created by COVID-19. NYS should pass a benefits- and assistance-focused package that would adopt time-limited changes to State Social Service Law provisions during the pendency of the pandemic. Among other measures, the package would help prevent eviction and homelessness by eliminating the FHEPS lawsuit requirement (at essentially no cost); help ensure the ability to apply for and keep benefits; change budgeting rules to make sure people with poverty level wages and meager resources can still access assistance; suspend the 45-day “waiting period” required to receive Safety Net Assistance; forgive the repayment of rental assistance; and make a small PPE supplement available to help low-income New Yorkers get through the pandemic safely.

New York Health and Essential Rights Act (NY HERO Act) sponsored by Assemblywoman Karines Reyes, and State Sen. Michael Gianaris

The NY HERO Act would direct the New York State Department of Labor to establish requirements for testing, face masks, PPE, social distancing, hand hygiene, disinfection, and engineering controls. Every employer in the state would be required to follow these standards, which will be enforced by DOL through investigations, fines, and legal injunctions. The legislation would encourage workers to monitor and report them, along with guarantees the workers would be protected from retaliation. Fines, which have not yet been set, would function as additional revenue for the Department of Labor. The standards include providing workers with

personal protective equipment, implementing testing protocols, supplying hand sanitizer, following social distancing, and disinfecting areas in the workplace. No bill number yet.

Restoring UI Benefits to Workers Refusing to Work Under Unsafe Conditions (A.10468 Simon/S.8309 Hoylman)

Protects workers' right to continued receipt of UI benefits if they refuse to work under unsafe conditions. Of enormous importance, especially since the DOL issued guidance to the public that is misleading and undercuts existing protections in the case law. Cost is to the UI trust fund, which is currently borrowing from the federal trust fund and will be insolvent regardless of the DOL's policy on this issue. Doesn't affect the general fisc. Referred to committee.

Extend UI Benefits to Workers with Part-Time Employment (A.446 Stirpe/S.5754 Ramos)

Changes the state's UI rules for claimants with part-time work. This is critical for people, particularly during the pandemic, who are piecing together whatever work they can find right now. Instead of getting punished by the UI system for finding part-time work, they would benefit from it, up to a point. The governor has proposed it in the past, but said it would take years for the computer system to be fixed to handle the new calculations (which involve simple arithmetic), but now he has Google helping him out, so it might be possible to move this. Cost would be only to the State trust fund, currently borrowing from the federal trust fund; no cost to the public fisc. It could well increase employment.

Generating new tax revenue for a worker relief fund (A.10414 de la Rosa/S.8277 Ramos)

This bill would create a fund for excluded workers. Would create tax on unrealized appreciation in wealth of NY billionaires and use it to fund a program providing cash to workers who don't qualify for UI or federal assistance (e.g., because of lack of work authorization or because they were recently released from incarceration and didn't have a job to lose). This is very important, because these groups are left out in the cold so far. It's a racial justice issue, too.

HOUSING

Pass new "good cause" eviction legislation to bring renters' rights to tenants in smaller Buildings (A.5050 Hunter/S.2892 Salazar)

Rent stabilization only applies to buildings with 6 or more units. But more and more, large corporate landlords are buying up smaller buildings, and tenants who live in them face escalating rents and displacement. In gentrifying parts of New York City, like East New York and Bushwick, the housing stock is overwhelmingly smaller buildings. As the housing affordability crisis seeps out of New York City and into the suburbs, it is imperative that we bring rent relief to smaller buildings as these residents increasingly come under threat of displacement. Good cause eviction would bring the right to a renewal lease at limited rent increases set by a local price index to all tenants.

Housing access voucher program (A.9657A Cymbrowitz/S.7628A Kavanagh)

The Housing Access Voucher Program would create a state-wide Section 8 program. The bill would prioritize vouchers for homeless New Yorkers to provide a path to permanent housing while also providing vouchers to low-income tenants who are unstably housed.

Funding for Public Housing

Some 600,000 NYCHA tenants are living in untenable conditions. The State needs to fund the capital needs of public housing across the state but especially in New York City.

IMMIGRATION

Child Trauma Response Act (A.7815B Hevesi/S.6225B Biaggi)

The Child Trauma Response Act would provide universal representation to unaccompanied minor children in immigration court.

PUBLIC BENEFITS

Adopt a Critical Rent Subsidy Program - Home Stability Support (A.1620 Hevesi/S.2375 Krueger)

The Home Stability Support (HSS) program would establish realistic rent supplements to prevent eviction and homelessness. The public assistance shelter allowance is decades out of date. In NYC a single person receives only \$215 towards rent, a couple only \$250, and a family of 4 only \$450 per month. Meanwhile, the **Fair Market Rent** for a modest apartment in New York City ranges from \$1,760 for a studio, to \$2,053 for a two-bedroom apartment. New York City and a few other counties have state-approved rent supplement programs, but up until now the State has kept the subsidy unrealistically low and imposed onerous restrictions. The HSS bill would create a statewide housing supplement program providing payments of up to the Fair Market Rent to avoid homelessness and unsafe housing conditions. Adoption of HSS is part of the platform adopted by Housing Justice for All – a statewide coalition that The Legal Aid Society is actively involved with.

Provide Diaper Allowance to Help Struggling Families (A.2567B Solages/S.1086 Persaud)

This legislation would empower Social Services Districts to make grants of up to \$80 every three months to families with children under the age of two who need diapers. This common sense reform will help ensure that low-income families with infants do not need to choose between essentials like food and housing and ensuring they have enough diapers for their young children.

Strengthen Families – Allow Fair Treatment of a Child’s Unearned Income (A.9064 Hevesi/S.7260 Persaud)

Passed in the Senate and the Assembly in 2019, but vetoed by the Governor and reintroduced in 2020. The legislation would amend Social Services Law sections 131a (8) and 131c to enable families to choose whether to include a child with unearned income in their household when they apply for public assistance. Families could maximize the resources available to the children in the family by not requiring brothers, sisters, half-brothers and half- sisters, stepbrothers, stepsisters, and cousins be included in the public assistance household and not presuming that the income of such children is available to the public assistance household.

Under current law, the income of any child, such as child support or Social Security Survivor’s benefits provided for the support of that individual child, is **considered available to the entire household**, reducing or eliminating the public assistance grant for the household. This makes far fewer resources available for the care of the child applying for assistance and other members of the household. In practice, the current law requires a child’s income intended for that child’s

support to support other members of the household. There is a coalition continuing to work on this issue.

EMPLOYMENT

The SWEAT bill: Secure compliance with wage laws through wage liens (A.9008 Rosenthal/S.7256 Ramos)

This bill would, among other things, create an employee's lien for employees with wage claims. Gov. Cuomo vetoed a previous iteration of the bill, numbered A.486B/S.2844B, in January 2020. The most recent iteration was reintroduced and passed in the Senate in mid-2020 but has not received a vote in the Assembly.

Ending forced labor in correctional facilities and extending NYS minimum wage laws to incarcerated workers

Labor Is Labor is centered around two bills. The first bill is the Freedom from Forced Labor Act (A.8661 Epstein/S.6781 Myrie), which will amend the state constitution to prohibit the forced labor of people who are incarcerated. The second bill is the Real Wages for All New Yorkers Act, which moves regulation of work performed by incarcerated people out of the Department of Corrections and into the Department of Labor. The Real Wages for All New Yorkers Act also calls on the Commissioner of Labor to convene a wage board to set the minimum wage and regulations governing work performed in correctional facilities. The Act also prohibits the forced labor of incarcerated people. We are on the steering committee of the "Labor is Labor" coalition. Related bills are A.1275/S.3138 (Perry/Myrie), the "Prison Minimum Wage Act," would set a \$3 minimum wage for incarcerated individuals; A.1275/S.3138 were introduced in Jan. 2020.

Applying the "ABC" Test to Determine Whether Workers Are Employees or Independent Contractors under New York Labor Law (A.8721A Glick/S.6699A Jackson)

Applying the ABC test in NYS would make it difficult for employers to misclassify their workers as independent contractors under NYS Labor Law or Workers' Compensation Law. Our bill would be similar to AB5, recently signed into law in CA. LAS is part of the NY DIRECT Coalition that was finalizing the drafting of legislation on this issue to extend the test for construction and commercial trucking to (almost) all industries in 2019. As of 2019, the Coalition has already approached potential sponsors who are interested in introducing the bill once finalized. In early 2020, these bills (**A.8721A Glick/S.6699A Jackson**) were introduced.

Lower-priority items:

Partial UI

New York's antiquated partial unemployment rule requiring "total unemployment" on a given day should be replaced with an earnings disregard rule that allows workers to make some money but insures them against destitution when they are given insufficient hours of work to support themselves and their families. The Governor proposed language to address this issue last session and we submitted comments/edits on it to the Senate. The Assembly offered a similar bill outside of the budget process. In the end, there was a dispute over the effective date, since

implementation of the partial UI changes would require computer changes. There will likely be negotiations on how to handle that issue. Regardless of the decision on that issue, we strongly favor proposals to immediately eliminate future penalties based on supposed fraud in receipt of benefits, something the Governor has proposed, and we support adding penalties on employers who commit fraud that delays receipt of benefits. We oppose any increase in existing penalties for receipt of benefits through fraud (up from 15%).

EMPIRE Worker Protection Act (A.2265A, Joiner/S.1848A Hoylman)

LAS is participating in the coalition behind this campaign, led by MRNY. The bill would create a public enforcement action that would allow aggrieved employees to bring on behalf of the state DOL to enforce NYS labor law, even if the employees are themselves restricted to individual arbitration to enforce their own rights directly. As of late 2019, we were finalizing revisions to the text of the bill to address various concerns.

Amend the Human Rights Law regarding employer consideration of criminal records, credit history and other factors

Strengthen protections for job applicants with criminal records – amend the state HRL to mirror NYC’s Fair Chance Act, including a ban the box provision. In addition, the State Human Rights Law should be amended to add protections for certain categories of job applicants and employees: those who are unemployed or have poor credit histories, those who face domestic violence, stalking, or sexual offenses that might interfere with their employment, those who are gender non-conforming.

HEALTH

Medicaid Overpayment Reform

We are awaiting introduction of legislation that would address several of the most egregious aspects of the Medicaid overpayment investigation and collections process in New York State. In many overpayment cases, the beneficiary was eligible for Medicaid for all or part of the period of the investigation. Those facing investigations frequently are pressured into signing settlement agreements they cannot afford or are subject to default judgments when settlement agreements are not reached and they are sued in civil court. Those impacted are often immigrants, those with limited English proficiency, and the working poor. The proposed legislation would: limit the amount of recovery to the amount that a recipient was over-income or over-resourced if that amount is less than the cost of assistance; require an attestation by a government official at the time of the filing of a complaint or the signing of a settlement agreement that the defendant’s lack of eligibility had been adequately established and documented; establish a two-year grace period for those who become ineligible for Medicaid not because of any change to income or resources, but because their category of Medicaid eligibility changed; ensure that individuals who can prove financial hardship are protected from collections or are able to pay a reasonable amount that does not threaten their ability to provide for basic necessities; establish a two year statute of limitations on recovery in overpayment cases; and lower the maximum interest rate to three percent.

Look-Back Requirements for Medical Assistance Benefits (A.10489 Gottfried /S.8337 Rivera)

The new look-back requirement enacted in the 2020-2021 state budget would count any assets transferred during the last 30 months as available resources to an individual applying for home care. The look-back requirement as written would compromise access to home care for many applicants. This legislation would make several changes including exempting certain asset transfers including those used for the benefit of the home care applicant. It would also allow attestation about transfers for those with an immediate need for home care and correct a provision that would essentially make it impossible for anyone's home care services to begin after the look-back.

Eligibility for Home Care Services for Individuals With Cognitive Disabilities (A.10486 Gottfried/S.8403 Rivera) A new requirement limits eligibility for home care services to those who need assistance with more than two Activities of Daily Living (ADLs). There is an exception for those with Alzheimer's and dementia, which allows for home care if they need help with more than one ADL, but the exception doesn't apply to individuals with other diagnosis who require supervision. This legislation adds other cognitive disabilities including traumatic brain injury, developmental disability, cognitive impairment, and blindness to the exemption.

Essential Plan Coverage for Individuals Ineligible Because of Immigration Status (S.8357 Gottfried/A.10474 Rivera)

This bill would provide temporary Essential Plan coverage to income-eligible New Yorkers who tested positive for COVID-19 and are otherwise ineligible because of immigration status.

Automatic Re-enrollment for Medicaid Recipients with Home Care Services (A.9017 Gottfried/S.7523 Rivera)

This bill seeks to stop the cycle of "churning" eligible people off of Medicaid by automating the Medicaid recertification process for four groups: 1) Managed Long Term Care (MLTC) enrollees, 2) Mainstream managed care members receiving personal care or consumer-directed personal assistance services, 3) Medicaid enrollees in the Aged, Blind, and Disabled Category without excess income, and 4) Medicare Savings Program (MSP) recipients. By automating the annual Medicaid "renewal" process, it will prevent the erroneous termination of Medicaid eligibility for these vulnerable populations. When Medicaid is cut off because of a glitch in the renewal process, the individual is automatically disenrolled from their Managed Long Term Care (MLTC) plan, resulting in the loss of life-saving home care benefits. Allowing deemed resource eligibility and attestation for these groups would not put the State at risk of reauthorizing Medicaid for people who are ineligible. Attestation of resources is already used in many parts of Medicaid, with no reported downside. This would not change enrollees' obligation to report changes in income or resources and would not change excess income liability to the plans.

This proposal was combined with a proposal for automatic enrollment into MLTC as A.7578/S.5485, which passed the Senate and Assembly but was vetoed by Governor Cuomo on December 6, 2019 based on a concern that it violates federal law. However, federal law encourages this facilitation of enrollment and recertification.

CONSUMER

Rates of Interest on Money Judgments (A.10479 Weinstein/S.7946 Thomas)

The bill would change the rate of interest on money judgments in consumer debt actions from the current statutory rate of 9% to a variable rate – one year U.S. Treasury bill rate, which is currently what is utilized in federal court. The current 9% was set in 1981, which at the time was just over half the federal benchmark that year. Since then, the benchmark rate has fallen from 14.5% to 0.09% making NY’s judgement interest rate disproportionately high. To date, 28 other states have implemented a post-judgment variable interest rate tied to a federal benchmark. The rates are typically lower than New York’s flat rate. The bill defines consumer debt consistently with federal law to reach judgments against credit card debt, student debt, medical debt, and rent arrears, and caps the interest rate at three percent.

Consumer Credit Fairness Act (CCFA) (A.6909 Weinstein/S.4827 Thomas)

The bill applies to collection lawsuits on ‘consumer credit transactions’ – e.g. credit card, store cards, not other types of consumer debts – e.g. rent arrears, medical bills. We support the bill, except the provision relating to additional notice with summary judgment motions, which in effect is a threatening collection letter. We are working with the New Yorkers for Responsible Lending (NYRL) on this; the bill was amended several times in 2020.

Ban Unfair and Abusive Acts UDAP/GBL 349 Bill (A.679C Niou/S.2407C Comrie)

The bill did would include unfair and abusive acts under General Business Law 349’s list of prohibited acts. It eliminates the requirement that the prohibited activity be consumer-oriented or have an impact on the public at large. Statutory damages increase from \$50 to \$1,000, and punitive damages would be permitted. Attorney fees would be required for the prevailing plaintiff, rather than being discretionary. Also, the bill allows third party standing for some organizations to represent members of the general public. We are working with NYRL on this.

Create a Private Right of Action to Enforce Mortgage Servicing Rules (A.10851 Dinowitz/S.8789 Kavanagh)

Pursuant to Section 595-b of the Banking Law, the Department of Financial Services (DFS) has promulgated detailed regulations governing mortgage servicing in New York State, which provide important consumer protections for New York mortgagors. These detailed rules cover the gamut of mortgage servicers’ activity, including handling of escrow accounts, crediting of payments, statements of account, fees, borrower complaints and inquiries, prohibited conduct, oversight of third party providers, transfers of servicing, the loss mitigation process, and affiliated entities. See 3 NYCRR 419. But in contrast to mortgage regulations under federal law, there is no private right of action to enforce state mortgage financing rules. This bill would create a private right of action for homeowners and borrowers; allow violations of *prior* mortgage services to be asserted as defense to actions brought to enforce mortgage loans after the transfer of servicing rights; and permit defenses in both foreclosure actions and actions on the mortgage note.

Lower-priority items:

Imposes a 16 percent interest rate cap on auto loans (A.7585 Zebrowski /S.5947 Sanders)

About a quarter of all auto loans are now subprime loans, made available to customers who do not qualify for prime loans because of their credit history. Currently, car dealers in New York State are permitted to use retail installment contracts that have an exception from the state's civil usury cap of 16%, and are making high-cost car loans to low- and moderate-income customers at rates of up to 24.99%. At rates that high, consumers can end up paying more in interest than the cost of the car. We have seen increasing numbers of clients who enter into unaffordable auto loans at 22-23 percent interest and are unable to break out of these installment agreements. The bill was referred the Senate Consumer Protection Committee in January 2020.

TAX

Further amend Tax Law Section 171-v to protect the rights of tax debtors facing a driver's license suspension

The New York Legislature amended Tax Law Section 171-v on April 1, 2019 to include new grounds upon which a taxpayer may challenge the proposed suspension of her license. A taxpayer can now challenge on the basis that she receives public assistance or supplemental security income, or that "suspension of the taxpayer's license will cause the taxpayer undue economic hardship." Tax Law § 171-v(5)(vii), (viii). The amendments do not contain any father definitions of "undue economic hardship." New York has previously issued regulations defining this term in the context of the Offer In Compromise ("OIC") Program. See 20 N.Y.C.R.R. § 5005.1(b)(3). Under the OIC regulations, "undue economic hardship" occurs simply when a taxpayer is unable to pay "reasonable basic living expenses." 20 N.Y.C.R.R. § 5005.1(b)(3)(i).

On July 31, 2019, the Department published a new webpage explaining that taxpayers can apply for the undue economic hardship exemption by mailing in a newly issued Form DTF 5.1 (Application for Undue Economic Hardship Exemption from Driver's License Suspension Program), along with a completed Form DTF-5 (Statement of Financial Condition). The DTF-5.1 requires a written explanation of why the taxpayer is eligible for the exemption. The 10-page DTF-5 is the primary document used in the OIC Program its required attachments include the taxpayer's preceding three Federal tax returns, complete credit report, 12 months of bank statements, etc.

The amendments to Tax Law Section 171-v explicitly state that "nothing in this subdivision is intended to limit a taxpayer from seeking relief pursuant to an offer in compromise ...," thereby indicating that the new grounds for challenge are to be considered separately from the OIC Program. Yet, the Tax Department has essentially merged the requirements of the undue hardship exemption and the OIC Program. We believe that by adopting nearly all of the onerous requirements for an OIC into that of the driver's license hardship exemption, the Department violates the statutory and due process rights of New York taxpayers who owe \$10,000 or more in tax debt.

As such, Tax Law Section 171-v should be amended to clearly define economic hardship in order to protect the rights of taxpayers who would be harmed by a suspension of their driver's licenses. The reporting requirements should be simplified for individuals seeking license suspension exemptions, and the standard should be clearly defined to exempt, for example, anyone who receives public assistance, SSI, SSD, child support, unemployment insurance, or

other forms of assistance. For example, Section 171-v(5) could be amended to include a subsection (ix) to provide that a taxpayer may challenge a suspension of their license if “... (ix) the taxpayer receives payments from any of the sources described in CPLR § 5205(1)(2),” so that people with “exempt income” as defined by that section of the CPLR are excluded, or, if “... (ix) the taxpayer receives payments from any of the following sources: social security, including retirement, survivors' and disability benefits, supplemental security income or child support payments; public assistance; workers' compensation; or unemployment insurance.”¹

FAMILY

Child Custody Forensic Reports (A.5621 Weinstein/S.4686 Biaggi)

Provides for uniform access to court ordered forensic mental health evaluation reports and underlying data by litigants, their counsels, and the counsel for the attorney for the child in child custody and visitation cases. Creates a uniform procedure for forensic evaluation reports, which takes the due process rights of litigants into account, and calls for some additional protections, including timely appointment of attorneys for the child and mandatory training and certification of forensic evaluators to further improve custody and visitation matters in family court.

Child Custody Forensic Reports and Training (A.9888 Dinowitz) - Regulates court ordered forensic evaluations involving child custody and visitation and establishes training programs for such forensic evaluators. A9888 is similar to A5621 but does not include as many provisions.

Lesser priority:

Amending SSL 459-a

SSL 459-a defines a domestic violence survivor. It was most recently cited in the governor's budget, section PP and is now referenced in DRL 236B. The problem is that when we amended the FCA article 8 (OP law) to include financial crimes, we did not add these crimes to the definition of DV in the SSL. So, this adds these crimes in, including “identity theft, grand larceny, coercion” at SSL § 459-a(1) in the definition of “victim of domestic violence.”

¹ Other possibilities could include amending 171-v to provide that the taxpayer may challenge the suspension of their license by simply making a brief statement regarding their income; or, N.Y. Tax Law § 171 could be amended to provide that taxpayers can demonstrate “undue economic hardship” simply by making a brief sworn statement, or that the Department of Taxation and Finance’s regulations defining “undue economic hardship” must be answerable by the taxpayer in a brief sworn statement; or the statute could be amended to define “undue economic hardship” could more simply. This would reduce the requirements for taxpayers seeking an Offer in Compromise and for taxpayers seeking an exemption from their license suspension. Section 171 already authorizes the commissioner of the Department to “promulgate regulations defining what constitutes undue economic hardship.”