



**NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
BAR CENTER, ALBANY, NEW YORK
SATURDAY, NOVEMBER 4, 2017 – 9:00 A.M.**

AGENDA

1. Approval of minutes of June 17, 2017 meeting 9:00 a.m.
2. Report of Treasurer – Mr. Scott M. Karson 9:05 a.m.
3. Report and recommendations of Finance Committee re proposed 2017 income and expense budget– Mr. T. Andrew Brown 9:15 a.m.
4. Hon. Judith S. Kaye portrait unveiling – Mr. John H. Gross 9:35 a.m.
5. Report of President – Ms. Sharon Stern Gerstman 9:55 a.m.
6. Report of Nominating Committee – Mr. Glenn Lau-Kee 10:10 a.m.
7. Report and recommendations of Trusts and Estates Law Section – Prof. Ira M. Bloom 10:20 a.m.
8. Memorial for Ms. Jana Springer Behe – Ms. Elizabeth Jean Champnoi 10:45 a.m.
9. Report and recommendations of New York County Lawyers' Association – Ms. Sarah Jo Hamilton and Mr. Ronald C. Minkoff 10:55 a.m.
10. Memorial for Mr. John Eric Higgins – Mr. Kenneth G. Standard 11:20 a.m.
11. Report of Committee on Membership – Mr. Thomas J. Maroney 11:30 a.m.
12. Report and recommendations of Commercial and Federal Litigation Section – Messrs. Mark A. Berman and Mitchell J. Katz and Ms. Bernice K. Leber 11:45 p.m.
13. Administrative items – Mr. Michael Miller 12:10 p.m.
14. New business 12:15 p.m.
15. Date and place of next meeting:
Friday, January 26, 2018
New York Hilton Midtown, New York City

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
JUNE 17, 2017
THE OTESAGA, COOPERSTOWN, NEW YORK**

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PRESENT: Abbott; Alcott; Alomar; Barreiro; Behrins; Berman; Billings; Block; Bowler; Braunstein; Brown, E.; Buholtz; Burke, J.; Burns, S.; Carola; Castellano; Chambers; Christensen; Christopher; Clouthier; Coffey; Cohen, D.; Cohen, O.; Coseo; Davis; DiFalco; Disare; Doyle; Effman; Everett; Fay; Fennell; Fernandez; Finerty; Fishberg; Fogel; Foley; Fox; Freedman; Gallagher; Galligan; Gensini; Gerbini; Gerstman; Getnick; Gingold; Gold; Goldfarb; Grimaldi; Gutekunst; Gutierrez; Hack; Heath; Hetherington; Higgins; Himes; Hollyer; Hurteau; Hyer; James; Jochmans; Kamins; Karson; Kearns; Kiesel; King, B.; Kirby; Kobak; Krausz; Lamberti; LaRose; Lau-Kee; Levy; Madigan; Mancuso; Margolin; Mariano; Marinaccio; Martin; May; McCann; McGinn; McNamara, C.; McNamara, M.; Meisenheimer; Miller, C.; Miller, M.; Miller, R.; Millett; Millon; Minkoff; Minkowitz; Miranda; Moretti; Mosher; Murphy; Napoletano; Nowotarski; Onderdonk; Ostertag; Owens; Perlman; Pitegoff; Poster-Zimmerman; Prager; Preston; Richardson; Richman; Richter; Rivera; Rodriguez; Rosiny; Rosner; Ryba; Santiago; Schofield; Schraver; Schub; Shafer; Shamoan; Champnoi; Shautsova; Sigmond; Singer; Sonberg; Stabinski; Steinhardt; Stieglitz; Strenger; Sullivan; Sweet; Tarver; Tennant; Tesser; Thaler-Parker; Tully; Vitacco; Walach; Walsh; Weathers; Weiss; Weston; Whittingham; Wildgrube; Williams; Witmer; Young; Younger; Zuchlewski.

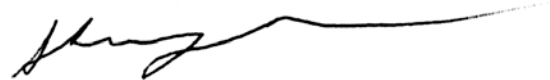
Mr. Miller presided over the meeting as Chair of the House.

1. Call to order, introduction of new members. The meeting was called to order and the Pledge of Allegiance was recited, and Mr. Miller welcomed the new members of the House.
2. Minutes of April 1, 2017 meeting. The minutes were accepted as previously distributed.
3. Report of the Treasurer. Scott M. Karson, Treasurer, updated the House with respect to the results of operations for the first four months of 2016. The report was received with thanks.
4. Memorial for Hon. Sheila Abdus-Salaam. Hon. Eugene M. Fahey, Associate Judge of the New York State Court of Appeals, presented a memorial in honor of Hon. Sheila Abdus-Salaam, Associate Judge of the Court of Appeals, who passed away in April 2017. A moment of silence was observed out of respect for Judge Abdus-Salaam's memory and her contributions to the legal profession.
5. Presentation of Root-Stimson Award. President Gerstman presented the Root-Stimson Award, which honors members of the profession for outstanding community service, to Lesley Freedman Rosenthal of New York City. Executive vice president and general counsel of Lincoln Center, she was honored in particular for her service on several boards and her promotion of the role of in-house counsel at nonprofit organizations.

6. Remarks by ABA President Linda A. Klein. Linda A. Klein, President of the American Bar Association, addressed the House, focusing on collaboration between the ABA and NYSBA, including ABA Day in Washington and Freelegalanswers.com. She also provided an update on ABA activities. The report was received with thanks.
7. Installation of President. Ms. Gerstman was formally installed as President. The oath of office was administered by Hon. Eugene M. Foley, Associate Judge of the New York State Court of Appeals. Ms. Gerstman then addressed the House with respect to her planned initiatives for her term as President.
8. Report of President. Ms. Gerstman highlighted the information contained in her printed report, a copy of which is appended to these minutes.
9. Report and recommendations of Committee on the New York State Constitution. Henry M. Greenberg, chair of the committee, reviewed the committee's report on whether to support the holding of a constitutional convention, noting the arguments both for and against a convention and outlining the committee's reasoning for support. After discussion, a motion was adopted to approve the report and recommendations by a standing vote of 111-28. Mr. Everett abstained from participating in the discussion and vote.
10. Report and recommendations of Environmental and Energy Law Section. Kevin M. Bernstein, chair of the section, outlined the section's report with recommendations as to steps New York State might take to address climate change. After discussion, a motion was adopted to approve the report and recommendations.
11. Memorial for Gregory T. Miller. Past President Vincent E. Doyle III presented a memorial in honor of Gregory T. Miller, President of the Erie County Bar Association and a member of the House, who passed away on April 28, 2017. A moment of silence was observed out of respect for Mr. Miller's memory and his contributions to the legal profession.
12. Report of The New York Bar Foundation. John H. Gross, President of The Foundation, presented an informational report on recent developments with respect to The Foundation, including new and departing Board members; an update on the Catalyst Public Service Program; and fundraising. The report was received with thanks.
13. Administrative items. Mr. Miller reported on the following:
 - a. New Audit Committee members. At its June 15-16, 2017 meeting, the Executive Committee had confirmed the appointment of Lillian M. Moy and Elizabeth Jean Champnoi as new members of the Audit Committee. Pursuant to the Bylaws, the House is required to ratify the selection of these members. A motion was adopted to ratify the members' selection.

- b. Following the meeting, the Committee on Leadership Development will host a luncheon for members interested in learning of leadership opportunities.
- 14. New Business. Mr. Richman offered a motion to request that the Environmental and Energy Law Section consider preparing a report on the impact of Federal actions with respect to climate change. After discussion, the motion was approved.
- 15. Date and place of next meeting. Mr. Miller announced that the next meeting of the House of Delegates would take place on Saturday, November 4, 2017 at the Bar Center in Albany.
- 16. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



Sherry Levin Wallach
Secretary

Sharon Stern Gerstman
President, New York State Bar Association

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**REPORT OF THE PRESIDENT
TO THE HOUSE OF DELEGATES
June 17, 2017**

PRESIDENT'S INITIATIVES

One of my major initiatives during the coming year is to focus on ways to reduce the inmate population in state and federal prisons. One way to do so is to reduce the number of children entering prisons. In many instances, “zero tolerance” policies in schools means that children are expelled or suspended; we know that a lack of education increases the odds of criminal conduct. To that end, I have appointed a Task Force on School to Prison Pipeline, chaired by John Gross and Sheila Gaddis, to formulate best practices and policies for use by schools to assist in reducing juvenile crime. For a full roster of the Task Force and its mission statement, visit <http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=73622>.

LEGISLATIVE INITIATIVES

Federal Legislative Priorities

The State Bar’s highest federal legislative priority is to provide adequate funding for the Legal Services Corporation (LSC). In the face of proposed “defunding” according to the budget submitted to Congress by the Administration’s Office of Management and Budget, NYSBA has vigorously advocated on this critically important issue.

During ABA Day, April 25-27, NYSBA lobbied the New York State Congressional Delegation, calling for a budget of no less than \$385 million for LSC. The lobbying trip in April was the second time this year that NYSBA leaders carried this message to the Delegation -- that elimination of LSC funding would devastate the ability of many New Yorkers to obtain essential legal services in such life-altering cases as evictions from housing and obtaining protection from domestic violence.

State Legislative Priorities

A. Executive Budget adopted in April

State Bar Leaders, then-President Claire P. Gutekunst, then-President-Elect Sharon Stern Gerstman, and then-President-Elect-Designee Michael Miller led the Association’s successful efforts regarding several of our 2017 state legislative priorities. The final state budget included provisions to enhance indigent criminal defense services, address wrongful convictions, raise the age of criminal responsibility, and allow sealing of records relating to certain criminal convictions.

Further, it was particularly important that the Legislature adopted public policy to extend to all counties, terms of the settlement in *Hurrell-Harring v. State of New York*, thereby improving indigent criminal

defense services -- **without** increasing the Biennial Attorney Registration Fee to provide funds for that program.

NYSBA strongly objected to that proposed fee increase immediately after it appeared in the proposed Executive Budget on January 17, because providing indigent criminal defense is a constitutional mandate. Extending the terms of *Hurrell-Harring* throughout the state is a state obligation and a societal responsibility that should be paid for by the state's General Fund, not by a surcharge on lawyers.

B. NYSBA's Legislation to Reform the Power of Attorney (POA)

In order to address the current problems with the POA form, NYSBA's legislation would:

- Simplify the current power of attorney form;
- Prevent third parties from improperly refusing to accept a valid power of attorney;
- Provide protection for third parties who follow the process for accepting a power of attorney; and,
- Authorize language in the power of attorney form that substantially conforms with the statutory language, in order to prevent the harsh consequence of the form being invalidated because of harmless error in the form.

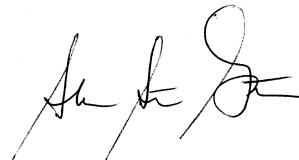
As of the date of this report, both the Senate and Assembly judiciary committees reported bills based on the Association's proposal. The Association will continue to seek passage of this important legislation before conclusion of the regular legislative session, scheduled for June 21. For more information about power of attorney, go to <http://www.nysba.org/AssemblyPowerofAttorneyBill>.

OTHER ACTIVITIES

On June 12, the Young Lawyers Section hosted its annual Supreme Court admissions ceremony in Washington, D.C. I was honored to sponsor the admission of 40 young lawyers to the bar of the United States Supreme Court. Photos of the event are available at <https://www.facebook.com/NYSBAYLS/>.

On June 13, the Association sent to the Governor its ratings of the seven candidates recommended by the State Commission on Judicial Nomination to fill the vacancy created by the untimely passing of Hon. Sheila Abdus-Salaam. The letter sent to the Governor is available at <http://www.nysba.org/June2017COARatings/>.

The next meeting of the House of Delegates will take place on Saturday, November 4 at the Bar Center in Albany. I look forward to seeing you there.

A handwritten signature in black ink, appearing to be 'Sheila Abdus-Salaam', written in a cursive style.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #2

Attached for your reference are the Association's financial statements through September 30, 2017.

**NEW YORK STATE BAR ASSOCIATION
2017 OPERATING BUDGET
NINE MONTHS OF CALENDAR YEAR 2017**

REVENUE

	2017 BUDGET	ADJUST- MENTS	2017 BUDGET AS ADJUSTED	UNAUDITED RECEIVED 9/29/2013	% RECEIVED 9/29/2013	2016 BUDGET	UNAUDITED RECEIVED 9/29/2012	% RECEIVED 9/29/2012
MEMBERSHIP DUES	10,925,000		10,925,000	10,040,712	91.91%	10,925,000	10,419,895	95.38%
SECTIONS:								
Dues	1,411,600		1,411,600	1,306,494	92.55%	1,416,400	1,346,825	95.09%
Programs	2,763,550		2,763,550	2,282,974	82.61%	2,606,550	2,080,396	79.81%
INVESTMENT INCOME	345,000		345,000	263,221	76.30%	390,000	255,816	65.59%
ADVERTISING	133,000		133,000	33,940	25.52%	125,000	115,982	92.79%
CONTINUING LEGAL EDUCATION	3,900,000		3,900,000	2,318,872	59.46%	4,050,000	2,748,205	67.86%
USI AFFINITY PAYMENT	2,269,000		2,269,000	1,653,717	72.88%	2,025,000	1,702,327	84.07%
ANNUAL MEETING	869,500		869,500	897,247	103.19%	919,500	865,567	94.13%
HOUSE OF DELEGATES & COMMITTEES	108,100		108,100	64,221	59.41%	206,200	193,805	93.99%
PUBLICATIONS, ROYALTIES AND OTHER	274,200		274,200	116,957	42.65%	276,800	160,995	58.16%
REFERENCE MATERIALS	1,350,000		1,350,000	725,435	53.74%	1,450,000	778,295	53.68%
TOTAL REVENUE	24,348,950	0	24,348,950	19,703,790	80.92%	24,390,450	20,668,108	84.74%

EXPENSE

	2017 BUDGET	ADJUST- MENTS	2017 BUDGET AS ADJUSTED	UNAUDITED EXPENDED 9/29/2013	% EXPENDED 9/29/2013	2016 BUDGET	UNAUDITED EXPENDED 9/29/2012	% EXPENDED 9/29/2012
SALARIES & FRINGE	10,409,950		10,409,950	7,158,693	68.77%	10,365,900	7,490,701	72.26%
BAR CENTER:								
Rent	305,000		305,000	208,066	68.22%	288,000	214,453	74.46%
Building Services	283,250		283,250	155,037	54.74%	285,000	182,530	64.05%
Insurance	142,000		142,000	124,242	87.49%	150,000	103,155	68.77%
Taxes	5,250		5,250	4,949	94.27%	7,750	13,378	172.62%
Plant and Equipment	858,000		858,000	683,066	79.61%	620,000	563,417	90.87%
Administration	543,500		543,500	398,802	73.38%	539,700	403,918	74.84%
SECTIONS	4,171,175		4,171,175	3,128,675	75.01%	3,961,650	2,916,859	73.63%
PUBLICATIONS:								
Reference Materials	430,150		430,150	222,543	51.74%	491,050	209,617	42.69%
Journal	431,200		431,200	324,713	75.30%	489,200	336,197	68.72%
Law Digest	187,800		187,800	121,218	64.55%	221,000	127,582	57.73%
State Bar News	247,300		247,300	169,848	68.68%	254,300	155,972	61.33%
MEETINGS:								
Annual Meeting	348,200		348,200	337,841	97.02%	303,100	320,924	105.88%
House of Delegates, Officers and Executive Committee	520,600		520,600	404,448	77.69%	481,250	403,666	83.88%
COMMITTEES:								
Continuing Legal Education	1,767,875		1,767,875	1,128,996	63.86%	1,944,050	1,105,279	56.85%
LPM / Electronic Communication Committee	86,250		86,250	60,207	69.81%	85,300	70,126	82.21%
Marketing / Membership	971,200		971,200	464,132	47.79%	1,000,650	535,456	53.51%
Media Services	115,300		115,300	30,397	26.36%	267,750	78,099	29.17%
All Other Committees and Departments	2,489,075		2,489,075	1,818,846	73.07%	2,612,220	1,773,666	67.90%
TOTAL EXPENSE	24,313,075	0	24,313,075	16,944,719	69.69%	24,367,870	17,004,995	69.78%
BUDGETED SURPLUS	35,875	0	35,875	2,759,071		22,580	3,663,113	

NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF SEPTEMBER 30, 2017

<u>ASSETS</u>	<u>UNAUDITED</u> <u>9/29/2013</u>	<u>UNAUDITED</u> <u>9/29/2012</u>	<u>UNAUDITED</u> <u>12/30/2012</u>
<u>Current Assets:</u>			
General Cash and Cash Equivalents	8,656,898	9,202,388	14,728,435
Accounts Receivable	95,822	142,024	157,953
Accrued interest receivable	0	0	0
Prepaid expenses	537,397	774,417	1,170,385
Royalties and Admin. Fees receivable	466,640	509,750	705,055
Total Current Assets	9,756,757	10,628,579	16,761,828
<u>Board Designated Accounts:</u>			
<u>Cromwell Fund:</u>			
Cash and Investments at Market Value	2,281,755	2,089,908	2,077,752
Accrued interest receivable	0	0	0
	2,281,755	2,089,908	2,077,752
<u>Replacement Reserve Account:</u>			
Equipment replacement reserve	1,116,917	1,116,583	1,116,667
Repairs replacement reserve	793,904	793,666	793,726
Furniture replacement reserve	219,822	219,756	219,773
	2,130,643	2,130,005	2,130,166
<u>Long-Term Reserve Account:</u>			
Cash and Investments at Market Value	22,042,948	19,835,582	19,835,080
Accrued interest receivable	0	0	119,404
	22,042,948	19,835,582	19,954,484
<u>Sections Accounts:</u>			
Section Accounts Cash equivalents and Investments at market value	3,630,987	3,559,250	3,527,130
Cash	460,793	510,362	8,273
	4,091,780	4,069,612	3,535,403
<u>Fixed Assets:</u>			
Furniture and fixtures	1,344,474	1,332,511	1,340,918
Leasehold Improvements	1,368,781	1,363,251	1,366,016
Equipment	8,352,125	8,494,289	8,466,905
Telephone	107,636	107,636	107,636
	11,173,016	11,297,687	11,281,475
Less accumulated depreciation	8,789,769	8,468,459	8,548,569
Net fixed assets	2,383,247	2,829,228	2,732,906
Total Assets	42,687,130	41,582,914	47,192,539
<u>LIABILITIES AND FUND BALANCES</u>			
<u>Current liabilities:</u>			
Accounts Payable & other accrued expenses	580,583	672,060	1,117,148
Deferred dues	124,027	347,614	7,921,620
Deferred income special	980,769	1,211,538	1,153,845
Deferred grant revenue	55,413	34,780	34,780
Other deferred revenue	179,019	111,640	797,941
Unearned Income - CLE	54,864	24,878	53,183
Payable To The New York Bar Foundation	970	5,394	35,845
Total current liabilities & Deferred Revenue	1,975,645	2,407,904	11,114,362
<u>Long Term Liabilities:</u>			
Accrued Pension Costs	0	1,352,046	734,372
Accrued Other Postretirement Benefit Costs	7,437,723	7,080,303	7,212,723
Accrued Supplemental Plan Costs and Defined Contribution Plan Costs	299,200	379,399	381,559
Total Liabilities & Deferred Revenue	9,712,568	11,219,652	19,443,016
<u>Board designated for:</u>			
Cromwell Account	2,281,755	2,089,908	2,077,752
Replacement Reserve Account	2,130,643	2,130,005	2,130,166
Long-Term Reserve Account	14,306,025	11,023,834	11,506,426
Section Accounts	4,091,780	4,069,612	3,535,403
Invested in Fixed Assets (Less capital lease)	2,383,247	2,829,228	2,732,906
Undesignated	7,781,112	8,220,675	5,766,870
Total Net Assets	32,974,562	30,363,262	27,749,523
Total Liabilities and Net Assets	42,687,130	41,582,914	47,192,539

New York State Bar Association
Statement of Activities
For the Nine Months Ending September 30, 2017

	<u>September 2017</u>	<u>September 2016</u>	<u>December 2016</u>
REVENUES AND OTHER SUPPORT			
Membership dues	\$10,040,712	\$10,419,895	\$10,537,010
Section revenues			
Dues	1,306,494	1,346,825	1,360,835
Programs	2,282,974	2,080,396	2,223,618
Continuing legal education program	2,318,872	2,748,205	3,631,127
Administrative fee and royalty revenue	1,773,390	1,826,753	2,493,706
Annual meeting	897,247	865,567	865,217
Investment income	512,712	438,644	856,515
Reference Books, Formbooks and Disk Products	725,435	778,295	1,256,740
Other revenue	<u>92,272</u>	<u>385,762</u>	<u>425,172</u>
 Total revenue and other support	 19,950,108	 20,890,342	 23,649,940
PROGRAM EXPENSES			
Continuing legal education program	1,713,195	1,710,978	2,401,679
Graphics	1,397,781	1,471,493	1,856,614
Government relations program	478,721	465,058	591,137
Law, youth and citizenship program	150,896	158,074	193,577
Lawyer assistance program	154,232	173,555	191,929
Lawyer referral and information services	138,906	143,076	181,053
Law practice management services	84,991	154,039	194,450
Media / public relations services	325,276	267,311	360,775
Meetings services	0	228,168	253,540
Marketing and Membership services	1,029,816	1,186,829	1,655,277
Pro bono program	162,993	138,168	169,464
Local bar program	78,124	103,227	126,376
House of delegates	357,575	371,327	454,622
Executive committee	46,874	32,338	46,196
Other committees	495,685	645,711	762,377
Sections	3,128,675	2,916,859	3,576,180
Section newsletters	111,842	117,349	144,522
Reference Books, Formbooks and Disk Products	726,715	740,551	1,027,634
Publications	615,780	619,750	779,118
Annual meeting expenses	<u>337,841</u>	<u>320,924</u>	<u>321,137</u>
 Total program expenses	 <u>11,535,918</u>	 <u>11,964,785</u>	 <u>15,287,657</u>
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	2,595,447	2,475,590	3,830,892
Pension plans and other employee benefit plan costs	498,252	498,185	44,928
Rent and equipment costs	764,542	686,686	919,372
Consultant and other fees	749,530	712,524	972,151
Depreciation and amortization	565,200	455,355	601,546
Other expenses	<u>235,834</u>	<u>211,867</u>	<u>237,335</u>
 Total management and general expenses	 <u>5,408,805</u>	 <u>5,040,207</u>	 <u>6,606,224</u>
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS			
Realized and unrealized gain (loss) on investments	3,005,385	3,885,350	1,756,059
	2,219,582	1,113,508	629,058
 CHANGES IN NET ASSETS	 5,224,967	 4,998,858	 2,385,117
Net assets, beginning of year	<u>27,749,523</u>	<u>25,364,406</u>	<u>25,364,406</u>
Net assets, end of year	<u><u>32,974,490</u></u>	<u><u>30,363,264</u></u>	<u><u>27,749,523</u></u>



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #3

REQUESTED ACTION: Approval of the 2018 Association income and expense budget.

Attached is the 2018 proposed Association operating budget. The budget has projected income of \$23,704,135 and expense of \$23,797,360, leaving a projected deficit of \$93,225.

Any member of the House who would like to review the complete budget book may contact Kristin M. O'Brien, Senior Director of Finance, at (518) 487-5510 or kobrien@nysba.org.

The budget will be presented by T. Andrew Brown, chair of the Finance Committee.

2018 PROPOSED BUDGET

THE ASSOCIATION HAS PROJECTED REVENUE OF \$23,704,135 AND EXPENSE OF \$23,797,360 LEAVING A PROJECTED DEFICIT OF \$93,225.

NEW YORK STATE BAR ASSOCIATION

2018 PROPOSED INCOME BUDGET

<u>Item</u>	<u>2017 Budget</u>	<u>Received To 6/30/2017</u>	<u>Projected Year End</u>	<u>2018 Proposed Budget</u>	<u>2016 Actual</u>	<u>2015 Actual</u>	<u>2014 Actual</u>
Membership Dues	10,925,000	9,960,070	10,050,000	10,050,000	10,537,010	10,882,248	11,328,611
Continuing Legal Education	3,900,000	1,717,133	3,392,000	3,635,000	3,631,127	3,633,014	4,289,018
Investment Income	345,000	125,724	464,900	477,000	472,795	376,796	417,920
Advertising	133,000	11,998	139,000	276,000	154,429	143,584	98,176
Reference Materials	1,350,000	460,000	1,320,000	1,310,000	1,256,741	1,253,532	1,296,887
Publications and Miscellaneous	274,200	89,202	317,800	316,500	266,168	282,103	300,132
Insurance Program	2,269,000	1,102,478	2,262,000	2,262,000	2,269,769	2,081,758	2,029,531
Annual Meeting	869,500	900,897	900,900	930,000	865,217	812,353	927,610
House of Delegates	28,100	32,500	36,325	36,500	27,205	34,100	29,825
Committees	80,000	20,130	79,275	175,000	190,483	77,700	146,478
Sections	4,175,150	3,091,070	4,150,210	4,236,135	3,584,453	3,546,227	3,552,904
TOTALS	24,348,950	17,511,202	23,112,410	23,704,135	23,255,397	23,123,415	24,417,092

Page 4

Page 5

Page 10 & 11

**NEW YORK STATE BAR ASSOCIATION
2018 PROPOSED EXPENSE BUDGET**

ITEM	2017 BUDGET	EXPENDED To 6/30/2017	PROJECTED YEAR END	2018 PROPOSED BUDGET	2016 ACTUAL	2015 ACTUAL	2014 ACTUAL	
Salaries and Fringe Benefits	10,409,950	4,705,992	10,186,050	10,105,550	9,432,133	9,678,528	13,819,553	
Less: Allocations	(10,392,400)	(4,701,000)	(10,182,100)	(10,100,500)	(9,428,589)	(9,734,847)	(13,819,553)	
Bar Center Operations	2,137,500	1,081,549	2,179,200	2,334,700	1,955,358	1,990,119	2,361,967	Page 7
Publications and Meetings	1,735,100	1,103,151	1,705,070	1,681,050	1,601,073	1,767,763	1,702,466	Page 8
Committees and Departments	16,251,750	7,470,834	15,429,152	15,577,710	14,755,760	15,153,281	15,504,732	Page 9
Sections	4,171,175	2,248,083	3,962,750	4,198,850	3,576,180	3,445,419	3,379,919	Page 12
TOTALS	24,313,075	11,908,610	23,280,122	23,797,360	21,891,916	22,300,262	22,949,084	

**NEW YORK STATE BAR ASSOCIATION
2018 MEMBERSHIP DUES
(BASED ON PROJECTED MEMBERSHIP)**

Class	Dues	Members	Amount
Regular Membership:			
Sustaining Members	400	696	278,400
Members admitted 2010 and Prior	275	25,631	7,048,525
Members admitted 2011-2012	185	1,422	263,070
Members admitted 2013-2014	125	1,628	203,500
Members admitted 2015 -2017	60	2,875	172,500
Special Dues Classes	70	1,163	81,410
Newly admitted	0	5,601	0
Law students	0	6,793	0
		45,809	8,047,405
Out-of-State Members:			
Sustaining Members	400	130	52,000
Members admitted 2010 and Prior	180	8,730	1,571,400
Members admitted 2011-2012	150	840	126,000
Members admitted 2013-2014	120	969	116,280
Members admitted 2015 -2017	60	1,621	97,260
Newly admitted	0	3,578	0
		15,868	1,962,940
Total		61,677	10,010,345
Amount for Changes in Dues Category			39,655
PROPOSED DUES REVENUE			10,050,000

**CLE INCOME
2018 PROPOSED BUDGET**

ITEM NAME	2017 BUDGET	RECEIVED to 6/30/2017	PROJECTED YEAR END	2018 PROPOSED BUDGET	2016 ACTUAL	2015 ACTUAL	2014 ACTUAL
<i>Programs</i>	2,050,000	880,944	1,660,000	1,800,000	1,661,165	1,887,298	2,381,261
<i>Webcast Program Income</i>	650,000	243,180	600,000	650,000	600,248	660,987	614,897
<i>LPM Program Income</i>	100,000	25,990	75,000	75,000	87,013	99,588	0
<i>On-Line</i>	750,000	434,410	800,000	850,000	844,225	610,792	652,516
<i>Audio Compact Disk (CD)</i>	225,000	79,132	150,000	150,000	272,864	231,124	411,022
<i>Course Book</i>	40,000	16,079	32,000	35,000	41,152	41,976	65,500
<i>DVD</i>	85,000	37,398	75,000	75,000	124,460	101,249	163,822
TOTAL	3,900,000	1,717,133	3,392,000	3,635,000	3,631,127	3,633,014	4,289,018

CLE GENERAL DEPARTMENT

	<u>2017</u>	<u>EXPENDED</u>	<u>PROJECTED</u>	<u>2018</u>	<u>2016</u>	<u>2015</u>	<u>2014</u>
	<u>BUDGET</u>	<u>to 6/30/2017</u>	<u>YEAR END</u>	<u>PROPOSED</u>	<u>ACTUAL</u>	<u>ACTUAL</u>	<u>ACTUAL</u>
<i>Training & Professional Development</i>	3,650	2,645	4,000	5,000	2,899	5,054	3,437
<i>Salary and Fringe Allocation</i>	825,600	374,225	829,100	854,100	768,007	912,056	1,292,045
<i>Dues & Subscriptions</i>	4,675	3,110	3,500	3,500	3,044	2,896	5,013
<i>Bank and Investment Fees</i>	103,000	49,393	103,000	103,000	98,598	98,625	75,870
<i>Programs</i>	1,300,000	599,825	1,200,000	1,200,000	1,158,517	1,284,819	1,687,898
<i>Webcast</i>	165,000	120,465	200,000	200,000	170,914	175,686	106,057
<i>LPM Programs</i>	55,000	27,088	50,000	50,000	48,529	54,116	0
<i>Hosting</i>	60,000	35,395	70,000	70,000	90,414	68,847	52,511
<i>Postage and Shipping</i>	750	(1,363)	2,200	1,000	(1,350)	623	791
<i>Supplies</i>	3,000	7,820	10,000	5,000	3,394	2,913	7,026
<i>Compact Disk (CD's)</i>	22,000	7,460	15,000	15,000	20,080	22,406	74,700
<i>Course Book</i>	3,500	359	1,000	2,200	2,204	6,438	12,456
<i>DVD</i>	15,000	7,887	12,000	12,000	16,159	13,071	14,374
<i>Misc Service/Professional Fees</i>	0	1,516	3,000	3,000	2,532	2,616	2,058
<i>Committee Meeting</i>	8,500	5,243	9,500	9,500	9,146	7,838	0
<i>Graphics Department</i>	2,000	7,735	18,000	2,750	8,761	1,313	3,174
<i>Travel Costs</i>	21,800	12,754	30,000	30,000	42,316	19,015	16,395
	2,593,475	1,261,557	2,560,300	2,566,050	2,444,164	2,678,332	3,353,805

BAR CENTER OPERATIONS AND ADMINISTRATIVE EXPENSE

2018 PROPOSED BUDGET

	<u>2017 BUDGET</u>	<u>EXPENDED 6/30/2017</u>	<u>PROJECTED YEAR END</u>	<u>2018 PROPOSED BUDGET</u>	<u>2016 ACTUAL</u>	<u>2015 ACTUAL</u>	<u>2014 ACTUAL</u>
Rent	305,000	132,509	287,000	287,000	285,078	285,078	285,078
Building Services	283,250	99,563	228,250	238,250	227,752	266,454	308,017
Insurance	142,000	77,738	138,500	142,000	141,781	153,194	140,175
Taxes	5,250	1,767	5,250	5,250	23,148	12,079	21,388
Plant and Equipment	858,500	454,218	910,600	904,600	754,395	675,901	761,903
Office Administration	75,000	(13)	41,500	34,500	(18,089)	113,395	226,819
Other	468,500	315,768	568,100	723,100	541,294	484,018	618,587
TOTALS	2,137,500	1,081,549	2,179,200	2,334,700	1,955,358	1,990,119	2,361,967

PUBLICATIONS AND MEETINGS

PUBLICATIONS

<u>Item</u>	2017 BUDGET	EXPENDED to 6/30/2017	PROJECTED YEAR END	2018 PROPOSED BUDGET	2016 ACTUAL	2015 ACTUAL	2014 ACTUAL
<i>New York State Bar Journal</i>	431,200	240,814	419,700	378,200	418,138	464,084	476,642
<i>New York State Law Digest</i>	187,800	84,316	186,300	187,800	187,721	145,080	130,309
<i>State Bar News</i>	247,300	107,743	242,300	242,300	173,259	256,857	247,412
TOTAL PUBLICATIONS	866,300	432,873	848,300	808,300	779,118	866,021	854,363
<u>MEETINGS</u>							
<i>Annual Meeting</i>	348,200	337,520	337,520	345,800	321,137	377,577	381,727
<i>Executive Committee</i>	51,000	40,911	54,750	49,200	46,196	48,596	55,331
<i>House of Delegates and Officer's Expense</i>	469,600	291,847	464,500	477,750	454,622	475,569	411,045
TOTAL MEETINGS	868,800	670,278	856,770	872,750	821,955	901,742	848,103
TOTAL PUBLICATIONS AND MEETINGS	1,735,100	1,103,151	1,705,070	1,681,050	1,601,073	1,767,763	1,702,466

**COMMITTEES
2018 PROPOSED BUDGET**

<i>Item</i>	<u>2017 Budget</u>	<u>Expended To 6/30/2017</u>	<u>Projected Year End</u>	<u>2018 Proposed Budget</u>	<u>2016 Actual</u>	<u>2015 Actual</u>	<u>2014 Actual</u>
<i>Line Item Committees (\$25,000 or more)</i>	400,550	257,593	405,675	450,425	456,937	356,772	578,148
<i>Line Item Committees (\$2,501-\$24,999)</i>	226,250	116,730	191,852	226,975	175,740	176,293	171,565
<i>Non-Line Item Committees and Other</i>	151,350	81,530	123,775	115,400	124,968	111,803	124,092
<i>Departments</i>	15,473,600	7,014,980	14,707,850	14,784,910	13,998,114	14,508,413	14,630,927
TOTALS	16,251,750	7,470,834	15,429,152	15,577,710	14,755,760	15,153,281	15,504,732

SECTIONS
2018 PROPOSED DUES INCOME BUDGET

<u>SECTION</u>	2017	RECEIVED	PROJECTED	2018	2016	2015	2014
	<u>BUDGET</u>	<u>To 6/30/2017</u>	<u>YEAR END</u>	<u>PROPOSED BUDGET</u>	<u>ACTUAL</u>	<u>ACTUAL</u>	<u>ACTUAL</u>
<i>Antitrust</i>	14,000	12,153	13,000	13,200	13,335	13,140	13,520
<i>Business Law</i>	86,000	74,728	76,000	75,000	81,314	85,472	88,817
<i>Commercial & Federal Litigation</i>	75,000	69,440	70,600	70,000	74,330	76,004	78,893
<i>Corporate Counsel</i>	42,000	35,368	37,000	38,000	37,300	39,745	41,340
<i>Criminal Justice</i>	37,500	34,809	37,000	35,000	36,615	37,995	40,081
<i>Dispute Resolution</i>	41,000	37,724	40,000	37,724	41,510	41,882	44,668
<i>Elder Law and Special Needs</i>	80,000	74,065	77,000	80,000	77,960	78,366	77,875
<i>Entertainment Law</i>	40,000	34,230	35,500	36,000	36,914	41,103	41,935
<i>Environmental Law</i>	30,000	28,429	30,000	29,450	29,725	31,353	32,354
<i>Family Law</i>	77,000	74,313	76,000	75,000	75,873	77,916	80,385
<i>Food, Drug</i>	5,200	4,713	5,000	4,600	5,193	5,238	5,250
<i>General Practice</i>	38,000	31,158	33,000	32,500	34,410	38,236	40,548
<i>Health Law</i>	35,000	33,283	34,500	34,000	34,053	35,005	34,328
<i>Intellectual Property Law</i>	42,000	37,113	40,000	40,500	40,951	45,604	48,303
<i>International Law</i>	50,000	45,705	50,000	50,000	49,261	49,550	51,648
<i>Judicial</i>	8,400	9,581	9,750	10,000	8,345	8,025	7,763
<i>Labor & Employment</i>	69,000	64,926	67,500	68,000	67,969	68,751	71,395
<i>Local State Government</i>	31,000	29,340	30,000	31,500	29,962	27,778	28,445
<i>Real Property</i>	143,000	138,571	142,000	139,000	142,853	153,646	149,538
<i>Senior Lawyers</i>	42,000	43,880	45,000	45,000	47,080	33,769	40,008
<i>Tax</i>	56,000	49,914	54,000	55,000	53,699	54,854	57,173
<i>Torts, Insurance and Compensation</i>	81,000	75,175	77,000	76,000	77,310	83,740	87,192
<i>Trial Lawyers</i>	73,500	65,897	70,000	70,500	69,098	72,960	57,670
<i>Trusts and Estates</i>	170,000	164,380	168,000	165,600	170,977	170,316	170,228
<i>Young Lawyers</i>	45,000	25,489	26,000	30,000	24,800	29,243	35,322
TOTAL	1,411,600	1,294,380	1,343,850	1,341,574	1,360,835	1,399,691	1,424,679

SECTIONS

2018 PROPOSED LUNCHEONS, PROGRAMS and SURPLUS INCOME BUDGET

<u>SECTION</u>	<u>2017 BUDGET</u>	<u>RECEIVED To 6/30/2017</u>	<u>PROJECTED YEAR END</u>	<u>2018 PROPOSED BUDGET</u>	<u>2016 ACTUAL</u>	<u>2015 ACTUAL</u>	<u>2014 ACTUAL</u>
Antitrust	228,000	158,774	227,450	218,400	147,275	171,257	170,890
Business Law	88,000	6,143	59,100	127,500	28,466	21,385	41,733
Commercial & Federal Litigation	182,000	176,870	188,300	184,000	178,090	170,114	155,141
Corporate Counsel	30,000	965	26,200	25,400	10,421	32,924	17,475
Criminal Justice	28,000	25,205	26,300	22,200	17,525	25,140	24,954
Dispute Resolution	125,000	54,705	98,400	136,376	98,745	86,565	73,255
Elder Law and Special Needs	250,000	102,048	214,500	240,000	201,905	223,475	224,965
Entertainment Law	52,200	17,173	57,900	62,800	43,669	40,133	41,696
Environmental Law	48,300	39,287	59,800	55,350	45,265	62,432	40,481
Family Law	224,200	327,161	338,500	278,800	290,308	191,071	181,343
Food, Drug	4,650	1,310	4,000	1,300	585	0	0
General Practice	66,500	2,545	42,700	49,400	2,420	3,472	2,810
Health Law	52,500	24,422	67,900	37,800	32,591	29,378	52,840
Intellectual Property Law	34,000	21,723	41,200	40,000	33,138	34,441	40,793
International Law	257,000	178,950	277,000	290,800	249,017	216,914	270,012
Judicial	13,500	21,465	21,960	18,100	13,530	13,730	11,148
Labor & Employment	117,000	20,550	88,350	115,150	71,497	79,091	83,169
Local State Government	16,700	145	9,200	32,700	11,730	7,226	9,059
Real Property	99,600	46,033	111,200	82,500	48,929	47,182	46,776
Senior Lawyer	37,000	1,553	17,000	45,200	15,632	9,960	11,608
Tax	183,000	149,270	211,850	218,150	154,825	145,292	164,066
Torts, Insurance and Compensation	67,650	24,631	103,600	80,135	102,346	63,568	67,508
Trial Lawyers	105,000	32,085	73,000	76,500	23,357	65,655	49,472
Trusts and Estates	311,750	195,294	250,400	277,900	257,733	294,871	219,021
Young Lawyers	142,000	168,385	190,550	178,100	144,620	111,260	128,010
TOTAL	2,763,550	1,796,691	2,806,360	2,894,561	2,223,618	2,146,536	2,128,225

SECTIONS

2018 PROPOSED EXPENSE BUDGET

<u>ACCOUNT NAME</u>	<u>2017 BUDGET</u>	<u>EXPENDED TO 6/30/2017</u>	<u>PROJECTED YEAR END</u>	<u>2018 BUDGET</u>	<u>2016 ACTUAL</u>	<u>2015 ACTUAL</u>	<u>2014 ACTUAL</u>
<i>Antitrust</i>	241,600	192,636	240,450	231,600	193,013	175,372	153,670
<i>Business Law</i>	174,000	75,900	135,100	202,500	123,254	143,991	131,832
<i>Commercial & Federal Lit.</i>	257,000	212,295	258,900	254,000	259,822	249,894	198,340
<i>Corporate Counsel</i>	72,000	18,721	63,200	63,400	57,927	71,754	50,873
<i>Criminal Justice</i>	65,500	33,743	62,600	55,200	70,866	66,558	63,558
<i>Dispute Resolution</i>	166,000	84,059	138,400	174,100	106,861	103,022	72,711
<i>Elder Law and Special Needs</i>	330,000	88,557	291,500	320,000	285,817	265,096	297,036
<i>Entertainment Law</i>	92,200	56,444	93,400	98,800	76,963	68,635	66,702
<i>Environmental Law</i>	78,300	57,593	83,600	84,800	65,935	65,165	51,170
<i>Family Law</i>	301,200	124,077	380,250	353,800	378,011	285,451	272,199
<i>Food, Drug & Cosmetic</i>	9,850	8,600	9,000	5,900	6,037	8,994	7,001
<i>General Practice</i>	104,500	46,803	75,700	81,900	44,377	44,878	37,137
<i>Health Law</i>	87,500	77,080	102,400	71,800	69,241	58,303	82,406
<i>Intellectual Prop Law</i>	76,000	46,836	81,200	80,500	64,563	86,187	104,233
<i>International</i>	304,000	89,682	282,000	309,700	242,216	265,438	287,313
<i>Judicial</i>	21,900	24,634	26,400	27,050	19,645	20,235	26,989
<i>Labor & Employment</i>	186,000	65,603	155,850	183,150	115,728	124,770	115,547
<i>Local State Government</i>	47,700	15,773	34,450	64,200	23,257	20,111	30,926
<i>Real Property</i>	242,600	117,663	253,200	221,500	240,235	202,787	181,400
<i>Senior Lawyers</i>	79,000	17,078	41,200	90,200	30,572	26,213	28,736
<i>Tax</i>	239,000	191,776	265,850	273,150	198,767	208,367	216,776
<i>Torts, Ins, Comp</i>	148,500	77,048	149,000	153,000	145,414	149,690	166,132
<i>Trial Lawyers</i>	178,500	95,546	143,000	147,000	97,413	148,943	185,232
<i>Trusts and Estates</i>	481,750	271,328	382,100	443,500	484,772	446,653	390,209
<i>Young Lawyers</i>	186,575	158,608	214,000	208,100	175,475	138,912	161,791
TOTALS	4,171,175	2,248,083	3,962,750	4,198,850	3,576,180	3,445,419	3,379,919



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #7

REQUESTED ACTION: Approval of the report and recommendations of the Trusts and Estates Law Section regarding the adoption of a Uniform Trust Code.

Attached is a report from the Trusts and Estates Law that recommends enactment of a revised version of the Uniform Trust Code, which to date has been enacted in 30 states. The Section notes that New York has not comprehensively reviewed its trust laws since 1966. In the intervening 50 years, trust practices have changed dramatically. A comprehensive review now would enable changed practices and case law to be codified, making it simpler for lawyers practicing in this field.

The report consists of the legislation being proposed by the section (pages 1-72), followed by the section's memorandum in support explaining the proposed Code (pages 73-90).

This report originally was presented to the Executive Committee on an informational basis in January 2017. Because of the broad scope of the proposed legislation and impact on other groups, the Executive Committee believes that this report is appropriate for House consideration. The report was posted in the Reports Community last summer; no comments have been received as of this writing.

The report will be presented at the November 4 meeting by Prof. Ira Mark Bloom, chair of the Section's New York Uniform Trust Code Committee.

STATE OF NEW YORK

[XXXX]

20[XX]-20[XX] Regular Sessions

IN ASSEMBLY

[•], 20[XX]

Introduced by [•]

AN ACT to amend the estates, powers and trusts law, the surrogate's court procedure act, the banking law and the civil practice, law and rules in relation to a new trust code

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The Estates, Powers and Trusts Law is amended by adding a new article 7-A to read as follows:

ARTICLE 7-A
NEW YORK TRUST CODE
SUMMARY OF ARTICLE

Part 1. In General

Section 7-A-1.1 Short title.

7-A-1.2 Scope.

7-A-1.2-A Purchase-money resulting trust abolished.

7-A-1.3 Definitions.

7-A-1.4 Knowledge.

7-A-1.5 Default and mandatory rules.

7-A-1.6 Common Law and principles of equity.

7-A-1.7 Governing law.

7-A-1.8 Principal place of administration.

7-A-1.9 Methods and waiver of notice.

7-A-1.10 Others treated as qualified beneficiaries.

7-A-1.11 Nonjudicial settlement agreements.

7-A-1.12 [Reserved].

EXPLANATION—Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

Part 2. Judicial Proceedings

Section 7-A-2.1 Role of court in administration of trust.

7-A-2.2 Jurisdiction over trustee and beneficiary.

Part 3. Representation [Reserved]

Part 4. Creation, Validity, Amendment, Modification, and Termination of Trust

Section 7-A-4.1 Methods of creating trust.

7-A-4.2 General requirements for trust creation.

7-A-4.2-A Specific rules for creation of lifetime trusts.

7-A-4.1-B Trustee of passive trust not to take.

7-A-4.2-C When trust interests not to merge.
7-A-4.3 Trusts created in other jurisdictions.
7-A-4.4 Trust purposes.
7-A-4.4-A Supplemental needs trusts established for persons with severe and chronic or persistent disabilities.
7-A-4.5 Charitable purposes; enforcement.
7-A-4.6 Creation of trust induced by fraud, duress, or undue influence or the result of mistake.
7-A-4.7 Oral trusts not recognized.
7-A-4.8 Trusts for pets.
7-A-4.9 Noncharitable trust without ascertainable beneficiary.
7-A-4.9-A Amendment of trust other than by trust contributor.
7-A-4.10 Modification, termination, or reformation of trust; proceedings for approval or disapproval.
7-A-4.11 Revocation or amendment of irrevocable lifetime trust initiated by consent.
7-A-4.12 Modification or termination because of unanticipated circumstances or inability to administer trust effectively.
7-A-4.13 Cy pres.
7-A-4.14 Modification or termination of uneconomical trust.
7-A-4.15 Reformation to correct mistakes.
7-A-4.16 Modification to achieve settlor's tax or supplemental needs trust objectives.
7-A-4.17 Combination and division of trusts.

Part 4-A. Bank Accounts in Trust Form

Section 7-A-4-A.1 Definitions.
7-A-4-A.2 Terms of a trust account.
7-A-4-A.3 Payment to beneficiary.
7-A-4-A.4 Effect of payment.
7-A-4-A.5 Rights not affected.
7-A-4-A.6 Joint depositors.
7-A-4-A.7 Multiple beneficiaries.
7-A-4-A.8 Application.

Part 5. Rights of Beneficiaries and Creditors; Spendthrift and Discretionary Trusts

Section 7-A-5.1 Rules regarding transfer of income interest in trust; rights of creditors.
7-A-5.2 Rules regarding transfer of principal interest in trust; rights of creditors.
7-A-5.2-A When proceeds of life insurance policy inalienable.
7-A-5.3 Special creditor exceptions to restraints on involuntary alienation.
7-A-5.4 Discretionary trusts.
7-A-5.5 Creditor's claim against trust contributor to a revocable trust.
7-A-5.5-A Creditor claims to contribution of trust property by trust beneficiary.
7-A-5.6 Overdue distribution.
7-A-5.7 Personal obligations of trustee.

Part 6. Revocable Trusts

Section 7-A-6.1 Capacity of trust contributor of revocable trust.
7-A-6.2 Revocation or amendment of revocable trust.
7-A-6.3 Rights duties in revocable trusts; powers of withdrawal.

7-A-6.4 Limitation on action contesting validity of revocable trust;
distribution of trust property.

Part 7. Office of Trustee

Section 7-A-7.1 Accepting or declining trusteeship of a lifetime trust.

7-A-7.2 Trustee's bond.

7-A-7.3 Co-trustees.

7-A-7.4 Vacancy in trusteeship; appointment of successor.

7-A-7.4-A Suspension of powers of trustee in war service.

7-A-7.5 Resignation of trustee.

7-A-7.6 Removal of trustee.

7-A-7.7 Delivery of property by former trustee.

7-A-7.8 Compensation of trustee.

7-A-7.9 Reimbursement of expenses.

7-A-7.10 Accounting by trustee in supreme court.

Part 8. Duties and Powers of Trustee

Section 7-A-8.1 Duty to administer trust.

7-A-8.2 Duty of loyalty.

7-A-8.3 Duty of impartiality.

7-A-8.4 Duty of prudent administration.

7-A-8.5 Duty regarding costs of administration.

7-A-8.6 Duty to exercise trustee's special skills and expertise.

7-A-8.7 Powers and duties regarding delegation by trustee to agent or
another trustee.

7-A-8.8 [Reserved].

7-A-8.9 Duty to control and protect trust property.

7-A-8.10 Duty regarding recordkeeping and identification of trust
property.

7-A-8.11 Duty to enforce and defend claims.

7-A-8.12 Duty to collect trust property.

7-A-8.13 Duty to inform and report.

7-A-8.14 Duty regarding discretionary powers.

7-A-8.15 General powers of trustee.

7-A-8.16 Specific powers of trustee.

7-A-8.17 Duties and powers regarding distribution upon termination.

7-A-8.18 Power of trustee to pay income or principal to trust
contributor as reimbursement for income taxes.

7-A-8.19 Powers and duties regarding decanting.

7-A-8.20 Duty when resulting trust arises.

Part 9. [Reserved]

Part 10. Liability of Trustees and Rights of Persons Dealing with Trustees

Section 7-A-10.1 Remedies for breach of trust.

7-A-10.2 Liability for breach of trust.

7-A-10.3 Damages in absence of breach.

7-A-10.4 Compensation of attorneys, costs and allowances.

7-A-10.5 Limitation of action against trustee.

7-A-10.6 Reliance on trust instrument.

7-A-10.7 Event affecting administration or distribution.

7-A-10.8 Exculpation of trustee and trust director.

7-A-10.9 Beneficiary's consent, release, or ratification.

7-A-10.10 Limitation on personal liability of trustee.

7-A-10.11 Interest as general partner.

7-A-10.12 Protection of person dealing with trustee.

7-A-10.13 Certification of trust.

Part 11. Miscellaneous Provisions

Section 7-A-11.1 [Reserved].

7-A-11.2 Electronic records and signatures.

7-A-11.3 Severability clause.

7-A-11.4 Effective date.

7-A-11.5 [Reserved].

7-A-11.6 Application to existing relationships.

PART 1. In General

§ 7-A-1.1 Short title

This article may be cited as the New York Trust Code.

§ 7-A-1.2 Scope

(a) This article applies to express trusts (as defined by section 7-A-1.3(7)), to resulting trusts, and where expressly made applicable to bank accounts in trust form.

(b) This article does not apply to constructive trusts.

(c) Cross-reference. Article 8 also applies to charitable trusts.

§ 7-A-1.2-A Purchase-money resulting trust abolished

A disposition of property to one person for a valuable consideration paid, in whole or in part, by another is presumed fraudulent as against the creditors of the payor at the time of such disposition and, unless the presumption is rebutted, a trust results in favor of such creditors to the extent necessary to satisfy their claims; but title to the property vests in the transferee and no trust results to the payor unless the transferee either:

(a) Takes such property, in his own name, as an absolute transfer without the consent or knowledge of the payor; or

(b) In violation of some trust, purchases the property so transferred with money or property belonging to another.

§ 7-A-1.3 Definitions

In this article:

(1) "Action," with respect to an act of a trustee, includes a failure to act.

(2) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.

(3) "Beneficiary" means a person that:

(A) has a present or future beneficial interest in a trust, vested or contingent, including a person who would be entitled to trust property if a resulting trust arose, or

(B) in a capacity other than that of trustee, holds a power of appointment over trust property.

(4) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in section 8-1.1.

(5) "Creator" means a person defined in section 1-2.2.

(6) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(7) "Express trust," is defined as follows:

(A) Except as provided in paragraph (B), an express trust means a fiduciary relationship with respect to property arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for:

(i) one or more persons, at least one of whom is not the sole trustee, or

(ii) the benefit of charity, or

(iii) the care of an animal as provided in section 7-A-4.8, or
(iv) a noncharitable purpose as provided in section 7-A-4.9,
and includes a trust created pursuant to any other statute, judgment, or
decree that requires the trust to be administered in the manner of an express
trust.

(B) An express trust shall not include a trust for the benefit of
creditors, a business trust where certificates of beneficial interest are
issued to the beneficiary, an investment trust, voting trust, a security
instrument such as a deed of trust and a mortgage, a liquidation or
reorganization trust, a trust for the sole purpose of paying dividends,
interest, interest coupons, salaries, wages, pensions or profits, instruments
wherein persons are mere nominees for others, any other type of trust created
for a business or commercial purpose, or a bank account in trust form.

(8) "Guardian for property" means a guardian for property management as
appointed under SCPA article 17 or 17A or under article 81 of the mental
hygiene law or any person appointed by a court outside of New York for
property management of an incapacitated person. The term does not include a
guardian ad litem.

(9) "Interests of the beneficiaries" means the beneficial interests
provided in the terms of the trust.

(10) "Internal Revenue Code" means the United States Internal Revenue Code
of 1986, as amended. Such references, however, shall be deemed to constitute
references to any corresponding provisions of any subsequent federal tax
code.

(11) "Irrevocable trust" means a trust that is not a revocable trust.

(12) "Jurisdiction," with respect to a geographic area, includes a State
or country, or similar governmental entity.

(13) "Lifetime trust" means an express trust, including all amendments
thereto, created other than by will.

(14) "Person" means a person as defined in section 1-2.12. As the context
indicates, person may include more than one person.

(15) "Power of withdrawal" means a presently exercisable general power of
appointment, as defined in sections 10-3.2(b) and 10-3.3(b) other than a
power: (A) limited by an ascertainable standard; or (B) exercisable by any
person only upon consent of a person holding a substantial adverse interest.

(16) "Property" means property as defined by section 1-2.15.

(17) "Qualified beneficiary" means a beneficiary who, on the date the
beneficiary's status as qualified beneficiary is determined:

(A) is entitled to receive or is a permissible recipient of trust income
or principal; or

(B) would be entitled to receive or would be a permissible recipient of
trust income or principal if the interests of the recipients described in
subparagraph (A) terminated on that date without causing the trust to
terminate; or

(C) would be entitled to receive or would be a permissible recipient of
trust income or principal if the trust terminated on that date.

(18) "Resulting trust" means a trust that arises in favor of the settlor
or the settlor's successor's interest on the failure of an express trust in
whole or in part.

(19) "Revocable" as applied to a trust, means revocable by a trust
contributor without the consent of a person holding a substantial adverse
interest.

(20) "Settlor" means the person, including the testator, who

(A) initially transfers property of the person to a trustee; or

(B) declares as the owner of property that the person holds identifiable
property as trustee; or

(C) exercises a power of appointment in favor of a trustee, where the terms of such trust are created in connection with the exercise of the power of appointment, including the exercise by a trustee of a discretionary power in favor of a trustee.

For purposes of this subdivision, if a person authorized to act on behalf of a person acts with respect to property owned by that person, the person owning the property shall be deemed to have taken the action.

(D) Cross references. See sections 3-3.7 (devise to trustee) and 13-3.3 (beneficiary designation of trustee).

(21) "Spendthrift provision" means the restraint on the voluntary transfer of a beneficiary's interest as provided by the terms of a trust or by application of sections 7-A-5.1 and 7-A-5.2 and the restraint on involuntary transfer of a beneficiary's interest as provided by any statutory rule restraining the involuntary transfer of a beneficiary's interest. "Terms of a trust" includes any provision stating that the interest of a beneficiary is held subject to a "spendthrift trust" or words of similar import.

(22) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a State.

(23) "Terms of a trust" means

(A) except as otherwise provided in subdivision (B), the manifestation of the settlor's intent regarding a trust's provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(B) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accord with applicable law; or

(ii) court order; or

(iii) nonjudicial settlement agreement under section 7-A-1.11.

(24) "Testamentary trust" means an express trust created under a will.

(25) "Trust," unless otherwise provided, means a lifetime trust and a testamentary trust but does not include a resulting trust.

(26) "Trust contributor" means

(A) a settlor as defined by subdivision (20) other than a person who exercises, or who is considered to exercise, a special power of appointment in favor of a trustee; or

(B) a person who transfers or is deemed to transfer property owned by that person to the trustee of an existing trust, except to the extent another person has the power to revoke or has a non-lapsing power of withdrawal over the transferred property.

For purposes of paragraph (B):

(i) The exercise of a presently exercisable general power of appointment is deemed to be a transfer of property owned by the powerholder, and

(ii) a person is deemed to transfer property owned by that person if the person's fiduciary actually transfers the property to, or exercises a power of appointment in favor of, a trustee

(C) if more than one person contributes property to the trustee of an existing trust, each person is the trust contributor of the portion of the trust property attributable to that person's contribution, except to the extent another person has the power to revoke or has a non-lapsing power of withdrawal over that portion.

(27) "Trust director" means

(A) a person, other than as provided in paragraph (B), who is granted by the terms of a trust a power to direct a trustee in the administration of the trust to the extent the power is exercisable while the person is not then

serving as a trustee, whether or not the terms of the trust designate the person as a trust director, trust protector, trust adviser or as a member of a committee.

(B) A trust director does not include a person who has a

(i) power of appointment as defined by section 10-3.1(a);

(ii) power to appoint or remove a trustee or trust director;

(iii) power of a trust contributor to the extent the trust contributor has a power to revoke the trust;

(iv) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects:

(I) the beneficial interest of the beneficiary; or

(II) the beneficial interest of another beneficiary represented by the beneficiary under SCPA 315 with respect to the exercise or nonexercise of the power; or

(v) power over a trust if:

(I) the terms of the trust provide that the power is held in a nonfiduciary capacity; and

(II) the power must be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the Internal Revenue Code.

(28) "Trust instrument" means a properly executed instrument that contains terms of the trust, including any amendments thereto.

(29) "Trustee" means a person who has accepted an appointment as trustee or has been issued letters of trusteeship. "Trustee" includes an original, additional, and successor trustee, and a co-trustee.

§ 7-A-1.4 Knowledge

(a) Subject to paragraph (b), a person has knowledge of a fact if the person:

(1) has actual knowledge of it;

(2) has received a notice or notification of it; or

(3) from all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.

§ 7-A-1.5 Default and mandatory rules

(a) Except as otherwise provided in the terms of the trust, court order or decree or other applicable law, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this article except:

(1) the rules for the governing law of a trust (as provided in section 7-A-1.7);

(2) the rules regarding the principal place of administration (as provided in section 7-A-1.8);

(3) the rules for judicial proceedings (as provided in sections 7-A-2.1 and 7-A-2.2);

(4) the requirements for creating and amending a trust (as provided in sections 7-A-4.1 to 7-A-4.9-A);

(5) the rules for commencing a proceeding (as provided in section 7-A-4.10(b)) and the limitations on modification and termination (as provided in section 7-A-4.10(c));

(6) the power of the court to amend or revoke a trust under section 7-A-4.11(c), to modify or terminate a trust under section 7-A-4.12 and sections 7-A-14 through 7-A-4.16 or to combine or divide trusts under section 7-A-4.17;

(7) the rights of creditors of trust beneficiaries (as provided in part 5);

(8) the power of the court to require, dispense with, or modify or terminate a bond (as provided in section 7-A-7.2);

(9) the requirement that a trustee of a testamentary trust provide the court with written notice of resignation (as provided in section 7-A-7.5(d));

(10) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust (as provided in section 7-A-8.1);

(11) the duty to administer the trust (as provided in section 7-A-8.4).

(12) the duties relating to delegation if a delegation is made (as provided in section 7-A-8.7);

(13) the duties relating to recordkeeping and identification of property (as provided in section 7-A-8.10);

(14) Beginning at the death of the later to die of the settlor or the settlor's surviving spouse or after 21 years if the settlor is not an individual, the duty under section 7-A-8.13(a) to respond to the reasonable request of a beneficiary of an irrevocable trust for information related to the administration of a trust;

(15) Beginning at the death of the later to die of the settlor or the settlor's surviving spouse, or after 21 years if the settlor is not an individual, the duty under section 7-A-8.13(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request information related to the administration of the trust;

(16) the duty under section 7-A-8.19(g) and the restrictions on powers (as provided in section 7-A-8.19);

(17) the principles for the computation of damages (as provided in section 7-A-10.2);

(18) the effect of an exculpatory provision (as provided in 7-A-10.8);

(19) the rights under sections 7-A-10.10 through 7-A-10.13 of a person other than a trustee or beneficiary;

(20) periods of limitation for commencing a judicial proceeding; and

(21) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

§ 7-A-1.6 Common law and principles of equity

The common law of trusts and principles of equity supplement this article, except to the extent modified by this article or another statute of this state.

§ 7-A-1.7 Governing law

(a) As used in this section:

(1) "Real property" means land or any estate in land, including leaseholds, fixtures and mortgages or other liens thereon.

(2) "Personal property" means any property other than real property, including tangible and intangible things.

(3) "Intrinsic validity" relates to the rules of substantive law by which a jurisdiction determines the legality of a disposition in trust, including the general capacity of the settlor and the rule against perpetuities.

(4) "Effect" relates to the legal consequences attributed under the law of a jurisdiction to a valid disposition in trust.

(5) "Interpretation" relates to the procedure of applying the law of a jurisdiction to determine the meaning of language employed by the settlor where the settlor's intention is not otherwise ascertainable.

(6) "Local law" means the law which the courts of the jurisdiction apply in adjudicating legal questions that have no relation to another jurisdiction.

Notwithstanding the definition of "real property" in this paragraph, whether an estate in, leasehold of, fixture, mortgage or other lien on land is real or personal is determined by the local law of the jurisdiction in which the land is situated.

(b) The intrinsic validity, effect, interpretation and amendment of any term of a lifetime trust, created by a domiciliary or non-domiciliary, and the revocation of a lifetime trust, by a domiciliary or non-domiciliary, are determined by:

(1) the law of the jurisdiction designated in the trust instrument unless the designation of that jurisdiction's law is contrary to a mandatory trust rule or a strong public policy, including the rule against perpetuities, of the jurisdiction having the most significant relationship to the matter at issue., except where the law of a jurisdiction other than this state is designated in the trust instrument, this state shall not be the jurisdiction having the most significant relationship to any matter at issue that does not involve real property located in this state so long as none of the trustees are domiciled in this state, whether or not this state is the domicile of the settlor or of any of the beneficiaries; or

(2) in the absence of a controlling designation in the trust instrument, the law of the jurisdiction where the settlor was domiciled at the time of execution to the matter at issue, except

(i) that with respect to real property the law of the situs shall govern, and

(ii) with respect to the interpretation of the terms of the trust applying to personal property the local law of the jurisdiction in which the settlor was domiciled at the time of execution shall govern.

(c) Notwithstanding anything to the contrary in paragraph (b), whenever a person, not domiciled in this state, creates a lifetime trust which provides that one or more terms shall be governed by the laws of this state, such provision shall be given effect by using the local law of this state to determine the intrinsic validity, effect, interpretation and amendment of the designated term or terms and the revocation of a lifetime trust with respect to:

(1) any trust property situated in this state at the time the trust is created;

(2) any trust property situated in this state at the time such property is added to the trust; and

(3) personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.

(d) The law governing any aspect of the administration of a trust, created by a domiciliary or non-domiciliary, is the law so designated in the trust instrument unless the designation of that jurisdiction's law is contrary to a mandatory trust rule or a strong public policy of the jurisdiction of the trust's principal place of administration, as determined by section 7-A-1.8. If the terms of the trust do not designate the governing law, both of the following apply:

(1) The law of the trust's principal place of administration, as determined under section 7-A-1.8, governs the administration of the trust.

(2) If the trust's principal place of administration is transferred to another jurisdiction under section 7-A-1.8, the law of the new principal place of administration of the trust governs the administration of the trust from the time of the transfer.

(e) Notwithstanding anything to the contrary in paragraph (d), whenever a person, not domiciled in this state, creates a trust which provides that one or more terms for trust administration shall be governed by the laws of this state, such provision shall be given effect by using the local law of this state with respect to:

(1) any trust property situated in this state at the time the trust is created;

(2) any trust property situated in this state at the time such property is added to the trust; and

(3) personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.

(f) Cross-reference. See section 3-5.1 (relating to the choice of law rules involving testamentary trusts) and section 7-A-4.3 (relating to the formal validity of lifetime trusts).

§ 7-A-1.8 Principal place of administration

(a) The terms of a trust designating the principal place of administration of the trust are valid only if there is a sufficient connection with the designated jurisdiction. Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) a trustee's usual place of business is located in or a trustee is a resident of the designated jurisdiction; or

(2) a trust director's usual place of business is located in or a trust director is a resident of the designated jurisdiction; or

(3) all or part of the administration occurs in the designated jurisdiction.

(b) Unless designated under paragraph (a):

(1) If there is one trustee, the principal place of administration of a trust is the trustee's usual place of business for administering trusts or, if the trustee has no such usual place of business, the trustee's residence.

(2) If there are two or more co-trustees, the principal place of administration is:

(A) If there is only one corporate co-trustee, the usual place of business for administering trusts of that trustee;

(B) If there is more than one corporate co-trustee, the place agreed upon by the co-trustees where any corporate co-trustee has its the usual place of business for administering trusts or if the co-trustees do not agree, the place where a majority of the trust administration occurs, or if there is no such place, as a court may determine;

(C) If there is no corporate co-trustee, the place agreed upon by the co-trustees where any co-trustee carries on the work of trust administration or if the co-trustees do not agree, the place where a majority of the trust administration occurs or if there is no such place, as a court may determine.

(c) Notwithstanding paragraph (b), if a corporate trustee is designated as the trustee of a trust and the corporate trustee has offices in multiple states and performs administrative functions for the trust in multiple states, the corporate trustee may designate which is the corporate trustee's usual place of business for administering trusts with respect to a particular trust by providing notice to the qualified beneficiaries and trust directors. The notice is valid and controlling if the corporate trustee has a connection to the jurisdiction designated in the notice, including an office where

trustee services are performed and the actual performance of some administrative functions for that particular trust take place in that particular jurisdiction. The subsequent transfer of some of the administrative functions of the corporate trustee to another state or states does not transfer the principal place of administration as long as the corporate trustee continues to maintain an office and perform some administrative functions in the jurisdiction designated in the notice and the corporate trustee does not notify the qualified beneficiaries of a change in the principal place of administration pursuant to paragraph (f).

(d) A trustee may transfer the trust's principal place of administration of a testamentary trust to another State or to a jurisdiction outside of the United States upon the approval of the Court that has most recently issued letters of trusteeship to the trustee of the trust.

(e) A trustee may transfer the principal place of administration of a lifetime trust to another State or to a jurisdiction outside of the United States

(1) upon the approval of any Court that has jurisdiction over the trustee;

(2) without the approval of any Court and in the absence of any objection by a qualified beneficiary.

(f) A trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than 60 days before initiating the transfer. The notice of proposed transfer must include:

(1) the name of the jurisdiction to which the principal place of administration is to be transferred;

(2) The address and phone number of the new location at which the trustee can be contacted;

(3) an explanation of the reasons for the proposed transfer;

(4) the date on which the proposed transfer is anticipated to occur; and

(5) the date, not less than 45 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(g) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to section 7-A-7.4.

(h) If there are two or more co-trustees of a trust, decisions made with respect to actions described in this section are governed by section 7-A-7.3.

(i) Nothing in this section shall limit the application of section 7-A-8.19 to any trust.

(j) Notwithstanding any other provision of this Code, the trustee has no duty to inform beneficiaries about the availability of this section and further has no duty to review the trust instrument to determine whether any action should be taken under this section unless requested to do so in writing by a beneficiary then entitled to receive reports and information related to the administration of the trust.

§ 7-A-1.9 Methods and waiver of notice

(a) Notice to a person under this article or the sending of a document to a person under this article must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document to the person's last known place of residence or place of business include (but are not limited to) first-class mail, special mail service, or personal delivery.

(b) Notice otherwise required under this article or a document otherwise required to be sent under this article need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) Notice under this article or the sending of a document under this article may be waived by the person to be notified or sent the document.

(d) Notice to an incapacitated person may be given to any guardian for property of such incapacitated person or to a parent or other person with whom such incapacitated person resides.

(e) Notice of a judicial proceeding must be given as provided in the SCPA and other applicable rules of civil procedure.

(f) The notice provision of section 7-A-8.19(i)(2) with respect to the exercise of the power to appoint to an appointed trust under paragraph (a) or (b) of section 7-A-8.19 shall apply in lieu of the notice provision this section.

§ 7-A-1.10 Others treated as qualified beneficiaries

(a) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this article if the charitable organization, on the date the charitable organization's qualification is being determined:

(1) is entitled to receive or is a permissible recipient of trust income or principal;

(2) would be entitled to receive or is a permissible recipient of trust income or principal upon the termination of the interests of others entitled to receive or permissible recipients then receiving or eligible to receive distributions; or

(3) would be entitled to receive or is a permissible recipient of trust income or principal if the trust terminated on that date.

(b) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in section 7-A-4.8 or 7-A-4.9 has the rights of a qualified beneficiary under this article.

(c) The attorney general of this State has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this State.

§ 7-A-1.11 Nonjudicial settlement agreements

(a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court determined by taking into account SCPA 315 as if the settlement were the result of a proceeding in which process was required to be served on all persons interested in the trust. The following persons if not described by the foregoing sentence shall be deemed interested persons: the settlor if no adverse income or transfer tax results would arise from the settlor's participation and the currently serving trustee or trustees.

(b) Except as otherwise provided in paragraph (c), interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving the trust.

(c) A nonjudicial settlement agreement is valid only to the extent it (1) does not violate the purposes of the trust unless the settlor is a party to the agreement and (2) includes terms and conditions that could be approved by the court pursuant to this article or other applicable law. Notwithstanding the prior sentence, a nonjudicial settlement agreement shall not be used to transfer the principal place of administration of a testamentary trust or accomplish any of the following actions for which court approval is specifically required: trust termination under section 7-A-4.12(b), modification of dispositive provisions under section 7-A-4.12(b), cy pres reformation under section 8-1.1(c), removal from this state of trust property in a testamentary trust under SCPA 710(4); and appointment of a successor or co-trustee of a testamentary trust under section SCPA 706(2) and 1502.

(d) Matters that may be resolved by a nonjudicial settlement agreement include but are not limited to:

- (1) the interpretation or construction of the terms of the trust;
 - (2) the approval of a trustee's report or accounting;
 - (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
 - (4) the resignation or appointment of a trustee and the determination of a trustee's compensation;
 - (5) transfer of the principal place of administration of a lifetime trust; and
 - (6) liability of a trustee for an action or omission to act relating to the trust.
- (e) A nonjudicial settlement agreement shall be in writing and executed by all interested persons described in paragraph (a) in the manner required by the laws of this state for the conveyance of real property.
- (f) An agreement entered into in accordance with this section is final and binding on all beneficiaries, the trustee and all other persons identified in paragraph (a) as if ordered by a court with jurisdiction over the trust. The failure of a court to approve a nonjudicial settlement agreement as provided in paragraph (g) has no effect on the binding nature of the agreement.
- (g) Notwithstanding paragraph (f), any interested person may petition the court to approve or disapprove a proposed or an executed a—nonjudicial settlement agreement. Such petition may request a court to determine any issue regarding the agreement including whether the representation as provided in SCPA 315 is adequate, whether the agreement contains terms and conditions that violate the purposes of the trust or whether the agreement contains terms and conditions that the court could properly approve.
- (h) A petition described in paragraph (g) must be filed no later than 60 days after the effective date of the agreement absent a showing of good cause why the petition was not timely filed. Process must issue to all other interested persons described in paragraph (a).
- (i) An interested person may also commence a proceeding to interpret, apply or enforce a nonjudicial settlement agreement. Process must issue to all other interested persons described in paragraph (a).
- (j) Cross reference. See Section 7-A-4.11(revocation or amendment of irrevocable trust initiated by consent).

PART 2 Judicial Proceedings

§ 7-A-2.1 Role of court in administration of trust

The rules for court involvement in the administration of a trust are provided by numerous sections of the estates, powers and trusts law, the surrogate's court procedure act, and the civil practice law and rules.

§ 7-A-2.2 Jurisdiction over trustee and beneficiary

The jurisdiction over trusts, trustees and beneficiaries is provided in article 2 of the SCPA.

PART 3 [Reserved]

PART 4 Creation, Validity, Amendment, Modification, and Termination of Trust

§ 7-A-4.1 Methods of creating trust

(a) Subject to the requirements of sections 7-A-4.2, 7-4.2-A, and 7-A-4.4, a trust may be created by:

(1) a transfer of property to another person as trustee during the settlor's lifetime or by will or other transfer of property taking effect upon the settlor's death;

(2) a declaration by the owner of property that the owner holds identified property as trustee;

(3) the exercise of a power of appointment in favor of a trustee where the terms of such trust are created by the exercise of the power of appointment, including the exercise by a trustee of a discretionary power in favor of a trustee; or

(4) a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

(b) For purposes of subparagraph (a)(1), a transfer of property shall include a beneficiary designation as provided in section 13-3.3.

(c) Cross reference. See section 3-3.7 (disposition in will to trustee).

§ 7-A-4.2 General requirements for trust creation

(a) In addition to the requirements for creating a lifetime trust pursuant to section 7-A-4.2-A and the formality requirements to create a testamentary trust, and subject to section 7-A-4.4, a trust is created under section 7-A-4.1 only if:

(1) the settlor (or a person authorized to act for the settlor who acts for the settlor) has capacity to create a trust;

(2) the settlor (or a person properly acting on behalf of the settlor) indicates an intention to create the trust;

(3) the trust has a definite beneficiary or is:

(A) a charitable trust;

(B) a trust for the care of an animal, as provided in section 7-A-4.8; or

(C) a trust for a noncharitable purpose, as provided in section 7-A-4.9;

(4) the trustee has duties to perform, see also section 7-A-4.2-B; and

(5) the same person is not the sole trustee and sole beneficiary. See also section 7-A-4.2-C.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

§ 7-A-4.2-A Specific rules for creation of lifetime trusts

(a) Any person may by lifetime trust dispose of real and personal property. A natural person who creates a lifetime trust shall be eighteen years of age or older.

(b) Every estate in property may be disposed of by lifetime trust.

(c) Every lifetime trust shall be in writing, and shall be executed by the settlor or the person authorized to act on behalf of the settlor and unless such person is the sole trustee, by at least one trustee thereof. The signature of the settlor (or the person authorized to act on behalf of the settlor) must be either (i) affixed to the document in the presence of two witnesses, who then affix their signatures to the document, or (ii) acknowledged by the settlor (or the person authorized to act on behalf of the settlor) in the manner required by the laws of this state for the conveyance of real property. If the signature of a trustee is required, the signature of the trustee must be either (i) affixed to the document in the presence of two witnesses, who then affix their signatures to the document, or (ii) acknowledged by the trustee in the manner required by the laws of this state for the conveyance of real property.

(d) A lifetime trust shall be valid as to any assets therein to the extent the assets have been transferred to the trustee. A transfer is not accomplished by recital of assignment, holding or receipt in the trust instrument. An asset will be deemed to have been transferred to a trustee on the delivery of the asset to the trustee except that when the settlor is the sole trustee, (a) in the case of assets capable of registration such as real estate, stocks, bonds, bank and brokerage accounts and the like, such assets are deemed transferred on the recording of the deed or the completion of registration of the asset in the name of the trust or trustee, and (b) in the case of other assets such assets are deemed transferred to the trustee (i) by a written assignment, either in the trust instrument or by a separate writing, describing the asset with particularity or (ii) by describing with

particularity, either in the trust instrument or in a schedule attached to the trust instrument, the asset held in the trust or (iii) by affixing the asset to the trust instrument.

(e) A lifetime trust shall be irrevocable unless the terms of the trust expressly provide that it is revocable.

§ 7-A-4.2-B Trustee of passive trust not to take

Every disposition of property shall be made directly to the person in whom the right to possession and income is intended to be vested and not to another in trust for such person, and if made to any person in trust for another, no estate, legal or equitable, vests in the trustee. But neither this section nor section 7-A-4.2-C shall apply to trusts arising or resulting by implication of law.

§ 7-A-4.2-C When trust interests not to merge

A trust is not merged or invalid because a person, including but not limited to the settlor of the trust, is or may become the sole trustee and the sole holder of the present beneficial interest therein, provided that one or more other persons hold a beneficial interest therein, whether such interest be vested or contingent, present or future, and whether created by express provision of the instrument or as a result of reversion to the settlor's estate.

§ 7-A-4.3 Trusts created in other jurisdictions

(a) A lifetime trust is validly created if it is in writing and its creation complies with

(1) the law of the jurisdiction in which the trust instrument was executed, or

(2) the law of the jurisdiction in which, at the time of creation:

(i) the settlor was domiciled, had a place of abode, or was a national; or

(ii) a trustee was domiciled or had a place of business; or

(3) any trust property was situated.

(b) A testamentary trust is validly created if the will creating the trust may be admitted to probate in New York under section 3-5.1(c), provided, however, if the trust property includes real property, the trust must be validly created under the law of the jurisdiction in which the land is situated.

§ 7-A-4.4 Trust purposes

A trust may be created only to the extent its purposes are lawful, and not contrary to public policy.

§ 7-A-4.4-A Supplemental needs trusts established for persons with severe and chronic or persistent disabilities

(a) Definitions: When used in this section, unless otherwise expressly stated or unless the context otherwise requires:

(1) "Developmental disability" means developmental disability as defined in subdivision twenty-two of section 1.03 of the mental hygiene law.

(2) "Government benefits or assistance" means any program of benefits or assistance which is intended to provide or pay for support, maintenance or health care and which is established or administered, in whole or in part, by any federal, state, county, city or other governmental entity.

(3) "Mental illness" means mental illness as defined in subdivision twenty of section 1.03 of the mental hygiene law.

(4) "Person with a severe and chronic or persistent disability" means a person (i) with mental illness, developmental disability, or other physical or mental impairment; (ii) whose disability is expected to, or does, give rise to a long-term need for specialized health, mental health, developmental disabilities, social or other related services; and (iii) who may need to rely on government benefits or assistance.

(5) "Supplemental needs trust" means a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability (the "beneficiary") which conforms to all of the following criteria:

(i) The trust document clearly evidences the creator's intent to supplement, not supplant, impair or diminish, government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving, except as provided in clause (ii) of this subparagraph;

(ii) The trust document prohibits the trustee from expending or distributing trust assets in any way which may supplant, impair or diminish government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving; provided, however, that the trustee may be authorized to make such distributions to third parties to meet the beneficiary's needs for food, clothing, shelter or health care but only if the trustee determines (A) that the beneficiary's basic needs will be better met if such distribution is made, and (B) that it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance;

(iii) The beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from the trust;

(iv) If an inter vivos trust, the creator of the trust is a person or entity other than the beneficiary or the beneficiary's spouse; and

(v) Notwithstanding subparagraph (iv) of this paragraph, the beneficiary of a supplemental needs trust may be the creator of the trust if such trust meets the requirements of subparagraph two of paragraph (b) of subdivision two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses. Provided, however, that if the trust is funded with the proceeds of retroactive payments made as a result of a court action and due the beneficiary under the federal supplemental security income program, as established under title XVI of the federal social security act, the creation of a supplemental needs trust by the beneficiary under this subparagraph shall not impair nor limit any right under applicable law of a representative payee to receive reimbursement out of such proceeds for expenses incurred on behalf of the beneficiary pending the determination of the beneficiary's eligibility for such federal supplemental security income program, nor any right under applicable law of any state or local governmental entity which provided the beneficiary with interim assistance pending the determination of the beneficiary's eligibility for such federal supplemental security income program to be repaid out of such proceeds for the amount of such interim assistance.

(6) A "beneficiary" means a person with a severe and chronic or persistent disability who is a beneficiary of a supplemental needs trust.

(b) A supplemental needs trust shall be construed in accordance with the following:

(1) It shall be presumed that the creator of the trust intended that neither principal nor income be used to pay for any expense which would otherwise be paid by government benefits or assistance for which the beneficiary might otherwise be eligible or which the beneficiary might be receiving, notwithstanding any authority the trustee may have to make distributions for food, clothing, shelter or health care as provided in clause (ii) of subparagraph five of paragraph (a) of this section;

(2) Section 7-A-4.4-A(b) shall not be applicable to the extent that the application or possible application of that section would reduce or eliminate the beneficiary's entitlement to government benefits or assistance;

(3) Neither principal nor income held in trust shall be deemed an available resource to the beneficiary under any program of government

benefits or assistance; however, actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any such program;

(4) The trustee of the trust shall not be deemed to be holding assets for the benefit of the beneficiary for purposes of section 43.03 of the mental hygiene law or section one hundred four of the social services law; and

(5) If the trust provides the trustee with the authority to make distributions for food, clothing, shelter or health care as provided in clause (ii) of subparagraph five of paragraph (a) of this section, and if the mere existence of that authority would, under the terms of any program of government benefits or assistance, result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority were actually exercised, then:

(i) if the trust instrument expressly provides, such provision shall be null and void and the trustee's authority to make such distributions shall cease and shall be limited as otherwise provided; or

(ii) the trust shall no longer be treated as a supplemental needs trust under this section and the trust shall be construed, and the trust assets considered, without regard to the provisions of this section.

(c)(1) Paragraph (b) of this section shall not apply to the extent that the trust is funded, directly or indirectly, by the beneficiary, except as provided in clause (v) of subparagraph five of paragraph (a) of this section, by someone with a legal obligation of support to the beneficiary, or by someone with another financial obligation to the beneficiary to the extent of such obligation, at the time the beneficiary is receiving or applying to receive:

(i) Government benefits or assistance for which an income and resource calculation is made; or

(ii) Services, care or assistance for which payment or reimbursement is or may be sought under section 43.03 of the mental hygiene law or section one hundred four of the social services law.

(2) To the extent that said paragraph (b) does not apply, the trust shall not be treated as a supplemental needs trust under this section, and the trust shall be construed, and the trust assets considered, without regard to the provisions of this section.

(d) The provisions of paragraph (b) of this section shall not apply to bar claims by government against persons with an interest in or under the trust other than the beneficiary.

(e)(1) The following language may be used as part of a trust instrument, but is not required, to qualify a trust as a supplemental needs trust:

1. The property shall be held, IN TRUST, for the benefit of _____ (hereinafter the "beneficiary") and shall be held, managed, invested and reinvested by the trustee, who shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, apply for the benefit of the beneficiary, so much (even to the extent of the whole) of the net income and/or principal of this trust as the trustee shall deem advisable, in his or her sole and absolute discretion, subject to the limitations set forth below. The trustee shall add to the principal of such trust the balance of net income not so paid or applied.

2. It is the grantor's intent to create a supplemental needs trust which conforms to the provisions of section 7-A-4.4-A of the estates, powers and trust law. The grantor intends that the trust assets be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving. Consistent with that intent, it is the grantor's desire that, before

expending any amounts from the net income and/or principal of this trust, the trustee consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible and that, where appropriate and to the extent possible, the trustee endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary.

3. None of the income or principal of this trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.

4. The beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this trust.

(2)(i) If the creator elects, the following additional language may be used:

5. Notwithstanding the provisions of paragraphs two and three above, the trustee may make distributions to meet the beneficiary's need for food, clothing, shelter or health care even if such distributions may result in an impairment or diminution of the beneficiary's receipt or eligibility for government benefits or assistance but only if the trustee determines that (i) the beneficiary's needs will be better met if such distribution is made, and (ii) it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance.

(ii) If the trustee is provided with the authority to make the distributions as described in subparagraph (2)(i), the creator may elect to add the following clause:

; provided, however, that if the mere existence of the trustee's authority to make distributions pursuant to this paragraph shall result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this paragraph shall be null and void and the trustee's authority to make such distributions shall cease and shall be limited as provided in paragraphs two and three above, without exception.

(f) Nothing in this section shall affect the establishment, interpretation or construction of trust instruments which do not conform with the provisions of this section, nor shall this section impair the state's authority to be paid from or seek reimbursement from any trust which does not conform with the provisions of this section or to deem the principal or income of such trust an available resource under any program of government benefits or assistance.

§ 7-A-4.5 Charitable purposes; enforcement

The rules for charitable purposes and enforcement are provided in article 8.

§ 7-A-4.6 Creation of trust induced by fraud, duress, or undue influence or the result of mistake

A trust is voidable to the extent its creation, amendment or restatement was induced by fraud, duress, or undue influence or the creation, amendment or restatement of the trust was the result of a mistake.

§ 7-A-4.7 Oral trusts not recognized

Other than a testamentary trust in a nuncupative will created pursuant to section 3-2.2, no oral trust can be created in New York.

§ 7-A-4.8 Trusts for pets

(a) A trust for the care of a designated domestic or pet animal is valid. Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.

(b) The intended use of the principal or income of a trust that is authorized pursuant to paragraph (a) may be enforced by a person designated for that purpose in the trust instrument. If no person is appointed to act or the person appointed is unable or unwilling to act, a court may appoint a person to act. A trustee or person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals.

(d) Upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the settlor or to the settlor's successors in interest.

(e) A court may reduce the amount of the property transferred if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property pursuant to paragraph (d) of this section.

(f) If no trustee is designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the settlor and the purposes of this section.

§ 7-A-4.9 Noncharitable trust without ascertainable beneficiary

Except as otherwise provided in section 7-A-4.8 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years.

(2) A trust authorized by this section shall or may be enforced by a person appointed in the terms of the trust or if no person is appointed, or if the person so appointed is unwilling or unable to act, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only for its intended purpose. Except as otherwise provided by the terms of the trust, if the court determines that not all of the trust property is required for its intended purpose, the excess property must be distributed to the settlor or to the settlor's successors in interest.

§ 7-A-4.9-A Amendment of trust other than by trust contributor

(a) A trust may be amended by a person other than the trust contributor to the extent the trust terms provide.

(b) Any authorized trust amendment by a person other than the trust contributor shall be in writing and executed by the person authorized to amend the trust, and except as otherwise provided in the governing instrument, shall be acknowledged or witnessed in the manner required by paragraph (c) of section 7-A.4.2-A, and shall take effect as of the date of such execution. Written notice of such amendment shall be delivered to at least one other trustee within a reasonable time if the person executing such amendment is not the sole trustee, but failure to give such notice shall not affect the validity of the amendment or the date upon which same shall take effect. No trustee shall be liable for any act reasonably taken in reliance on an existing trust instrument prior to actual receipt of notice of amendment thereof. Absent written consent, no trustee shall be liable for the failure to comply with an amendment that expands, restricts or otherwise modifies the trustee's duties, powers, obligations, or compensation for a period of 60 days after receipt of notice of amendment.

§ 7-A-4.10 Modification, termination, or reformation of trust; proceedings for approval or disapproval

(a) A trust terminates when and to the extent:

(1) The terms of the trust so provide, including by the valid exercise of a power to revoke pursuant to the terms of the trust;

(2) No purpose of the trust remains to be achieved;

(3) The purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve;

(4) All of the trust property has been distributed by the trustee in accordance with the terms of the trust;

(5) A trust is revoked pursuant to section 7-A-4.11; or

(6) A court orders a termination in a proceeding brought under sections 7-A-4.12 or 7-A-4.14.

(b) A proceeding to approve or disapprove a modification or termination under sections 7-A-4.12, 7-A-4.14 and 7-A-4.16, or a reformation under section 7-A-4.15 may be commenced solely by a trustee or beneficiary on notice to the parties interested in the proceeding. The parties interested in such a proceeding shall include the trustee and any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account SCPA 315. In addition, the party commencing any proceeding described in the first sentence of this paragraph shall notify the settlor in writing that such proceeding has been commenced.

(c) Notwithstanding anything in sections 7-A-4-12, 7-A-4-14 and 7-A-4-16 to the contrary, a trust shall not be modified or terminated to the extent doing so would jeopardize (i) the deduction or exclusion originally claimed with respect to any contribution to the trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code, the marital deduction under section 2056(a) or 2523(a) of the Internal Revenue Code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the Internal Revenue Code, (ii) the qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code, or (iii) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code, or (iv) a beneficiary's eligibility for, or a beneficiary's receipt of, public benefits or both.

§ 7-A-4.11 Revocation or amendment of irrevocable lifetime trust initiated by consent

(a) Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the living persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke or amend the whole or any part thereof by an instrument in writing acknowledged or proved in like manner, and thereupon the estate of the trustees ceases with respect to any part of such trust property, the disposition of which has been revoked. If the conveyance or other instrument creating a trust of property was recorded in the office of the clerk or register of any county of this state, the instrument revoking or amending such trust, together with the consents thereto, shall be recorded in the same office of every county in which the conveyance or other instrument creating such trust was recorded.

(b) For the purposes of paragraph (a)(1), a disposition, contained in a trust created on or after September first, nineteen hundred fifty-one, in favor of a class of persons described only as the heirs, next of kin or distributees (or by any term of like import) of the creator of the trust does not create a beneficial interest in such persons.

(c) If not all of the beneficiaries consent to a revocation or amendment of the trust under paragraph (a)(1) and the creator so consents, the revocation or amendment may be approved by the court in a proceeding brought by the creator or a beneficiary if the court is satisfied that:

(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under paragraph (a)(1); and

(2) the interests of a beneficiary who does not or cannot consent will be adequately protected; and

(3) the revocation or amendment will not jeopardize any tax described in section 7-A-4.10(c)(i)-(iii).

(4) the revocation or amendment will not jeopardize a beneficiary's eligibility for, or a beneficiary's receipt of, public benefits or both.

(d) A trustee is not an interested person for purposes of paragraph (c).

(e) For purposes of this section, a trustee who exercises a power under section 7-A-8.19 is not a creator.

§ 7-A-4.12 Modification or termination because of unanticipated circumstances or inability to administer trust effectively

(a) The court may modify the administrative terms of a trust if the modification, because of circumstances not anticipated by the settlor or for any other compelling reason, will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the dispositive terms of a trust (other than a wholly charitable trust or a supplemental needs trust that conforms to the provisions of section 7-A-4.4-A) or terminate such trust if, because of circumstances not anticipated by the settlor, including changes in law, modification or termination will further the purposes of the trust, provided, however, no modification may be made if the trust terms expressly provide that the settlor does not intend an invasion of principal for an income beneficiary's health, education, maintenance or support. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in accordance with the terms of the trust or as the court may otherwise direct.

§ 7-A-4.13 Cy pres

The rules for cy pres are provided in section 8-1.1(1).

§ 7-A-4.14 Modification or termination of uneconomical trust

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than \$100,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. Upon termination of a trust under this paragraph, the trustee shall distribute the trust property as the trustee determines will best effectuate the settlor's intention.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines under the circumstances that the value of the trust property is insufficient to justify the cost of administration. Upon termination of a trust under this paragraph, the trust property shall be distributed as the court determines will best effectuate the settlor's intention. Nothing in this paragraph shall be deemed to supersede the provisions of section 8-1(c)(2) governing a wholly charitable trust.

(c) Notwithstanding paragraphs (a) and (b), a trust may not be terminated if the express terms of the trust prohibit its early termination.

(d) This section does not apply to

1. an easement for conservation or preservation, or
2. a supplemental needs trust which conforms to the provisions of section 7-A-4.4-A, or

3. a wholly charitable trust. See § 8.1(c)(2).

§ 7-A-4.15 Reformation to correct mistakes

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what was the settlor's intention and that specific terms of the trust do not carry out that intention because the specific terms were affected by a mistake of fact or law, whether in expression or inducement.

§ 7-A-4.16 Modification to achieve settlor's tax or supplement needs trust objectives

(a) The court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention in order to (a) achieve the settlor's tax objectives or (b) to conform such trust to the requirements of section 7-A-4.4-A. The court may provide that the modification has retroactive effect.

(b) Cross reference. See section 11-1.11 (limited power of trustee to amend trust for certain tax purposes.)

§ 7-A-4.17 Combination and division of trusts

(a) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts and distribute the trust property to the trustee of each separate trust if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust, including any tax purposes.

(b) The court having jurisdiction of an express trust, upon the petition of the trustee or of any qualified beneficiary and upon notice to all qualified beneficiaries, may direct the combination of two or more trusts for any reason not directly contrary to the primary purpose of each trust, or may direct the establishment of two or more separate trusts for any reason not directly contrary to the primary purpose of the trust.

(c) Unless the court otherwise directs, the trusts established under this section by the division of an existing trust shall be deemed to have been created as of the date the divided trust was created; provided that the separate trusts created under paragraph (a) of this section may be deemed created upon the date or dates provided in the instrument or instruments required by paragraph (g) of this section.

(d) Unless the court otherwise directs, a trust established by the combination of two or more trusts under paragraph (a) of this section shall be deemed to be created on the date specified by the trustee.

(e) Unless the court otherwise directs, and except as provided in paragraph (f), the property distributed to the separate trust shall be fairly representative of appreciation or depreciation and shall be based upon the fair market value of the assets on the date or dates of the distributions of such assets to the separate trusts.

(f) Where separate trusts are to be created to segregate property transferred in trust by a creator (including but not limited to a transfer treated as made by a spouse by reason of section 2513 of the United States Internal Revenue Code) (i) from property transferred in trust by one of more different creators or (ii) from property transferred pursuant to a disposing instrument from property transferred by the same creator pursuant to another disposing instrument, paragraph (e) shall not apply if the original assets transferred remain or can be traced.

(g) Separate trusts or a trust resulting from the combination of existing trusts shall be established under paragraph (a) of this section by an instrument or instruments in writing, signed and acknowledged by the trustee.

Such instruments shall be filed in the office of the clerk of the court having jurisdiction over the trust; except that where the divided trust was a lifetime trust or where all of the combined trusts were lifetime trusts and the divided trust or all of the combined trusts have not been the subject of a proceeding in surrogate's court, no filing is required. Whether or not filing is required, a copy of the instrument or instruments shall be served on all qualified beneficiaries of the trusts (or the guardian of the property, committee, conservator, adult guardian, or personal representative of such persons), by registered or certified mail, return receipt requested, or by personal delivery or upon application of the trustee in any other manner directed by the court.

(h) In any case where the Internal Revenue Code requires that an election or other action be made or taken by the executor or if no trustee of a trust under a will has qualified, the term "trustee" as used in this section shall mean the executor or administrator of an estate. In any such case, the trustee shall comply with any action taken by the executor or administrator under this section.

(i) For purposes of this section, a division of a trust into two or more separate trusts to permit one or more such trusts to be governed by article 11-A and another one or more such trusts to be governed by section 11-2.4 shall be deemed to be for a reason which is not directly contrary to the primary purpose of the trust unless such division is expressly prohibited by the terms of the disposing instrument.

(j) Unless the terms of the trust that is divided into separate trusts provide otherwise, the commissions allowed to a trustee as determined under article 23 of the SCPA, as amended from time to time, shall not be increased by reason of the establishment of separate trusts pursuant to this section unless the court otherwise permits an increase, provided, however, that such trustee shall be entitled to charge the trust for any additional reasonable and necessary expenses incurred in the administration of such separate trusts.

PART 4-A Bank Accounts in Trust Form

§ 7-A-4-A.1 Definitions

(a) A "beneficiary" is a person who is described by a depositor as a person for whom a trust account is established or maintained.

(b) A "depositor" is a person in whose name a trust account subject to this part is established or maintained.

(c) A "financial institution" is a bank, trust company, national banking association, savings bank, industrial bank, private banker, foreign banking corporation, federal savings and loan association, a savings institution chartered and supervised as a savings and loan or similar institution under federal law or the laws of a state, a federal credit union, or a credit union chartered and supervised under the laws of a state.

(d) A "trust account" includes a savings, share, certificate or deposit account in a financial institution established by a depositor describing himself as trustee for another, other than a depositor describing himself as acting under a will, trust instrument or other instrument, court order or decree.

§ 7-A-4-A.2 Terms of a trust account

The funds in a trust account, which shall include any dividends or interest thereon, shall be trust funds subject to the following terms:

(1) The trust can be revoked, terminated or modified by the depositor during his lifetime only by means of, and to the extent of, withdrawals from or charges against the trust account made or authorized by the depositor or by a writing which specifically names the beneficiary and the financial

institution. The writing shall be acknowledged or proved in the manner required to entitle conveyances of real property to be recorded, and shall be filed with the financial institution wherein the account is maintained.

(2) A trust can be revoked, terminated or modified by the depositor's will only by means of, and to the extent of, an express direction concerning such trust account, which must be described in the will as being in trust for a named beneficiary in a named financial institution. Where the depositor has more than one trust account for a particular beneficiary in a particular financial institution, such a direction will affect all such accounts, unless the direction is limited to one or more accounts specifically identified by account number in addition to the foregoing requirements. A testamentary revocation, termination or modification under this paragraph can be effected by express words of revocation, termination or modification, or by a specific bequest of the trust account, or any part of it, to someone other than the beneficiary. A bequest or part of a trust account shall operate as a pro tanto revocation to the extent of the bequest.

(3) If the depositor survives the beneficiary, the trust shall terminate and title to the funds shall continue in the depositor free and clear of the trust.

(4) If the beneficiary survives the depositor, and the depositor's will contains no provision revoking, terminating or modifying the trust account under paragraph two, the trust shall terminate and title to the funds shall vest in the beneficiary free and clear of the trust.

(5) If the beneficiary survives the depositor and the depositor's will contains language sufficient under paragraph two of this section, to revoke, terminate or modify the trust, in whole or in part, that part of the trust which is affected shall terminate and title to the funds shall be subject to disposition by the depositor's will, free and clear of the trust.

§7-A-4-A.3 Payment to beneficiary

(a) If the beneficiary survives the depositor under the circumstances provided in paragraph four of section 7-A-4-A.2, the funds shall be paid to the beneficiary upon his order, if, at the time of his demand for payment of all or part of the funds, he is eighteen or more years of age.

(b) If the beneficiary survives the depositor under the circumstances provided in paragraph four of section 7-A-4-A.2, and if the beneficiary is under eighteen years of age at the time demand for payment of any part or all of the funds is made, the funds may be paid to the order of the parent or parents of the beneficiary to be held for the use and benefit of such infant beneficiary or to the order of the duly appointed guardian of the property of the beneficiary, if the funds are equal to or are less than ten thousand dollars; but if the funds are more than ten thousand dollars, the funds may be paid only to the order of the duly appointed guardian of the property of the beneficiary.

§7-A-4-A.4 Effect of payment

A financial institution which upon the death of a depositor and, prior to service upon it of a restraining order, injunction or other appropriate process from a court of competent jurisdiction prohibiting payment, makes payment to a beneficiary, or if the beneficiary is under eighteen years of age, to the guardian of the property or to the parent or parents of the infant pursuant to section 7-A-4-A.3, shall, to the extent of such payment, be released from liability to any person claiming a right to the funds and the receipt or acquittance of the person to whom payment is made shall be a valid and sufficient release and discharge of the financial institution.

§7-A-4-A.5 Rights not affected

This part does not affect:

(1) The rights of creditors of the depositor or his estate,

(2) The rights of fiduciaries of the estate of the depositor, or

(3) The rights of the surviving spouse of the depositor.

§ 7-A-4-A.6 Joint depositors

If a trust account is established in the names of more than one depositor, in form to be paid or delivered to any, or the survivor of them, in trust for another, such account shall be subject to the terms of this part, except that the title to the funds on deposit, as between the depositors, shall be governed by article XIII-E of the banking law.

§ 7-A-4-A.7 Multiple beneficiaries

(a) Whenever any proceeds of a trust account would pass pursuant to section 7-A-4-A.2 to two or more beneficiaries, such proceeds shall pass to such beneficiaries in equal proportions, unless the terms of the trust provide otherwise.

(b) Whenever any proceeds of a trust account would pass pursuant to section 7-A-4-A.2 to two or more beneficiaries, and one or more of the beneficiaries predeceases the depositor, such proceeds shall pass to the surviving beneficiary or beneficiaries in equal proportions, unless the terms of the trust provide otherwise.

§ 7-A-4-A.8 Application

This part shall apply to all funds in trust accounts, as defined in paragraph (d) of section 7-A-4-A.1, which are in existence on its effective date, except that its provisions shall not impair or defeat any rights which have accrued prior to such date.

PART 5 Rights of Beneficiaries and Creditors; Spendthrift and Discretionary Trusts

§ 7-A-5.1 Rules regarding transfer of income in trust; rights of creditors

(a) A right of a beneficiary to receive income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust. The preceding sentence shall not apply to (1) a beneficiary's income interest with respect to trust property attributable to that beneficiary; or (2) the proceeds of a life insurance policy governed by section 7-A-5.2-A.

(b) Notwithstanding paragraph (a):

(1) The beneficiary of a trust who has the right to receive income from property and apply it to the use of or pay it to any person may, unless otherwise provided in the instrument creating or declaring such trust, transfer any amount in excess of ten thousand dollars of the annual income to which the beneficiary is entitled from such trust to the spouse, issue, ancestors, brothers, sisters, uncles, aunts, nephews or nieces of the beneficiary, or to a trustee, guardian for property, committee, conservator, curator, custodian, or the donee of a power during minority for the benefit only of any such person bearing such relationship to the beneficiary, provided that such transfer is evidenced by a written instrument signed and acknowledged by the beneficiary and delivered to the trustee of the trust, together with an affidavit by the beneficiary that such transfer and any like transfer concurrently in effect are for all or part of the excess over ten thousand dollars of the annual income from such trust to which such beneficiary is entitled, and that the beneficiary has not received and is not to receive any consideration in money or money's worth for the transfer.

(2) Any such transfer shall be effective in any year only as to income from such trust in excess of ten thousand dollars to which such beneficiary is entitled, and for this purpose all previous like transfers applicable to a given year shall be taken into account. If two or more transfers are made in

or for any year in a total amount exceeding the sum of ten thousand dollars, transferees shall be preferred in the order in which the instruments of transfer were delivered to the trustee.

(3) A trustee shall be exonerated and fully discharged for any payment made to a transferee in reliance on the affidavit of a beneficiary described in subparagraph (1).

(4) The provisions of this paragraph do not apply to sections 7-A-5.2-A and 7-A-5.4.

(c) A transferee of income may, if he has not received or is not to receive any consideration in money or money's worth therefor, make a further transfer of such income only to one or more of the permissible transferees referred to in subparagraph (b)(1), other than a prior transferor; provided, however, that upon the death of a transferee any income not so transferred by him shall be an asset of his estate, subject to his testamentary disposition or passing to his distributees under the statutes of descent and distribution.

(d) A beneficiary who has the right to receive the income from property and apply it to the use of or pay it to any person is not precluded by anything contained in this section from transferring by assignment or otherwise any part or all of such income to or for the benefit of persons whom the beneficiary is legally obligated to support.

(e) To the extent a trust beneficiary validly transfers an income interest during lifetime or at death if the interest has not terminated, the transferee becomes a beneficiary of the trust.

(f) A beneficiary's income interest is subject to the claims of creditors of the beneficiary to the extent provided by law, including article 52 of the civil practice law and rules and sections 7-A-5.3 and 7-A-5.5-A.

§ 7-A-5.2 Rules regarding transfer of principal interests in trust; rights of creditors

(a) Trusts created prior to the effective date of this article. The right of a beneficiary of a trust to receive principal may be transferred by assignment or otherwise unless such transfer is prohibited by the instrument creating or declaring the trust. Such a provision shall not apply to a beneficiary's interest in principal with respect to property attributable to that trust beneficiary.

(b) Trusts created on or after the effective date of this article. The right of a beneficiary of a trust to receive principal may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust. The preceding sentence shall not apply to a beneficiary's interest in principal with respect to property attributable to that trust beneficiary, or to proceeds of a life insurance policy as provided in section 7-A-5.2-A.

(c) Whenever a trust is created,

(1) To the extent a trust beneficiary validly transfers an interest in principal during lifetime or at death if the interest has not terminated, the transferee becomes a beneficiary of the trust.

(2) A beneficiary's interest in principal is subject to the claims of creditors of the beneficiary to the extent provided by law, including article 52 of the civil practice law and rules, and sections 7-A-5.3 and 7-A-5.5-A.

§ 7-A-5.2-A When proceeds of life insurance policy inalienable

The proceeds of a life insurance policy which, under a trust or other agreement, are upon the death of the insured left with the insurance company may not be

(1) transferred,

(2) subject to commutation or encumbrance, or

(3) subject to legal process

except in an action for necessities, if provisions to such effect were incorporated in such trust or other agreement.

§ 7-A-5.3 Special creditor exceptions to restraints on involuntary alienation

(a) An order of support directing the payment of alimony, maintenance, support or child support can be enforced against the income interest of a beneficiary that is subject to a spendthrift provision as provided in CPLR section 5241 and against a principal interest that is subject to a spendthrift provision.

(b) A spendthrift provision is unenforceable against:

(1) a judgment creditor who has provided goods or performed services suitable to the condition in life of the person to whom they are furnished or for whose benefit they are performed and which meet his or her actual needs at the time such goods are provided or services performed;

(2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and

(3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.

(c) Nothing in this section shall be construed to limit the rights of creditors as otherwise provided by law.

§ 7-A-5.4 Discretionary trusts

(a) A beneficiary may not transfer his or her discretionary trust interest whether or not the interest is spendthrifted.

(b) A beneficiary's discretionary trust interest is subject to the claims of creditors of the beneficiary to the extent provided by law, including section 7-A-5.5-A and article 52 of the civil practice law and rules.

(c) A beneficiary of a discretionary trust interest has the right to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

§ 7-A-5.5 Creditor's claim against trust contributor to a revocable trust

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the trust contributor, the property of a trust over which the trust contributor has the power to revoke is subject to claims of the trust contributor's creditors.

(2) After the death of a trust contributor, and subject to the trust contributor's right to direct the source from which liabilities will be paid, the property of a trust over which immediately before the trust contributor's death the trust contributor has the power to revoke is subject to claims of the trust contributor's creditors, costs of administration of the trust contributor's estate, and the expenses of the trust contributor's funeral and disposal of the trust contributor's remains to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, and expenses.

(b) For purposes of paragraph (a), a trust created before the date of the enactment of this article is a revocable trust only if the creator reserved an unqualified power of revocation described in section 10-10.6.

(c) During the period the holder of a power of withdrawal may exercise the power, the property subject to the power is subject to the claims of the powerholder's creditors, the creditors of the powerholder's estate and the expense of administering the powerholder's estate to the extent provided by section 10-7.2.

§ 7-A-5.5-A Creditor claims to contribution property by trust beneficiary

(a) To the extent that trust property is attributable to property contributed by a beneficiary the interest of the beneficiary in the trust property is subject to the claims of the beneficiary's existing and subsequent creditors whether or not the beneficiary's interest is subject to a spendthrift provision.

(b) For purposes of paragraph (a), upon the lapse, release, or waiver of a power of withdrawal, the holder of the power of withdrawal is treated as making a contribution to the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest amount specified in section 2041(b)(2), 2503(b) or 2514(e) of the Internal Revenue Code, on the date of the lapse, release, or waiver.

(c) Paragraph (a) shall not apply to property contributed by a beneficiary to a trust for the beneficiary's spouse described in (i) section 2523(e) of the Internal Revenue Code or (ii) for which the election described in section 2523(f) of the Internal Revenue Code has been made and (iii) to a trust to the extent the assets of that trust are attributable to a trust described in (i) or (ii) after the death of the beneficiary's spouse.

(d) (1) Paragraph (a) does not apply to all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either an individual retirement account plan which is qualified under section 408 or section 408A of the Internal Revenue Code, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the Internal Revenue Code, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4), 408 (d) (3) or 408A of the Internal Revenue Code, or a plan that satisfies the requirements of section 457 of the Internal Revenue Code, even though the individual making any contribution is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.

(2) All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in subparagraph 1 of this paragraph shall be conclusively presumed to be trusts with spendthrift provisions under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

(3) This section shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the Internal Revenue Code.

(4) Additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

(e) A provision in any trust, other than a testamentary trust or a trust which meets the requirements of subparagraph two of paragraph (b) of paragraph two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses, which provides directly or indirectly for the suspension, termination or diversion of the principal, income or beneficial interest of either the creator or the creator's spouse in the event that the creator or creator's spouse should apply for medical assistance or require medical, hospital or nursing care or long term custodial, nursing or medical care shall be void as against the public policy of the state of New York, without regard to the irrevocability of the trust or the purpose for which the trust was created.

(f) Paragraph (a) shall not apply by reason of the trustee's authority to pay trust income or principal to the trust contributor pursuant to section 7-A-8.18. Nor shall paragraph (a) apply where the trustee, as defined in paragraph (b) of section 7-A-8.18, is authorized under the trust instrument

or any other provision of law to pay or reimburse the trust contributor for any tax on trust income or trust principal that is payable by the trust contributor under the law imposing such tax or to pay any such tax directly to the taxing authorities. No creditor of a trust contributor shall be entitled to reach any trust property based on the discretionary powers described in this paragraph.

§ 7-A-5.6 Overdue distribution

(a) In this section, "mandatory distribution" means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term does not include a distribution subject to the exercise of the trustee's discretion even if (1) the discretion is expressed in the form of a standard of distribution, or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction.

(b) Whether or not a trust contains a spendthrift provision, a creditor may compel the trustee to make a mandatory distribution of income or principal, including a distribution upon termination of the trust, to the beneficiary if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

§ 7-A-5.7 Personal obligations of trustee

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

PART 6 Revocable Trusts

§ 7-A-6.1 Capacity of trust contributor of revocable trust

The trust contributor's capacity to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. Notwithstanding the foregoing, the trust contributor's capacity required to irrevocably release a power to revoke or amend such a trust is the same as that required to make a gift.

§ 7-A-6.2 Revocation or amendment of revocable trust

(a) If a revocable trust has more than one trust contributor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses;

(2) to the extent the trust consists of property other than community property, each trust contributor may revoke or amend the trust with regard the portion of the trust property attributable to that trust contributor's contribution; and

(3) upon the revocation or amendment of the trust by fewer than all of the trust contributors, the trustee shall promptly notify the other trust contributors of the revocation or amendment.

(b) The trust contributor may revoke or amend a revocable trust:

(1) by substantially complying with any method provided in the terms of the trust requiring a writing; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

(A) a later will that expressly refers to the trust or a particular provision thereof; or

(B) by executing an instrument that both expressly refers to the trust or a particular provision thereof and complies with the formalities for the creation of a lifetime trust as provided in section 7-A-4.2-A(c), and the revocation or amendment shall take effect as of the date of such execution.

(c) Upon the revocation of a revocable trust, the trustee shall deliver the trust property as the trust contributor directs.

(d) A trust contributor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust, the power of attorney, or by law.

(e) A guardian of the trust contributor may exercise a trust contributor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.

(f) A trustee who does not know that a trust has been revoked or amended is not liable to the trust contributor or the trust contributor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

(g) Written notice of such amendment or revocation by the trust contributor shall be delivered to at least one other trustee within a reasonable time if the trust contributor is not the sole trustee but failure to give such notice shall not affect the validity of the amendment or revocation or the date upon which the amendment or revocation shall take effect. No trustee shall be liable for any act reasonably taken in reliance on an existing trust instrument prior to actual receipt of notice of amendment or revocation thereof. Absent written consent, no trustee shall be liable for the failure to comply with an amendment that expands, restricts or otherwise modifies the trustee's duties, powers, obligations, or compensation for a period of 60 days after receipt of notice of amendment.

(h) Cross reference. See section 7-A-4.2-A(e) (lifetime trust is irrevocable unless the terms of the trust expressly provide that the trust is revocable).

§ 7-A-6.3 Rights and duties in revocable trusts; power of withdrawal

(a) While a trust is revocable, the trustee shall follow a direction of the person having the unqualified power to revoke the trust that is contrary to the terms of the trust.

(b) While a trust is revocable and the person having the power to revoke the trust is the only present beneficiary, rights of all other beneficiaries are subject to the control of, the duties of the trustee are owed exclusively to, and the trustee is exclusively accountable to the person having the power to revoke.

(c) After the death of a person described in paragraph (b), the beneficiaries of the trust have standing to petition the court for an order compelling the trustee to account for the period before the death of the person having the power to revoke and have standing to file objections on the grounds that the trustee violated the trustee's duties to the person having the power to revoke and consequently impaired the interests of the objectants in the trust.

(d) If the person having the power to revoke the trust loses the capacity to exercise the power to revoke and if by reason of that loss of capacity additional persons become present beneficiaries of the trust, the trustee's duties are owed to those persons as well so long as they are present beneficiaries of the trust.

(e) During the period the power may be exercised, the holder of a non-lapsing power of withdrawal shall be treated, for purposes of paragraph (a) and paragraph (b) of this section, as if the holder of the non-lapsing power of withdrawal were the person having a power to revoke the trust to the extent of the property subject to the power.

§ 7-A-6.4 Limitations on action contesting validity of revocable trust; distribution of trust property

(a) The following persons may commence a judicial proceeding after the settlor's death to contest the validity of a trust that was revocable at the settlor's death:

(1) the personal representative of the settlor;

(2) the trustee of a trust created under the will of the settlor duly admitted to probate by a court of competent jurisdiction;

(3) the trustee of a trust to which a disposition was validly made by the will of the settlor duly admitted to probate by a court of competent jurisdiction;

(4) an adversely-affected beneficiary of the will of the settlor admitted to probate by any court of competent jurisdiction or the guardian of or the agent duly authorized under a power of attorney granted by such beneficiary; or

(5) any adversely-affected distributee of the settlor.

A person who has been issued limited letters under SCPA 702(9) may also commence a proceeding under this paragraph (a).

(b) A petition to contest the validity of a revocable trust must be filed by the earlier of

(1) six years after the settlor's death; or

(2) 120 days after the trustee sent the persons described in paragraph (a)(1)-(5) a copy of the trust instrument and a notice informing those persons of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding. Notice given to some but not all of the persons described in paragraph (a)(1)-(5) is effective only as to the persons or persons receiving such notice.

(c) Process must issue to the following persons if not petitioners:

(1) all trustees of the trust that was revocable at the settlor's death;

(2) all persons designated as beneficiaries in the trust that was revocable at the settlor's death;

(3) all distributees of the settlor;

(4) the administrator of the settlor's estate, if any;

(5) the executor or executors named in and the beneficiaries under the will of the settlor admitted to probate or offered for probate in any court of competent jurisdiction; and

(6) the trustee of a trust to which a disposition was validly made by the will of the settlor duly admitted to probate or offered for probate in a court of competent jurisdiction;

(7) such other persons as the court in its discretion may determine.

(d) In any proceeding concerning the validity of a trust that was revocable at the settlor's death, the burden of proof on the issue of the settlor's capacity, the existence of undue influence, and the existence of fraud shall be on the person or persons seeking to challenge the validity of the trust instrument.

(e) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

(f) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

(g) Where applicable, this section shall apply to a trust contributor who is not a settlor.

PART 7 Office of Trustee

§ 7-A-7.1 Accepting or declining trusteeship of a lifetime trust

(a) Except as otherwise provided in paragraph (c), a person designated as trustee of a lifetime trust accepts the trusteeship:

(1) by complying with the execution requirements of section 7-A-4.2-A(c), or

(2) by substantially complying with a method of acceptance provided in the terms of the trust; or

(3) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee of a lifetime trust who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee of a lifetime trust who does not accept the trusteeship within a reasonable time after knowing of the designation and knowing of the occurrence of the event that makes the designation effective is deemed to have rejected the trusteeship.

(c) A person designated as trustee of a lifetime trust, without accepting the trusteeship, may:

(1) act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

§ 7-A-7.2 Trustee's bond

(a) Except as provided in SCPA 710(2) and by paragraph (c), a trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(b) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

(c) A trust company, as defined by Banking law section 2(2), any bank authorized to exercise fiduciary powers and any national bank having a principal, branch or trust office in this state and duly authorized to exercise fiduciary powers need not give a bond unless a bond is expressly required of the trust company or bank by the terms of the trust.

§ 7-A-7.3 Co-trustees

(a) Co-trustees who are unable to reach a unanimous decision with respect to the exercise of a joint power may act by majority decision.

(b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may continue to act as trustees.

(c) A co-trustee must participate in carrying out the trustee's duties and in exercising joint powers unless the co-trustee is unavailable to do so because of absence, illness, disqualification under other law, or other temporary incapacity or the co-trustee has properly delegated the performance of the duty or exercise of the joint power to an agent or another trustee pursuant to section 8.7(e).

(d) If a co-trustee is either unwilling to perform duties or exercise joint powers or is unavailable to perform duties or exercise joint powers because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act.

(e) The rules for delegation by a trustee to another trustee are provided in section 8.7(e).

(f) Except as otherwise provided in paragraph (h), a trustee who does not join in an action of another trustee is not liable for the action if the trustee is unavailable to join in the action due to absence, illness, disqualification under other law or other temporary incapacity, or if the trustee has properly delegated the performance of the action pursuant to section 8.7.

(g) Except as otherwise provided in paragraph (h), a dissenting trustee who joins in carrying out a decision of a majority of the trustees and who notified in writing any co-trustee of the dissent at or before the time of the carrying out the decision is not liable for the consequences of the majority decision.

(h) A trustee is not excused from liability for failing to exercise reasonable care to:

(1) prevent a co-trustee from committing a breach of trust; and

(2) compel a co-trustee to redress a breach of trust.

(i) For purposes of this section, a joint power includes a power in a trustee to invade trust principal under section 7-A-8.19 or under the terms of the dispositive instrument.

§ 7-A-7.4 Vacancy in trusteeship; appointment of successor

(a) A vacancy in a trusteeship occurs if:

(1) a person designated as trustee rejects the trusteeship;

(2) a person designated as trustee cannot be identified or does not exist;

(3) a trustee resigns;

(4) a trustee is disqualified or removed;

(5) a trustee dies; or

(6) a guardian is appointed for an individual serving as trustee;

(7) a trust instrument so provides.

(b) If one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee. If for any reason the trust has no remaining trustee, the trust estate immediately vests in the supreme court or surrogate's court, as the case may be, unless the settlor provides otherwise.

(c) A vacancy in a trusteeship of a lifetime noncharitable trust that is required to be filled must be filled in the following order of priority:

(1) by a person designated in the terms of the trust to act as successor trustee;

(2) by a person appointed by unanimous agreement of the qualified beneficiaries; or

(3) by a person appointed by the court.

(d) A vacancy in a trusteeship of a lifetime charitable trust that is required to be filled must be filled in the following order of priority:

(1) by a person designated in the terms of the trust to act as successor trustee;

(2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general concurs in the selection; or

(3) by a person appointed by the court.

(e) A vacancy in a trusteeship of a testamentary trust that is required to be filled shall be filled pursuant to SCPA 706 or 1502 by the court having jurisdiction of the decedent's estate.

(f) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee as provided in SCPA 1502.

(g) Nothing in this section shall be construed to limit the application of SCPA 706 and any other application of SCPA 1502.

§ 7-A-7.4-A Suspension of powers of trustee in war service

(a) Whenever a trustee of an express trust is engaged in war service, as defined in this section, such trustee or any other person interested in the

trust estate may present a petition to the supreme court or the surrogate's court, as the case may be, to suspend the powers of such trustee while he is so engaged and until the further order of the court, and if the suspension of such trustee will leave no person acting as trustee or leave a beneficiary of such trust as the only acting trustee thereof, the petition must pray for the appointment of a successor trustee, unless a successor has been named in the trust instrument and is not engaged in war service or is not for any other reason unable or unwilling to act as such trustee.

(b) For the purposes of this section, a trustee is engaged in war service in any of the following cases:

(1) If the trustee is a member of the armed forces of the United States or of any of its allies, or if the trustee has been accepted for such service and is awaiting induction.

(2) If the trustee is engaged in any work abroad in connection with a governmental agency of the United States or with the American Red Cross Society or any other body with similar objectives.

(3) If the trustee is interned in any enemy country or is in a foreign country or a possession or dependency of the United States and is unable to return to this state.

(4) If the trustee is a member of the Merchant Marine or similar service.

(c) Where the application is made by a trustee engaged in war service, notice shall be given to such persons and in such manner as the court may direct. Where the application is made by any other person interested in the trust estate and the trustee is in the armed forces of the United States, notice shall be given to such trustee in such manner as the court may direct. In every other case, where the application is made by a person other than the trustee, notice thereof shall be given to such persons and in such manner as the court may direct.

(d) Upon the filing of the petition and proof of service of notice prescribed in paragraph (c), the court may, notwithstanding any other provision of law, suspend the trustee engaged in war service from the exercise of all of the trustee's powers and duties while engaged in such service and until the further order of the court. The order may further provide that the remaining trustee or, if there is none, the successor named in the trust instrument or appointed by the court may exercise all of the powers and be subject to all of the duties of the original trustee.

(e) The successor trustee shall be limited to commissions as computed under SCPA 2308 or 2309, whichever is applicable, upon income received and disbursed and upon principal disbursed. Commissions may also be allowed under 2308 or 2309 upon rents if the trustee is authorized or required to collect the rents of and manage real property. In case of the resignation or removal of the suspended trustee, or in the event of such trustee's death, the foregoing basis for computing the commissions shall not apply and the trustee's commissions shall be computed in the same manner as those of any other trustee.

(f) When the suspended trustee ceases to be engaged in war service the trustee may, upon application to the court and upon such notice as the court may direct, be reinstated as trustee if any of the duties of such office remain unexecuted. If the suspended trustee is reinstated the court shall thereupon remove the trustee's successor and make such other order as justice requires, but such removal shall not bar the successor from subsequently qualifying as a trustee if for any reason it thereafter becomes necessary to appoint a trustee.

§ 7-A-7.5 Resignation of trustee

(a) A trustee may resign:

(1) upon at least 30 days' notice to (i) the trust contributor and all co-trustees in the case of a revocable trust or (ii) the qualified beneficiaries and all co-trustees, in the case of any other trust; or

(2) with the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

(d) The resignation of a trustee of a testamentary trust shall not be effective until the trustee provides written notice of such resignation to the court that has taken jurisdiction over the trust.

§ 7-A-7.6 Removal of trustee

(a) In addition to any provision for removal in the trust instrument, the settlor, a co-trustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

(1) the trustee has committed a serious breach of trust;

(2) lack of cooperation among co-trustees substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, provided that the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with the purposes of the trust, and a suitable co-trustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under section 7-A-10.1(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

(d) For purposes of this section, "court" shall refer to the supreme court and the surrogate's court.

(e) Nothing in this section shall be construed to limit the application of SCPA 711, 712, 713 and 719.

§ 7-A-7.7 Delivery of property by former trustee

(a) Unless a co-trustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession (subject to a reasonable reserve for the expenses of such trustee's accounting) to the co-trustee, successor trustee, or other person entitled to it.

§ 7-A-7.8 Compensation of trustee

The rules for compensating a trustee are provided in SCPA 2308 through 2313.

§ 7-A-7.9 Reimbursement of expenses

(a) A trustee is entitled to be reimbursed out of the trust property, with interest, if appropriate, at a reasonable rate, for:

(1) expenses that were properly incurred in the administration of the trust; and

(2) to the extent necessary to prevent unjust enrichment of the trust property, expenses that were not properly incurred in the administration of the trust.

(b) An advance by the trustee of money for the protection of the trust property gives rise to a lien against trust property to secure reimbursement with reasonable interest.

§ 7-A-7.10 Accounting by trustee in supreme court

Any proceeding for an accounting or other relief brought by a trustee or by a substituted or successor trustee may be commenced by such notice to the beneficiaries of the trust as the supreme court may direct.

PART 8 Duties and Powers Of Trustee

§ 7-A-8.1 Duty to administer trust

The trustee shall administer the trust in good faith, in accordance with its terms and purposes, and in accordance with this article and other applicable law.

§ 7-A-8.2 Duty of loyalty

(a) As between a trustee and the beneficiaries, the duty of loyalty requires that a trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in section 7-A-10.11, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is a breach of the duty of loyalty and voidable by a qualified beneficiary unless:

(1) the transaction was authorized by the terms of the trust;

(2) the transaction was approved by the court;

(3) the qualified beneficiary did not commence a judicial proceeding within the time allowed by section 7-A-10.4;

(4) the qualified beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 7-A-10.8;
or

(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became trustee.

(c) For purposes of paragraph (b), a sale, encumbrance, or other transaction involving the investment or management of trust property is conclusively presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(1) the trustee's spouse;

(2) the trustee's issue, siblings, parents, or their spouses;

(3) an agent or attorney of the trustee; or

(4) a corporation or other person or enterprise in which the trustee, or a person described in subparagraph (1), (2) or (3), or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction between a trustee and a qualified beneficiary that does not concern trust property but that occurs during the existence of the trust, and which is outside the ordinary course of the trustee's business or on terms and conditions substantially less favorable than those the trustee generally offers customers similarly situated, is voidable by the qualified beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity is affected by a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust. Such transaction is a breach of the duty of loyalty and is voidable by a qualified beneficiary, subject to the exceptions in paragraphs (b)(1)-(5).

(f) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(g) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) payment of reasonable compensation to the trustee;

(3) a transaction between a trustee and another trustee of another trust or decedent's estate or guardianship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a bank, banking department or insured depository institution operated by the trustee or an affiliate; or

(5) an advance by the trustee of money for the protection of the trust.

(h) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

(i) Cross reference. See section 7-A-10.1 (providing other remedies for a breach of trust) and section 7-A-10.2(b)(2) (trustee's liability may require restoration of trust property).

§ 7-A-8.3 Duty of impartiality

If a trust has two or more beneficiaries, the trustee has the duty to act impartially in investing, managing, distributing and otherwise administering the trust property, giving due regard to the beneficiaries' respective interests.

§ 7-A-8.4 Duty of prudent administration

(a) A trustee has the duty to administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) Cross-reference. See section 11-2.3 (duties under prudent investor act).

§ 7-A-8.5 Duty regarding costs of administration

In administering a trust, the trustee has a duty to incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee taking into account sections 7-A-8.7 to the extent those sections apply.

§ 7-A-8.6 Duty to exercise trustee's special skills and expertise

A trustee who has represented that such trustee has special skills (other than special investment skills) or expertise, shall use those special skills or expertise, subject to the rules governing trustees with special investment skills provided in section 11-2.3(b)(6).

§ 7-A-8.7 Powers and duties regarding delegation by trustee to agent or another trustee

(a) A trustee may delegate to an agent duties and powers that a prudent trustee could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) selecting an agent suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the agent;

(2) establishing the scope and terms of the delegation, consistent with the purposes of the governing instrument;

(3) periodically reviewing the agent's exercise of the delegated function and compliance with the scope and terms of the delegation.

(4) taking any appropriate action based on the trustee's review; and

(5) controlling the overall cost by reason of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trustee and the beneficiaries to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution. An attempted exoneration of the agent from liability for failure to meet such duty is contrary to public policy and void.

(c) A trustee who complies with paragraph (a) is not liable for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of duties or powers from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of New York.

(e) A trustee may delegate duties and powers to a co-trustee that a prudent trustee could properly delegate under the circumstances. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(1) In making a delegation under this paragraph, the trustee shall exercise reasonable care, skill, and caution in:

(A) selecting a trustee suitable to exercise the delegated function;

(B) establishing the scope and terms of the delegation consistent with the purposes of the governing instrument; and

(C) periodically reviewing the trustee's exercise of the delegated function and compliance with the scope and terms of the delegation.

(2) A trustee who complies with paragraph (e)(1) is not liable for an action of the trustee to whom the function was delegated.

(3) Unless a delegation was irrevocable, a trustee may revoke a delegation previously made under this paragraph (e).

§ 7-A-8.9 Duty to control and protect trust property

A trustee has the duty to take reasonable steps to take control of and protect the trust property.

§ 7-A-8.10 Duty regarding recordkeeping and identification of trust property

(a) A trustee has the duty to keep adequate records of the administration of the trust.

(b) A trustee has the duty to keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in paragraph (d) or elsewhere in this article, a trustee has the duty to cause the trust property to be designated as held in the trustee's capacity as trustee so that the interest of the trustee, to the extent capable of registration, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee may invest as a whole the property in which the trustee has interests under two or more trust instruments, the trustee has the duty to maintain records clearly indicating the respective interests of the trustee under each trust instrument.

(e) Notwithstanding anything in this section to the contrary, this section shall not be construed to abridge in any way any duties imposed, or any powers conferred, upon a trustee under any other provision of this chapter, including without limitation under section 11-1.6.

§ 7-A-8.11 Duty to enforce and defend claims

A trustee has the duty to take reasonable steps to enforce claims of the trustee in the trustee's capacity as such and to defend claims against the trustee in such capacity.

§ 7-A-8.12 Duty to collect trust property

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.

§ 7-A-8.13 Duty to inform and report

(a) Unless unreasonable under the circumstances, a trustee has the duty to promptly respond to a beneficiary's request for information related to the administration of the trust, including a report containing the information referred to in paragraph (c).

(b) A trustee:

(1) upon request of a beneficiary, has the duty to promptly furnish to the beneficiary a copy of the trust instrument;

(2) within 60 days after accepting a trusteeship, has the duty to notify the qualified beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee has the duty to notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in paragraph (c); and

(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

(c) A trustee has the duty to send to current recipients or permissible recipients of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(e) Paragraphs (b)(2) and (3) do not apply to a trustee who accepted a trusteeship or was issued letters of trusteeship before the effective date of this article, to an irrevocable trust created before the effective date of this article, or to a revocable trust that becomes irrevocable before the effective date of this article.

(f) Nothing in this section shall be construed to limit the application of SCPA 2102(1), 2309(4) and 2312(6).

(g) Cross-reference. See §7-A-6.3 (Rights and duties in revocable trusts). § 7-A-8.14 Duty regarding discretionary powers

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee has the duty to exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust.

(b) The trustee shall not be compelled to exercise the trustee's discretion under paragraph (a) in such a way that would jeopardize a beneficiary's eligibility for, or receipt of, public benefits or both.

(c) The rules that address the exercise of discretionary powers by a trustee-beneficiary are set forth in section 10-10.1.

§ 7-A-8.15 General powers of trustee

(a) A trustee, without authorization by the court, may exercise:

(1) powers conferred by the terms of the trust; and

(2) except as limited by the terms of the trust, court order or decree or other applicable law:

(A) all powers over the trust property which an unmarried competent owner has over individually owned property;

(B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and

(C) any other powers conferred by this article.

(b) The court having jurisdiction of the trust may authorize the trustee to exercise any power which in the judgment of the court is necessary for the proper administration of the trust.

(c) The exercise of a power is subject to the fiduciary duties prescribed by this chapter.

§ 7-A-8.16 Specific powers of trustee

Without limiting the authority conferred, or the restrictions imposed, by section 7-A-8.15, a trustee may:

(1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) acquire or sell trust property at public or private sale, and on such terms as in the opinion of the trustee will be most advantageous to those interested therein;

(3) exchange, partition, or otherwise change the character of trust property;

(4) deposit trust money in an account in a bank or other insured depository institution.

(5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) with respect to an interest in a proprietorship (and subject to SCPA 2108), partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

(7) with respect to stocks or other securities held as a trustee, exercise the rights of an absolute owner, including the right to:

(A) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

(B) employ a financial institution as custodian of any such stock or other securities as in the same manner as authorized for a fiduciary in section 11-1.1(b)(9);

(C) cause any such stock or other securities to be registered and held in the name of a nominee in the same manner as authorized for a fiduciary in section 11-1.1(b)(10);

(D) cause any such stock or other securities to be deposited in the same manner as authorized for a fiduciary in sections 11-1.8 and 11-1.9;

(E) employ a broker-dealer as a custodian of any such stock or other securities and to register such securities in the name of the such broker-dealer in the same manner as authorized for a fiduciary in section 11-1.10;

(F) pay calls, assessments, and other sums chargeable or accruing against the securities, in the same manner as authorized for a fiduciary in section 11-1.1(b)(15); and

(G) sell or exercise stock subscription or conversion rights, participate in foreclosures, reorganizations, consolidations, mergers or liquidations, and consent to corporate sales, leases and encumbrances in the same manner as authorized for a fiduciary in section 11-1.1(b)(16).

(8) with respect to repairs and other actions;

(A) for an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party

walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

(B) for an interest in tangible personal property, make repairs to, conserve or improve such property.

(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) effect and keep in force fire, rent, title, liability casualty or other insurance to protect the property of the trust and to protect the trustee;

(12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(13) with respect to possible liability for violation of environmental law:

(A) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

(E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust, including the reasonable expense of obtaining and continuing the trustee's bond and any reasonable counsel fees the trustee may necessarily incur;

(16) exercise elections with respect to federal, state, and local taxes;

(17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(19) pledge trust property to guarantee loans made by others to the beneficiary;

(20) appoint a trustee to act in another jurisdiction with respect to real or tangible or personal trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the

appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) pay an amount distributable to a beneficiary who is under a legal disability by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(A) paying it to the beneficiary's guardian;

(B) paying it to the beneficiary's custodian under New York's Uniform Transfers to Minors Act and, for that purpose, creating a custodianship pursuant to sections 7-6.5 and 7-6.6;

(C) if the amount is not in excess of \$10,000 paying the amount to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;

(D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution; or

(E) if the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the institution is authorized to receive under section 29.23 of the mental hygiene law, paying such sum to such director for use as provided in that section.

(22) on distribution of trust property or the division or termination of a trust, make distributions in cash, in kind valued at the fair market value of the property at the date of distribution, or partly in each, and make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(23) seek resolution of a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) contest, compromise or otherwise settle any claim in favor of the trust or trustee or in favor of third persons and against the trust or trustee;

(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

(27) acquire the remaining undivided interest in the property of a trust in which the trustee, in the trustee's capacity, holds an undivided interest;

(28) invest and reinvest property of the trust under the provisions of the will, deed or other instrument or as otherwise provided by law;

(29) take possession of, collect the rents from and manage any property or any estate therein owned by the trustee;

(30) with respect to any mortgage on property owned by the trustee (A) continue the same upon and after the maturity, with or without renewal or extension, upon such terms as the trustee deems advisable; (B) foreclose, as an incident to collection of any bond or note, any mortgage securing such bond or note, and to purchase the mortgaged property or acquire the property by deed from the mortgagor in lieu of foreclosure;

(31) in the case of a successor or substitute trustee, succeed to all of the powers, duties and discretion of the original trustee, with respect to the trust, as were given to the original trustee unless the exercise of such powers, duties or discretion of the original fiduciary are expressly prohibited by the will, deed or other instrument to any successor or substituted fiduciary;

(32) hold the property of two or more trusts or parts of such trusts created by the same instrument as an undivided whole without separation as between such trusts or parts, provided that such separate trusts or parts

shall have undivided interests and provided further that not such holding shall defer the vesting of any estate in possession or otherwise;

(33) invest as a whole the property in which the trustee has interests under two or more trusts instruments; and

(34) in addition to those expenses specifically provided for in this sub paragraph, to pay all other reasonable and proper expenses of administration from the property of the or trust, including the reasonable expense of obtaining and continuing the trustee's bond his bond and any reasonable counsel fees the trustee may necessarily incur.

§ 7-A-8.17 Duties and powers regarding distribution upon termination

(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. Subject to the provisions of paragraph (c) hereof, the right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) it was induced by improper conduct of the trustee; or

(2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

§ 7-A-8.18 Power of trustee to pay income or principal to trust contributor as reimbursement for income taxes

(a) Notwithstanding any contrary provision of law, the trustee, unless otherwise provided in the disposing instrument, may, from time to time pay to, or apply on behalf of, a trust contributor of such trust an amount equal to any income taxes on any portion of the trust income or trust principal of which such trust contributor is treated as the owner under Part 1 of Subchapter J of Subtitle 1 of the Internal Revenue Code. If the income tax is based on amounts allocated to trust income payment shall be made from trust income. If the income tax is based on amounts allocated to trust principal payment shall be made from trust principal.

(b) For purposes of paragraph (a), a trustee does not include a trust contributor unless the trust contributor has a power of revocation with respect to the trust.

(c) Paragraph (a) shall not apply if the application or the possibility of the application of paragraph (a) to any trust would reduce or eliminate a charitable deduction otherwise available to any person under any provision of the Internal Revenue Code.

(d) Paragraph (a) shall not apply if the application or the possibility of the application of paragraph (a) to any trust would reduce or eliminate for any person a gift tax marital deduction or a gift tax annual exclusion under the Internal Revenue Code.

(e) Paragraph (a) shall not apply if its application or possible application would reduce or eliminate a public benefit otherwise available to the trust contributor or to the trust contributor's spouse.

§ 7-A-8.19 Powers and duties regarding decanting

(a) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder

beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).

(1) An authorized trustee exercising the power under this paragraph may grant a discretionary power of appointment as defined in paragraph (b) of section 10-3.4 (including a presently exercisable power of appointment) in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint could receive the principal outright under the terms of the invaded trust.

(2) If the authorized trustee grants a power of appointment under subparagraph (1) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

(3) If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.

(4) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of such class.

(b) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.

(1) If the authorized trustee exercises the power under this paragraph, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.

(2) If the authorized trustee exercises the power under this paragraph to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subparagraph (1) of this paragraph, may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term.

(3) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of such class.

(4) If the authorized trustee exercises the power under this paragraph and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.

(c) An exercise of the power to invade trust principal under paragraphs (a) and (b) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2.

(d) The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth

in the invaded trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.

(e) If an authorized trustee has unlimited discretion to invade the principal of a trust and the same trustee or another trustee has the power to invade principal under the trust instrument which power is not subject to unlimited discretion, such authorized trustee having unlimited discretion may exercise the power of appointment under paragraph (a) of this section.

(f) An authorized trustee may exercise the power to appoint in favor of an appointed trust under paragraphs (a) and (b) of this section whether or not there is a current need to invade principal under the terms of the invaded trust.

(g) An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(h) Unless the authorized trustee provides otherwise:

(1) The appointment of all of the assets comprising the principal of the invaded trust to an appointed trust shall include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and

(2) The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust shall not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust; such assets shall remain the assets of the invaded trust.

(i) The exercise of the power to appoint to an appointed trust under paragraph (a) or (b) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date.

(1) An authorized trustee may exercise the power authorized by paragraphs (a) and (b) of this section without the consent of the creator, or of the persons interested in the invaded trust, and without court approval, provided that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.

(2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust, (B) to any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section, and (C) to any persons interested in the invaded trust and the appointed trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides), by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust.

(3) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or a part but not all the assets comprising the principal of the invaded trust and if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

(4) A person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.

(5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power under paragraph (a) or (b) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account. Whether the exercise of a power under paragraph (a) or (b) of this section begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation.

(6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required. The instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.

(j) This section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.

(k) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (a) or (b) of this section.

(l) A power authorized by paragraph (a) or (b) of this section may be exercised, subject to the provisions of paragraph (g) of this section, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift provision shall not preclude the exercise of a power under paragraph (a) or (b) of this section.

(m) An authorized trustee may not exercise a power authorized by paragraph (a) or (b) of this section to effect any of the following:

(1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (a) or (b) of this section to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 7-A-4.4-A;

(2) To decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence;

(3) To eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under paragraph (a) or (b) of this section unless a court having jurisdiction over the trust specifies otherwise;

(4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or

(5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the Internal Revenue Code, the marital deduction under section 2056(a) or 2523(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the Internal Revenue Code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the Internal Revenue Code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code.

(n) An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (a) or (b) of this section.

(o) An authorized trustee may not exercise a power described in paragraph (a) or (b) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2, and any such exercise shall void the entire exercise of such power.

(p) (1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (a) or (b) of this section to change the provisions regarding the determination of the compensation of any trustee; the commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as in the invaded trust.

(2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to paragraph (a) or (b) of this section.

(q) Unless the invaded trust expressly provides otherwise, this section applies to:

(1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.

(r) For purposes of this section:

(1) The term "appointed trust" means an irrevocable trust which receives principal from an invaded trust under paragraph (a) or (b) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust.

(2) The term "authorized trustee" means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).

(3) The term "current beneficiary or beneficiaries" means the person or persons (or as to a class, any person or persons who are or will become

members of such class) to whom the trustees may distribute principal at the time of the exercise of the power, provided however that the interest of a beneficiary to whom income, but not principal, may be distributed in the discretion of the trustee of the invaded trust may be continued in the appointed trust.

(4) The term "invade" shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

(5) The term "invaded trust" means any existing irrevocable inter vivos or testamentary trust whose principal is appointed under paragraph (a) or (b) of this section.

(6) The term "person or persons interested in the invaded trust" shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account SCPA 315.

(7) The term "principal" shall include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

(8) The term "unlimited discretion" means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.

(9) A trust contributor shall not be considered to be a beneficiary of an invaded or appointed trust by reason of the trustee's authority to pay trust income or principal to the creator pursuant to section 7-A-8.18 or by reason of the trustee's authority under the trust instrument or any other provision of law to pay or reimburse the trust contributor for any tax on trust income or trust principal that is payable by the trust contributor under the law imposing such tax or to pay any such tax directly to the taxing authorities.

(s) Cross-reference. For the exercise of the power under paragraph (a) or (b) of this section where there are multiple trustees, see sections 10-6.7 and 10-10.7.

§ 7-A-8.20 Duty when a resulting trust arises

Subject to section 7-A-8.17, the trustee has the duty to distribute trust property to the settlor or the settlor's successors in interest when a resulting trust arises.

PART 10 Liability of Trustees and Rights of Persons Dealing with Trustee

§ 7-A-10.1 Remedies for breach of trust

(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

- (1) compel the trustee to perform the trustee's duties;
- (2) enjoin the trustee from committing a breach of trust;
- (3) compel the trustee to redress a breach of trust by paying money, by restoring property, and by other means;
- (4) order a trustee to account;
- (5) appoint a successor trustee or co-trustee to take possession of the trust property and administer the trust as provided in SCPA section 1502;
- (6) suspend the trustee;
- (7) remove the trustee as provided in Section 7-A-7.6;
- (8) reduce or deny compensation to the trustee;

(9) subject to section 7-A-10.11, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

(c) Nothing in this section shall be construed to limit the court's application of remedial provisions that are provided in the surrogate's court procedure act.

§ 7-A-10.2 Liability for breach of trust

(a) Unless section 7-A-10.9 applies, and except as otherwise provided in this section, a trustee who commits a breach of trust is chargeable with the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court.

(b) Unless section 7-A-10.9 applies, a trustee who commits a serious breach of trust (other than breaching the duty of loyalty) by contravening an express term of the trust or by committing another serious breach of trust for any other reason is chargeable with the greater of

(1) the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court or

(2) the amount at the time of the decree required to restore the values of the trust property to what they would have been if the portion of the trust affected by the breach had been properly administered.

(c) Unless section 7-A-10.9 applies, a trustee who commits a breach of trust by breaching the duty of loyalty is chargeable with

(1) the greater of

(A) the value of the capital lost by reason of the breach plus prejudgment interest as determined by the court or

(B) the amount required to restore the values of the trust property to what they would have been if the portion of the trust affected by the breach had been properly administered; or

(2) the amount of any benefit to the trustee personally as a result of the breach.

(d) In addition to charging the trustee as provided in paragraphs (b) and (c), a trustee may be additionally chargeable as the court deems appropriate to fashion complete equitable relief.

(e) Except as otherwise provided in this paragraph, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee may be entitled to contribution from the other trustee or trustees in accordance with applicable law. A trustee is not entitled to contribution if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

(f) Cross reference. See section 7-A-8.2 (allowing qualified beneficiaries to void a transaction if a trustee breaches the duty of loyalty).

§ 7-A-10.3 Damages in absence of breach

(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

§ 7-A-10.4 Compensation of attorney's fees, costs and allowances

(a) In a judicial proceeding involving the administration of a trust a court is authorized to

(1) fix and determine the compensation of an attorney as provided in SCPA 2110, and

(2) award costs and allowances as provided in article 23 of the SCPA.

(b) Cross reference. Section 7-A-8.16(b)(34)(trustee's payment of reasonable counsel fees).

§ 7-A-10.5 Limitation of action against trustee

A judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within six years after the first to occur of:

- (1) the removal, resignation, or death of the trustee;
- (2) the termination of the beneficiary's interest in the trust;
- (3) the termination of the trust; or.
- (4) the open repudiation of the trust by the trustee.

§ 7-A-10.6 Reliance on trust instrument

To the extent section 11-2.3 does not apply, a trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

§ 7-A-10.7 Event affecting administration or distribution

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

§ 7-A-10.8 Exculpation of trustee and trust director

The rules for the exculpation of a trustee and a trust director are provided in section 11-1.7.

§ 7-A-10.9 Beneficiary's consent, release, or ratification

(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented in writing to the conduct constituting the breach, executed a written release of the trustee from liability for the breach, or ratified in writing the transaction constituting the breach, unless:

- (1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or
- (2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

(b) A consent, release, or ratification under paragraph (a) that is made by a beneficiary upon whom service of process would be required in a proceeding to settle the trustee's account is binding upon all persons upon whom service of process would not be required under SCPA 315 because process was served upon the beneficiary.

§ 7-A-10.10 Limitation on personal liability of trustee

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee disclosed the fiduciary capacity in the contract.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee failed to exercise reasonable care, diligence, and prudence.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

(d) In any case where liability is found against the trustee as the result of an action or proceeding brought under paragraph (c), issues of liability as between the trustee in the trustee's fiduciary capacity and the trustee in

the trustee's individual capacity shall, if necessary, be determined in an accounting proceeding brought pursuant to SCPA 2205.

§ 7-A-10.11 Interest as general partner

(a) Unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trustee's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the partnership law.

(b) A trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) If the trustee of a revocable trust holds an interest as a general partner, the trust contributor is personally liable for contracts and other obligations of the partnership as if the trust contributor were a general partner.

§ 7-A-10.12 Protection of person dealing with trustee

(a) Except in the case of a breach pursuant to section 7-A-8.2, a person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith transfers money or property to a trustee is not responsible for the proper application of such money or property; and any right or title derived by him from the trustee in consideration of such transfer is not affected by the trustee's misapplication of such money or property.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

(f) Paragraphs (a) through (e) of this section apply only to transactions that occur after the effective date of this article.

(g) With respect to transactions between a trustee or trustees and any person occurring before the effective date of this article:

(1) If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee, in contravention of the trust, except as authorized in this article and by any other provision of law, is void.

(2) An express trust not declared in the disposition to the trustee or an implied or resulting trust does not defeat the title of a purchaser from the trustee for value and without notice of the trust, or the rights of a creditor who extended credit to the trustee in reliance upon his apparent ownership of the trust property.

§ 7-A-10.13 Certification of trust

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing so much of the following information as is requested by such person:

(1) that the trust exists and the date the trust instrument was executed;

- (2) the identity of the settlor;
- (3) the identity and address of the currently acting trustee;
- (4) the powers of the trustee;
- (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
- (7) the manner of taking title to trust property.
- (b) A certification of trust may be signed or otherwise authenticated by any trustee.
- (c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.
- (d) A certification of trust need not contain the dispositive terms of a trust.
- (e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.
- (f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.
- (g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.
- (h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.
- (i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

PART 11 Miscellaneous Provisions

§ 7-A-11.2 Electronic records and signatures

The provisions of this article governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of section 102 of the electronic signatures in global and national commerce act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the electronic signatures in global and national commerce act.

§ 7-A-11.3 Severability clause

If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

§ 7-A-11.4 Effective date

This article takes effect 180 days after enactment.

§ 7-A-11.6 Application to existing relationships

(a) Except as otherwise provided in this article, on the effective date of this article:

(1) this article applies to all trusts created before, on, or after its effective date;

(2) this article applies to all judicial proceedings concerning trusts commenced on or after its effective date;

(3) this article applies to judicial proceedings concerning trusts commenced before its effective date unless the court finds that application of a particular provision of this article would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provisions of this article does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in this article applies to trust instruments executed before the effective date of the article unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before the effective date of the article is not affected by this article.

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the article, that statute continues to apply to the right even if it has been repealed or superseded.

(c) The provisions of this article shall not impair or defeat any rights which have accrued under dispositions or appointments in effect prior to its effective date.

§ 2. Section 1-2.12 of the Estates, Powers and Trusts Law, is amended to read as follows:

§ 1-2.12 Person

The term "person" includes [~~a natural person, an association, board, any corporation, whether municipal, stock or non stock, court, governmental agency, authority or subdivision, partnership or other firm and the state~~] an individual, corporation, business trust, estate, partnership, limited liability company, association, or joint venture; government; government subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

§ 3. Section 3-3.10 of the Estates, Powers and Trusts Law is added to read as follows:

§ 3-3.10 Reformation of wills to correct mistakes

The court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intention if it is proved by clear and convincing evidence what was the testator's intention and that specific terms of the will do not carry out that intention because the specific terms were affected by a mistake of fact or law, whether in expression or inducement.

§ 4. The article heading of article 7 of the Estates, Powers and Trusts Law is amended to read as follows:

ARTICLE 7

[~~TRUSTS~~]NON-GRATUITOUS TRUSTS, TRANSFERS TO MINORS AND CHILD PERFORMER TRUST ACCOUNTS

§ 5. The Summary of article 7 is amended to read as follows:

SUMMARY OF ARTICLE

~~[Part 1. Rules Governing Trusts
Section 7-1.1 When trust interests not to merge.
7-1.2 Trustee of passive trust not to take
7-1.3 Purchase money resulting trust abolished
7-1.4 Purposes for which trust may be created~~

- ~~7-1.5 When trust interest inalienable; exception~~
- ~~7-1.6 Application of principal to income beneficiary~~
- ~~7-1.7 Interest remaining in creator of trust~~
- ~~7-1.8 Duration of trust for benefit of creditors~~
- ~~7-1.9 Revocation of trusts~~
- ~~7-1.10 Provision by non-domiciliary creator as to law to govern trust~~
- ~~7-1.11 Application of principal to creator of trust as reimbursement for taxes~~
- ~~7-1.12 Supplemental needs trusts established for persons with severe and chronic or persistent disabilities~~
- ~~7-1.13 Division of trusts and establishment of separate trusts~~
- ~~7-1.14 Who may make a lifetime trust~~
- ~~7-1.15 What property may be disposed of by lifetime trust~~
- ~~7-1.16 Revocation of lifetime trust by will~~
- ~~7-1.17 Execution, amendment and revocation of lifetime trusts~~
- ~~7-1.18 Funding of lifetime trust]~~

Part 1-A. Rules Governing Non-gratuitous Trusts

Section 7-1.1-A Scope of part 1-A

7-1.2-A Purposes for which trust may be created.

7-1.3-A Duration of trust for benefit of creditors

7-1.4-A Provision by non-domiciliary creator as to law to govern trust

7-1.5-A Extent of trustee's estate

7-1.6-A Trust estate not to descend on death of trustee; appointment, duties and rights of successor trustee

7-1.7-A Suspension of powers of trustee in war service

7-1.8-A Resignation, suspension or removal of trustee

7-1.9-A Accounting by trustee in supreme court

7-1.10-A Commissions of trust to sell real property for benefit of creditors

7-1.11-A Common Law and principles of equity

[Part 2. Rules Governing Trustees

Section 7-2.1 Extent of trustee's estate

~~7-2.2 When estate of trustee ceases~~

~~7-2.3 Trust estate not to descend on death of trustee; appointment, duties and rights of successor trustee~~

~~7-2.4 Act of trustee in contravention of trust~~

~~7-2.5 Suspension of powers of trustee in war service~~

~~7-2.6 Resignation, suspension or removal of trustee~~

~~7-2.7 Accounting by trustee in supreme court~~

~~7-2.8 Commissions of trustee to sell real property for benefit of creditors~~

Part 3. Rights of Purchasers, Creditors and Other Persons

Section 7-3.1 Disposition in trust for creator void as against creditors

~~7-3.2 Bona fide purchasers and creditors protected~~

~~7-3.3 Person paying money to the trustee protected~~

~~7-3.4 Excess income from trust property subject to creditors' claims~~

~~7-3.5 Rights of creditors to obtain information concerning beneficiaries~~

PART 4. [Repealed]

Part 5. Bank Accounts in Trust Form

Section 7-5.1 Definitions

~~7-5.2 Terms of a trust account~~
~~7-5.3 Payment to beneficiary~~
~~7-5.4 Effect of payment~~
~~7-5.5 Rights not affected~~
~~7-5.6 Joint depositors~~
~~7-5.7 Multiple beneficiaries~~
~~7-5.8 Application]~~

Part 6. Uniform Transfers to Minors Act

Section 7-6.1 Definitions

7-6.2 Scope and jurisdiction
7-6.3 Nomination of custodian
7-6.4 Transfer by gift or exercise of power of appointment
7-6.5 Transfer authorized by will or trust
7-6.6 Other transfer by fiduciary
7-6.7 Transfer by obligor
7-6.8 Receipt for custodial property
7-6.9 Manner of creating custodial property and effecting transfer;
designations of initial custodian; control
7-6.10 Single custodianship
7-6.11 Validity and effect of transfer
7-6.12 Care of custodial property
7-6.13 Powers of custodian
7-6.14 Use of custodial property
7-6.15 Custodian's expenses, compensation, and bond
7-6.16 Exemption of third person from liability
7-6.17 Liability to third persons
7-6.18 Renunciation, resignation, death, or removal of custodian;
designations of successor custodian
7-6.19 Accounting by and determination of liability of custodian
7-6.20 Termination of custodianship
7-6.21 Age eighteen election
7-6.22 Effect on existing custodianships
7-6.23 Applicability
7-6.24 Uniformity of application and construction
7-6.25 Short title
7-6.26 Severability

Part 7. Child Performer Trust Account

Section 7-7.1. Child performer trust account

~~[PART 8. Honorary Trusts for Pets~~

~~Section 7-8.1 Trusts for pets]~~

§ 6. Part 1 of article 7 of the Estates, Powers and Trusts Law is REPEALED.

§ 7. Part 1-A of article 7 of the Estates, Powers and Trusts Law is added to read as follows:

PART 1-A Rules Governing Non-gratuitous Trusts

§ 7-1.1-A Scope of part 1-A

(a) This Part 1-A provides rules for non-gratuitous trusts. Non-gratuitous trusts are trusts not governed by article 7-A.

(b) Cross-reference. See §7-A-1.2(a)(trusts governed by article 7-A).

§ 7-1.2-A Purposes for which trust may be created

A non-gratuitous trust may be created for any lawful purpose.

§ 7-1.3-A Duration of trust for benefit of creditors

(a) Where an estate in real property has heretofore vested or shall hereafter vest in an assignee or other trustee for the benefit of creditors, it shall cease at the expiration of ten years from the time the trust was created, except where a different limitation is contained in the instrument creating the trust or is otherwise prescribed by law. Such estate shall thereupon revert to the assignor.

(b) This section does not apply to a trust of personal property or to a trust of real property created in connection with the salvaging of mortgage participation certificates. Nor does this section affect any rights to the proceeds of a sale of real property made by the assignee or other trustee for the benefit of creditors.

§ 7-1.4-A Provision by non-domiciliary creator as to law to govern trust

Whenever a person, not domiciled in this state, creates a non-gratuitous trust which provides that it shall be governed by the laws of this state, such provision shall be given effect in determining the validity, effect and interpretation of the disposition in such trust of:

(1) Any trust property situated in this state at the time the trust is created.

(2) Personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.

§ 7-1.5-A Extent of trustee's estate

A trust as described in sections 9-1.5, 9-1.6 and 9-1.7, including a business trust as defined in subdivision two of section two of the general associations law, may acquire property in the name of the trust as such name is designated in the instrument creating said trust. Any property, so acquired can be conveyed, encumbered or otherwise disposed of only in such name by a conveyance, encumbrance or other instrument executed by:

(1) the person or persons authorized by the instrument creating said trust; or

(2) the person or persons authorized by a resolution duly adopted by the trustees; or

(3) a majority of the trustees unless the instrument creating said trust otherwise provides.

Any instrument of conveyance, encumbrance or disposition delivered prior to the effective date of this section to or by a trust to which this section applies, in its trust name is hereby validated provided that no action or proceeding to cancel or disaffirm it shall be instituted within one year from the effective date hereof, but nothing herein contained shall affect any such pending action or proceeding.

§ 7-1.6-A Trust estate not to descend on death of trustee; appointment, duties and rights of successor trustee

(a) On the death of the sole surviving trustee of a non-gratuitous trust, the trust estate does not vest in his personal representative or pass to his distributees or devisees, but, in the absence of a contrary direction by the creator, if the trust has not been executed, the trust estate vests in the supreme court or the surrogate's court, as the case may be, and the trust shall be executed by a person appointed by the court.

(b) Upon such notice to the beneficiaries of the trust as the court may direct of an application for the appointment of a successor trustee, unless the creator has directed otherwise, the court may appoint a successor trustee, even though the trust has terminated, whenever in the opinion of the court such appointment is necessary for the effective administration and distribution of the trust estate, subject to the following:

(1) A successor trustee shall give security in such amount as the court may direct.

(2) A successor trustee shall be subject to the same duties, as to accounting and trust administration, as are imposed by law on trustees and, in addition to the reasonable expenses incurred in the course of trust administration, shall be entitled to such commissions as may be fixed by any court having jurisdiction to pass upon such trustee's final account, which shall in no case exceed the commissions allowable by law to trustees.

§ 7-1.7-A Suspension of powers of trustee in war service

(a) Whenever a trustee of a non-gratuitous trust not governed by article 1-a is engaged in war service, as defined in this section, such trustee or any other person interested in the trust estate may present a petition to the supreme court or the surrogate's court, as the case may be, to suspend the powers of such trustee while the trustee is so engaged and until the further order of the court, and if the suspension of such trustee will leave no person acting as trustee or leave a beneficiary of such trust as the only acting trustee thereof, the petition must pray for the appointment of a successor trustee, unless a successor has been named in the trust instrument and is not engaged in war service or is not for any other reason unable or unwilling to act as such trustee.

(b) For the purposes of this section, a trustee is engaged in war service in any of the following cases:

(1) If the trustee is a member of the armed forces of the United States or of any of its allies, or if he has been accepted for such service and is awaiting induction.

(2) If the trustee is engaged in any work abroad in connection with a governmental agency of the United States or with the American Red Cross Society or any other body with similar objectives.

(3) If the trustee is interned in any enemy country or is in a foreign country or a possession or dependency of the United States and is unable to return to this state.

(4) If the trustee is a member of the Merchant Marine or similar service.

(c) Where the application is made by a trustee engaged in war service, notice shall be given to such persons and in such manner as the court may direct. Where the application is made by any other person interested in the trust estate and the trustee is in the armed forces of the United States, notice shall be given to such trustee in such manner as the court may direct. In every other case, where the application is made by a person other than the trustee, notice thereof shall be given to such persons and in such manner as the court may direct.

(d) Upon the filing of the petition and proof of service of notice prescribed in paragraph (c), the court may, notwithstanding any other provision of law, suspend the trustee engaged in war service from the exercise of all of the trustee's powers and duties while engaged in such service and until the further order of the court. The order may further provide that the remaining trustee or, if there is none, the successor named in the trust instrument or appointed by the court may exercise all of the powers and be subject to all of the duties of the original trustee.

(e) The successor trustee shall be limited to commissions as computed under SCPA 2308 or 2309, whichever is applicable, upon income received and disbursed and upon principal disbursed. Commissions may also be allowed under 2308 or 2309 upon rents if the trustee is authorized or required to collect the rents of and manage real property. In case of the resignation or removal of the suspended trustee, or in the event of such trustee's death, the foregoing basis for computing the commissions shall not apply and the trustee's commissions shall be computed in the same manner as those of any other trustee.

(f) When the suspended trustee ceases to be engaged in war service the trustee may, upon application to the court and upon such notice as the court

may direct, be reinstated as trustee if any of the duties of such office remain unexecuted. If the suspended trustee is reinstated the court shall thereupon remove the trustee's successor and make such other order as justice requires, but such removal shall not bar the successor from subsequently qualifying as a trustee if for any reason it thereafter becomes necessary to appoint a trustee.

§ 7.1-1.8-A Resignation, suspension or removal of trustee

(a) Subject to the relevant provisions of the civil practice law and rules, the supreme court has power:

(1) On the application of a trustee of a non-gratuitous trust, to accept the trustee's resignation and to discharge the trustee on such terms as it deems proper.

(2) On the application of any person interested in the trust estate, to suspend or remove a trustee who has violated or threatens to violate his trust, who is insolvent or whose insolvency is imminent or apprehended or who for any reason is a person unsuitable to execute the trust.

(3) In the case of the resignation or removal of a trustee, to appoint a successor trustee and, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction. This section does not apply to a trust arising or resulting by implication of law, nor where other provision is made by law for the resignation, suspension or removal of a trustee or the appointment of a successor trustee.

§ 7-1.9-A Accounting by trustee in supreme court

(a) With respect to a non-gratuitous trust, any proceeding for an accounting or other relief brought by a trustee or by a substituted or successor trustee may be commenced by such notice to the beneficiaries of the trust as the supreme court may direct.

(b) In case of the resignation, suspension or removal, pursuant to this part, of any trustee of a trust which includes real property and mortgage participation certificates held by more than one person and secured by a mortgage on real property or any estate therein, payment of which certificates is not guaranteed by the trustee or by any title or mortgage guaranty or investment company, the court in its discretion may dispense with a formal accounting by such trustee; but the trustee shall file with the court a statement of the condition of the trust and of the security underlying such certificates as of the date of his resignation, suspension or removal and shall assign, transfer or convey all of the assets of the trust to the successor trustee or the receiver or other officer appointed by the court, as the case may be.

§ 7-1.10-A Commissions of trust to sell real property for benefit of creditors

A trustee of a trust to sell real property for the benefit of creditors is entitled to the same commissions as an assignee for the benefit of creditors.

§ 7-1.11-A Common law and principles of equity

The common law of trusts and principles of equity supplement this part, except to the extent modified by this part or another statute of this state.

§ 8. Part 2 of article 7 of the Estates, Powers and Trusts Law is REPEALED.

§ 9. Part 3 of article 7 of the Estates, Powers and Trusts Law is REPEALED.

§ 10. Part 5 of article 7 of the Estates, Powers and Trusts Law is REPEALED.

§ 11. Part 8 of article 7 of the Estates, Powers and Trusts Law is REPEALED.

§ 12. Subparagraph (c)(1) of section 8-1.1 of the Estates, Powers and Trusts Law is amended to read as follows:

(c)(1) ~~[The supreme court and, where the disposition is made by will, the surrogate's court in which such will is probated have]~~Whenever it appears to the court having jurisdiction over the dispositions referred to and authorized by paragraphs (a) and (b), and whenever it appears to such court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, ~~[the]~~such court may, on application of the ~~[trustee or of]~~settlor, as provided in article 7-A, the charitable beneficiary, the attorney general, the trustee, or the person having custody of the property subject to the disposition, and on such notice as the court may direct, make an order or decree directing that such disposition be administered and applied, in whole or in part, in [such manner as in the judgment of the court will most effectively accomplish its general purposes]~~a~~manner consistent with the settlor's intent (which intent shall be presumed to be generally charitable subject to rebuttal), free from any specific restriction, limitation or direction contained therein; provided, however, that any such order or decree is effective only with the consent of the ~~[creator of the disposition if he is living]~~settlor if he is living and competent. Notwithstanding the foregoing, a provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court to apply its powers under this paragraph to modify or terminate the trust.

§ 13. Subparagraph (b) of section 10-6.6 of the Estates, Powers and Trusts Law is amended to read as follows:

(b) ~~[An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries)]~~Cross reference. See section 7-A-8.19 (powers and duties regarding decanting).

~~[(1) An authorized trustee exercising the power under this paragraph may grant a discretionary power of appointment as defined in paragraph (c) of section 10-3.4 of this article (including a presently exercisable power of appointment) in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint could receive the principal outright under the terms of the invaded trust.~~

~~(2) If the authorized trustee grants a power of appointment under subparagraph (1)¹ of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.~~

~~(3) If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.~~

~~(4) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of such class.~~

~~(c) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.~~

~~(1) If the authorized trustee exercises the power under this paragraph, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.~~

~~(2) If the authorized trustee exercises the power under this paragraph to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subparagraph (1) of this paragraph, may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term.~~

~~(3) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of such class.~~

~~(4) If the authorized trustee exercises the power under this paragraph and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.~~

~~(d) An exercise of the power to invade trust principal under paragraphs (b) and (c) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2 of this article.~~

~~(e) The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.~~

~~(f) If an authorized trustee has unlimited discretion to invade the principal of a trust and the same trustee or another trustee has the power to invade principal under the trust instrument which power is not subject to unlimited discretion, such authorized trustee having unlimited discretion may exercise the power of appointment under paragraph (b) of this section.~~

~~(g) An authorized trustee may exercise the power to appoint in favor of an appointed trust under paragraphs (b) and (c) of this section whether or not there is a current need to invade principal under the terms of the invaded trust.~~

~~(h) An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.~~

~~(i) Unless the authorized trustee provides otherwise:~~

~~(1) The appointment of all of the assets comprising the principal of the invaded trust to an appointed trust shall include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and~~

~~(2) The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust shall not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust; such assets shall remain the assets of the invaded trust.~~

~~(j) The exercise of the power to appoint to an appointed trust under paragraph (b) or (c) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date. The exercise of the power is irrevocable on such effective date, either thirty days following service of the notice or the effective date as set forth in the written consent.~~

~~(1) An authorized trustee may exercise the power authorized by paragraphs (b) and (c) of this section without the consent of the creator, or of the persons interested in the invaded trust, and without court approval, provided that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.~~

~~(2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust, (B) to any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section, and (C) to any persons interested in the invaded trust and the appointed trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides), by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust.~~

~~(3) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or a part but not all the assets comprising the principal of the invaded trust and if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.~~

~~(4) A person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.~~

~~(5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power under paragraph (b) or (c) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account. Whether the exercise of a power under paragraph (b) or (c) of this section begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation.~~

~~(6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and, within twenty days of the effective date, the original shall be filed in the court having jurisdiction over the invaded~~

~~trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required. The instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.~~

~~(7) Prior to the effective date as provided herein, a trustee may revoke the exercise of the power to invade to a new trust. Where a trustee has served notice of the exercise of the power pursuant to subparagraph (2) of this paragraph, the trustee shall serve notice of the revocation of the exercise of the power to persons interested in the invaded trust and the appointed trust by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust. Where the notice of the exercise of the power was filed with the court, the trustee shall file the notice of revocation of the exercise of the power with such court.~~

~~(k) This section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.~~

~~(l) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (b) or (c) of this section.~~

~~(m) A power authorized by paragraph (b) or (c) of this section may be exercised, subject to the provisions of paragraph (h) of this section, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power under paragraph (b) or (c) of this section.~~

~~(n) An authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to effect any of the following:~~

~~(1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (b) or (c) of this section to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 7-1.12 of this chapter;~~

~~(2) To decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence;~~

~~(3) To eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section unless a court having jurisdiction over the trust specifies otherwise;~~

~~(4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or~~

~~(5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the internal revenue code, the marital deduction under section 2056(a) or 2523(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or~~

~~2522(a) of the internal revenue code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the internal revenue code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation skipping transfer tax purposes under the internal revenue code.~~

~~(o) An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (b) or (c) of this section.~~

~~(p) An authorized trustee may not exercise a power described in paragraph (b) or (c) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power.~~

~~(q)(1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to change the provisions regarding the determination of the compensation of any trustee; the commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as in the invaded trust.~~

~~(2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to paragraph (b) or (c) of this section.~~

~~(r) Unless the invaded trust expressly provides otherwise, this section applies to:~~

~~(1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and~~

~~(2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.~~

~~(s) For purposes of this section:~~

~~(1) The term "appointed trust" means an irrevocable trust which receives principal from an invaded trust under paragraph (b) or (c) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust. For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be executed and acknowledged by the person establishing such trust shall be deemed satisfied by the execution and acknowledgment of the trustee of the appointed trust.~~

~~(2) The term "authorized trustee" means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non fiduciary capacity).~~

~~(3) References to sections of the "internal revenue code" refer to the United States internal revenue code of 1986, as amended from time to time, or to corresponding provisions of subsequent internal revenue laws, and also refer to corresponding provisions of state law.~~

~~(4) The term "current beneficiary or beneficiaries" means the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustees may distribute principal at the time of the exercise of the power, provided however that the interest of a~~

~~beneficiary to whom income, but not principal, may be distributed in the discretion of the trustee of the invaded trust may be continued in the appointed trust.~~

~~(5) The term "invade" shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.~~

~~(6) The term "invaded trust" means any existing irrevocable inter vivos or testamentary trust whose principal is appointed under paragraph (b) or (c) of this section.~~

~~(7) The term "person or persons interested in the invaded trust" shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act.~~

~~(8) The term "principal" shall include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.~~

~~(9) The term "unlimited discretion" means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.~~

~~(10) The creator shall not be considered to be a beneficiary of an invaded or appointed trust by reason of the trustee's authority to pay trust principal to the creator pursuant to section 7-1.11 of this chapter or by reason of the trustee's authority under the trust instrument or any other provision of law to pay or reimburse the creator for any tax on trust income or trust principal that is payable by the creator under the law imposing such tax or to pay any such tax directly to the taxing authorities.~~

~~(t) Cross reference. For the exercise of the power under paragraph (b) or (c) of this section where there are multiple trustees, see sections 10-6.7 and 10-10.7 of this article.]~~

§ 14. Section 10-10.1 of the Estates, Powers and Trusts Law is amended to read as follows:

§ 10-10.1 Power to distribute principal or allocate income; restriction on exercise

A power held by a person as trustee of an express trust to make a discretionary distribution of either principal or income to such person as a beneficiary, or to make a discretionary [allocations in such person's favor of receipts or expenses as between] distribution of either principal [and] or income in discharge of the trustee's personal obligation of support, cannot be exercised by such person unless (1) such person is the grantor of the trust and the trust is revocable by such person during such person's lifetime, or (2) the power is a power to provide for such person's health, education, maintenance or support within the meaning of sections 2041 and 2514 of the Internal Revenue Code, or (3) the trust instrument, by express reference to this section, provides otherwise. If the power is conferred on two or more trustees, it may be exercised by the trustee or trustees who are not so disqualified. If there is no trustee qualified to exercise the power, its exercise devolves on the supreme court or the surrogate's court, except that if the power is created by will, its exercise devolves on the surrogate's court having jurisdiction of the estate of the donor of the power.

§ 15. Section 10-10.6 of the Estates, Powers and Trusts Law is amended to read as follows:

§ 10-10.6 Effect of reserved unqualified power to revoke

Where a creator reserves an unqualified power of revocation, he remains the absolute owner of the property disposed of so far as the rights of his creditors or purchasers are concerned. This section does not apply to the trust contributor of an express trust created after the effective date of section 7-A-5.5.

§ 16. Section 10-10.7 of the Estates, Powers and Trusts Law is amended to read as follows:

§ 10-10.7 Exercise of powers by multiple fiduciaries; joint and several powers

Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power other than a power of appointment[~~but including a power in a trustee to invade trust principal under section 10-6.6 of this article or under the terms of the dispositive instrument~~], conferred upon three or more fiduciaries, as that term is defined in 11-1.1, by the terms of such instrument, or by statute, or arising by operation of law, may be exercised by a majority of such fiduciaries, or by a majority of survivor fiduciaries, or by the survivor fiduciary. Such a power conferred upon or surviving to two such fiduciaries may be exercised jointly by both such fiduciaries or by the survivor fiduciary, unless contrary to the express terms of the instrument creating the power. A fiduciary who fails to act through absence or disability, or a dissenting fiduciary who joins in carrying out the decision of a majority of the fiduciaries if his or her dissent is expressed promptly in writing to his or her co-fiduciaries, shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the estate[~~or trust or to prevent a breach of the trust~~] may not thus be avoided. A power vested in one or more persons under a trust of real property created in connection with the salvaging of mortgage participation certificates may be executed by one or more of such persons as provided in such trust. This section shall not affect the right of any one of two or more personal representatives of a decedent to exercise a several power.

§ 17. Section 11-1.1 of the Estates, Powers and Trusts Law is amended to read as follows:

Fiduciaries' powers. (a) As used in this section, unless the context or subject matter otherwise requires, (1) the term "estate" means the estate of a decedent; (2) the term "trust" means any express trust of property, created by a will, deed or other instrument, whereby there is imposed upon a trustee the duty to administer property for the benefit of a named or otherwise described income or principal beneficiary, or both. A trust shall not include trusts for the benefit of creditors, resulting or constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiary, investment trusts, voting trusts, security instruments such as deeds of trust and mortgages, trusts created by the judgment or decree of a court, liquidation or reorganization trusts, trusts for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, instruments wherein persons are mere nominees for others, or trusts created in deposits in any banking institution or savings and loan institution; (3) the term "fiduciary" means administrators, executors, preliminary executors, administrators d.b.n., administrators c.t.a.d.b.n., administrators c.t.a., ancillary executors, ancillary administrators, ancillary administrators c.t.a [and trustees of express trusts], including a corporate as well as a natural person acting as fiduciary, and a successor or substitute fiduciary, whether designated in a trust instrument or otherwise.

(b) In the absence of contrary or limiting provisions in the court order or decree appointing a fiduciary, or in a subsequent order or decree, or in the will, deed or other instrument, every fiduciary is authorized:

(1) To accept additions to any estate[~~-or trust~~] from sources other than the estate of the decedent[~~-or the settlor of a trust~~].

(2) To acquire the remaining undivided interest in the property of an estate [~~or trust~~] in which the fiduciary, in his fiduciary capacity, holds an undivided interest.

(3) To invest and reinvest property of the estate[~~-or trust~~] under the provisions of the will, deed or other instrument or as otherwise provided by law.

(4) To effect and keep in force fire, rent, title, liability, casualty or other insurance to protect the property of the estate [~~or trust~~]and to protect the fiduciary.

(5) With respect to any property or any estate therein owned by an estate[~~or trust~~], except where such property or any estate therein is specifically disposed of:

(A) To take possession of, collect the rents from and manage the same.

(B) To sell the same at public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested therein.

(C) With respect to fiduciaries[~~-other than a trustee~~], to lease the same for a term not exceeding three years[~~-and, in the case of a trustee, to lease the same for a term not exceeding ten years although such term extends beyond the duration of the trust and, in either of such cases~~], including the right to explore for and remove mineral or other natural resources, and in connection with mineral leases to enter into pooling and unitization agreements.

(D) To mortgage the same.

(E) Any power to take possession of, collect the rent from, manage, sell, lease or mortgage, granted by this subparagraph (5), which is prohibited by the terms of the will, deed or other instrument or by the provisions of this subparagraph (5), nonetheless exists, upon the approval of the surrogate, where such power is necessary for the purposes set forth in SCPA 1902.

(F) A fiduciary acting under a will may exercise all of the powers granted by this subparagraph (5) notwithstanding the effect upon such will of the birth of a child after its execution or of any election by a surviving spouse.

(6) To make ordinary repairs to the property of the estate[~~-or trust~~].

(7) To grant options for the sale of property for a period not exceeding six months.

(8) With respect to any mortgage held by the estate[~~-or trust~~] (A) to continue the same upon and after maturity, with or without renewal or extension, upon such terms as the fiduciary deems advisable; (B) to foreclose, as an incident to collection of any bond or note, any mortgage securing such bond or note, and to purchase the mortgaged property or acquire the property by deed from the mortgagor in lieu of foreclosure.

(9) To employ any bank or trust company incorporated in this state, any national bank located in this state or any private banker duly authorized by the superintendent of financial services of this state to engage in business here (who, as private banker, maintains a permanent capital of not less than one million dollars) as custodian of any stock or other securities held as a fiduciary, and the cost thereof, except in the case of a corporate fiduciary, shall be a charge upon the estate or trust. The records of such bank, trust company or private banker shall at all times show the ownership of such stock or other securities. Such stock or other securities shall at all times be kept separate from the assets of such bank, trust company or private banker and may be kept by such bank, trust company or private banker

(A) in a manner such that all certificates representing the securities from time to time constituting the assets of a particular estate, trust or

other fiduciary account are held separate from those of all other estates, trusts or accounts; or

(B) in a manner such that, without certification as to ownership attached, certificates representing securities of the same class of the same issuer and from time to time constituting assets of particular estates, trusts or other fiduciary accounts are held in bulk, including, to the extent feasible, the merging of certificates of small denomination into one or more certificates of large denomination, provided that a bank, trust company or private banker, when operating under the method of safekeeping security certificates described in this subparagraph (B), shall be subject to such rules and regulations as, in the case of state chartered institutions, the state superintendent of financial services and, in the case of national banking associations, the comptroller of the currency may from time to time issue. Such bank, trust company or private banker shall, on demand by the fiduciary, certify in writing the securities held by it for such estate, trust or fiduciary account.

(10) To cause any stock or other securities (hereinafter referred to as "securities") held by any bank or trust company, when acting as fiduciary, whether alone or jointly with an individual, with the consent of the individual fiduciary, if any (who is hereby authorized to give such consent), to be registered and held in the name of a nominee of such bank or trust company without disclosure of the fiduciary relationship; and, in the case of an individual acting as fiduciary, to direct any bank or trust company incorporated under the laws of this state, any national bank located in this state or any private banker duly authorized by the superintendent of financial services of this state to engage in business here (who, as private banker, maintains a permanent capital of not less than one million dollars) to register and hold any securities deposited with such bank, trust company or private banker (hereinafter referred to as "bank") in the name of a nominee of such bank. The bank shall not redeliver such securities to the individual fiduciary, who authorized their registration in the name of a nominee of the bank, without first registering the securities in the name of the individual fiduciary, as such. But, any sale of such securities by the bank at the direction of the individual fiduciary shall not be treated as a redelivery. The bank may make any disposition of such securities which is authorized or directed by an order or decree of the court having jurisdiction of the estate or trust. Any such bank shall be absolutely liable for any loss occasioned by the acts of its nominee with respect to the securities so registered. The records of the bank shall at all times show the ownership of any such securities and of those held in bearer form. Such securities and those held in bearer form shall at all times be kept separate from the assets of the bank and may be kept by such bank

(A) in a manner such that all certificates representing the securities from time to time constituting the assets of a particular estate, trust or other fiduciary account are held separate from those of all other estates, trusts or accounts; or

(B) in a manner such that, without certification as to ownership attached, certificates representing securities of the same class of the same issuer and from time to time constituting assets of particular estates, trusts or other fiduciary accounts are held in bulk, including, to the extent feasible, the merging of certificates of small denomination into one or more certificates of large denomination, provided that a bank, when operating under the method of safekeeping security certificates described in this subparagraph (B), shall be subject to such rules and regulations as, in the case of state chartered institutions, the state superintendent of financial services and, in the case of national banking associations, the comptroller of the currency

may from time to time issue. Such bank or trust company shall, on demand by any party to an accounting by such bank or trust company as fiduciary or on demand by the attorney for such party, certify in writing the securities held by such bank or trust company as such fiduciary.

(11) In the case of the survivor of two or more fiduciaries, to continue to administer the property of the estate~~[-or trust]~~ without the appointment of a successor to the fiduciary who has ceased to act and to exercise or perform all of the powers given to the original fiduciaries unless contrary to the express provision of the will, deed or other instrument.

(12) As successor or substitute fiduciary, to succeed to all of the powers, duties and discretion of the original fiduciary, with respect to the estate~~[-or trust]~~, as were given to the original fiduciary, unless the exercise of such powers, duties or discretion of the original fiduciary are expressly prohibited by the will, deed or other instrument to any successor or substituted fiduciary.

(13) To contest, compromise or otherwise settle any claim in favor of the estate~~[-, trust]~~ or fiduciary or in favor of third persons and against the estate~~[-, trust]~~ or fiduciary.

(14) To vote in person or by proxy, discretionary or otherwise, shares of stock or other securities held by him as fiduciary.

(15) To pay calls, assessments and any other sums chargeable or accruing against or on account of shares of stock, bonds, debentures or other corporate securities held by a fiduciary, whenever such payments may be legally enforceable against the fiduciary or any property of the estate or ~~[trust or]~~the fiduciary deems payment expedient and for the best interests of the estate~~[-or trust]~~.

(16) To sell or exercise stock subscription or conversion rights, participate in foreclosures, reorganizations, consolidations, mergers or liquidations, and to consent to corporate sales, leases and encumbrances. In the exercise of such powers the fiduciary is authorized to deposit stocks, bonds or other securities with any protective or other similar committee under such terms and conditions respecting the deposit thereof as the fiduciary may approve.

(17) To execute and deliver agreements, assignments, bills of sale, contracts, deeds, notes, receipts and any other instrument necessary or appropriate for the administration of the estate~~[-or trust]~~.

~~[(18) In the case of a trustee, to hold the property of two or more trusts or parts of such trusts created by the same instrument as an undivided whole without separation as between such trusts or parts, provided that such separate trusts or parts shall have undivided interests and provided further that no such holding shall defer the vesting of any estate in possession or otherwise.]~~

~~(19)]~~(18) When a legacy, a distributive share, the proceeds of any action brought as prescribed by 5-4.1, or the proceeds of a settlement of an action brought in behalf of an infant for personal injuries are payable to an infant, incompetent, conservatee or person under disability and the sum does not exceed ten thousand dollars, to make payment thereof to the father or mother or to some competent adult person with whom the infant, incompetent, conservatee or person under disability resides or who has some interest in his welfare for the use and benefit of such infant, incompetent, conservatee or person under disability. If the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the institution is authorized to receive under section 29.23 of the mental hygiene law, to make payment of such sum to such director for use as provided in that section.

~~(+20)~~(19) To make distribution in cash, in kind valued at the fair market value of the property at the date of distribution, or partly in each, without being required to make pro rata distributions of specific property.

~~(+21)~~(20) To join with the surviving spouse or the executor of his will or the administrator of his estate in the execution and filing of a joint income tax return for any period prior to the death of a decedent for which he has not filed a return or a gift tax return on gifts made by the decedent's surviving spouse, and to consent to treat such gifts as being made one-half by the decedent, for any period prior to a decedent's death, and to pay such taxes thereon as are chargeable to the decedent.

~~(+22)~~(21) In addition to those expenses specifically provided for in this paragraph, to pay all other reasonable and proper expenses of administration from the property of the estate or trust, including the reasonable expense of obtaining and continuing his bond and any reasonable counsel fees he may necessarily incur.

(c) The court having jurisdiction of the estate [~~or trust~~] may authorize the fiduciary to exercise any other power which in the judgment of the court is necessary for the proper administration of the estate [~~or trust~~].

(d) The powers set forth in this section shall apply to all estates [~~and trusts~~] now in existence or which may hereafter come into existence and are in addition to the powers granted by law or by the will, deed or other instrument.

§ 18. Section 11-1.7 of the Estates, Powers and Trusts Law is amended to read as follows:

§ 11-1.7. Limitations on powers and immunities of executors [~~and testamentary~~], trustees and trust directors

(a) The attempted grant to an executor [~~or testamentary~~], trustee or trust director, as defined in section 7-A-1.3(27), or the successor of [~~either~~] any such executor, trustee or trust director, of any of the following enumerated powers or immunities is contrary to public policy:

(1) The exoneration of such [~~fiduciary~~] executor, trustee or trust director from liability for failure to exercise reasonable care, diligence and prudence.

(2) The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.

(b) The attempted grant in any will or trust of any power or immunity in contravention of the terms of this section shall be void but shall not be deemed to render such will or trust invalid as a whole, and the remaining terms of the will or trust shall, so far as possible, remain effective.

(c) Any person interested in an estate or [~~testamentary~~] trust may contest the validity of any purported grant of any power of immunity within the purview of this section without diminishing or affecting adversely his interest in the estate or trust, any provision in any will or trust to the contrary notwithstanding.

§ 19. Paragraph (c) of section 11-2.3 of the Estates, Powers and Trusts Law is amended to read as follows:

(c) Delegation of investment or management functions.

(1) [~~Delegation~~] Except as provided in subparagraph 4, delegation of an investment or management function requires a trustee to exercise care, skill and caution in:

(A) selecting a delegee suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the delegee;

(B) establishing the scope and terms of the delegation consistent with the purposes of the governing instrument;

(C) periodically reviewing the delegee's exercise of the delegated function and compliance with the scope and terms of the delegation; and

(D) controlling the overall cost by reason of the delegation.

(2) The delegee has a duty to the trustee and to the trust to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution. An attempted exoneration of the delegee from liability for failure to meet such duty is contrary to public policy and void.

(3) By accepting the delegation of a trustee's function from the trustee of a trust that is subject to the law of New York, the delegee submits to the jurisdiction of the courts of New York even if a delegation agreement provides otherwise, and the delegee may be made a party to any proceeding in such courts that places in issue the decisions or actions of the delegee.

(4) A trustee, as defined in this article, shall be authorized to delegate in its investment or management functions as set forth in section 7-A-8.7.

§ 20. Subdivision 5 of section 100-a of the Banking Law is amended to read as follows:

5. Bonds. No bond or other security, except as hereinafter provided, shall be required from any trust company [~~for or in respect to any trust, nor~~]when appointed executor, administrator, guardian[, ~~trustee~~], receiver, committee or depository or in any other fiduciary capacity nor when receiving commissions under the provisions of SCPA 2310 or 2311. The settlor of a trust governed by EPTL Article 7-A may expressly require that a trust company furnish a bond. The court, or officer making such appointment may, upon proper application, require any trust company, which shall have been so appointed to give such security as to the court or officer shall seem proper, or upon failure of such trust company to give security as required, may remove such trust company from and revoke such appointment.

§ 21. Subdivision (c) of section 5205 of the Civil Practice Law and Rules is amended to read as follows:

(c) Trust exemption. 1. Except as provided in paragraphs four, five, and [~~five~~]six of this subdivision, all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment.

2. For purposes of this subdivision, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code of 1986, as amended, a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4), 408 (d) (3) or 408A of the Internal Revenue Code of 1986, as amended, or a plan that satisfies the requirements of section 457 of the Internal Revenue Code of 1986, as amended, shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.

3. All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in paragraph two of this subdivision shall be conclusively presumed to be spendthrift trusts under this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under

sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

4. This subdivision shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended or under any order of support, alimony or maintenance of any court of competent jurisdiction to enforce arrears/past due support whether or not such arrears/past due support have been reduced to a money judgment.

5. Additions to an asset described in paragraph two of this subdivision shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be fraudulent conveyances under article ten of the debtor and creditor law.

6. For purposes of this subdivision, a trust shall be considered a trust which has been created by or which has proceeded from the judgment debtor on the lapse, release, or waiver of a power held by the judgment debtor to withdraw property from the trust only to the extent that the value of the property affected by the release, waiver, or lapse exceeds the greatest amount specified in sections 2041(b)(2), 2503(b), or 2514(e) of the Internal Revenue Code of 1986, as amended, at the time of the lapse, release, or waiver.

§ 22. Subdivision 2 of section 706 of the Surrogate's Court Procedure Act is amended to read as follows:

2. When all the persons to whom letters have been issued die or where letters issued to all of them have been revoked by a decree of the surrogate's court, or, in the case of a lifetime trust, when all persons serving as trustee die or are removed, without any successor trustee having been effectively appointed pursuant to the terms of the lifetime trust instrument, or if a trustee is appointed pursuant to EPTL 7-A-7.4(c)(2) or 7-A-7.4(d)(2), that court has, except in a case where it is otherwise specially prescribed by law, the same power to appoint a successor to the person or persons whose powers have ceased as if the letters had not been issued or as if no appointment had been made. The successor may complete the administration of the estate committed to his predecessor, he may continue in his own name a civil action or proceeding pending in favor of his predecessor and he may enforce a judgment, order or decree in favor of the latter.

§ 23. Section 715 of the Surrogate's Court Procedure Act is amended to read as follows:

§ 715. Application by fiduciary for permission to resign. A fiduciary may present to the court at any time a petition praying that he or she be permitted to resign, that his or her letters be revoked and that he or she be permitted to settle his or her account judicially or informally as such fiduciary, and that notice of the application be given to the persons and in the manner directed by the court. Notwithstanding the prior sentence, a testamentary trustee may resign as provided in section 7-A-7.5 of the Estates, Powers and Trusts Law. The petition shall show the facts upon which the application is founded.

§ 24. Section 806 of the Surrogate's Court Procedure Act is amended to read as follows:

§ 806. Bond of [~~a testamentary trustee or~~]an executor acting as trustee. Whenever [~~a testamentary trustee is appointed by will or order of the court or~~] an executor is appointed who is required to hold, manage or invest real or personal property for the benefit of another, he shall unless the will provides otherwise, execute and file a bond.

§ 25. Subdivision 2 of section 1502 of the Surrogate's Court Procedure Act is amended to read as follows:

2. The court shall not appoint a trustee, successor or co-trustee if the appointment would contravene the express terms of the will or lifetime trust instrument or if a trustee may be or has been named in the will or lifetime trust instrument as successor, substitute or co-trustee and is not disqualified to act, or if a trustee is appointed pursuant to EPTL 7-A-7.4(c)(2) or 7-A-7.4(d)(2).

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with [Assembly Rule III, Sec 1(f)]**

BILL NUMBER: [.]

SPONSOR: [.]

TITLE OF BILL: New York Trust Code

PURPOSE OR GENERAL IDEA OF BILL: The purpose for this legislation is to create a stand-alone Article 7-A of the Estates, Powers and Trust Law which sets forth the substantive rules (as well as procedural rules not governed by the Surrogate's Court Procedure Act) for gratuitous trusts. In order to implement enactment of new Article 7-A, the legislation makes appropriate conforming changes to various sections in the Estates, Powers and Trust Law and to various sections in other New York Codes.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1 of the bill adds a new Article 7-A to the Estates, Powers and Trusts Law ("NEW YORK TRUST CODE"), which consists of the following:

Summary of Article 7-A

Part 1 of Article 7-A of the Estates, Powers and Trusts Law is entitled "In General".

Section 7-A-1.1 of the Estates, Powers and Trusts Law establishes the short title of Article 7-A as the New York Trust Code.

Section 7-A-1.2 of the Estates, Powers and Trusts Law clarifies that Article 7-A applies to express trusts that are gratuitous in nature, resulting trusts, and (where expressly made applicable) to bank accounts in trust form. This section also makes clear that this article will not apply to constructive trusts.

Section 7-A-1.2 of the Estates, Powers and Trusts Law replaces EPTL section 7-1.3, and includes the same language abolishing purchase money resulting trusts.

Section 7-A-1.3 of the Estates, Powers and Trusts Law adds new definitions for implementing the provisions of Article 7-A. Notable definitions include the following:

Express Trust: This definition is based on the traditional definition for an express trust, but has been amplified to reflect the recognition of pet trusts and purpose trusts. The definition also includes trusts that are created by other statutes and courts that will be administered as express trusts. In addition, the definition limits express trusts to gratuitous trusts.

Qualified Beneficiary: This is an important definition used throughout Article 7-A. Generally, qualified beneficiaries are beneficiaries who would be entitled to notice for proceedings involving the trust under the

principles of virtual representation as they currently exist in the law of New York. Only qualified beneficiaries are entitled to notice of some actions by the trustee or to demand information from the trustee. All other beneficiaries are non-qualified beneficiaries. Settlor: This definition is critical because it is employed throughout Article 7-A. It is intended to be precise enough to reflect the many nuances of trust law. For example, a person who exercises a special power of appointment in favor of a trustee effectively creates a trust, and should therefore be treated as a settlor. By including the donee of a special power of appointment, the uncertain general application of the relation back doctrine would be discarded. Similarly, the trustee who decants all or part of trust property is the settlor of the appointed trust because the exercise of a decanting power is considered to be the exercise of a special power of appointment. See EPTL section 7-A-8-19(c).

Trust Contributor: A separate definition is provided for "trust contributor" because that concept, which includes many settlors (but not persons who exercise special powers of appointment), has significance, especially in the area of creditors' rights and for certain revocable trust issues. Excluded from the definition of "trust contributor" are persons who contribute property to a trust revocable by another person and persons who contribute property if another person has a non-lapsing power of withdrawal over the contributed property.

Section 7-A-1.4 of the Estates, Powers and Trusts Law defines when an organization has notice or knowledge of a fact involving a trust.

Section 7-A-1.5 of the Estates, Powers and Trusts Law provides that most rules set forth in EPTL Article 7-A are default rules subject to modification by the terms of a trust, court order or decree or other applicable law. See section 7-A-1.5(a). Some of those rules, however, embody public policies that are too important to be overridden by the terms of the trust. These mandatory trust rules are listed in section 7-A-1.5(b) by reference to the numbers of the sections that set out the rules. Most of these rules set forth the fiduciary duties at the heart of trust law. Some involve the authority of the court to act with regard to a trust at the trustee's or beneficiaries' request—such as modifying, terminating, combining or dividing trusts and the principles for the computation of damages—as provided in the Code. Others are even more fundamental such as the rules governing the determination of the governing law and principal place of administration of the trust. The Code allows a trust to be "quiet" for only a limited period of time by requiring that the trustee inform, and furnish requested information about an irrevocable trust to, qualified beneficiaries over the age of 25 after the later death of the settlor or the settlor's spouse (and if the settlor was not an individual for a maximum of 21 years).

Section 7-A-1.6 of the Estates, Powers and Trusts Law makes clear that the common law of trusts and principles of equity supplement Article 7-A unless these are otherwise modified by Article 7-A or another statute.

Section 7-A-1.7 of the Estates, Powers and Trusts Law Section 7-A-1.7 principally provides comprehensive conflict of laws rules for lifetime trusts (as contrasted with the limited provision of repealed EPTL 7-1.10) that for the most part follow the conflict of laws rules governing testamentary trusts in EPTL 3-5.1. The most important difference between the two provisions allows the settlor of a lifetime trust to designate the law of any jurisdiction to govern the trust or some aspects of the trust so long as the

law of the designated jurisdiction does not conflict with a mandatory trust provision or violate some strong public policy of the jurisdiction having the most significant relationship to the matter of issue, such as the rule against perpetuities. The section also provides flexible conflict of laws rules.

Section 7-A-1.8 of the Estates, Powers and Trusts Law provides ways that a settlor can designate the principal place of administration of the trust as well as default rules for determining principal place of administration, including where there are multiple trustees and where corporate trustees are involved. The section also provides that the trustee may change the principal place of administration of a testamentary trust with court approval, and may change the principal place of administration of a lifetime trust with court approval or if the qualified beneficiaries do not object to the change.

Section 7-A-1.9 of the Estates, Powers and Trusts Law makes clear what constitutes notice to a person under this Article.

Section 7-A-1.10 of the Estates, Powers and Trusts Law addresses situations in which other persons or entities would be treated as "qualified beneficiaries" as defined in EPTL section 7-A-1.3, including charitable organizations, persons appointed to enforce trusts for the care of animals or other noncharitable purposes, and the Attorney General.

Section 7-A-1.11 of the Estates, Powers and Trusts Law expands current New York law in order to allow for nonjudicial settlement of various trust matters by interested persons besides nonjudicial settlements of accounts by fiduciaries, which are governed by SCPA 315, subsection 8. Matters which may be resolved under section 7-A-1.11 include, but are not limited to, the interpretation or construction of trust terms, the approval of a trustee's report or accounting; the ability to direct a trustee to refrain from performing a particular act or to grant a trustee any necessary or desirable power; the resignation or appointment of a trustee and the determination of trustee compensation; the transfer of the principal place of administration of a lifetime trust; and the liability of a trustee for an act or failure to act in relation to a trust.

Section 7-A-1.12 of the Estates, Powers and Trusts Law is a reserved section for possible future use.

Part 2 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Judicial Proceedings".

Section 7-A-2.1 of the Estates, Powers and Trusts Law makes clear that there are existing rules for court involvement in the administration of a trust which are provided in the EPTL, SCPA and the CPLR.

Section 7-A-2.2 of the Estates, Powers and Trusts Law makes clear that jurisdiction over trustees and beneficiaries is covered by Article 2 of the SCPA.

Part 3 of Article 7-A of the Estates, Powers and Trusts Law is Reserved for possible future use.

Part 4 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Creation, Validity, Amendment, Modification, and Termination of Trust".

Section 7-A-4.1 of the Estates, Powers and Trusts Law codifies the methods for creating a trust which are currently part of the New York common law.

Section 7-A-4.2 of the Estates, Powers and Trusts Law consolidates into a single section the formal requirement for trust creation currently found in various statutory sections.

Section 7-A-4.2-A of the Estates, Powers and Trusts Law replaces EPTL sections 7-1.14, 7-1.15, 7-1.16 (first sentence), and 7-1.17(a), and expands EPTL section 7-1.18, in order to consolidate the rules for the creation of lifetime trusts into a single statutory section.

Section 7-A-4.2-B of the Estates, Powers and Trusts Law replaces EPTL section 7-1.2, which addresses trustees of passive trusts, without changing its provisions.

Section 7-A-4.2-C of the Estates, Powers and Trusts Law replaces EPTL section 7-1.1, which addresses when trust interests do not merge, without substantively changing its provisions.

Section 7-A-4.3 of the Estates, Powers and Trusts Law addresses the validity of lifetime trusts created in other jurisdictions. The validity of testamentary trusts is addressed in EPTL section 3-5.1.

Section 7-A-4.4 of the Estates, Powers and Trusts Law, which replaces EPTL section 7-1.4, is makes clear that a trust may be created only to the extent that its purposes are lawful and not contrary to public policy. Current EPTL section 7-1.4 addresses only the lawfulness requirement; the public policy requirement is currently a common law doctrine.

Section 7-A-4.4-A of the Estates, Powers and Trusts Law replaces EPTL section 7-1.12, which addresses the establishment of supplemental needs trusts, without substantively changing its provisions.

Section 7-A-4.5 of the Estates, Powers and Trusts Law makes clear that the rules for charitable purposes and enforcement are to be found in Article 8.

Section 7-A-4.6 of the Estates, Powers and Trusts Law codifies the rule that a trust is voidable if created through fraud, duress, undue influence or mistake. This concept is currently governed by New York common law.

Section 7-A-4.7 of the Estates, Powers and Trusts Law supplements EPTL section 7-1.17(a) by providing that oral trusts may not be created, except for a testamentary trust in a nuncupative will created pursuant to EPTL section 3-2.2.

Section 7-A-4.8 of the Estates, Powers and Trusts Law replaces New York's present pet trust statute (EPTL section 7-8.1). While generally consistent with EPTL section 7-8.1, this section modifies that statute to (i) set out, in a separate paragraph, provisions for enforcing the intended use of the trust, (ii) clarify that any person, not just an individual, may be appointed as an enforcer of the trust's intended use and (iii) provide that unexpended property passes to the settlor or the settlor's successors in interest, rather than to the successor's estate.

Section 7-A-4.9 of the Estates, Powers and Trusts Law codifies current New York common law in order to explicitly provide for the creation of trusts for

noncharitable purposes (so-called "honorary trusts"). The term of any such trust is to be limited to 21 years, consistent with current law. This section also supplements current law by giving the court the authority to appoint an enforcer if an appointed enforcer is unable or unwilling to act, and by providing that trust property not required for its intended purpose be distributed to the settlor or the settlor's successors in interest.

Section 7-A-4.9-A of the Estates, Powers and Trusts Law replaces and supplements current EPTL section 7-1.17(b). It maintains that section's current authority for trust amendments to be made by a person other than a settlor, as well as the formality requirements for making such amendments. Section 7-A-4.9-A supplements current law by shielding a trustee from liability for failure to comply with an amendment that modifies the trustee's powers, obligations or compensation for a period of 60 days after being notified of the amendment.

Section 7-A-4.10 of the Estates, Powers and Trusts Law codifies current New York common law by setting forth all of the circumstances under which a trust may terminate. This section supplements current New York law by providing procedural rules for modifying or terminating a trust, and provides limitations for when a trust can be modified or terminated.

Section 7-A-4.11 of the Estates, Powers and Trusts Law replaces in substance, and adds to, EPTL section 7-1.9, by allowing irrevocable trusts to be terminated or modified with the consent of the creator and all living beneficiaries, clarifying, based on a Court of Appeals holding, that the consent of only living beneficiaries is required. Further, this section clarifies that a court can act in certain circumstances if the creator and only some beneficiaries consent; it also clarifies that a trustee who exercises a special power of appointment is not a creator.

Section 7-A-4.12 of the Estates, Powers and Trusts Law codifies current law to allow the court to modify the administrative terms of a trust due to changed circumstances. This section also supplements current law to allow the court to modify the dispositive terms of a trust or terminate a trust due to changed circumstances (and, in the case of an administrative modification, when the court finds another compelling reason for the modification).

Section 7-A-4.13 of the Estates, Powers and Trusts Law clarifies that the cy pres rules are provided for in EPTL section 8-1.1(c)(1).

Section 7-A-4.14 of the Estates, Powers and Trusts Law replaces EPTL section 7-1.19, which permits judicial termination of certain lifetime or testamentary trusts when the expense of administering such a trust is uneconomical. This section modifies EPTL section 7-1.19 by giving authority, except in certain situations, to (1) trustees to terminate trusts of \$100,000 or less without a court proceeding and (2) the court to terminate any uneconomical trust if the value of the trust property is insufficient to justify the cost of administration. This section also provides that on termination the trust property is distributed as the trustee or court, as the case may be, determines will best effectuate the settlor's intention.

Section 7-A-4.15 of the Estates, Powers and Trusts Law modifies current New York law by allowing the court to reform even unambiguous terms of a trust that fails to carry out the settlor's intent because of a mistake.

Section 7-A-4.16 of the Estates, Powers and Trusts Law allows courts to modify a trust, possibly with retroactive effect, to accomplish the settlor's tax objectives or the settlor's supplemental needs trust objectives.

Section 7-A-4.17 of the Estates, Powers and Trusts Law restates, modifies and liberalizes EPTL section 7-1.13, which governs the division of existing trusts. This section modifies EPTL section 7-1.13 by generally permitting a trustee to combine or divide an existing trust for any purpose without obtaining beneficiary consent or court approval, provided that "qualified beneficiaries" are notified. This section continues to allow a trustee or "qualified beneficiary" to seek a court order authorizing the combination or division of an existing trust. This section then sets forth the rules governing the combination or division of existing trusts.

Part 4-A of Article 7-A of the Estates, Powers and Trusts Law replaces EPTL Part 5 of EPTL Article 7 (Bank Accounts in Trust Form).

Section 7-A-4-A-1 replaces EPTL 7-5.1, which sets forth applicable definitions, without changing its provisions.

Section 7-A-4-A.2 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.2, which sets forth the terms to which a trust account is subject, without changing its provisions.

Section 7-A-4-A.3 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.3, which addresses when payments are to be made to the beneficiary of the trust account that survives the depositor under certain circumstances, without changing its provisions.

Section 7-A-4-A.4 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.4, which releases from liability a financial institution that makes payments to a beneficiary or guardian upon the death of a depositor in certain circumstances without changing its provisions.

Section 7-A-4-A.5 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.5, which clarifies the parties not affected by EPTL Part 4-A, without changing its provisions.

Section 7-A-4-A.6 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.6, which addresses the application of EPTL Part 4-A to trust accounts established in the name of more than one depositor, without changing its provisions.

Section 7-A-4-A.7 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.7, which addresses how payments of proceeds of a trust account with multiple beneficiaries are to be made, without changing its provisions.

Section 7-A-4-A.8 of the Estates, Powers and Trusts Law replaces EPTL section 7-5.8, which addresses the application of EPTL Part 4-A to funds in trust accounts, without changing its provisions.

Part 5 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Rights of Beneficiaries and Creditors; Spendthrift and Discretionary Trusts".

Section 7-A-5.1 of the Estates, Powers and Trusts Law replaces, with minor alterations, EPTL section 7-1.5 as it applies to a beneficiary's income

interest. This section provides that unless the trust instrument provides otherwise, the income interest of a trust beneficiary is not transferrable, subject to specific exceptions described in this section. The rule as it applies to (1) self-settled trusts is described in EPTL section 7-A-5.5-A and (2) life insurance proceeds trusts is described in EPTL section 7-A-5.2-A. This section also clarifies that the transferee of a valid transfer becomes a beneficiary, and that a beneficiary's income interest remains subject to the claims of creditors to the extent provided by law.

Section 7-A-5.2 of the Estates, Powers and Trusts Law replaces and modifies EPTL section 7-1.5(a) as it applies to a beneficiary's principal interest. Section 7-A-5.2 provides that unless the trust instrument provides otherwise, the principal interest of a trust beneficiary is not transferrable for trusts created on or after the effective date of Article 7-A. Section 7-A-5.2 also clarifies that the transferee of a valid transfer becomes a beneficiary, and that a beneficiary's principal interest remains subject to the claims of creditors to the extent provided by law.

Section 7-A-5.2-A of the Estates, Powers and Trusts Law replaces EPTL section 7-1.5(a)(2), which generally prohibits the alienation of the proceeds of a life insurance policy left with the insurance company upon the death of the insured, without changing its provisions.

Section 7-A-5.3 of the Estates, Powers and Trusts Law codifies current New York law by listing special creditors against whom a spendthrift provision in a trust is unenforceable.

Section 7-A-5.4 of the Estates, Powers and Trusts Law prohibits a beneficiary from transferring his discretionary trust interest irrespective of any spendthrift clause, although this interest remains subject to the claims of creditors to the extent provided by law. This section also allows the beneficiary to sue a trustee for abusing trustee discretion or for failing to comply with a standard for distribution.

Section 7-A-5.5 of the Estates, Powers and Trusts Law allows the creditors of a trust contributor to reach property in a revocable trust during the contributor's lifetime unless revocation requires the consent of an adverse person. This property would also be reachable after the contributor's death to cover claims and certain expenses.

Section 7-A-5.5-A of the Estates, Powers and Trusts Law replaces and modifies certain provisions of EPTL 7-3.1, allowing a creditor to reach property contributed by a beneficiary of a trust (i.e., a self-settled trust). Section 7-A-5.5-A clarifies the extent to which the lapse, release or waiver of a power of withdrawal is treated as a contribution, and clarifies that the donor is not treated as a contributing beneficiary of certain marital deduction trusts.

Section 7-A-5.6 of the Estates, Powers and Trusts Law gives a creditor the power to compel the trustee to distribute an overdue distribution to the beneficiary. Once the beneficiary receives the property, creditors will then be able to reach the property.

Section 7-A-5.7 of the Estates, Powers and Trusts Law makes explicit the basic implication of New York trust law that the trustee takes an estate in the trust property only to the extent necessary to carry out the duties imposed by the trust's terms.

Part 6 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Revocable Trusts".

Section 7-A-6.1 of the Estates, Powers and Trusts Law makes explicit that the capacity required by a trust contributor to create, revoke, or amend a trust is the same as that required to make a will; and that the capacity required to relinquish a power to revoke a trust is the same as that required to make a gift.

Section 7-A-6.2 of the Estates, Powers and Trusts Law maintains the presumption in New York law (current EPTL section 7-1.16) that a trust is irrevocable unless its terms expressly state that it is revocable, and provides rules for amending and revoking trusts, including the writing requirements of current EPTL section 7-1.17(b)). Section 7-A-6.2 supplements current law by shielding a trustee from liability for failure to comply with an amendment that revokes the trust or modifies the trustee's powers, obligations or compensation for a period of 60 days after being notified of the amendment.

Section 7-A-6.3 of the Estates, Powers and Trusts Law codifies New York common law setting forth the trustee's duty in a revocable trust and the requirement that the trustee follow the directions of the person with the power of revocation (or with a non-lapsing power of withdrawal).

Section 7-A-6.4 of the Estates, Powers and Trusts Law codifies existing law, which allows for the contest of the validity of a revocable trust. The law is significantly clarified by providing important standing and procedural rules. Standing is given to those who are interested in the trust, including distributees of the settlor who are adversely affected by the trust, the trustees of testamentary trusts, and trusts receiving pour-overs from the settlor's will. The proceeding must commence within 6 years of the settlor's death, a period which can be shortened to 120 days by sending a copy of the trust instrument and notice of the 120-day period to those who have standing.

Part 7 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Office of Trustee".

Section 7-A-7.1 of the Estates, Powers and Trusts Law codifies current New York common law governing the acceptance of lifetime trusts. SCPA Article 7 will continue to govern testamentary trusts.

Section 7-A-7.2 of the Estates, Powers and Trusts Law deals with the posting of a bond by a trustee and continues the provisions of SCPA section 806 the exception of that section's default requirement that every testamentary trustee furnish a bond. Under the new section, a corporate trustee must obtain a bond but only if the terms of the trust expressly require it to do so.

Section 7-A-7.3 of the Estates, Powers and Trusts Law provides rules for co-trustees, including the expansion of reasons for which a co-trustee may act alone.

Section 7-A-7.4 of the Estates, Powers and Trusts Law deals with vacancies in the office of trustee and the appointment of successors. The section sets forth a hierarchy of persons who can fill a vacancy in the trusteeship of a noncharitable lifetime trust. It gives first priority to a designation in the

trust instrument. If there is no such designation, it allows appointment by unanimous agreement of the qualified beneficiaries. Finally, as a last resort, it allows appointment by the court. There are similar rules for lifetime charitable trusts. A vacancy in the trusteeship of a testamentary trust must be filled by the court under SCPA section 706 or section 1502.

Section 7-A-7.4-A of the Estates, Powers and Trusts Law makes EPTL section 7-2.5 (suspension of powers during war service) applicable to trusts under EPTL Article 7-A.

Section 7-A-7.5 of the Estates, Powers and Trusts Law changes the current law of resignation of trustees. Under this section the trustee of a revocable trust may resign on 30 days' notice to the trust contributor and all other trustees and a testamentary trustee may resign by giving 30 days' notice to the qualified beneficiaries, or with court approval. However, resignation has no effect on the trustee's possible liability for actions taken as trustee. The resignation of a testamentary trustee is not effective until written notice is given to the court that has jurisdiction over the trust.

Section 7-A-7.6 of the Estates, Powers and Trusts Law maintains existing law with the addition of allowing a court to remove a trustee if there has been "a substantial change of circumstances," or if a majority of the qualified beneficiaries request removal and the court finds that removal is in the interests of all beneficiaries and is not inconsistent with the purposes of the trust.

Section 7-A-7.7 of the Estates, Powers and Trusts Law codifies the procedures that well-advised fiduciaries currently follow for the delivery of trust property, such as the procedures in SCPA section 716.

Section 7-A-7.8 of the Estates, Powers and Trusts Law cross references with SCPA sections 2308 through 2313, in order to explicitly provide that those statutory sections should continue to govern the compensation of both individual and corporate trustees.

Section 7-A-7.9 of the Estates, Powers and Trusts Law expressly allows a trustee to collect appropriate interest at a reasonable rate when the trustee advances the trustee's her own funds for the benefit of the trust.

Section 7-A-7.10 of the Estates, Powers and Trusts Law clarifies that any proceeding for an accounting may be commenced by such notice to the beneficiaries of the trust as the Supreme Court may direct. The text of section 7-A-7.10 is identical to current section EPTL 2-7(a).

Part 8 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Duties and Powers of Trustee".

Section 7-A-8.1 of the Estates, Powers and Trusts Law codifies New York's rule that a trustee has a non-waivable duty both to act in good faith and follow the terms of the trust when administering the trust.

Section 7-A-8.2 of the Estates, Powers and Trusts Law codifies New York's rule that the trustee has a duty of loyalty to the beneficiaries. The section also expands the related no-further-inquiry rule (when a trustee is on both sides of a transaction) to include indirect self-dealing cases. The section does not extend the exemption under EPTL 11-2.3(d) from the ban on self-dealing for investments in a corporate trustee's proprietary mutual funds to

investments of other sorts, for example, investment in the hedge funds managed by the trustee or its affiliate. However, a settlor may affirmatively provide for this exemption.

Section 7-A-8.3 of the Estates, Powers and Trusts Law codifies New York's rule that a trustee must act impartially, including with regard to administrative functions, unless otherwise directed by the settlor.

Section 7-A-8.4 of the Estates, Powers and Trusts Law applies to the duty of administering the trust the same duty of care as that provided under the Prudent Investor Act.

Section 7-A-8.5 of the Estates, Powers and Trusts Law imposes on the trustee the duty of only paying expenses that are reasonable in their relation to the trust's purpose or property.

Section 7-A-8.6 of the Estates, Powers and Trusts Law imposes a duty on specially skilled trustees to utilize their expertise. This excludes special investment skills, which are governed by current EPTL section 11-2.3(b)(6).

Section 7-A-8.7 of the Estates, Powers and Trusts Law extends the authority to delegate investment functions or management functions under the Prudent Investor Act (EPTL 11-2.3(b)(4)(C)) to all duties and powers subject the use of reasonable care, skill, and caution in making the delegation. Under paragraph (c), a trustee may delegate to a co-trustee using reasonable care, skill and caution.

Section 7-A-8.8 of the Estates, Powers and Trusts Law is a reserved section for potential future use. The previous proposal (the "6th Report") recommended using—section 7-A-8.8 for a directed trust statute, but it is now proposed that the New York directed trust statute currently being drafted be placed in its own Article (specifically, EPTL Article 7-B) rather than inserted here.

Section 7-A-8.9 of the Estates, Powers and Trusts Law codifies the protection of trust property already required under New York common law.

Section 7-A-8.10 of the Estates, Powers and Trusts Law requires a trustee to keep adequate and clear records, and to keep trust property separate from the trustee's own property. This section expands on and overlaps with EPTL sections 11-1.6 and 11-1.1, but such sections, and other relevant EPTL provisions, shall continue to apply.

Section 7-A-8.11 of the Estates, Powers and Trusts Law codifies current New York common law requiring a trustee to take reasonable steps to enforce claims and to defend against claims.

Section 7-A-8.12 of the Estates, Powers and Trusts Law codifies existing standards and requires a trustee to take reasonable steps to compel a former trustee or other person to deliver trust property to the current trustee, and to redress a breach of trust known to the current trustee to have been committed by a former trustee. Present New York law can be found in SCPA section 1506 and various cases.

Section 7-A-8.13 of the Estates, Powers and Trusts Law strengthens the law found in SCPA sections 2102, 2309, and 2312 regarding a trustee's duty to inform and report. The section requires a trustee to respond to a beneficiary's request for both information related to the administration of

the trust and to obtain a copy of the trust instrument. It also provides time limits within which a trustee must inform qualified beneficiaries about certain aspects about the trust. As noted under section 7-A-1.5, the duty to furnish requested information and to fulfill certain notification duties are "mandatory provisions" with respect to qualified beneficiaries who have attained 25 years of age except with regard to lifetime trusts during the lifetimes of the settlor and the settlor's spouse (and if the settlor was not an individual for a maximum of 21 years). Section 7-A-8.13 also mandates that a trustee furnish annual reports to most beneficiaries and to other requesting beneficiaries. Beneficiaries can waive their rights to be informed and to receive reports

Section 7-A-8.14 of the Estates, Powers and Trusts Law codifies current New York common law: Notwithstanding the discretion granted to a trustee, the trustee has the duty to exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust. In addition, the trustee shall not be compelled to exercise such discretion in a way that would jeopardize a beneficiary's eligibility for public benefits.

Section 7-A-8.15 of the Estates, Powers and Trusts Law provides a default rule that a trustee, without authorization by the court, may exercise powers conferred by the terms of the trust and, unless limited by the trust, court order, decree or other law, all powers over trust property that an individual would have over individually owned property, any other powers appropriate to achieve proper investment, management, and distributions, and any other powers conferred by Article 7-A. The court may authorize additional powers which are deemed necessary. Reference to trustees in EPTL 11-1.1(a) 11 will be repealed, including the more restrictive default rules for trustees under EPTL 11-1.1(b).

Section 7-A-8.16 of the Estates, Powers and Trusts Law enumerates common trustee powers, including many that are currently found in EPTL sections 11-1.1(b) as well as powers under EPTL 11-1.8 through 11-1.10, without limiting the authority conferred or restrictions imposed by EPTL section 7-A-8.15.

Section 7-A-8.17 of the Estates, Powers and Trusts Law codifies current New York law and provides that, upon full or partial termination of a trust, a trustee may send to the beneficiaries a proposal for distribution. The right of a beneficiary to object to the proposed distribution terminates 30 days after the proposal is sent. Subject to a reasonable reserve, the trustee shall proceed expeditiously to distribute the trust property. In addition, a release by a beneficiary for breach of trust is invalid under certain circumstances.

Section 7-A-8.18 of the Estates, Powers and Trusts Law expands upon EPTL section 7-1.11 and provides that, notwithstanding any contrary provision of law, the trustee, unless otherwise provided in the trust, may pay to or on behalf of a trust contributor that has a power of revocation an amount equal to the income taxes on any portion of the trust income or principal that the trust contributor is treated as owning. Section 7-A-8.18 also safeguards against estate inclusion under sections 2036(a) or 2038(a) of the Internal Revenue Code.

Section 7-A-8.19 of the Estates, Powers and Trusts Law consolidates the rules regarding decanting, which are currently found in EPTL section 10-6.6(b)-(t), with one modification. EPTL section 10-6.6(s)(1) ("For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the

instrument be signed by the creator shall be deemed satisfied by the signature of the trustee of the appointed trust") is deleted because its substance is continued in EPTL section 7-A-4.2-A(c).

Section 7-A-8.20 of the Estates, Powers and Trusts Law clarifies the duty of the trustee when a resulting trust arises. Current EPTL section 7-1.7, which is based on 1830 trust legislation, is obsolete and will be repealed.

Part 9 of Article 7-A of the Estates, Powers and Trusts Law is reserved for possible future use.

Part 10 of Article 7-A of the Estates, Powers and Trusts Law is entitled "Liability of Trustees and Rights of Person Dealing with Trustee".

Section 7-A-10.1 of the Estates, Powers and Trusts Law defines a breach of trust and provides remedies that the court may use for such breach, in order to create a consolidated listing of such remedies in a single EPTL section. Some of these remedies are from current sections of the EPTL or SCPA, and others are codifications of New York common law. Nothing in section 7-A-10.1 shall limit the court's application of remedial provisions that are in the SCPA. Present New York law can be found in EPTL sections 7-2.6 and 7-2.7 and SCPA sections 209, 711, 719, 1501, 1509, 2205 and 2206.

Section 7-A-10.2 of the Estates, Powers and Trusts Law codifies New York law and defines the amount that a trustee is charged with in various breach-of-trust situations in cases where EPTL section 7-A-10.9 does not apply. This section also allows for additional charges by the court and covers when a liable trustee may or may not be entitled to contribution from another liable trustee.

Section 7-A-10.3 of the Estates, Powers and Trusts Law codifies the rule that a trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust. However, absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation or for not having made a profit.

Section 7-A-10.4 of the Estates, Powers and Trusts Law references the statutory authority for courts to fix the compensation of an attorney (SCPA section 2110) and award costs and allowances (Article 23 of the SCPA).

Section 7-A-10.5 of the Estates, Powers and Trusts Law codifies current New York law and requires that a judicial proceeding by a beneficiary for breach of trust be commenced within six years after the first to occur of the removal, resignation, or death of the trustee, the termination of the beneficiary's interest, the termination of the trust, or the open repudiation of the trust by the trustee.

Section 7-A-10.6 of the Estates, Powers and Trusts Law provides that to the extent EPTL 11-2.3 do not apply a trustee who acts in reasonable reliance on the terms of the trust is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

Section 7-A-10.7 of the Estates, Powers and Trusts Law codifies current New York law, and provides that if the occurrence of an event affects the administration or distribution of a trust, then a trustee who has exercised reasonable care to ascertain the occurrence of the event is not liable for a loss resulting from the trustee's ignorance of the occurrence of the event.

Section 7-A-10.8 of the Estates, Powers and Trusts Law provides that the rules for the exculpation (exoneration) of a lifetime trustee and trust director are found in EPTL section 11-1.7, as amended.

Section 7-A-10.9 of the Estates, Powers and Trusts Law codifies case law. Specifically, a trustee is not liable to a beneficiary for breach of trust if the beneficiary consented in writing to the conduct, executed a release of the trustee from liability, or ratified in writing the transaction constituting the breach, unless the beneficiary was induced by improper conduct or did not know of his or her rights or the material facts relating to the breach. Virtual representation will apply in determining the effect of such consent, release, or ratification.

Section 7-A-10.10 of the Estates, Powers and Trusts Law codifies current New York law by absolving a trustee who discloses his or her fiduciary capacity in a contract from personal liability on such contract. The section also provides that if a trustee fails to exercise reasonable care, diligence, and prudence, such trustee is personally liable for torts committed in the course of administering a trust or for obligations arising from ownership or control of trust property. This section also simplifies existing law by allowing actions against a trustee in his or her fiduciary capacity whether or not the trustee will be personally liable. If liability of the trustee is found in a proceeding regarding an obligation or a tort, issues of liability as between the trustee in the trustee's fiduciary capacity or individual capacity shall be determined in an accounting proceeding.

Section 7-A-10.11 of the Estates, Powers and Trusts Law sets forth rules whether or not a trustee is liable when a trustee holds an interest as a general partner. There is no current New York law that corresponds to this section.

Section 7-A-10.12 of the Estates, Powers and Trusts Law provides that, after the effective date of Article 7-A, a non-beneficiary who deals with a trustee in good faith without knowledge that the trustee was improperly exercising powers is protected from liability, except in the case of a breach of the duty of loyalty. In addition, such non-beneficiary is not required to inquire into the extent of the trustee's powers. A non-beneficiary who in good faith deals with a former trustee without knowledge that the trusteeship has terminated is protected from liability. A person who transfers property to a trustee in good faith is not responsible for the proper application of such property. Transactions before the date of enactment would be governed by EPTL sections 7-2.4 and 7-3.2, which are consolidated into paragraph (g).

Section 7-A-10.13 of the Estates, Powers and Trusts Law provides that a trustee may furnish a certification of trust instead of a copy of the trust to a non-beneficiary and such certification need only provide the information requested, as outlined within this section. There is no current New York law that corresponds to this section.

Part 11 of Article 11-A of the Estates, Powers and Trusts Law is entitled "Miscellaneous Provisions".

Section 7-A-11.1 of the Estates, Powers and Trusts Law is a reserved section for possible future use.

Section 7-A-11.2 of the Estates, Powers and Trusts Law makes clear that any provisions of this Article governing electronic records or signatures are to conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

Section 7-A-11.3 of the Estates, Powers and Trusts Law provides that any potential invalidity of any provision of EPTL Article 7-A does not affect other provisions or applications of EPTL Article 7-A, to the extent possible.

Section 7-A-11.4 of the Estates, Powers and Trusts Law sets forth that the effective date for EPTL Article 7-A is 180 days after enactment.

Section 7-A-11.5 of the Estates, Powers and Trusts Law is a reserved section for possible future use.

Section 7-A-11.6 of the Estates, Powers and Trusts Law provides rules regarding the application of EPTL Article 7-A, including its application to trusts created before, on, or after EPTL Article 7-A's effective date and to judicial proceedings concerning trusts commenced on or after its effective date. The section clarifies that if a right is acquired, extinguished, or barred under another statute upon the expiration of a period of time that has started to run before the effective date of EPTL Article 7-A, such other statute continues to apply even if it has been repealed or superseded. The section also makes clear that vested rights will not be adversely affected.

Section 2 of the bill amends section 1-2.12 of the Estates, Powers and Trusts Law to revise and broaden the definition of "person."

Section 3 of the bill adds section 3-3.10 of the Estates, Powers and Trusts Law to track the language of EPTL section 7-A-4.15 and explicitly allow the court to reform the terms of a will to conform to the testator's intention if such intention is proved by clear and convincing evidence and such terms cannot otherwise carry out the intention due to a mistake of fact or law in the expression or inducement of such terms. Current New York law does not allow for the reformation of will provisions.

Section 4 of the bill amends the title of Article 7 of the Estates, Powers and Trusts Law to read "NON-GRATUITOUS TRUSTS, TRANSFERS TO MINORS AND CHILD PERFORMANCE ACCOUNTS" in order to accurately reflect the contents of its new organizational scheme.

Section 5 of the bill amends the Summary of Article to reflect the limited scope of Article 7.

Section 6 of the bill repeals Part 1, which consists of sections 7-1.1 through 7-1.19 of EPTL Article 7.

Section 7 of the bill adds Part 1-A of Article which consists of the following:

Part 1-A of Article 7-A of the Estates, Powers and Trusts Law is entitled "Non-gratuitous Trusts."

Section 7-1.1-A of the Estates, Powers and Trusts Law sets forth the scope of Part 1-A, which is to provide rules for non-gratuitous trusts, including

business and commercial trusts. Non-gratuitous trusts are defined as trusts not governed by Article 7-A.

Section 7-1.2-A of the Estates, Powers and Trusts Law provides that a non-gratuitous trust may be created for any lawful purpose.

Section 7-1.3-A of the Estates, Powers and Trusts Law provides that where an estate in real property vests in an assignee or other trustee for the benefit of creditors, that estate will cease after ten years and revert to the assignor. This section does not apply to trusts of personal property or trusts of real property created in connection with the salvaging of mortgage participation certificates, nor does it affect the rights to the proceeds of a sale of real property made by an assignee or other trustee for the benefit of creditors.

Section 7-1.4-A of the Estates, Powers and Trusts Law clarifies that where a non-domiciliary creates a non-gratuitous trust that states that it is governed by New York law, New York law shall govern any determination of the validity or interpretation of any provision disposing of (a) trust property situated in New York at the time of the trust's creation and (b) personal property, wherever situated, where the trustee is an individual residing or doing business in New York or is a national bank with an office in New York.

Section 7-1.5-A of the Estates, Powers and Trusts Law provides that certain trusts can acquire property in the name of the trust. It further clarifies that such acquired property can be conveyed, encumbered, or disposed of only in such name by a conveyance, encumbrance, or other instrument executed by the individuals authorized to do so or, where permitted, by a majority of the trustees.

Section 7-1.6-A of the Estates, Powers and Trusts Law clarifies that a New York court shall appoint a successor trustee to administer a non-gratuitous trust where the sole surviving trustee of the trust dies, the trust has not been executed, and the trust does not provide further direction regarding appointment of a successor. It further sets forth the rights and duties of such successor trustee.

Section 7-1.7-A of the Estates, Powers and Trusts Law clarifies that where the trustee of a non-gratuitous trust is engaged in war service and either no successor is named in the trust instrument or the remaining trustee is the sole beneficiary of the trust, a person interested in the trust estate can petition the Surrogate's Court for the suspension of the trustee's powers and appointment of a successor trustee. The section defines "engaged in war." The section also provides a procedure for such a proceeding, limits commissions for the successor trustee, and permits the trustee to petition the court for reinstatement.

Section 7-1.8-A of the Estates, Powers and Trusts Law specifies that the Supreme Court has the power to accept a trustee's resignation, to suspend or remove a trustee of a non-gratuitous trust who is unable to act, and to appoint a successor trustee upon removal of a trustee.

Section 7-1.9-A of the Estates, Powers and Trusts Law makes clear that a trustee or successor trustee of a non-gratuitous trust can commence an accounting or related proceeding by giving notice to the trust's beneficiaries. This section further provides the circumstances under which

the court may dispense with a formal accounting by a trustee who is resigning or being suspended or removed.

Section 7-1.10-A of the Estates, Powers and Trusts Law clarifies that a trustee of a trust to sell real property for the benefit of creditors is entitled to the same commissions as an assignee for the benefit of creditors.

Section 7-1.11-A of the Estates, Powers and Trusts Law provides that the common law of trusts and principles of equity may supplement Part 1-A of EPTL Article 7.

Section 8 of the bill repeals Part 2, which consists of sections 7-2.1 through 7-2.8 of EPTL Article 7.

Section 9 of the bill repeals Part 3, which consists of sections 7-3.1 through 7-3.5 of EPTL Article 7.

Section 10 of the bill repeals Part 5, which consists of sections 7-5.1 through 7-5.8 of EPTL Article 7.

Section 11 of the bill repeals Part 8, which consists of section 7-8.1 of EPTL Article 7.

Section 12 of the bill amends subparagraph (c)(1) of section 8-1.1 of the Estates, Powers and Trusts Law to: (1) make clear that the court having jurisdiction over a testamentary or lifetime trust has cy pres authority; (2) expand the persons allowed to apply to the court for cy pres treatment; (3) require the settlor, if competent, to receive notice of the application; (4) allow reformation "in a manner consistent" with the settlor's objectives (presuming a general charitable intent) rather than requiring the court to determine which alternative most effectively accomplishes the charitable purposes; and (5) recognize the validity of a gift over to a noncharitable beneficiary if the original charitable purpose fails.

Section 13 of the bill amends subparagraph (b) of section 10-6.6 of the Estates, Powers and Trusts Law to replace it with a cross-reference to EPTL section 7-A-8.19, which maintains the substance of current EPTL section 10-6.6(b).

Section 14 of the bill amends section 10-10.1 of the Estates, Powers and Trusts Law to replace the power "to make discretionary allocations in such person's favor of receipts or expenses as between principal and income" with the power "to make a discretionary distribution of either principal or income in discharge of the trustee's personal obligation of support" as one of the powers held by a trustee that cannot be exercised unless certain listed requirements are met.

Section 15 of the bill amends section 10-10.6 of the Estates, Powers and Trusts Law to clarify that section 10-10.6 does not apply to the trust contributor of an express trust created after the effective date of EPTL section 7-A-5.5.

Section 16 of the bill amends section 10-10.7 of the Estates, Powers and Trusts Law to remove the references to trusts and trustees currently present

in this section, so as to be consistent with the treatment of co-trustees in section 7-A-7.3 and trustee powers in sections 7-A-8.15 and 7-A.8.16.

Section 17 of the bill amends section 11-1.1 of the Estates, Powers and Trusts Law to remove the references to trusts and trustees currently present in this section, so as to be consistent with the consolidation of trustee powers in—section 7-A.8.16. In addition, because subparagraph (b)(19) of EPTL section 11-1.1 is entirely addressed to trustees, that subparagraph is entirely removed, and the subsequent subparagraphs renumbered accordingly.

Section 18 of the bill amends section 11-1.7 of the Estates, Powers and Trusts Law to limit the ability of a testator to exonerate an executor or testamentary trustee. It extends the ban on exoneration to trustees of lifetime trusts and to trust directors.

Section 19 of the bill amends section 11-2.3 of the Estates, Powers and Trusts Law to allow a trustee to delegate its investment or management functions as set forth in EPTL section 7-A-8.7.

Section 20 of the bill amends subdivision 5 of section 100-a of the Banking Law, which generally provides that no bond is required from any trust company, by adding an exception where the settlor of a trust governed by EPTL Article 7-A expressly requires the trust company to furnish a bond. See section 7-A-7.2(c).

Section 21 of the bill amends section 5205(c) of the Civil Practice Law and Rules to conform with section 7-A-5.5-A(b) which limits creditors from reaching trust assets on the lapse, release or waiver of a power of withdrawal by treating such actions as contributions but only for the amount in excess of the 5/5 amount under tax law or the gift tax annual exclusion amount.

Section 22 of the bill amends subdivision 2 of section 706 of the Surrogate's Court Procedure Act to provide by reference to the provisions in section 7-A-7.4 that any vacancy in trusteeship of a lifetime noncharitable or charitable trust may be filled by unanimous agreement of the qualified beneficiaries without the need for court approval, in the absence of a designated successor.

Section 23 of the bill amends section 715 of the Surrogate's Court Procedure Act to allow testamentary trustees to resign without needing to petition for court approval. Under current New York law, a time-consuming and expensive petitioning process is required even when all interested parties consent to the resignation, a requirement that burdens beneficiaries unnecessarily.

Section 24 of the bill amends section 806 of the Surrogate's Court Procedure Act to remove the default requirement that a testamentary trustee furnish a bond in order to serve.

Section 25 of the bill amends section 1502 of the Surrogate's Court Procedure Act to reference, and conform to, sections 7-A-7.4(c)(2) and 7-A-7.4(d)(2). These sections explicitly permit a vacancy in trusteeship to be filled by qualified beneficiaries (in the absence of a designated successor) before a court may act to fill a vacancy.

JUSTIFICATION: There are several reasons for enactment of new Article 7-A of Estates, Powers and Trusts Law, which will embody a modern New York Trust

Code for gratuitous trusts. First, although trust practices have dramatically changed over the past 50 years, New York has not comprehensively changed its trusts laws since 1967. The proposed New York Trust Code would change many statutory provisions to reflect contemporary needs. In addition, the New York Trust Code would codify virtually all existing trust case law thereby making it far simpler for lawyers to research and practice in this area. In turn, consumers would greatly benefit as costs for trust preparation and operation would be reduced. Finally, a modern New York Trust Code would also help to make New York more competitive with other states.

LEGISLATIVE HISTORY: New Bill

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: 180 Days after Enactment



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #9

REQUESTED ACTION: Approval of the report and recommendations of the New York County Lawyers Association.

In 2016, the New York County Lawyers Association appointed a Task Force on On-Line Legal Providers to, among other things, review issues related to on-line legal documents. Attached is the Task Force's report, which includes (a) a summary of recommendations; (b) background on on-line legal service providers; (c) legislation and case law related to on-line providers and unauthorized practice of law; (d) a market overview; (e) the effect of on-line providers on the "justice gap"; (e) the need for consumer protection; (f) existing regulatory models; and (g) regulatory proposals. The Task Force concludes that there is some level of regulation needed to establish minimum standards for products; provide consumers with information and protection against abuse; ensure consumers are advised of the risk of proceeding without an attorney; inform consumers as to how to locate an attorney; and protect consumers' confidential information. The Task Force proposes a set of regulatory standards for protection of the public (Appendix I); in the absence of such standards, it proposes the adoption of voluntary best practices as an interim measure (Appendix II).

This report was posted in the Reports Group community in August 2017. As of this writing, the Brooklyn Bar Association, Suffolk County Bar Association, Bar Association of Erie County, Queens County Bar Association, and Westchester County Bar Association have indicated support for the report and recommendations.

The report will be presented at the November 4 meeting by Sarah Jo Hamilton, director of NYCLA's Ethics Institute, and Ronald C. Minkoff, chair of NYCLA's Committee on Professionalism and Professional Discipline.

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REPORT OF NYCLA TASK FORCE ON ON-LINE LEGAL PROVIDERS

REGARDING ON-LINE LEGAL DOCUMENTS

I.	SUMMARY OF TASK FORCE CONCLUSIONS AND RECOMMENDATIONS.....	4
II.	THE HISTORY OF LEGAL FORMS: A SHORT OVERVIEW.....	6
III.	UNAUTHORIZED PRACTICE OF LAW LITIGATION.....	8
IV.	THE ON-LINE LEGAL SERVICES MARKET.....	12
V.	OLPs AND THE “JUSTICE GAP”.....	14
VI.	THE NEED FOR CONSUMER PROTECTION REGULATION.....	15
VII.	BEST PRACTICES AND PROPOSED GENERAL PROVISIONS AND CONSIDERATIONS FOR REGULATION OF ON-LINE PROVIDERS OF LEGAL DOCUMENTS.....	18
VIII.	EXISTING REGULATORY MODELS.....	20
IX.	NYCLA TASK FORCE PROPOSAL.....	27

Appendix I: GENERAL PROVISIONS AND CONSIDERATIONS FOR
REGULATION OF ON-LINE PROVIDERS OF LEGAL DOCUMENTS

Appendix II: BEST PRACTICES FOR DOCUMENT PROVIDERS

The New York County Lawyers Association (“NYCLA”) has long advocated for access to justice for all New Yorkers and, indeed, for all Americans. This commitment has taken many forms in NYCLA’s 109-year history, with NYCLA pressing for equal treatment for all regardless of economic status, fighting for funding for high-quality criminal defense and civil legal services, supporting legislative reforms eliminating biases against women and minorities, and advocating for judicial independence. Over the years, NYCLA has also partnered with concerned groups to bring about positive change within the legal community.

On-line legal forms provide enhanced access to justice for people of modest means; however the impact on consumer protection of the on-line sales of these forms has received only modest attention. The NYCLA Board of Directors established a Task Force on On-line Legal Providers (the “Task Force”) in early 2016, on the recommendation of then-President Carol A. Sigmond. The Task Force was authorized to study and undertake such steps necessary to consider all relevant issues, including convening a public forum, in order to make appropriate recommendations to NYCLA’s Board of Directors. This report focuses solely on the Task Force’s investigation concerning issues related to on-line legal documents. The Task Force anticipates further investigation of on-line legal referral services and the issues related thereto.

The members of this Task Force included NYCLA Past Presidents Arthur Norman Field, James B. Kobak, Jr. and Michael Miller; NYCLA Ethics Institute Director Sarah Jo Hamilton; NYCLA Committee on Professionalism and Professional Discipline Chair Ronald C. Minkoff; NYCLA Law and Technology Committee Co-Chair Joseph J. Bambara; and then-NYCLA Treasurer Vincent Chang.

As part of its investigation, the Task Force conducted an all-day public forum at NYCLA on September 30, 2016 which addressed a wide range of topics pertaining to on-line legal documents and On-line Legal Providers (“OLPs”). The public forum was titled: Should On-line Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not?¹ (the “NYCLA Forum”).

The Forum included three panels, each followed by a question and answer session, as well as the President’s Perspective on the issues, presented by then-NYCLA President Carol A. Sigmond. Panelists included: Charles Rampenthal, General Counsel of Legal Zoom, Inc.; Paige E. Zandri, Attorney Network Director at Priori Legal; Peter D. Kennedy, Graves Dougherty Hearon & Moody, counsel to LegalZoom and noted expert on the unauthorized practice of law; Tom Gordon, noted consumer advocate and Executive Director of Responsive Law; NYS Assemblyman Matthew Titone, Assembly District 61; David P. Miranda, immediate past president of the New York State Bar Association (“NYSBA”) and a leading commentator on the issue; Sarah Jo Hamilton, Scalise & Hamilton LLP and Director, NYCLA’s Ethics Institute; Ronald C. Minkoff, Frankfurt Kurnit Klein & Selz and Chair, NYCLA’s Committee on Professionalism and Professional Discipline; and Joseph Bambara, UCNy and Co-Chair, NYCLA’s Law and Technology Committee. Sarah Jo Hamilton, James B. Kobak, Jr., and Michael Miller served as moderators.

The three panels focused, respectively, on the following questions:

¹ NYCLA Forum: Should On-line Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016).

- A. What does the online legal document sale industry do? Who uses it? How new is it? How big is it? Are legal documents like other consumer goods? Are there legal documents that should not be sold without advice from a lawyer?
- B. Some safeguards are required for consumer use of legal forms: which ones are provided? Which ones are lacking?
- C. If additional safeguards are required, should they be self-imposed or required by legislative action? Should the addition of safeguards provide a basis to regulate industry activity?

This report outlines: (i) a summary of the Task Force’s conclusions and recommendations, (ii) a brief history of legal form providers, (iii) unauthorized practice of law legislation and case law, (iv) an overview of the on-line legal services market, (v) on-line legal providers and the “justice gap,” (vi) the need for consumer protection in the on-line legal providers market, (vii) background behind the proposed regulatory provisions, (viii) existing regulatory models, and (ix) the Task Force’s regulatory proposals. This report was approved by the NYCLA Board of Directors at its June 13, 2017 meeting.

I. SUMMARY OF TASK FORCE CONCLUSIONS AND RECOMMENDATIONS

The NYCLA Forum considerably informed the Task Force and assisted greatly in reaching the Task Force conclusions and recommendations. Most significantly, the Task Force found that the NYCLA Forum reflected that:

- 1. OLPs are a worldwide multi-billion dollar industry that has created a new market;

2. On-line legal documents can genuinely benefit many people, especially low- and moderate-income persons, small businesses, and startups, as the public interest is served by having accurate and modestly priced on-line legal forms available; and
3. Most important, many OLPs do not now provide basic protections for sensitive consumer information or for consumer use of on-line forms.

Considerable research by members of the Task Force, coupled with the discussion at the NYCLA Forum, led the Task Force to conclude that there is a need for some form of regulation in order to (i) establish minimum standards of product reliability and efficacy, (ii) provide consumers with information and recourse against abuse, (iii) ensure consumers are made aware of the risks of proceeding without attorneys, (iv) inform consumers how affordable attorneys can be found, and (v) protect consumers' confidential information. Discussed in further detail in Sections III and IV of this report, the process by which consumers select and generate an on-line legal form for use can simulate the process of legal advice; the computer is programmed to make certain judgments; and the information gathered is highly personal in many cases. The potential for harm, as with medical information, can be very high if there is a mistake or disclosure.

Regulation is justified based on the particular risks of handling personal information and not on a record of consumer abuse. Such regulation must target specific issues and practices to protect the public while allowing responsible providers to serve a significant need. The Task Force believes that the market success of OLPs strongly suggests that the nation's lawyers have not yet met this need effectively through traditional models of practice.

As set forth in greater detail below, the Task Force proposes a set of regulatory standards which provide for consumer protection in such areas as disclosure, consumer privacy, and

warranties. The Task Force’s General Provisions and Considerations for Regulation are attached as Appendix I. In its view, such standards are essential to ensure reasonable protection of the public.

In the area of customer privacy and protection of customer data, we urge regulators and legislators to give strong consideration to legislation similar to that enacted in Massachusetts, which provides protection for legal information provided to OLPs.² The North Carolina legislation (see further discussion below) also provides a useful model for regulation of on-line sales of legal documents.³ In preparing the General Provisions and Considerations, the Task Force has given special attention to these two statutory models.

The Task Force believes that traditional regulatory and legislative approaches are appropriate and desirable to protect and effectively ensure the public is adequately informed of risks attendant on using forms generated by OLPs, particularly in sensitive situations. While the Task Force prefers that the legislature or other appropriate regulators enact the regulatory standards, it believes that the adoption of industry-wide voluntary standards is a useful interim measure. To that end, the Task Force also offers in Appendix II a statement of *Best Practices for Document Providers*, which it calls on OLPs to voluntarily adopt immediately.

II. THE HISTORY OF LEGAL FORMS: A SHORT OVERVIEW

The legal form industry did not start on-line—at least as far back as the 1700s, books were written on “do-it-yourself” law and the concept of a scrivener service pre-dates the

² See discussion of Massachusetts legislation *infra* pp. 35–36.

³ See N.C. GEN. STAT. § 84-2.2 (2016).

internet.⁴ Similarly, Peter Kennedy noted that wills and form books date back to at least the 1850s.⁵ An 1859 book entitled “Everybody’s Lawyer and Counsellor in Business” contains 400 pages of legal forms and information.⁶ In the 1950s and 1960s, bar associations sought to take action against such self-help books, including NYCLA’s unsuccessful challenge in *Matter of New York County Lawyers Association v. Dacey*, 21 N.Y. 2d 694 (1967),⁷ a case involving a Do-It-Yourself Probate book.

As at least one court noted, the fact that OLP legal forms now reside on the internet is not what creates legal problems for LegalZoom and other OLPs; rather, such problems, if they exist, flow from the way OLP personnel advertise, draft, manipulate or help consumers create those documents.⁸ Indeed, as a South Carolina court pointed out,⁹ many court systems and governmental agencies make legal forms available to the public.¹⁰ Based upon its investigation and the discussion at the NYCLA Forum, the Task Force believes that often much more is being sold than mere blank forms and access to software.

⁴ Charles Rampenthal, General Counsel of Legal Zoom, Inc., Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016); *See also* the DIY legal forms that publishers, like Nolo Press, have provided since the 1970s, <http://www.nolo.com/about/about.html> (last visited July 20, 2017).

⁵ Peter Kennedy, Graves Dougherty Hearon & Moody, Counsel to LegalZoom, Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016).

⁶ FRANK CROSBY, EVERYBODY’S LAWYER AND COUNSELLOR IN BUSINESS (1859).

⁷ *Matter of New York County Lawyers Association v. Dacey*, 21 N.Y. 2d 694, 234 N.E. 2d 459, 287 N.Y.S.2d 422 (1967).

⁸ *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011) (“LegalZoom’s legal document preparation service goes beyond self-help because of the role played by its human employees, not because of the internet medium.”).

⁹ *Medlock v. LegalZoom.Com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362, *21 (S.C. Oct. 18, 2013).

¹⁰ Such forms appear on, for example, the website of the New York Office of Court Administration (<https://www.nycourts.gov/forms/>) and the website of California’s court system (<http://www.courts.ca.gov/forms.htm>).

Today, on-line legal forms generate approximately \$4.1 billion in annual revenue, providing, among other things, forms in a host of areas including trademarks, patents, copyrights, wills, living trusts, as well as LLC and corporate formation.¹¹ The business of LegalZoom, the largest OLP, generally involves the following steps:

First, the client fills out a series of questions pertaining to a particular legal issue. A customer support team is available for assistance as the customer completes the questionnaire. Second, LegalZoom's "document assistants" review the answers for "consistency and completeness." The company has trademarked this step in the process the "LegalZoom Peace of Mind Review," which includes a series of automated checks as well as personal review by the document scriveners. Third, LegalZoom uses the questionnaire to create the necessary legal documents, which it prints and delivers to customers with simple wrap-up instructions.¹²

III. UNAUTHORIZED PRACTICE OF LAW LITIGATION

Participants at NYCLA's Forum discussed litigation that bar associations have pursued against OLPs. Bar associations have historically commenced litigation against OLPs, contending that those companies were engaging in the unauthorized practice of law ("UPL"). Much of it has been either settled favorably to the OLPs or been outright unsuccessful. However, such litigation has tended to seek an outright ban on alternatives to the use of lawyers rather than more nuanced means of protecting consumers, which this report addresses.

Over approximately the last decade, LegalZoom was accused of engaging in UPL in several states, including California,¹³ Arkansas,¹⁴ North Carolina,¹⁵ Ohio¹⁶ and Missouri.¹⁷ The

¹¹ Issues Paper Concerning Unregulated LSP Entities, ABA COMM. ON THE FUTURE OF LEGAL SERVICES, 5 (Mar. 31, 2016), https://www.americanbar.org/content/dam/aba/images/office_president/final_unregulated_lsp_entities_issues_paper.pdf (citing WILL MCKITTERICK, IBISWORLD INDUSTRY REPORT OD5638: ONLINE LEGAL SERVICES IN THE U.S., 4 (2014)).

¹² Lauren Moxley, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice*, 9 HARV. L. & POL'Y REV. 553, 557 (2015), http://harvardlpr.com/wp-content/uploads/2015/07/9.2_9_Moxley.pdf.

¹³ *Webster v. Legalzoom*, 2014 Cal. App. Unpub. LEXIS 6972 (Cal. App. 2d Dist. Oct. 1, 2014), available at http://www.lidalitigation.com/docs/LZM_StampedAppeal_Opinion.pdf.

North Carolina case, *LegalZoom, Inc. v. North Carolina State Bar*, was settled on terms favorable to LegalZoom during litigation.¹⁸ The Missouri case, *Janson v. LegalZoom, Inc.*, was settled after an adverse ruling that LegalZoom was engaged in UPL for selling to customers a document preparation system through which “[t]he customer merely provides information and ‘LegalZoom takes over.’”¹⁹ In *Janson*, the U.S. District Court judge stated that “there is a clear risk of the public being served in legal matters by ‘incompetent or unreliable persons.’”²⁰

Notably, however, in *Medlock v. LegalZoom, Inc.*, the South Carolina Supreme Court approved LegalZoom’s business practices and ruled that most of the forms that LegalZoom provides were like ones already offered by various state and local agencies.²¹ In Texas, the state legislature passed a law specifying that the sale of computer legal software did not constitute the practice of law.²² Most settlements have, in effect, given the OLP a license to continue to provide legal forms to the public. However, it is important to note that these consent decrees and laws concerning OLPs and the sale of on-line legal documents have hinged on arguments

¹⁴ *LegalZoom.com, Inc. v. McIlwain*, No. 12-cv-1043, 2013 Ark. 370 (Ark. Oct. 3, 2013), *cert. denied.*, 134 S. Ct. 1563 (2014).

¹⁵ *LegalZoom.com, Inc. v. N.C. State Bar*, 2015 NCBC 96, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015) (discussed more extensively at pages 23–25, *infra*).

¹⁶ *Lowry v. LegalZoom.Com, Inc.*, No. 4:11-cv-02259, 2012 WL 2953109 (N.D. Ohio 2012).

¹⁷ *See Joint Motion for Preliminary Approval of Class Action Settlement Agreement, Janson v. LegalZoom.com, Inc.*, No. 2:10-cv-04018-NKL (W.D. Mo. Sept. 28, 2011); *Janson v. LegalZoom.com, Inc.*, 2012 U.S. Dist. LEXIS 60019 (W.D. Mo. Apr. 30, 2012) (approving the settlement agreement).

¹⁸ *LegalZoom.com, Inc. v. N.C. State Bar*, 2015 NCBC 96, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015) (discussed more extensively at pages 23–25, *infra*).

¹⁹ *See Joint Motion for Preliminary Approval of Class Action Settlement Agreement, Janson v. LegalZoom.com, Inc.*, No. 2:10-cv-04018-NKL (W.D. Mo. Sept. 28, 2011); *Janson v. LegalZoom.com, Inc.*, 2012 U.S. Dist. LEXIS 60019 (W.D. Mo. Apr. 30, 2012) (approving the settlement agreement).

²⁰ *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1064 (W.D. Mo. Aug. 2, 2011).

²¹ *Medlock v. LegalZoom.com, Inc.*, No. 2012-208067, 2014 S.C. LEXIS 358 (S.C. Mar. 11, 2014) (adopting the findings set forth in *Medlock v. LegalZoom.Com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362, *10 (S.C. Oct. 18, 2013)).

²² TEX. GOV’T CODE ANN. § 81.101.

revolving around UPL. It has generally been ruled that the provision of such services does not violate unauthorized practice laws in and of itself.²³ However, when there was a determination that UPL was not involved, it turned on the narrow issue of selling software and forms, not on broader issues such as the confidential information given and lawyer algorithms utilized.

It is also important to note that the FTC and DOJ have long been hostile to a broad interpretation of UPL legislation. In a 2016 letter, they jointly recommended that the North Carolina General Assembly revise the definition of unauthorized practice of law to avoid undue burdens on “self-help products that may generate legal forms.”²⁴ They stated that these self-help products and other interactive software programs for generating legal documents would promote competition by enabling non-lawyers “to provide many services that historically were provided exclusively by lawyers.”²⁵ They also contended that:

Interactive websites that generate legal documents in response to consumer input may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services. Such products may also help increase access to legal services by providing consumers additional options for addressing their legal situations.²⁶

²³ *Medlock v. LegalZoom.com, Inc.*, No. 2012-208067, 2014 S.C. LEXIS 358. As the South Carolina Supreme Court found, “a majority of courts have held that the publication and sale of form books and software are protected by the First Amendment and do not constitute the unauthorized practice of law.” *Medlock v. LegalZoom.Com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362, *16 (S.C. Oct. 18, 2013) (citing *New York County Lawyers Assoc. v. Dacey*, 21 N.Y.2d 694, 234 N.E.2d 459 (N.Y. 1967); *Oregon State Bar v. GilChrist* 538 P.2d 913 (Or. 1975); *State Bar of Michigan v. Cramer*, 249 N.W.2d 1 (Mich. 1976); *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978); *People v. Landlords Professional Servs.*, 264 Cal. Rptr. 548, 553 (Cal. App. 1989); *Oregon Ethics Opinion*, 1994-137, 1994 WL 455098 (Or. State Bar Assoc. Bd. of Gov. 1994); *In re Thompson*, 574 S.W.2d 365, 367-69 (Mo. 1978); *State Ex. Rel. Schneider v. Hill*, 573 P.2d 1078, 1078-79 (Kan. 1978); *People Ex. Rel. Att’y General v. Bennett*, 74 P.2d 671, 672 (Colo. 1937)).

²⁴ *See* Letter from Marina Lao, Dir., Office of Policy Planning, Fed. Trade Comm’n and Robert Potter, Chief, Legal Policy Section, Antitrust Div., U.S. Dep’t of Justice to Bill Cook, N.C. State Senator, Dist.1 (June 10, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill-436/160610commentncbill.pdf.

²⁵ *See id.*

²⁶ *See id.*

Nevertheless, attacks directed at these other aspects of the OLP business are difficult to measure.²⁷ As Ronald Minkoff noted at the NYCLA Forum, the American Bar Association (“ABA”) and other bodies have spent years attempting to define the practice of law and have not succeeded in doing so.²⁸ As one law review article put it:

Despite the extensive history of unauthorized practice committees and their enforcement mechanisms, the unauthorized practice of law lacks a precise definition, and is ambiguous as to whom it applies. As a result, it is difficult for courts and legislatures to determine what activity by non-lawyers constitutes the unauthorized practice of law.²⁹

The on-line legal document industry is still in the early stages of development. The more appropriate UPL analysis may be a comparison between (a) a product based on client information and seller algorithms prepared by lawyers but without loyalty or confidentiality, and

²⁷ Some commentators have suggested that “online self help publishers such as LegalZoom face UPL prosecution because they use an automated decision tree to complete forms, rather than handing a printed decision tree to a customer. Such UPL prosecutions have a chilling effect on innovators throughout the legal industry. . . .” See Tom Gordon, *Comments on Issues Paper Concerning Unregulated Legal Service Providers*, AMERICANBAR.ORG, 5 (Apr. 28, 2016), https://www.americanbar.org/content/dam/aba/images/office_president/responsive_law.pdf ; See also *Frankfort Digital Servs. v. Kistler (In re Reynoso)*, 477 F.3d 1117, 1126 (9th Cir. 2007) (finding that the website, owned by a non-lawyer, that “offer[ed] legal advice and projected an aura of expertise concerning bankruptcy petitions,” constituted unauthorized practice of law); *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999) (vacating an order to enjoin a company from selling legal software because the Texas Legislature had enacted a statute specifying that the sale of computer software did not constitute the practice of law).

²⁸ Ronald Minkoff, *Frankfurt Kurnit Klein & Selz and Chair of NYCLA’s Committee on Professionalism and Professional Discipline, Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not?* (Sept. 30, 2016). “The work of the ABA Task Force on the Model Definition of the Practice of Law makes this clear: the Task Force could not draft an acceptable model definition of the practice of law and suggested that the states should develop their own definitions.” See ABA COMM., *supra*, note 11, at 5 (citing ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT (2003), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/taskforce_rpt_803.authcheckdam.pdf; TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AMERICAN BAR ASSOCIATION REPORT *ET AL.*, REPORT TO THE HOUSE OF DELEGATES (2003), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/recomm.authcheckdam.pdf).

²⁹ Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 717 (2012), http://www.minnesotalawreview.org/wp-content/uploads/2012/12/Rotenberg_MLR.pdf (“[T]he definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000)); see also Moxley, *supra* note 12.

(b) a lawyer using similar algorithms to assist in a consumer-based practice. The difference is primarily human interaction, loyalty and confidentiality.

IV. THE ON-LINE LEGAL SERVICES MARKET

As noted above, on-line legal documents generate billions of dollars annually and the OLP business is growing in size every year. Indeed, “as computers grow more powerful and ubiquitous, legal work will continue to drift on-line in different and evolving formats,”³⁰ and as NYCLA Past President Arthur Norman Field put it, “the public has voted that it wants on-line legal providers and they are here to stay.”³¹

LegalZoom estimates that it has served four million customers, and that its forms may have created one million corporations and that someone uses its forms to write a will every three minutes somewhere in the United States.³² In a draft S-1 that LegalZoom prepared in connection with its proposed initial public offering, it claimed that:

In 2011, nine out of ten of our surveyed customers said they would recommend LegalZoom to their friends and family, our customers placed approximately 490,000 orders and more than 20 percent of new California limited liability companies were formed using our online legal platform. We believe the volume of transactions processed

³⁰ Barton, Benjamin H., *Some Early Thoughts on Liability Standards for Online Legal Providers of Legal Services*, 44 HOFSTRA L. REV. 541, 546 (2015).

³¹ Arthur Norman Field, Former NYCLA President, Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016). Similarly, Stanford Law Professor Deborah L. Rhode, Director of Stanford Law School’s Center on the Legal Profession, stated: “With respect to LegalZoom, the train has left the station. They’ve got a couple million satisfied customers and it’s going to be really hard for anyone to shut them down.” Stephen Fairley, *Why LegalZoom Doesn’t Have to Mean Legal Doom for Solos and Small Firms*, NAT’L LAW REVIEW (Aug. 1, 2014), <http://www.natlawreview.com/article/why-legalzoom-doesn-t-have-to-mean-legal-doom-solos-and-small-firms>. Chief Judge Barbara Madsen of the Supreme Court of Washington has stated that “[i]nnovation will continue with or without us, so we need to get in the driver’s seat [...] [w]e need to get on that bandwagon to change the profession before it runs us over. And I believe that, given the statistics I’ve heard, maybe we’ve already been run over.” Lorelei Laird, *Avvo Founder Tells Lawyers to ‘Get Rid of UPL’ if They Want Innovation and Access to Justice*, ABA JOURNAL (Aug. 3, 2015), <http://www.abajournal.com/news/article/avvo-founder-tells-lawyers-to-get-rid-of-upl-if-they-want-innovation-and-to>.

³² See Statement of Charles Rampenthal, *supra* note 4.

through our online legal platform creates a scale advantage that deepens our knowledge and enables us to improve the quality and depth of the services we provide to our customers.³³

And while LegalZoom is the market leader, it has many competitors and emulators offering a variety of forms and related services. Another large OLP, RocketLawyer, contends that “well over half—the vast majority of people who’ve used RocketLawyer for legal advice—have never consulted with an attorney before in their life, and that includes small business people. So, we are really the on-ramp now for first-time purchasers of legal advice.”³⁴

Why have OLPs been this successful? The answer is that OLPs provide cost-savings and convenience for individuals and small businesses of limited means. Those starting small businesses – particularly internet start-ups and others whose businesses require the protection of intellectual property—simply cannot afford the hourly rates many lawyers charge for their services. Though some lawyers provide substantial rate reductions and other favorable financial arrangements for start-ups, those arrangements (such as deferring costs) still create financial pressure on start-up companies. These businesspeople view the economic equation as simple: they would rather rely on an inexpensive legal form (in order to obtain *some* degree of protection) than pay money (and risk financial stability) to hire an attorney.

To be clear, OLPs need not be considered adverse to the legal profession. Many attorneys work with OLPs, which provide them in turn with clients and revenue that they would

³³ LegalZoom, Inc., Registration Statement (Form S-1) (May 10, 2012), *available at* <https://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm>. A Form S-1 is an SEC filing used by companies planning on going public to register their securities with the U.S. Securities and Exchange Commission (SEC).

³⁴ Michael Zuckerman, *Is There Such a Thing as an Affordable Lawyer?* THE ATLANTIC (May 30, 2014), <http://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/>.

not otherwise obtain.³⁵ As a result, it is lawyers who themselves have participated in the new market created by OLPs.

V. OLPS AND THE “JUSTICE GAP”

It has been posited that the overwhelming majority of low-income individuals and families, and roughly half of those of moderate income, face their legal problems without a lawyer.³⁶ This “justice gap” is huge and is not closing.³⁷ Low cost internet legal providers can present the promise of affordable legal services for underserved populations of low and middle income consumers who cannot afford lawyers. In New York State alone, “[s]ome 1.8 million litigants in civil matters do not have representation when addressing the ‘core essentials of life – housing, family matters, access to health care and education and subsistence income.’”³⁸ In New York, over 90% of people involved in housing, family, and consumer problems have no legal representation.³⁹ According to some estimates, “about four-fifths of the civil legal needs of the poor and two to three-fifths of the needs of middle income individuals remain unmet.”⁴⁰

³⁵ Nicholas Gaffney, *How Branded Legal Networks Help Smaller Firms Land Big Work*, ABA LAW PRACTICE TODAY (Apr. 14, 2016), <http://www.lawpracticetoday.org/article/how-branded-legal-networks-help-smaller-firms-land-big-work/>.

³⁶ Raymond H. Brescia, *What We Know and Need to Know about Disruptive Innovation*, 67 S.C. L. REV. 203, 206 (2016), http://www.americanbar.org/content/dam/aba/images/office_president/brescia_whitepaper.pdf; See also Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013).

³⁷ Discussion of the “justice gap” is not new. See eg. Houseman, Alan, *The Justice Gap: Civil Legal Assistance Today and Tomorrow*, CENTER FOR AMERICAN PROGRESS (June 2011), <https://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/justice.pdf>; see also *Documenting the Justice Gap In America The Current Unmet Civil Legal Needs of Low-Income American*, LEGAL SERVICES CORPORATION (Sept. 2009), <https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf>.

³⁸ ABA COMM., *supra* note 11, at 2 (quoting TASK FORCE TO EXPAND ACCESS TO JUSTICE TO CIVIL LEGAL SERVICES IN NEW YORK REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 2, 3 (Nov. 2014), <http://nycourts.gov/accesstojusticecommission/PDF/CLS%20TaskForce%20Report%202014.pdf>); See also Alan Houseman, *The Justice Gap: Legal Assistance Today and Tomorrow*, CTR. FOR AM. PROGRESS, 3 (Jun. 22, 2011), <https://www.americanprogress.org/issues/courts/reports/2011/06/22/9824/the-justice-gap/>.

³⁹ See Tom Gordon, *Comments on Issues Paper on the Future of Legal Services*, AMERICANBAR.ORG, 1 (Dec. 10, 2014), https://www.americanbar.org/content/dam/aba/images/office_president/responsive_law.pdf. “In New

It has been thought by some that one potential method of closing the “justice gap” is the use of on-line, legal service platforms that provide legal assistance at a significantly discounted rate over traditional private attorney or firm prices.⁴¹ On-line legal services could, at least in theory, meet the needs of the large sectors of the population which are not eligible for legal assistance and yet do not have the resources to retain attorneys.⁴² Some commentators contend that “LegalZoom can bridge the justice gap by breaking down barriers to access for low and middle-income individuals and by encouraging innovation and competition in the market for legal services at the benefit of non-lawyer consumers of legal services.”⁴³ According to a recent article, LegalZoom charged as little as \$69 for wills, \$149 for business formation, and \$169 for trademark registration.⁴⁴ A reasonable regulatory regime could help ensure that OLPs play a role in addressing the justice gap, while protecting their consumers.

VI. THE NEED FOR CONSUMER PROTECTION REGULATION

In considering the appropriate extent of regulation of OLPs, it is important to note that it is overly simplistic to contend that they are currently “unregulated” – ostensibly, they are regulated by the Federal Trade Commission (“FTC”), the Department of Justice (“DOJ”) and

York, 2.3 million pro se litigants try to find their way through the civil justice system each year.” Wallace B. Jefferson, Chief Justice of the Supreme Court of Texas, Liberty and Justice for Some: How the Legal System Falls Short in Protecting Basic Rights, 19th Annual Justice William J. Brennan Lecture on State Courts and Social Justice, Address at N.Y.U. School of Law, 1960 (Dec. 2013), <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-88-6-Jefferson.pdf>.

⁴⁰ ABA COMM., *supra* note 11, at 3 (citing Deborah Rhode, *Access to Justice*, 3 (2004)).

⁴¹ Michael Zuckerman, *Is There Such a Thing as an Affordable Lawyer?*, THE ATLANTIC (May 30, 2014), <http://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/>.

⁴² *Id.* While pro bono and legal aid assistance is an enormously laudable contribution to the solution, there remains a “huge gap today between the legal needs of low-income people and the capacity of the civil legal assistance system to meet those needs,” as well as “severe inequality in funding among states.” Alan Houseman, *The Justice Gap: Legal Assistance Today and Tomorrow*, CTR. FOR AM. PROGRESS, 3 (Jun. 22, 2011), <https://www.americanprogress.org/issues/courts/reports/2011/06/22/9824/the-justice-gap/>.

⁴³ Moxley, *Zooming Past the Monopoly*, *supra* note 12, at 566–67.

⁴⁴ *Id.* at 566.

attorneys general.⁴⁵ The organized bar and consumer protection agencies also provide a degree of oversight.

At the NYCLA Forum, LegalZoom's Charles Rampenthal emphatically argued that proponents of further regulation have largely failed to identify any specific problems arising from LegalZoom's business.⁴⁶ However, it is difficult to obtain information regarding such problems given the fact that most claims in this area are either settled, arbitrated or abandoned. Moreover, harm or lack of efficacy may never be perceived by the user or, in the case of a will or trust, may not be known until after the death of its maker, perhaps decades after its execution. Unlike the purchaser of a toaster or even a car—both of which are subject to specific standards and regulations—the purchaser often cannot immediately judge the adequacy of the product or service purchased or recognize a product deficiency, until the product is actually tested (e.g. a

⁴⁵ See Tom Gordon, *Comments on Issues Paper Concerning Unregulated Legal Service Providers*, AMERICANBAR.ORG, 5 (Apr. 28, 2016), https://www.americanbar.org/content/dam/aba/images/office_president/responsive_law_unregulated.pdf. Gordon argued that existing laws provide a good deal of protection for consumers. He also contended that the ABA Futures Commission failed to recognize the impact of such laws and that it issued a working paper which did not mention generally applicable laws except in a footnote on page 8. Gordon suggested that existing laws were sufficient to regulate on-line legal providers. *Id.* at 3.

⁴⁶ See Statement of Charles Rampenthal, *supra* note 4; See also R. Brescia, *What We Know and Need to Know about Disruptive Innovation*, *supra* note 37 (“Although some providers of commoditized legal services have faced legal challenges based on consumer protection law—such as We the People (WTP), an early entrant into the commoditized legal services market—to date, companies like LegalZoom have not faced such litigation. Indeed, an analysis by Consumer Reports noted that several such groups seemed to provide credible services.”). See also *Legal DIY Websites Are No Match for a Pro*, CONSUMER REP. MAG. (Sept. 2012), <http://www.consumerreports.org/cro/magazine/2012/09/legal-diy-websites-are-no-match-for-a-pro/index.htm>; *LegalZoom Reviews by Experts & Customers [Updated 2016]*, BLOGTREPENEUR, <http://www.blogtrepreneur.com/legalzoom-reviews/> (“While not all of the LegalZoom reviews have been flattering, we have yet to come across one that accused LegalZoom of any form of malpractice. The company has been around since 2001 and is a fairly noteworthy and respected business.”); *Lionshare Holdings LLC, Compare Legal Forms, LegalZoom Review 2016*, COMPARELEGALFORMS.COM, <http://comparelegalforms.com/legalzoom-review/> (“LegalZoom has 58 complaints filed against it with the Better Business Bureau. At first we thought this was too many complaints. However, after further review, it appears that the number of complaints has a direct relationship to the total number of customers and LegalZoom is not proportionately different than their competitors.”).

will following death or when a competitor challenges the sufficiency of one's intellectual property rights).⁴⁷

The FTC/DOJ position on OLPs recognizes on-line forms as a substitute for legal services in some situations without addressing the extent of appropriate consumer safeguards. Services.⁴⁸ The Task Force does not propose a case for intrusive regulation of OLPs. Rather, we believe that regulators, legislators and bar associations need to consider important protections for the consumer (and at a minimum promote the adoption of voluntary best practices standards). One such area for possible regulation is the need for quality control.

At the NYCLA Forum, LegalZoom General Counsel Charles Rampenthal stated that LegalZoom has strict quality control standards and that it monitors calls, provides rigorous training to its employees, and utilizes lawyers and other outside monitors to evaluate the calls. He said that the company treats UPL violations the same way that it would treat sexual harassment and that the company would fire offenders, if appropriate, and would require re-training for relatively minor infractions. Rampenthal said that LegalZoom's culture is vigilant with respect to UPL allegations because of the company's past legal issues.⁴⁹

Rampenthal also said that, at LegalZoom, all forms are drafted by a team of "legal architects" who create templates, instructions, forms, and software. He said that LegalZoom stays abreast of changes in the law the same way a law firm would and will notify prior purchasers if the change in law retroactively applies. As an example, Rampenthal stated that LegalZoom reformatted a Health Insurance Portability and Accountability Act of 1996

⁴⁷ See Barton, *supra* note 30, at 544.

⁴⁸ See *supra* Section III.

⁴⁹ See Statement of Charles Rampenthal, *supra* note 4.

(“HIPAA”) form and informed its prior customers about the new form and advised them to consider consulting an attorney.⁵⁰ However, not all OLPs maintain the same standards that LegalZoom, one of the largest and best funded of the providers, claims it maintains.⁵¹

VII. BEST PRACTICES AND PROPOSED GENERAL PROVISIONS AND CONSIDERATIONS FOR REGULATION OF ON-LINE PROVIDERS OF LEGAL DOCUMENTS

The Task Force believes that the organized Bar should take leadership to encourage reasonable regulation to protect the public, while working with all OLPs to find ways to satisfy their concerns. In that spirit, the Task Force proposes General Provisions and Considerations for Regulation of On-line Providers of Legal Documents, attached as Appendix I, which the Task Force believes strikes a reasonable balance and avoids regulations that would unduly impair OLPs’ businesses.⁵² The Task Force additionally proposes that OLPs voluntarily adopt the *Best Practices for Document Providers*, attached as Appendix II, to incorporate regulatory

⁵⁰ *Id.*

⁵¹ Some other OLPs have encountered significant legal problems. See Samson Habte, *Third Ethics Panel Dings Avvo Flat-Fee Referral Service*, BLOOMBERG BNA (Oct. 15, 2016), <https://www.bna.com/third-ethics-panel-n57982078096/>.

⁵² For example, the regulatory regime in Florida was so burdensome that, at least at one point, some OLPs avoided that state. See G. Blankenship, *Technology rapidly transforms the legal services marketplace: Panel plans ‘aggressive’ recommendations to help lawyers enter this market ‘before it’s too late’*, THE FLA. BAR NEWS (Jan. 15, 2015), <https://www.floridabar.org/news/tfb-news/?durl=/DIVCOM/JN/jnnews01.nsf/cb53c80c8fabd49d85256b5900678f6c/2DFCD2FA693B5AE085257DC4004854D5!opendocument> (“When I spoke with the ABA about their partnership with RocketLawyer, I said, ‘Hey, you didn’t include Florida...Why don’t you try your program on RocketLawyer out in Florida?’” he said, “And the answer was very quick and very direct: ‘Florida’s restrictions are far too strict for us to even consider a pilot program; the advertising rules, the unlicensed practice of law rules, we can’t even recommend to the ABA to try a program in Florida.’”).

recommendations. If properly employed, these would help provide consumer protection in the legal form industry in such areas as disclosure, consumer privacy, and warranties.⁵³

The Task Force's recommendations are intended to counter the one-sided nature of OLP form contracts. Typically, such contracts contain no warranties and, indeed, often disclaim warranties. These contracts also generally contain arbitration clauses which LegalZoom contends are favorable to consumers but are likely to require the consumer to bear costs and arbitrate in a distant place;⁵⁴ however, these clauses often force consumers to waive their rights to a trial by jury and preclude class actions.⁵⁵ Use of any on-line service involves disclosure of personal data and potential disclosure of sensitive information about a user's transactions and circumstances. OLPs may make use of this data for marketing purposes, or may try to sell it outright. Typically, nothing in the contract precludes them from doing so.

At the same time, in a show of good faith, the Task Force urges that self-regulation be initially employed by OLPs, pending regulation or legislation. The Task Force does not view a voluntary standard as a substitute for effective governmental regulation. It is unlikely that the industry is cohesive enough to adopt an industry-wide self-regulatory scheme, and, even if it did, it is highly unlikely that such regulation would provide adequate and sufficient safeguards to

⁵³ At the NYCLA Forum, LegalZoom's General Counsel stated that LegalZoom already adheres to the great majority of these provisions. Rampenthal described many of those provisions as "best practices." See Statement of Charles Rampenthal, *supra* note 4.

⁵⁴ Catey Hill, *Don't buy legal documents online without reading this story*, MKT. WATCH (Nov. 27, 2015, 9:29 AM), <http://www.marketwatch.com/story/dont-buy-legal-documents-online-without-reading-this-story-2015->. See, e.g., Avvo.com Terms of Use, AVVO.COM (last revised Apr. 19, 2017), <https://www.avvo.com/support/terms> (indicating that arbitration will be held in Kings County, Washington); Revision Legal Terms of Use Agreement, REVISION LEGAL (last revised Dec. 18, 2013), <https://revisionlegal.com/terms-use> (indicating that arbitration will be held in Traverse City, Michigan); LawDepot Terms and Conditions, LAWDEPOT (last revised July 14, 2017), <https://www.lawdepot.com/terms.php> (indicating that arbitration will be held in Alberta, Canada).

⁵⁵ See, e.g., *Terms of Use*, LEGALZOOM <https://www.legalzoom.com/legal/general-terms/terms-of-use> (last visited July 20, 2017).

protect the public in the manner characterized by the Task Force’s *Best Practices for Document Providers*, attached as Appendix II.

However, NYCLA’s Task Force recognizes that regulation or legislative action may be difficult to achieve quickly and thus, encouraging self-regulatory efforts by individual OLPs such as adoption of best practices, may end up as the principal means of guarding consumer interests.

VIII. EXISTING REGULATORY MODELS

In issuing its General Provisions and Considerations for Regulation of On-line Providers of Legal Documents, the Task Force is not writing on a blank slate. At the NYCLA Forum, former NYSBA President David P. Miranda discussed some of the types of regulations that he believed would be necessary, including the imposition of disclaimers, warnings, and notifications that the user of legal forms should seek attorney assistance for difficult problems.⁵⁶ The Task Force has also reviewed the following regulations and guidelines that have thus far been adopted, including:

1. The ABA Model Regulatory Objectives;⁵⁷
2. The North Carolina settlement;⁵⁸
3. The Washington Attorney General Settlement;⁵⁹ and

⁵⁶ Miranda described online legal forms as a “gateway drug” to unauthorized practice of law. He said that online legal forms could lead to other things which should be regulated. However, he expressed uncertainty as to which entities could engage in such regulation. He suggested that bar associations, courts, and attorneys could not handle such regulation and that the legislature might need to intervene. See David P. Miranda, Past President of NYSBA, Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016).

⁵⁷ Resolution: ABA Model Regulatory Objectives for the Provision of Legal Services, AMERICAN BAR ASSOCIATION (Feb. 8, 2016), http://www.abajournal.com/files/2016_hod_midyear_105_authcheckdam.pdf.

⁵⁸ See N.C. GEN. STAT. § 84-2.2 (2016).

4. The Missouri Settlement.⁶⁰

In the Task Force’s view, the above regulatory regimes are imperfect at best and have often been adopted in settlement of ongoing litigation, a scenario which does not lend itself to optimal policymaking. Unlike the standards outlined above, the Task Force’s proposed General Provisions and Considerations for Regulation of On-line Providers of Legal Documents cover most of the major areas of consumer concern, yet strive to adopt balanced regulations which avoid any undue burden on the business of OLPs.

1. ABA Model Regulatory Objectives

The ABA Model Regulatory Objectives (the “ABA Objectives”) were adopted by the ABA in February 2016 in an effort to urge each state’s courts in assessing state regulatory framework and regulation concerning non-traditional legal service providers.⁶¹ LegalZoom has indicated its willingness to abide by these objectives. Those model regulations are:

- A. Protection of the public;
- B. Advancement of the administration of justice and the rule of law;
- C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems;

⁵⁹ Settlement between the State of Washington and LegalZoom.com, Inc., (Sep. 15, 2010), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2010/LegalZoomAOD.pdf.

⁶⁰ See Joint Motion for Preliminary Approval of Class Action Settlement Agreement, Janson v. LegalZoom.com, Inc., No. 2:10-cv-04018-NKL (W.D. Mo. Sept. 28, 2011); Janson v. LegalZoom.com, Inc., 2012 U.S. Dist. LEXIS 60019 (W.D. Mo. Apr. 30, 2012) (approving the settlement agreement).

⁶¹ See *Resolution: ABA Model Regulatory Objectives for the Provision of Legal Services*, AMERICAN BAR ASSOCIATION (Feb. 8, 2016), http://www.abajournal.com/files/2016_hod_midyear_105.authcheckdam.pdf.

- D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections;
- E. Delivery of affordable and accessible legal services;
- F. Efficient, competent, and ethical delivery of legal services;
- G. Protection of privileged and confidential information;
- H. Independence of professional judgment;
- I. Accessible civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs; and
- J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.⁶²

These ABA Objectives are intended as guidelines for regulation of legal services providers; they are not intended to serve as regulations themselves.⁶³ Nevertheless, the General Provisions and Considerations for Regulation of On-line Providers of Legal Documents adopt some of the ABA’s principles.⁶⁴ Like the ABA Objectives, the Task Force’s standards also seek

⁶² See Minkoff, *supra* note 28.

⁶³ See *id.*

⁶⁴ For example, the Task Force’s statement contains several provisions relating to the protection of private and confidential information. See *infra* Appendix I, at 9, 10 (“protection of information from unauthorized use or access by third person”).

to promote accessible civil remedies.⁶⁵ Moreover, as is the case with the ABA Objectives, many of the provisions aim at transparency.⁶⁶

Despite these similarities, the Task Force believes that its proposed General Provisions and Considerations for Regulation of On-line Providers of Legal Documents are considerably more specific and would protect consumer welfare to a much greater extent than the ABA Objectives.

2. *The North Carolina Settlement*

Between 2008 and 2015, the North Carolina State Bar (the “NC State Bar”) engaged in litigation with LegalZoom. The NC State Bar contended that LegalZoom’s business constituted the unauthorized practice of law. In turn, LegalZoom filed a lawsuit against the NC State Bar in federal court in North Carolina in June 2015, seeking \$10.5 million in antitrust damages.⁶⁷ LegalZoom’s suit relied on a U.S. Supreme Court antitrust ruling in 2015 against the state’s self-regulating body for dentists, which had unsuccessfully proposed regulations on teeth whitening by non-dentists.⁶⁸

LegalZoom and the NC State Bar settled their litigation, agreeing to provisions that read in full as follows:

The practice of law, including the giving of legal advice, as defined by G.S. 84-2.1 does not include the operation of a Web site by a provider that offers consumers access to

⁶⁵ See *infra* Appendix I, at 14–16 (submission to jurisdiction in the courts of the state in which the client is located).

⁶⁶ See *infra* Appendix I, at 5, 7, 13, 14.

⁶⁷ See *LegalZoom.com, Inc. v. North Carolina State Bar*, 2015 NCBC 96, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015); Terry Carter, *LegalZoom resolves \$10.5M antitrust suit against North Carolina State Bar*, ABA JOURNAL (Oct. 23, 2015), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar.

⁶⁸ *Id.*

interactive software that generates a legal document based on the consumer's answers to questions presented by the software, provided that all of the following are satisfied:

- 1) The consumer is provided a means to see the blank template or the final, completed document before finalizing a purchase of that document.
- 2) An attorney licensed to practice law in the State of North Carolina has reviewed each blank template offered to North Carolina consumers, including every potential part thereof that may appear in the completed document. The name and address of each reviewing attorney must be kept on file by the provider and provided to the consumer upon written request.
- 3) The provider must communicate to the consumer that the forms or templates are not a substitute for the advice or services of an attorney.
- 4) The provider discloses its legal name and physical location and address to the consumer.
- 5) The provider does not disclaim any warranties or liability and does not limit the recovery of damages or other remedies by the consumer.
- 6) The provider does not require the consumer to agree to jurisdiction or venue in any state other than North Carolina for the resolution of disputes between the provider and the consumer.
- 7) The provider must have a consumer satisfaction process. All consumer concerns involving the unauthorized practice of law made to the provider shall be referred to the North Carolina State Bar. The consumer satisfaction process must be conspicuously displayed on the provider's Web site.⁶⁹

At the NYCLA Forum, LegalZoom's representative, Charles Rampenthal, criticized the North Carolina regulation. He said that the regulations that had been adopted by North Carolina were not an appropriate model for other states. Rampenthal contended that at least some of the North Carolina regulations were overly intrusive, including the provision forbidding OLPs from disclaiming warranties. He urged other states not to follow North Carolina's example and said that other states should adopt a process that is not protectionist.⁷⁰

⁶⁹ See N.C. GEN. STAT. § 84-2.2 (2016); see also Richard Granat, *North Carolina Restricts the Distribution of Legal Self-Help Software to Consumers*, E-LAWYERING BLOG (July 12, 2016), <http://www.elawyringredux.com/2016/07/articles/access-to-justice/north-carolina-restricts-distribution-legal-self-help-software-consumers/>; see also *LegalZoom.com, Inc. v. North Carolina State Bar*, 2015 NCBC 96, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015)

⁷⁰ See Statement of Charles Rampenthal, *supra* note 4.

The Task Force has included some aspects of the North Carolina model in its General Provisions and Considerations For Regulation of On-line Providers of Legal Documents, including the requirements that: an attorney licensed in the relevant state review each form, the provider communicate that the forms are not a substitute for a lawyer, the provider disclose its legal name and physical location, the provider not disclaim any warranties, and the provider does not require the consumer to agree to jurisdiction in any other state. In short, the Task Force has incorporated considerable portions of the North Carolina settlement but has augmented the settlement provisions with many other recommendations.

The Task Force has also included a warranty provision analogous to the North Carolina provision.⁷¹ That provision proved to be a particular flashpoint at the NYCLA Forum and will be discussed separately below in Section IX.

3. *The Washington Attorney General Settlement*

The Washington Attorney General and LegalZoom entered into a settlement that barred the company from comparing its document costs favorably to attorney fees unless it discloses that its service is not a substitute for a law firm. In an “assurance of discontinuance,” LegalZoom also promised to refrain from:

- Offering estate-planning forms that do not conform to Washington law.
- Engaging in the unauthorized practice of law by providing individualized legal advice about a self-help form.
- Selling consumer information to third parties, unless the consumers are given a chance to opt in.

⁷¹ See *infra* Appendix I, at 2.

Like the Washington standards, the NYCLA Task Force’s General Provisions and Considerations for Regulation of On-line Providers of Legal Documents include a requirement that the OLP acknowledge that its services are not a substitute for an attorney and that its forms conform to state law.⁷²

4. *The Missouri Settlement*⁷³

The Missouri settlement includes the following elements, among others:

- LegalZoom will pay up to \$6 million in settlement.
- LegalZoom will provide a Missouri-specific sample of certain documents that the customer selects on the LegalZoom website, subject to review by a Missouri-licensed attorney.
- LegalZoom will remove certain references from its website and from its advertising, including references that compare the cost of LegalZoom’s self-help products without clear disclosure that LegalZoom is not a law firm or substitute for an attorney or law firm.
- LegalZoom will advertise that its “Peace of Mind Review” is not available in Missouri unless it is performed by a Missouri-licensed attorney.
- LegalZoom will provide an offer to consult with a Missouri-licensed attorney through certain of its programs.⁷⁴

⁷² Deborah Cassens Weiss, *Wash. AG’s Settlement with LegalZoom Bars Fee Comparisons Absent Disclosure*, ABA JOURNAL (Sept. 21, 2010, 12:06 PM), http://www.abajournal.com/news/article/wash_ag_settlement_with_legalzoom_bars_fee_comparisons_absent_disclosure.

⁷³ See Joint Motion for Preliminary Approval of Class Action Settlement Agreement, *Janson v. LegalZoom.com, Inc.*, No. 2:10-cv-04018-NKL (W.D. Mo. Sept. 28, 2011).

⁷⁴ *Id.* at 12-18.

IX. NYCLA TASK FORCE PROPOSAL

The NYCLA Task Force’s General Provisions and Considerations for Regulation of On-line Providers of Legal Documents and Best Practices for Document Providers are set out in full in Appendices I and II. Broadly speaking, the Task Force’s provisions contain three general categories:

- 1) Standards for disclosure and transparency (Appendix I & II, Nos. 1, 5, 7, 13, 14);
- 2) Standards for the protection of personal information provided by the consumer (Appendix I & II, Nos. 6, 8, 9, 10, 11-12); and
- 3) Provisions relating to arbitration and dispute resolution (Appendix Nos. 16-19).

Several of the more important provisions recommended in this report deserve special mention because they are not included in some of the settlements and because representatives from the OLPs have expressed opposition to these provisions.

a. Disclosure Provisions

As an initial matter, many of the provisions in the Task Force’s proposal track the recommendations of the FTC and DOJ in their letter to the North Carolina legislature. Thus, the proposal contains a number of disclosure related provisions, consistent with the FTC/DOJ letter.⁷⁵ Like the settlements in Washington and North Carolina, and also in accord with the FTC/DOJ proposal, the NYCLA Task Force’s proposal calls for OLPs to acknowledge that the services they provide are not a substitute for the services of a lawyer.⁷⁶ The proposal also adopts

⁷⁵ See *infra* Appendix I, at 1, 7, 13, 14.

⁷⁶ See Letter from Marina Lao and Robert Potter to Bill Cook, *supra* note 24 at 10 (“a commercial software product for generating legal forms should not falsely represent, either expressly or impliedly, that it is a substitute for the specialized legal skills of a licensed attorney . . .”).

the proposed regulation of the Joint Letter, “that advertisers should ensure that disclosures are clear and conspicuous on all devices and platforms consumers may use.”⁷⁷

b. Requirement of Clickwrap Agreements

The Task Force’s proposal also requires the use of so-called “clickwrap” agreements in which website users are required to click on an ‘I agree’ box after being presented with a list of terms and conditions of use.⁷⁸ “Clickwrap” agreements are more readily enforceable, since they “permit courts to infer that the user was at least on inquiry notice of the terms of the agreement, and has outwardly manifested consent by clicking a box.”⁷⁹ “‘Browsewrap’ agreements are treated differently under the law than ‘clickwrap’ agreements.”⁸⁰ Courts will generally enforce browsewrap agreements only if they have ascertained that a user “‘had actual or constructive knowledge of the site’s terms and conditions, and ... manifested assent to them.’”⁸¹ This is rarely the case for individual consumers. In fact, courts have stated that “the cases in which courts have enforced ‘browsewrap’ agreements have involved users who are businesses rather than... consumers.”⁸²

⁷⁷ *See id.*

⁷⁸ *See infra* Appendix I, at 5. “‘Clickwrap’ agreements are distinguished from and ‘browsewrap’ agreements, where a website’s terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen.” *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014). “The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists.” *Be In, Inc. v. Google Inc.*, No. 12–cv–03373, 2013 WL 5568706, at *6 (N.D.Cal. Oct. 9, 2013).

⁷⁹ *See Meyer v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073012, at *5 (S.D.N.Y. July 29, 2016) (quoting *Cullinane v. Uber Techs., Inc.*, No. 14–cv–14750, 2016 WL 3751652* 6 (D.Mass. July 11, 2016)); *See also Specht v. Netscape Communications Corp.*, 306 F.3d at 22 n. 4; *Savetsky v. Pre–Paid Legal Servs., Inc.*, 14–cv–03514, 2015 WL 604767, at *3 (N.D.Cal. Feb. 12, 2015); *Berkson v. Gogo LLC*, 97 F.Supp.3d 359, 397 (E.D.N.Y.2015).

⁸⁰ *See Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 129 n.18 (2d Cir. 2012).

⁸¹ *Id.* (quoting *Cvent, Inc. v. Eventbrite, Inc.*, 739 F.Supp.2d 927, 937 (E.D.Va.2010)).

⁸² *See Meyer v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073012, at *5 (S.D.N.Y. July 29, 2016) (quotation omitted). *See also Berkson*, 97 F.Supp.3d at 396 (“Following the ruling in *Specht*, courts generally have enforced browsewrap terms only against knowledgeable accessors, such as corporations, not against

In litigation involving the Terms of Service and “clickwrap” agreements of Uber, a technology company that uses phone applications to connect consumers with car transportation services, extensive discussions have arisen on the nature of “clickwrap” agreements with conflicting decisions, some of which have invalidated Uber’s arbitration agreements.⁸³ The *Meyer* court opined that “[w]hen contractual terms as significant as the relinquishment of one’s right to a jury trial or even of the right to sue in court are accessible only via a small and distant hyperlink titled ‘Terms of Service & Privacy Policy,’ with text about agreement thereto presented even more obscurely, there is a genuine risk that a fundamental principle of contract formation will be left in the dust: the requirement for ‘a manifestation of mutual assent.’”⁸⁴

However, other courts have held that consumer contracts presented by Uber and other internet-based companies constituted valid consent to arbitration or other waivers of rights. In these cases, the courts found that (unlike in *Meyer*), the agreements in question required an affirmative assent to the clause in question.⁸⁵

individuals.”); See Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 472 (2006) (“the courts have been willing to enforce terms of use against corporations, but have not been willing to do so against individuals).

⁸³ See *Meyer v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073012, at *5 (S.D.N.Y. July 29, 2016).

⁸⁴ *Id.* (quoting *Schnabel*, 697 F.3d at 119).

⁸⁵ See *Cullinane v. Uber Techs., Inc.*, No. 14-cv-14750, 2016 WL 3751652* 6 (D.Mass. July 11, 2016); *Defillipis v. Dell Fin. Servs.*, 14-cv-115, 2016 WL 394003, at *3 (M.D. Pa. Jan. 29, 2016) (“an applicant had to affirmatively click a box agreeing: ‘I have read and agree to the Privacy Policy and Terms & Conditions, which contain important account information.’”); *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 99 (E.D.N.Y. 2015) (“Plaintiff would have been presented with four buttons, two of which are the links to the terms of service and privacy policy, one which reads ‘I Do Not Accept,’ and one which reads ‘I Have Read And Accept Both Documents.’ If the registrant does not click the button reading ‘I ... Accept . . . the registration process stops and the online features cannot be activated.”); *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 150 (E.D.N.Y. 2015) (Dkt. 53-3) (the statement “By placing your order, you agree to Amazon.com’s privacy notice and conditions of use” appears directly under “Review your order” and higher on the page than the button to click to “Place your order,” so that “[t]o place his orders, Plaintiff had to navigate past this screen by clicking a square icon below and to the right of this disclaimer, which states: ‘Place your order.’”).

Uber has filed an appeal in *Meyer* and, thus, the Second Circuit will likely decide the issue of the validity of at least some of Uber’s arbitration clauses.⁸⁶ Regardless of the outcome of the litigation, the Task Force believes that OLP agreements should incorporate a protective form of “clickwrap” agreement, requiring that a customer affirmatively click “I agree” to assent to arbitration and the waiver of the right to access to court.

c. Provisions Regarding Warranties

At the NYCLA Forum, LegalZoom’s representative, Charles Rampenthal, opposed efforts to require LegalZoom to include warranties. However, Rampenthal acknowledged that North Carolina’s settlement imposes such a requirement and that LegalZoom adheres to it.⁸⁷ In the Task Force’s view, warranty protection is essential in this area because (unlike e.g., the internet purchase of a consumer product) flaws in many legal forms cannot easily be discerned by most lay customers.⁸⁸ For this reason, NYCLA’s Task Force regards warranty protection as a fundamental aspect of its General Provisions and Considerations for Regulation of On-line

⁸⁶ Mark Hamblett, *51 Law Professors Join Fight Against Arbitration in Uber Price-Fixing Case*, N.Y. LAW JOURNAL (Dec. 7, 2016), <http://www.newyorklawjournal.com/id=1202774152389/51-Law-Professors-Join-Fight-Against-Arbitration-in-Uber-PriceFixing-Case>.

⁸⁷ See Statement of Charles Rampenthal, *supra* note 4.

⁸⁸ Even with respect to other, typical, consumer products, “[a]pproximately one-third of states, in their enacted versions of section [UCC Section] 2-314, prevent merchants from disclaiming the implied warranty of merchantability under certain circumstances. Some of these statutes also preclude any attempt to limit remedies available for a breach of warranty.” Ethan R. White, *Big Brother and Buyers*, 51 WAKE FOREST L. REV. 917, 934 (Fall 2016) (citing, inter alia, CAL. CIV. CODE § 1793 (Deering 2015) (providing that if a seller makes express warranties in a sale of goods, the seller is unable to disclaim the implied warranty of merchantability); CONN. GEN. STAT. § 42a-2-316(5) (2015) (rendering disclaimers of the implied warranty of merchantability in the sale of new goods ineffective); KAN. STAT. ANN. § 50-639(a)(1) (2015) (“[N]o supplier shall ... [e]xclude, modify, or otherwise attempt to limit the implied warrant[y] of merchantability”); MASS. GEN. LAWS ch. 106, § 2-316A (2015) (prohibiting disclaimers of the implied warranty of merchantability when there has been injury to a person); VT. STAT. ANN. tit. 9A, § 2-316(5) (2015) (prohibiting disclaimers in the sale of new or unused consumer goods)).

Providers of Legal Documents and Best Practices.⁸⁹ The Task Force notes that consumers in New York and across the nation deserve warranty protection and not just North Carolinians.

d. Provisions Regarding Arbitration

The Task Force’s proposals contain several provisions relating to arbitration and dispute resolution.⁹⁰ Once again, many OLP form contracts require resolution in arbitration rather than in court, and require that arbitration take place in distant locations inconvenient to the customer.⁹¹ In addition, most of these forms prohibit class action law suits. All of these restrictions reduce the likelihood that aggrieved customers would pursue their legal remedies. The Task Force notes that restrictions on litigation are not uncommon in other form contracts.⁹² However, in this situation, the Task Force believes it is appropriate to permit the customer to have the option of preserving his or her day in a court in his or her home state.⁹³

Additionally, the Task Force’s proposal would forbid provisions in OLP contracts which bar class action litigation. As one consumer advocacy group has put it, “class action waivers

⁸⁹ See *infra* Appendices I and II at 2.

⁹⁰ See *infra* Appendix I, 15–18; see *infra* Appendix II, 16-19.

⁹¹ See Hill, *supra* note 55.

⁹² In fact, in applying the Federal Arbitration Act, the Supreme Court has often upheld restrictions on class action waivers contained in arbitration agreements. See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 2015 WL 8546242 (2015); See *Am. Exp. Co. v. Italian Colors Rest.* 133 S. Ct. 2304 (2013) (class action waivers are enforceable and do not deny a plaintiff any substantive right simply because individual claims of nominal value would more effectively proceed on a class basis). However, even if class action waivers are permissible, the NYCLA Task Force does not believe that they are desirable. In the NYCLA Task Force’s view, OLP contracts should be drawn so they do not deny access to the courts for class action cases that would not be viable if litigated on an individual basis. This view is consistent with holdings of the high courts in Massachusetts, New Mexico, North Carolina, California, Washington, Illinois, New Jersey, Alabama, and West Virginia have found class action bans unconscionable. See *Feeney v. Dell*, 908 N.E.2d 753 (Mass. 2009); *Gentry v. Superior Court of Los Angeles County*, 165 P.3d 556 (Cal. 2007); *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250 (Ill. 2006); *Muhammad v. Co. Bank of Rehoboth Beach, Del.*, 912 A.2d 88 (N.J. 2006).

⁹³ In some cases, a customer might rationally decide to choose arbitration over litigation. In some cases, arbitration could be faster, less burdensome, and/or less expensive. If that were the case, a customer could, of course, waive its right to go to court under the NYCLA General Provisions and Considerations for Regulation of On-line Providers of Legal Documents and Best Practices.

prevent consumers who have been harmed on a systematic basis from joining together to seek remedies from the offending company—which is often the only method of obtaining redress.”⁹⁴ For similar reasons, the Consumer Finance Protection Bureau has proposed a rule that would prohibit class action waivers in consumer finance contracts. Moreover, the Financial Industry Regulatory Authority (FINRA), which is an industry self-regulatory organization for broker dealers, allows forced arbitration clauses in brokerage contracts but does not allow those agreements to contain class action waivers.⁹⁵

e. Customer Privacy

The Task Force’s proposed General Provisions and Considerations for Regulation of On-line Providers of Legal Documents and its proposed Best Practices also focus on the protection of consumer information. Based upon its research and the sentiments expressed at the NYCLA Forum, the Task Force believes that sensible consumer privacy regulations in this area are important. The Task Force’s General Provisions and Considerations for Regulation of On-line Providers of Legal Documents contain one possible interim framework.⁹⁶ Laws such as the Massachusetts Consumer Privacy Law or HIPAA provide other longer-term regulatory solutions.⁹⁷

⁹⁴ Letter from Michael Best, Senior Policy Advocate, Consumer Federation of America, Tom Feltner, Director of Financial Services, Consumer Federation of America and Rachel Weintraub, Legislative Director and General Counsel, Consumer Federation of America to Monica Jackson, Executive Secretary, Consumer Financial Protection Bureau (Aug. 22, 2016), http://consumerfed.org/wp-content/uploads/2016/08/8-22-16-CFPB-Class-Action-Waiver-Rule_Letter.pdf.

⁹⁵ See FINRA Rule 12204(d), which forbids enforcing an arbitration agreement against a member of a class action, shows that this was a deliberate policy decision made to ensure that “investor access to the courts should be preserved for class actions.” Complaint at 14, *Department of Enforcement v. Schwab*, No. 2011029760201 (Apr. 24, 2014), <https://www.finra.org/sites/default/files/NACDecision/p496824.pdf> (citing October 1992 Approval Order, 1992 SEC LEXIS 2767, at *9–10).

⁹⁶ See *infra* Appendix I, at 6–12; See *infra* Appendix II, at 7–13.

⁹⁷ See Massachusetts Regulation 201 CMR 17.00.

It should be noted that, at the outset, many OLPs' activities (such as the mere sale of forms) do not involve confidential consumer information.⁹⁸ In addition, as Peter Kennedy pointed out at the NYCLA Forum, information should be treated differently depending upon the level of sensitivity. He suggested that "innocuous" information such as names and addresses need less protection as compared to other personal information, such as DNA data.⁹⁹

The Task Force agrees that consumer protection safeguards are necessary for sensitive consumer information and that OLPs must assure such protection in order to ensure the viability of their business models. Indeed, in its draft S-1, LegalZoom itself acknowledged that: "Our online legal platform involves the receipt, use, storage, processing and transmission of information from and about our customers, some of which may be personal or confidential." In its draft S-1, LegalZoom explained that "sophistication of intrusion techniques" could be used to compromise consumer privacy.¹⁰⁰

CONCLUSION

The online document form industry touches the lives of millions of consumers and small businesses and continues to grow rapidly. Online legal forms are widely used, and their presence – and eventually their effect on future transactions – already is, and increasingly will be, significant.

This is not a passing phenomenon and the impact of online forms and related activities – be they adequate substitutes for lawyers' services or not – cannot be dismissed as

⁹⁸ Kennedy said that the business of LegalZoom and other internet based providers often does not even involve confidential information because their business often does not involve any discussion between the clients and the provider. In addition, the provider does not necessarily collect or maintain client information. *See* Statement of Peter Kennedy, *supra* note 5.

⁹⁹ *Id.*

¹⁰⁰ *See supra* note 33.

inconsequential. Although the Task Force recognizes that First Amendment consideration may apply to the content of forms themselves, the First Amendment does not require specific practices involved in the on-line sale of forms be free from any regulation.¹⁰¹ Some regulation of this industry is important. Meeting an unmet need is not a valid argument for ignoring consumer risk.

The Task Force is concerned that many features of the online relationship could lend themselves to abuse in a manner similar to that encountered in other online industries. For example, while different companies have promulgated different terms and differ in the range and quality of their offerings, the relationship is typically governed by a lengthy online form contract which, depending on the provider, is not always consumer-friendly. Not many non-lawyers would readily understand the terms or consequences of these agreements, including non-English speakers. Some of the more popular services have forms which, if printed out, run to many densely typed, single spaced pages.¹⁰² Typically, these forms contain no warranties; in fact, quite the reverse: they disclaim consumer warranties, and strictly limit damages, while imposing indemnities that run from the user to the provider rather than vice versa. This stands in stark contrast to legal services, where disclaimer of warranties and malpractice liability is strictly prohibited.

The forms almost always include an arbitration clause; some of these have some features favorable to the consumer, as LegalZoom contends its clause does, but many require the

¹⁰¹ See *Matter of New York County v. Dacey*, 24 N.Y. 2d 694 (1967).

¹⁰² For example, the Revision Legal form is four pages, the Law Depot form is seven pages, the Avvo form is eight pages and the LegalZoom form is thirteen pages. See Avvo.com Terms of Use, AVVO.COM (last revised Apr. 19, 2017), <https://www.avvo.com/support/terms>; Revision Legal Terms of Use Agreement, REVISION LEGAL (last revised Dec. 18, 2013), <https://revisionlegal.com/terms-use>; LawDepot Terms and Conditions, LAWDEPOT (last revised July 14, 2017), <https://www.lawdepot.com/terms.php>.

consumer to bear costs and arbitrate in a distant place.¹⁰³ Additionally, the arbitration clause is also almost certain to preclude any form of class actions.

Use of the service often involves disclosure of some personal data and potential disclosure of sensitive information about a user's transactions and circumstances. Whether a particular OLP chooses to use this information for internal marketing purposes or even chooses to sell it, often nothing in the contract precludes them from doing so. Given that OLPs are not lawyers or law firms, the attorney-client privilege does not apply – another fact often not adequately conveyed to consumers.

In other regards, Massachusetts Consumer Privacy Law may be the most appropriate regulatory model. In 2007, the Massachusetts Legislature passed a comprehensive set of laws addressing data breaches.¹⁰⁴ The Massachusetts Regulation contains an extensive list of technical, physical and administrative security protocols aimed at protecting personal information that affected companies must implement into their security architecture, and describe in a comprehensive written information security program.¹⁰⁵ The law applies to companies such as OLPs that collect and retain personal information of their customers. “Personal information” under the law includes names plus any of the following social security numbers, driver's license numbers or financial account numbers, including credit or debit card numbers.¹⁰⁶ Commentators have described the Massachusetts law as “[t]he best example of a preventative-type of law.”¹⁰⁷ It has also been called “the most comprehensive data protection and privacy law in the United

¹⁰³ See note 55.

¹⁰⁴ Massachusetts Regulation 201 CMR 17.00.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Ieuan Jolly, *Data protection in the United States: overview*, THOMSON REUTERS PRACTICAL LAW (Jul. 1, 2016), <http://us.practicallaw.com/6-502-0467#a762707>.

States.”¹⁰⁸ It should be noted that at the NYCLA Forum, Rampenthal stated that LegalZoom follows Massachusetts law in all 50 states, does not share customer information without permission, and that, if LegalZoom wanted to market or disclose information, it would need to disclose that intention to its customers.¹⁰⁹

Regulators should consider not only the Massachusetts statute, but also privacy laws from other sectors such as HIPAA and Gramm Leach Bliley.¹¹⁰ While NYCLA’s Task Force urges that governmental regulators carefully study the possibility of adapting such regulations to the OLP context, the Task Force also urges that regulators consider the cost of regulations and arrive at a balanced outcome.

With respect to the sale of consumer information, it is the Task Force’s belief that such sale should be prohibited without informed consent. The Task Force believes that sensible regulations can be developed in this area. Charles Rampenthal said, at NYCLA’s Forum, that the sale of customer information is not likely to be a major problem because he does not believe there is massive profit to be made from information sharing.¹¹¹ However, it should be noted that Legal Zoom’s standard form provisions state that customer information can be re-sold. As several panelists pointed out, apart from “special” laws targeted at internet companies, those

¹⁰⁸ Kevin D. Lyles & Mauricio F. Paez, *Massachusetts Law Raises the Bar for Data Security*, JONES DAY (Feb. 2010), http://www.jonesday.com/massachusetts_law_raises/.

¹⁰⁹ See Statement of Charles Rampenthal, *supra* note 4.

¹¹⁰ *Safeguarding Customers’ Personal Information: A Requirement for Financial Institutions*, FTC (accessed Dec. 30, 2016), <https://web.archive.org/web/20170220213348/https://www.ftc.gov/system/files/documents/plain-language/alt115-safeguarding-customers-personal-information-requirement-financial-institutions.pdf>. It has been suggested that Gramm Leach Bliley may require some overhaul even in those areas where it currently operates. See *CFPB Proposes New Rules on Gramm-Leach-Bliley Act Annual Privacy Notices*, BALLARD SPAHR LLP (May, 15, 2014), <http://www.ballardspahr.com/alertspublications/legalalerts/2014-05-16-cfpb-proposes-new-rules-on-gramm-leach-bliley-act.aspx>.

¹¹¹ See Statement of Charles Rampenthal, *supra* note 4.

companies are subject to laws of general applicability.¹¹² Regulators and legislators should examine the prospect of enforcing current privacy laws in lieu of, or perhaps in addition to, the development of special laws targeted at OLPs.¹¹³ Notably, even if regulators take no steps to enforce existing laws, some courts might import existing laws even from other areas of law. For example, in fashioning private law remedies, courts have used the standards established by HIPAA even when that statute is not directly applicable.¹¹⁴

The General Provisions and Considerations for Regulation of On-line Providers of Legal Documents and the statement of Best Practices for Document Providers proposed by this Task Force provide a common-sense approach to regulation or self-regulation of OLPs. The Task Force believes that, if enacted or adopted, they would:

- establish reasonable standards of product reliability and efficacy;
- provide consumers with information and recourse against abuse;
- ensure consumers are made aware of the risks of proceeding without attorneys;
- inform consumers where affordable attorneys can be found; and
- protect confidential information.

¹¹² For example, existing laws dealing with fiduciary duty might cover customer information held by OLPs. As Peter Kennedy stated at the NYCLA Forum, if a provider stores and maintains control over information, the provider may have a fiduciary duty to keep that information private and disclosure could give the client a cause of action. *See* Statement of Peter Kennedy, *supra* note 5. Another speaker at the NYCLA Forum pointed to fear of malpractice suit (contract and tort) as potential enforcement mechanisms. It was also contended that contract and tort may defeat waivers of warranty.

¹¹³ At the NYCLA Forum, Peter Kennedy said that existing rules relating to confidentiality are not effectively enforced. He said proceedings regarding such information are secret proceedings, at least in Texas. He said that he had, in the past, argued that such proceedings should be public. *See* Statement of Peter Kennedy, *supra* note 5.

¹¹⁴ Stephanie D. Willis, *Provider Beware: HIPAA and State Privacy Laws May Inform Negligence Suits*, MINTZ LEVIN: HEALTH LAW & POLICY MATTERS (Dec. 9, 2014), <https://www.healthlawpolicymatters.com/2014/12/09/provider-beware-hipaa-and-state-privacy-laws-may-inform-negligence-suits/>.

The Task Force submits that such regulations would protect the public while allowing responsible providers to serve a demonstrated need that traditional models of practice have not been able to meet. NYCLA's Task Force will continue exploring the issues related to OLPs and will next investigate the thorny and complex issues regarding legal referrals, fee-splitting and non-lawyer ownership of law firms.

APPENDIX I

GENERAL PROVISIONS AND CONSIDERATIONS FOR REGULATION OF ON-LINE PROVIDERS OF LEGAL DOCUMENTS

The Usefulness and Propriety of Forms

- (1) AN OLP should be required to provide clear, plain language instructions as to how to complete forms and the appropriate uses for each form.
- (2) There should be a warranty either (a) that the form of documents provided to customers will be enforceable in the relevant State, or (b) that the OLP will inform its customers, in plain language, that the document is not enforceable in the relevant State and what steps can be taken to make it enforceable, including if necessary the retention of an attorney. OLPs should not be permitted to limit this warranty, or recovery under this warranty, in any way.
- (3) Documents should be kept up-to-date and account for important changes in the law.
- (4) If the OLP selects the service agent for a document, the OLP will be legally responsible for the proper recording or filing of the document.

Protection of Customers

- (5) OLPs should be required to use only clickwrap agreements with their customers and require the customers' consent and express opt-in to any changes made to the customer agreement after the initial registration.
- (6) OLPs should be required to inform their customers of all of the ways (if any) they intend to use and share customers' personal and legal information with the OLPs' business

associates and ask for consent and express opt-in authorization before initiating the relationship.

- (7) OLPs should be required to inform customers, in plain language, that the personal information customers provide is not covered by the attorney-client privilege or work product protection.
- (8) OLPs should be required to regulate the collection and use of customers' personal and legal information and use "best of breed" data security practices to maintain the privacy and security of the information provided.
- (9) OLPs should be required to protect customers' information from unauthorized use or access by third persons and OLPs should be required to inform customers of any breach of their systems.
- (10) OLPs should be required to make all efforts to remedy and cure any harm a breach of customers' personal and legal information may cause.
- (11) OLPs should not be permitted to sell, transfer or otherwise distribute customers' personal information to third persons without express opt-in authorization.
- (12) OLPs should be required to retain customer information and any completed forms for a period of three years, and make the form available for the customers' use during that period free of charge.

Recommendation of Attorneys to Assist

- (13) OLPs should be required to inform their customers, in plain language, of the importance of retaining an attorney to assist them with any legal transaction.

- (14) OLPs should not be permitted to advertise their services in a manner that suggests that their services are a substitute for the advice of a lawyer.

Dispute Resolution

- (15) OLPs should be required to disclose their legal names, addresses, and email addresses to which their customers can direct any complaints or concerns about their services.
- (16) OLPs should be required to submit to the jurisdiction of the courts of the State of New York for the resolution of any dispute with New York customers, and should not be permitted to require arbitration of any disputes.
- (17) OLPs should be not be permitted to preclude their customers from joining in class actions, or require shifting of legal fees to customers.
- (18) Any notifications to be provided should be required to be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of OLPs' web-sites, the required words, statements or notifications shall appear on their home pages.

APPENDIX II

BEST PRACTICES FOR DOCUMENT PROVIDERS

The Usefulness and Propriety of Their Forms

- 1) Document provider services (“Providers”) shall provide customers with clear, plain language instructions as to how to complete their forms, and the appropriate uses for each form.
- 2) Providers will warrant either (a) that the form of documents they provide to their customers will be enforceable in the relevant State, or (b) that Providers will inform their customers, in plain language, that the document is not enforceable in the relevant State and what steps can be taken to make it enforceable, including if necessary the retention of an attorney. Providers will not limit this warranty, or recovery under this warranty, in any way.
- 3) Providers will keep their documents up-to-date and account for important changes in the law.
- 4) If a Provider selects the service agent for a document, the Provider shall be legally responsible for the proper recording or filing of the document.

Protection of their Customers

- 5) Providers will use only clickwrap agreements with their customers and require the customers’ consent and express opt-in to any changes made to the customer agreement after the initial registration.
- 6) Providers will charge their customers a reasonable fee for their services.

- 7) Providers will inform customers of all of the ways (if any) they intend to use and share customers' personal and legal information with their business associates and ask for customers' consent and express opt-in authorization before the Providers begin a customer relationship.
- 8) Providers will inform customers, in plain language, that the personal information customers provide is not covered by the attorney-client privilege or work product protection.
- 9) Providers will regulate the collection and use of customers' personal and legal information and will use "best of breed" data security practices to maintain the privacy and security of the information customers provide.
- 10) Providers will protect customer information from unauthorized use or access by third persons and will inform customers of any data breach that might affect them.
- 11) Providers will make all efforts to remedy and cure any harm a breach of customers' personal and legal information may cause.
- 12) Providers will not sell, transfer or otherwise distribute a customer's personal information to third persons without the customer's express opt-in authorization.
- 13) Providers will retain customer information and any completed forms for a period of three years, and make the form available for the customers' use during that period free of charge.

Recommendation of Attorneys to Assist

- 14) Providers will inform their customers, in plain language, of the importance of retaining an attorney to assist them should their customers have questions regarding any legal

transaction, including without limitation transactions involving the customers' money, property, intellectual property, estate, trusts, matrimonial status or custody rights, and where an affordable attorney can be found.

- 15) Providers will not advertise their services in a manner that suggests their documents are a substitute for the advice of a lawyer.

Dispute Resolution

- 16) Providers will disclose their legal name, address, and email address to which their customers can direct any complaints or concerns about their services.
- 17) Providers will submit to the jurisdiction of the courts of the State of New York for the resolution of any dispute with New York customers, and will not require arbitration of any disputes.
- 18) Providers will not preclude their customers from joining in class actions, or require shifting of legal fees to the customer.
- 19) Any notifications to be provided pursuant to this Statement of Best Practices will be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of their web-site, the required words, statements or notifications shall appear on their home page.



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October 17, 2017

Kathleen R. Mulligan-Baxter, Esq.
General Counsel
New York State Bar Association
One Elk Street
Albany, New York 12207

RE: On-line Legal

Dear Ms. Mulligan-Baxter,

At the request of the New York County Lawyers Association and NYSBA Second District Vice President Domenick Napoletano the Brooklyn Bar Association reviewed the NYCLA Report and findings regarding On-line Legal Providers.

At the October 11, 2017 BBA Board of Trustees meeting this item was discussed. By a unanimous vote the Brooklyn Bar Association Board of Trustees voted to endorse the report, the findings and the recommendations.

We have further instructed Vice President Domenick Napoletano to communicate our position to the NYSBA Executive Board and to advocate for the report at the November House of Delegates meeting.

Very truly yours,

Aimee L. Richter
President

Cc: Michael J. McNamara
Domenick Napoletano
David M. Chidekel
Sophia Gianacoplos

THE SUFFOLK COUNTY BAR ASSOCIATION



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September 19, 2017

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President

New York County Lawyers Association

14 Vesey Street

New York, New York 10007-2906

Reference: NYCLA TASK FORCE REPORT –
Online Legal Providers of Forms (2017)

Dear Mr. McNamara:

In response to your email of September 11th, please be advised that our Board of Directors has reviewed the NYCLA Task Force Online Legal providers (OLPs) of Forms Report ("Report") and discussed the issue at our regular Board meeting on Monday, September 18, 2017.

Following a lengthy discussion and input from one of our past presidents, our Board of Directors unanimously agreed to support the Report at the NYSBA House of Delegates meeting scheduled for November 4, 2017 in Albany, NY.

The SCBA Board felt that the Task Force members did an excellent job in identifying the issues and reporting on prior attempts to sue and regulate these providers. The Task Force's proposal to deal with the issues appears to be in the best interest of the public as well as in the interest of the members of the Bar.

Sincerely,

Patricia M. Meisenheimer
President

PMM/jlc

cc: Anthe Maria Vorkas, General Counsel, NYCLA
Sophia Gianacoplos, Executive Director



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October 5, 2017

Anthe Marie Vorkas, General Counsel
New York County Lawyers Association
14 Vesey Street
New York, NY 10007

Re: *Report of NYCLA Task Force on On-Line Legal Providers
Regarding On-Line Legal Documents*

Dear Ms. Vorkas:

The board of directors of the Bar Association of Erie County has reviewed the Report of NYCLA Task Force on On-Line Legal Providers and supports the conclusions and recommendations contained in the Report.

We understand that the Report will be on the agenda for the New York State Bar Association House of Delegates meeting on November 4, 2017 and our Association would like to be a co-sponsor of the Report.

Thank you for the opportunity to be a co-sponsor of this important effort.

Very truly yours,

Melinda G. Disare
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Dear Mr. McNamara:

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At our Board of Managers meeting held on October 2, 2017, it was decided that the Queens County Bar Association will support and co-sponsor the New York County Lawyers Association's task force report on Online Legal Providers of Legal Forms. We ask that you place the name of our Association as a signatory on your report for the meeting of the NYSBA House of Delegates in November.

We thank you for bringing this matter to our attention and look forward to our continued collaboration with your Association.

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Very truly yours,

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October 17, 2017

VIA EMAIL Kmchargue@nysba.org

Kathleen R. Mulligan Baxter, General Counsel
New York State Bar Association
One Elk Street
Albany, NY 10007

Re: NYCLA Report on Online Legal Providers of Legal Forms

Dear Ms. Baxter:

The Executive Committee of the Westchester County Bar Association has voted to support New York County Lawyers Association's report on Online Legal Providers of Legal Forms. I write to express our support of this Report when it comes before the NYSBA House of Delegates. The WCBA fully supports and endorses the recommendations contained in NYCLA's Report seeking regulation of online document providers for the protection of consumers.

Very truly yours,

Stephanie L. Burns, Esq.
President



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #9

To supplement the other materials related to this agenda item, attached is a letter from the Monroe County Bar Association expressing support for the report and recommendations.



SENT VIA EMAIL TO: mcnamara@sewkis.com

October 20, 2017

Michael J. McNamara, President
New York County Lawyers Association
Seward & Kissel LLP
One Battery Park Plaza
New York, NY 10004

Dear Mr. McNamara:

I am pleased to inform you that the Monroe County Bar Association Board of Trustees met yesterday and voted to co-sponsor the report prepared by the New York County Lawyers Association regarding Online Legal Providers. They also, however, requested that I inform you of some concerns expressed by a small minority of our Trustees that some attorneys and their corporate clients may view those bar associations co-sponsoring the report as being anti-arbitration in general. This concern was not widely shared and did not prevent us from deciding to co-sponsor the report. However, we believe it is helpful for you to receive this information.

If you have any questions regarding our support, please feel free to contact me or the Monroe County Bar Association Executive Director, Kevin Ryan.

Best regards,

Jill M. Cicero, Esq., President



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #12

REQUESTED ACTION: Approval of the report and recommendations of the Commercial and Federal Litigation Section.

In 2016, the Commercial and Federal Litigation Section formed an ad hoc task force consisting of the women who have served as chairs of the section since its inception to examine the percentage of women who serve as litigators, arbitrators, and mediators. The task force created two questionnaires; the first was directed to federal and state judges in New York and asked judges to record speaking counsel by gender in their courtrooms. The second was directed to ADR providers, asking them to record the appearance of counsel by gender and the gender of neutrals conducting proceedings. The survey found that a low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court. In ADR matters, women had a slightly higher percentage level.

The report contains a number of suggested recommendations that firms, ADR providers and clients can take to increase the number of women in both litigation and ADR settings, including the following:

- Develop women's initiatives to develop tools needed for women to cultivate opportunities and place themselves in a position within the firm to gain trial and courtroom experience.
- Establish formal programs through which firm managers or litigation department heads seek out female junior associates to participate in a program enabling them to obtain courtroom and pre-trial experience.
- Encourage speaking opportunities, such as through continuing legal education programs.
- Encourage sponsorship of junior attorneys by senior attorneys.
- Encourage judges to address questions to junior counsel and to promote and support women in obtaining speaking and leadership roles in the courtroom.

- Encourage corporate clients to push for diverse trial teams.
- Encourage ADR providers to take steps to promote diversity in the composition of neutrals.

This report was posted in the Reports Group community in August 2017. As of this writing, no comments have been received with respect to the report and recommendations.

The report will be presented at the November 4 meeting by Mitchell J. Katz, chair of the Commercial and Federal Litigation Section; Mark A. Berman, the section's immediate past chair; and Bernice K. Leber, NYSBA past president and past chair of the Commercial and Federal Litigation Section.



IF NOT NOW, WHEN?

**Achieving Equality for Women Attorneys in
the Courtroom and in ADR**

Report of the Commercial & Federal Litigation Section

**For the Section
Mitchell J. Katz
Mark A. Berman**

**Prepared by the Section's Task Force on Women's Initiatives:
Hon. Shira A. Scheindlin (ret.); Carrie H. Cohen; Tracee E.
Davis; Bernice K. Leber; Sharon M. Porcellio; Lesley F.
Rosenthal; Lauren J. Wachtler**

July 2017

TABLE OF CONTENTS

I. Introduction	1
II. Literature Review: Women in Litigation; Women in ADR	2
A. Women in Litigation: Nationwide	2
B. Women in ADR	10
III. Survey: Methodology and Findings	14
A. Women Litigators in New York State Courts	15
B. Women Litigators in Federal Courts	16
C. Women Litigators: Criminal & Civil; Private & Public	17
D. Women in Alternative Dispute Resolution	18
IV. Going Forward: Suggested Solutions	18
A. Women’s Initiatives	18
B. Formal Programs Focused on Lead Roles in Court and Discovery	20
C. Efforts to Provide Other Speaking Opportunities for Women	21
D. Sponsorship	21
E. Efforts by the Judiciary	23
F. Efforts by Clients	24
G. ADR Context	26
V. Conclusion	27
VI. Appendix	29

Opinions expressed are those of the Section preparing this report and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association’s House of Delegates or Executive Committee.

**IF NOT NOW, WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS
IN THE COURTROOM AND IN ADR
REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION
2017 WOMEN’S INITIATIVE STUDY**

I. Introduction

During the last two decades, much has been written and discussed about whether women attorneys appear in court with the frequency expected given their numbers in the legal profession. The Commercial and Federal Litigation Section of the New York State Bar Association is a preeminent bar group focused on complex commercial state and federal litigation. The Section counts among its former chairs a substantial number of prominent women litigators from both upstate and downstate, including a former United States District Judge who previously served as a federal prosecutor and an attorney in private practice, a former President of the New York State Bar Association who is recognized as one of New York’s top female commercial litigators and also serves as a mediator and arbitrator of commercial disputes, a former federal and state prosecutor who now is a partner in a large global law firm, an in-house counsel at a large non-profit corporation, and senior partners in large and mid-size private law firms located both upstate and downstate. With the full support and commitment of the Section’s leadership, these female alumnae Section chairs met and formed an ad hoc task force devoted to the issue of women litigators in the courtroom. The task force also examined the related issue of the apparent dearth of women who serve as arbitrators and mediators in complex commercial and international arbitrations and mediations (collectively referred to herein as Alternative Dispute Resolution (“ADR”)).

As an initial matter, the task force sought to ascertain whether there was, in fact, a disparity in the number of female attorneys versus male attorneys who appear in speaking roles in federal and state courts throughout New York. Toward that end, the task force devised and distributed a survey to state and federal judges throughout the State and then compiled the survey results. As fully discussed below, based on the survey results, the task force found continued disparity and gender imbalance in the courtroom. This report first details recent studies and research on the issue of gender disparity in the legal profession, then discusses how the court survey was conducted, including methodology and findings, and concludes with recommendations for addressing the disparity and ensuring that women attorneys obtain their rightful equal place in the courtroom. This report further details the task force’s findings with respect to the gender gap in the ADR context.

II. Literature Review: Women in Litigation; Women in ADR

There is no shortage of literature discussing the gender gap in the courtroom, which sadly continues to persist at all levels—from law firm associates, to equity partnerships at law firms, to lead counsel at trial. To orient the discussion, the task force sets forth below a brief summary of some of the relevant articles it reviewed.

A. **Women in Litigation: Nationwide**

ABA Commission on Women in the Profession

The ABA Commission on Women in the Profession (the “ABA Commission”) was founded in 1987 “to assess the status of women in the legal profession and to identify barriers to their achievement.”¹ The following year, with Hillary Rodham Clinton serving as its inaugural chair, the ABA Commission published a groundbreaking report documenting the lack of adequate advancement opportunities for women lawyers.² Thirty years later, the ABA Commission is perhaps the nation’s preeminent body for researching and addressing issues faced by women lawyers.³

In 2015, the ABA Commission published *First Chairs at Trial: More Women Need Seats at the Table* (the “ABA Report”), “a first-of-its-kind empirical study of the participation of women and men as lead counsel and trial attorneys in civil and criminal litigation.”⁴ The study was based on a random sample of 600 civil and criminal cases filed in the United States District Court for the Northern District of Illinois in 2013—a sample that offered a limited but important snapshot into the composition of trial courtrooms at that time.⁵ As summarized by its authors, Stephanie A. Scharf and Roberta D. Liebenberg, the ABA Report showed at a high level the following:

[W]omen are consistently underrepresented in lead counsel positions and in the role of trial attorney In civil cases, [for example], men are three times more likely than women to appear as lead counsel That substantial gender gap is a marked departure from what we expected based on the distribution of

¹ Stephanie A. Scharf & Roberta D. Liebenberg, ABA Commission on Women in the Profession, *First Chairs at Trial: More Women Need Seats at the Table—A Research Report on the Participation of Women Lawyers as Lead Counsel and Trial Counsel in Litigation* at 25 (2015).

² *See id.*

³ *See id.*

⁴ *Id.* At 4.

⁵ *See id.*

men and women appearing generally in the federal cases we examined (a roughly 2 to 1 ratio) and the distribution of men and women in the legal profession generally (again, a roughly 2 to 1 ratio).⁶

The ABA Report also provided more granular statistics about the sample population, including that out of the 558 civil cases surveyed, 68% of all lawyers and 76% of the lead counsel were male.⁷ The disparity was even more exaggerated in the class action context, in which 87% of lead class counsel were men.⁸ The 50 criminal cases studied fared no better: among all attorneys appearing, 67% were men and just 33% were women.⁹

Contextualizing these statistics, the ABA Report also outlined factors that might help to explain the gender disparities evidenced by the data. In particular, the ABA Report posited that:

The underrepresentation of women among lead lawyers may. . . stem from certain client preferences, as some clients prefer a male lawyer to represent them in court. . . . In addition, women may too often be relegated by their law firms to second-chair positions, even though they have the talent and experience to serve as first chairs. The denial of these significant opportunities adversely affects the ability of women to advance at their firms. All of these issues apply with even greater force to women trial attorneys of color, who face the double bind of gender and race.

Id. at 15 (footnote omitted). The ABA Report concluded by offering some “best practices” for law schools, law firms, clients, judges, and women lawyers, many of which focus on cultivating opportunities for women to gain substantive trial experience.¹⁰

Other research corroborates the extent to which gender disparities continue to persist within the legal profession, particularly within law firm culture. This research shows that the presence of women in the legal profession—now in substantial numbers—has not translated into equal opportunities for women lawyers at all levels. For example, a recent law firm survey, conducted by the New York City Bar Association, found that just 35% of all lawyers at surveyed firms in 2015 were women—“despite [the fact that

⁶ *Id.*

⁷ *See id.* at 8-10.

⁸ *See id.* at 12.

⁹ *See id.* at 12-13.

¹⁰ *Id.* *See also id.* at 14-17.

women have] represent[ed] almost half of graduating law school classes for nearly two decades.”¹¹ That same survey found a disparity in lawyer attrition rates based on gender and ethnicity, with 18.4% of women and 20.8% of minorities leaving the surveyed firms in 2015 compared to just 12.9% of white men.¹² Serious disparities also have been identified at the most senior levels of the law firm structure. Indeed, a 2015 survey by the National Association of Women Lawyers found that women held only 18% of all equity partner positions—just 2% higher than they did approximately a decade earlier.¹³ Based on one study by legal recruiting firm, Major, Lindsey & Africa, it is estimated that the compensation of male partners is, on average, 44% higher than that of female partners.¹⁴

In April 2017, ALM Intelligence focused on Big Law and asked, “Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent.”¹⁵ The author found that certain niche practices such as education, family law, health care, immigration, and labor and employment had the greatest proportion of women; other areas such as banking, corporate, and litigation had the lowest number of female attorneys.¹⁶

Promisingly, however, there also have been significant calls to action—across the bar and bench—to increase advancement opportunities for women lawyers. In interviews conducted after the ABA Report was published, top female trial attorneys cited factors such as competing familial demands, law firm culture (including a desire to have “tried and true” lawyers serve as lead counsel), and too few training opportunities for young lawyers as reasons why so few women were present at the highest ranks of the profession.¹⁷ Those interviewed suggested ways in which law firms can foster the development of women lawyers at firms, including by affording female associates more

¹¹ Liane Jackson, *How can barriers to advancement be removed for women at large law firms?*, ABA Journal (Jan. 1, 2017), http://www.abajournal.com/magazine/article/visible_difference_women_law.

¹² *See id.*

¹³ Andrew Strickler, *Female Attorneys Should Grab High-Profile Work: Bar Panel*, Law360 (Jan. 27, 2016), <https://www.law360.com/articles/750952/female-attorneys-should-grab-high-profile-work-bar-panel>.

¹⁴ *See id.*

¹⁵ Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent* (Apr. 2017).

¹⁶ Meghan Tribe, *Study Shows Gender Diversity Varies Widely Across Practice Areas*, The Am Law Daily (Apr. 17, 2017) <http://www.americanlawyer.com/id=1202783889472/Study-Shows-Gender-Diversity-Varies-Widely-Across-Practice-Areas> (citing Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent* (Apr. 2017)).

¹⁷ Mary Ellen Egan, *Too Few Women in Court*, The American Lawyer (Apr. 25, 2016) <http://www.americanlawyer.com/id=1202755433078/Too-Few-Women-in-Court>.

courtroom opportunities and moving away from using business generation as the basis for determining who is selected to try a case.¹⁸ Among those interviewed was Ms. Liebenberg, one of the co-authors of the ABA Report. She stressed that clients can play an important role by using their economic clout to insist that women play a significant role in their trial teams.¹⁹

In another follow-up to the ABA Report, Law360 published an article focusing on the ABA Report's recommendation that judges help to close the gender gap by encouraging law firms to give young lawyers (including female and minority associates) visible roles in the courtroom and at trial.²⁰ The article highlighted the practice of some judges around the country in doing this, such as Judge Barbara Lynn of the Northern District of Texas. As explained in the article, Judge Lynn employs a "standard order"—adapted from one used by Judge William Alsup of the Northern District of California—that encouraged parties to offer courtroom opportunities to less experienced members of their teams.²¹ One such order provides: "In those instances where the court is inclined to rule on the papers, a representation that the argument would be handled by a young lawyer will weigh in favor of holding a hearing."²² As explained in the article, Judge Lynn said that, while her order does not mention gender, younger lawyers in her courtroom tend to include more women.

Indeed, a recent survey revealed that nineteen federal judges have issued standing orders that encourage law firms to provide junior attorneys with opportunities to gain courtroom experience.²³ Here are some examples of such orders:

- Judge Indira Talwani (D. Mass) "Recognizing the importance of the development of future generations of practitioners through courtroom opportunities, the undersigned judge, as a matter of policy, strongly encourages the participation of relatively inexperienced attorneys in all courtroom proceedings including but not limited to initial scheduling conferences, status conferences, hearings on discovery motions, and examination of witnesses at

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ Andrew Strickler, *Judges Key to Closing Trial Counsel Gender Gap*, Law360 (July 20, 2015) <https://www.law360.com/articles/680493/judges-key-to-closing-trial-counsel-gender-gap>.

²¹ *Id.*

²² *Id.*

²³ Michael Rader, *Rising to the Challenge: Junior Attorneys in the Courtroom*, 257 N.Y.L.J. 4 (Apr. 28, 2017).

trial.”

- Judge William Alsup (N.D. Cal.) “The Court strongly encourages lead counsel to permit young lawyers to examine witnesses at trial and to have an important role. It is the way one generation will teach the next to try cases and to maintain our district’s reputation for excellence in trial practice.”

- Magistrate Judge Christopher Burke (D. Del.) “indicates that the court will make extra effort to grant argument—and will strongly consider allotting additional time for oral argument—when junior lawyers argue.”

- Judge Allison Burroughs (D. Mass) offers law firm associates the chance to argue a motion after the lead attorneys have argued the identical motion.²⁴

As explained in the article cited below, there are benefits to both the lawyer and the client in having junior attorneys play a more significant role in the litigation:

When it comes to examining a witness at trial, junior lawyers frequently have a distinct advantage over their more senior colleagues. It is very often the junior lawyer who spent significant time with the witness during the discovery process In the case of an expert witness, the junior lawyer probably played a key role in drafting the expert report. In the case of a fact witness, the junior lawyer probably worked with the witness to prepare a detailed outline of the direct examination. . . . [C]lients should appreciate that the individual best positioned to present a witness’s direct testimony at trial may be the junior attorney who worked with that witness The investment of time required to prepare a junior attorney to examine a witness or conduct an important argument can be substantial, but this type of hands-on mentoring is one of the most rewarding aspects of legal practice.²⁵

At the same time, practitioners also have urged junior female attorneys to seek out advancement opportunities for themselves—a sentiment that was shared by panelists at a conference hosted by the New York State Bar Association in January 2016. Panel members—who spoke from a variety of experiences, ranging from that of a federal District Court Judge to a former Assistant U.S. Attorney to private practice—“uniformly called for rising female attorneys to seek out client matters, pro bono cases, bar roles, and other responsibilities that would give them experience as well as profile beyond their

²⁴ *Id.*

²⁵ *Id.*

home office.”²⁶

ABA Presidential Task Force on Gender Equity

In 2012, American Bar Association President Laurel G. Bellows appointed a blue-ribbon Task Force on Gender Equity (“Task Force”) to recommend solutions for eliminating gender bias in the legal profession.²⁷ In 2013, the Task Force in conjunction with the ABA Commission published a report that discussed, among other things, specific steps clients can take to ensure that law firms they hire provide, promote, and achieve diverse and inclusive workplaces.²⁸ Working together, the Task Force concluded, “general counsel and law firms can help reduce and ultimately eliminate the compensation gap that women continue to experience in the legal profession.”²⁹

The Task Force recommended several “best practices” that in-house counsel can undertake to promote the success of women in the legal profession. As a “baseline effort,” corporations that hire outside counsel, including litigators, should inform their law firms that the corporation is interested in seeing female partners serving as “lead lawyers, receiving appropriate origination credit, and being in line for succession to handle their representation on behalf of the firm.”³⁰ Corporate clients can also expand their list of “go-to” lawyers by obtaining referrals to women lawyers from local bar associations; contacting women lawyers in trial court opinions issued in areas of expertise needed; and inviting diverse lawyers to present CLE programs.³¹ This allows the corporate clients to use their “purchasing power” to ensure that their hired firms are creating diverse legal teams.³²

The Task Force also reported that clients can utilize requests for proposal and pitch

²⁶ Andrew Strickler, *Female Attorneys Should Grab High-Profile Work: Bar Panel*, Law360 (Jan. 27, 2016) <https://www.law360.com/articles/750952/female-attorneys-should-grab-high-profile-work-bar-panel> (emphasis added).

²⁷ *ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession, Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers* (2013).

²⁸ *Publications from the ABA Presidential Task Force on Gender Equity*, AMERICAN BAR ASSOCIATION (2012), https://www.americanbar.org/groups/women/gender_equity_task_force/task_force_publications.html.

²⁹ *Id.*

³⁰ *Id.* at 6. For an in-depth discussion of recommendations for steps clients can take to combat the gender disparity in courtrooms, see *infra* Part F.

³¹ *Id.* at 9.

³² *Id.* at 8.

meetings to convey their diversity policies to outside firms and “specify metrics by which they can better evaluate a firm’s commitment to women lawyers.”³³ When in-house counsel ask their outside firms to provide data, they demonstrate to the firms their consciousness of metrics, and the data allows them to benchmark the information against other firms.³⁴

Perhaps the most impactful practice corporate clients can undertake is a “deepened level of inquiry,” which involves investigating how work is credited within law firms.³⁵ For example, a general counsel may tell a firm that she wants “the woman lawyer on whom she continually relied to be the relationship partner and to receive fee credit for the client’s matters” even if that means “transferring that role from a senior partner” that might cause “tension in the firm.”³⁶

Finally, clients can “lead by example, both formally and informally” by partnering with law firms committed to bringing about pay equity.³⁷ The Task force professed that by doing so, corporate clients have the power to shatter the “last vestiges of the glass ceiling in the legal profession.”³⁸

Call for Diversity by Corporate Counsel

The ABA was not the first and only organization to recognize the growing importance of gender equity in the legal profession. In 1999, Charles R. Morgan, then Chief Legal Officer for BellSouth Corporation, developed a pledge titled Diversity in the Workplace: A Statement of Principle (“Statement of Principle”) as a reaction to the lack of diversity at law firms providing legal services to Fortune 500 companies.³⁹ Mr. Morgan intended the Statement of Principle to function as a mandate requiring law firms to make immediate and sustained improvements in diversity initiatives.⁴⁰ More than four hundred Chief Legal Officers of major corporations signed the Statement of Principle,⁴¹

³³ *Id.* at 10.

³⁴ *See Id.* at 11.

³⁵ *See id.* at 13.

³⁶ *Id.* at 10.

³⁷ *Id.* at 15.

³⁸ *Id.*

³⁹ Donald O. Johnson, *The Business Case for Diversity at the CPCU Society* at 5 (2007), <https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf>.

⁴⁰ Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

⁴¹ Donald O. Johnson, *The Business Case for Diversity at the CPCU Society* at 5 (2007),

which served as evidence of commitment by signatory corporations to a diverse legal profession.⁴²

By 2004, however, Rick Palmore, a “nationally recognized advocate for diversity in the legal industry,”⁴³ then serving as an executive and counsel at Sara Lee Corporation, observed that efforts for law firm diversity had reached a “disappointing plateau.”⁴⁴ Mr. Palmore authored *A Call to Action: Diversity in the Legal Profession*, (“Call to Action”), which built upon the Statement of Principle.⁴⁵ The Call to Action focused on three major elements: (1) the general principle of having a principal’s interest in diversity; (2) diversity performance by law firms, especially in hiring and retention; and (3) commitment to no longer hiring law firms that do not promote diversity initiatives.⁴⁶

Mr. Palmore pledged to “make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms.” To that end, he called upon corporate legal departments and law firms to increase the numbers of women and minority attorneys hired and retained.⁴⁷ Mr. Palmore stated that he intended to terminate relationships with firms whose performances “consistently evidence[] a lack of meaningful interest in being diverse.”⁴⁸ By December 4, 2004, the Call to Action received signatory responses from seventy-two companies, including corporate giants such as American Airlines, UPS, and Wal-Mart.⁴⁹ Both the Statement of Principle and *A Call to Action* reflect the belief of many leading corporations that diversity is important and has the potential to profoundly impact business performance.⁵⁰

<https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf>.

⁴² Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

⁴³ Rick Palmore, Senior Counsel, Dentons US LLP; LCLD Founding Chair Emeritus http://www.lclldnet.org/media/mce_filebrowser/2017/02/22/Palmore.Rick-Fellows-branded-bio.2.13.17.pdf (last visited May 30, 2017).

⁴⁴ Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

⁴⁵ Melanie Lasoff Levs, *Call to Action: Sara Lee's General Counsel: Making Diversity a Priority*, DIVERSITY & THE BAR (Jan./Feb. 2005), <http://archive.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803>.

⁴⁶ *See id.*

⁴⁷ *Id.*

⁴⁸ Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, 8 ENGAGE 21, 21 (2004).

⁴⁹ Melanie Lasoff Levs, *Call to Action: Sara Lee's General Counsel: Making Diversity a Priority*, DIVERSITY & THE BAR (Jan./Feb. 2005), <http://archive.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803>.

⁵⁰ Donald O. Johnson, *The Business Case for Diversity at the CPCU Society* at 7 (2007),

B. Women in ADR

Turning to the ADR context, the governing principle should be that “[n]eutrals should reflect the diverse communities of attorneys and parties whom they serve.”⁵¹ This statement strikes us as the best way to begin our survey of the literature concerning the status of women in the world of ADR.

It should come as no surprise that much has been written about the lack of diversity among ADR neutrals, especially for high-value cases. As a 2017 article examining gender differences in dispute resolution practice put it, “the more high- stakes the case, the lower the odds that a woman would be involved.”⁵² Data from a 2014 ABA Dispute Resolution Section survey indicated that for cases with between one and ten million dollars at issue, 82% of neutrals and 89% of arbitrators were men.⁵³ Another survey estimated that women arbitrators were involved in just 4% of cases involving one billion dollars or more.⁵⁴

One part of the problem may be that very few women and minorities are present within the field. For example, one ADR company estimated that in 2016 only 25% of its neutrals were women, 7% were minorities, and 95% were over fifty.⁵⁵ Similarly, in 2016, the International Centre for Settlement of Investment Disputes (an arm of the World Bank) reported that only 12% of those selected as arbitrators through the organization were women.⁵⁶ Similarly, the Institute for Conflict Prevention and Resolution (CPR)

<https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/BusinessDiversity.pdf>.

⁵¹ Theodore K. Cheng, *A Celebration of Diversity in Alternative Dispute Resolution*, Diversity and the Bar Spring 2017 MCCA.com at 14.

⁵² Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017).

⁵³ See *id.* (citing *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey* (Jan. 2014)).

⁵⁴ See Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, The American Lawyer (Oct. 10, 2016) <http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL>.

⁵⁵ See Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017) (citing Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, <http://www.law.com/sites/almstaff/2016/10/05/adr-business-wakes-up-to-glaring-deficit-of-diversity/> (Oct. 5, 2016)).

⁵⁶ See Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, The American Lawyer (Oct. 10, 2016) <http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL>.

reported that of more than 550 neutrals worldwide, about 15% are women and 14% are minorities.⁵⁷

It has been argued that among the concerns raised by this lack of diversity among neutrals is that it diminishes the legitimacy of the process.⁵⁸ But as one recent article in the *New York Law Journal* suggests, it may be even harder to take steps to improve diversity within ADR than it is to do so in law firms given the incentives of key stakeholders in the ADR context.⁵⁹ In particular, the article argues that law firms may be more inclined to recommend familiar, well-established (likely male) mediators in the interest of trying to achieve a good outcome, and their clients may be more willing to accept their lawyers' recommendations for that same reason.⁶⁰

Comparing ADR statistics with those of the judiciary is revealing. Approximately 33% of federal judges are women and 20% are minorities—which is far ahead of the numbers in the world of ADR.⁶¹ Despite ADR's "quasi-public" nature, it remains a private enterprise for which gender and racial statistics for private ADR organizations are not fully available.⁶² Nonetheless, the information that is available reveals a stark underrepresentation of women and minority arbitrators and mediators.⁶³ In short, the overwhelming percentage of neutrals are white men (and the lowest represented group is minority women). It is no wonder that one attorney reported that, in her twenty-three years of practice, she had just three cases with non- white men neutrals.⁶⁴

⁵⁷ Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

⁵⁸ See Christine Simmons, *Where Are the Women and Minorities in Global Dispute Resolution?*, *The American Lawyer* (Oct. 10, 2016) <http://www.americanlawyer.com/id=1202769481566/Where-Are-the-Women-and-Minorities-in-Global-Dispute-Resolution?mcode=0&curindex=0&curpage=ALL>.

⁵⁹ See Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y.L.J. S6 (Mar. 20, 2017) (citing Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, <http://www.law.com/sites/almstaff/2016/10/05/adr-business-wakes-up-to-glaring-deficit-of-diversity/> (Oct. 5, 2016)).

⁶⁰ See *id.*

⁶¹ Laura A. Kaster, et al., *The Lack of Diversity in ADR—and the Current Beneath*, *American Inns of Court* (Mar./Apr. 2017) at 14.

⁶² Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016); see also Laura A. Kaster, *Choose Diverse Neutral to Resolve Disputes—A Diverse Panel Will Improve Decision Making* ("Because alternative dispute resolution is a privatization of otherwise public court systems, it is . . . valid to compare the public judiciary to private neutrals in commercial arbitration.").

⁶³ *ABA Presidential Task Force on Gender Equity and the Commission on Women in the Profession, Power of the Purse: How General Counsel Can Impact Pay Equity for Women Lawyers* (2013).

⁶⁴ Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

The homogeneity within the ADR field is even worse at the case-specific level. A 2014 survey published by the American Bar Association indicated a clear disparity in the types of cases for which women neutrals were selected: whereas 57% of neutrals in family, elder, and probate cases were women, this figure was just 37% for labor and employment actions, 18% for corporate and commercial cases, and 7% for intellectual property cases.⁶⁵

Some have theorized that the reason for the lack of diversity within ADR—both in the neutrals available for selection and the types of cases for which diverse neutrals are selected—is a “chronological lag”: most neutrals who are selected are retired judges or lawyers with long careers behind them, drawn from a pool of predominantly white males.⁶⁶ But as others have pointed out, women have been attending law school at equal rates as men for more than ten years and there is no dearth of qualified female practitioners.⁶⁷ Accordingly, other important but difficult to dismantle factors may be implicit bias by lawyers or their related fear of engaging neutrals who may not share their same background (and therefore, who may arrive at an unfavorable decision).⁶⁸ This cannot be an excuse: “the privatization of dispute resolution through ADR . . . cannot alter the legitimacy of requiring that society’s dispute resolution professionals, who perform a quasi-public function, reflect the population at large.”⁶⁹

This disparity continues to exist despite the well-documented benefits of diversity in decision-making processes for all stakeholders. Indeed, studies indicate that “when arbitration involves a panel of three, the parties are likely to have harder working panelists and a more focused judgment from the neutrals if the panel is diverse.”⁷⁰ This is because “when members of a group notice that they are socially different from one another, . . . they assume they will need to work harder to come to a consensus. . . . [T]he hard work can lead to better outcomes.”⁷¹ In order to move the needle on diversity in the ADR field, especially with respect to lawyers’ selection of neutrals which is arguably the

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ David H. Burt, *et al.*, *Why Bringing Diversity to ADR Is a Necessity*, ACC Docket at 44 (Oct. 2013).

⁶⁸ *Id.*; See also Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

⁶⁹ Laura A. Kaster, *Why and How Corporations Must Act Now to Improve ADR Diversity*, Corporate Disputes (Jan.-Mar. 2015).

⁷⁰ Laura A. Kaster, *Choose Diverse Neutral to Resolve Disputes—A Diverse Panel Will Improve Decision Making*.

⁷¹ *Id.*

largest driver of its composition, “[w]hat may be missing is the firm belief that diversity matters not just for basic fairness and social equity but also for better judgment.”⁷²

In a recent article, Theodore Cheng, an ADR specialist, described what he sees as the failure of ADR to accept diversity in the selection of neutrals as both necessary and beneficial. He begins by noting that “the decision- making process is generally improved, resulting in normatively better and more correct outcomes, when there exists different points of view.”⁷³ Cheng then notes the gap between the commitment to diversity by companies in their own legal departments versus their commitment to diversity in ADR.

The efforts on the part of corporate legal departments to ensure diverse legal teams does not appear to extend to the selection of neutrals – a task routinely delegated to outside counsel. Mr. Cheng’s article explains that outside counsel may be fearful of taking a chance on an unknown quantity for fear that they might be held responsible for an unsatisfactory result. Accordingly, they tend to select known quantities, relying on recommendations from within their firms or from friends, which tends to produce the usual suspects – overwhelmingly lawyers like themselves – i.e., older white males. There is also “a failure to acknowledge and address unconscious, implicit biases that permeate any decision-making process.”⁷⁴ The author concludes that there are many qualified women and minorities available to be selected as neutrals but those doing the selections have somehow failed to recognize that this service – like any other service provided to corporate entities – must consider the need for diversity.

Mr. Cheng also stresses why diversity in ADR is important. His article notes that ADR is the privatization of a public function and it is therefore important that the neutrals be diverse and reflect the communities of attorneys and litigants they serve. Secondly, the author notes, as have many others, that better decisions are made when different points of view are considered. The addition of new perspectives is always a benefit. ADR providers are taking steps to document and address the problem. For example, the International Institute for Conflict Resolution has developed the following Diversity Commitment which any company can sign: “We ask that our outside law firms and counterparties include qualified diverse neutrals among any list of neutrals or arbitrators they propose. We will do the same with the lists we provide.”⁷⁵ Similarly, the American Arbitration Association has committed to ensuring that 20% of the arbitrators it suggests

⁷² *Id.*

⁷³ *Id.* (citing Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (Princeton Univ. Press 2017) and James Surowiecki, *The Wisdom of Crowds* (Anchor Books 2004)).

⁷⁴ *Id.* at 19.

⁷⁵ Laura A. Kaster, *Why and How Corporations Must Act Now to Improve ADR Diversity*, *Corporate Disputes* (Jan.-Mar. 2015).

to the parties are diverse candidates.⁷⁶ Although such initiatives are promising, the role of the parties is just as important: it is incumbent upon law firms, lawyers, and clients to select diverse neutrals.

III. Survey: Methodology and Findings

The task force's survey began with the creation of two questionnaires both drafted by the task force.⁷⁷ The first questionnaire was directed to federal and state judges sitting throughout New York. This questionnaire was designed to be an observational study that asked judges to record the presence of speaking counsel by gender in all matters in their courtrooms occurring between approximately September 1, 2016 and December 31, 2016. The second questionnaire was directed to various ADR providers asking them to record by gender both the appearance of counsel in each proceeding and the gender of the neutral conducting the proceeding.

The focus of the first survey was to track the participation of women as lead counsel and trial attorneys in civil and criminal litigation. While there have been many anecdotal studies about women attorneys' presence in the courtroom, the task force believes its survey to be the first study based on actual courtroom observations by the bench. The study surveyed proceedings in New York State at each level of court—trial, intermediate, and court of last resort—in both state and federal courts. Approximately 2,800 questionnaires were completed and returned. The cooperation of the judges and courthouse staff was unprecedented and remarkable: New York's Court of Appeals, all four Appellate Divisions, and Commercial Divisions in Supreme Courts in counties from Suffolk to Onondaga to Erie participated. The United States Court of Appeals for the Second Circuit provided assistance compiling publicly available statistics and survey responses were provided by nine Southern District of New York Judges (including the Chief Judge) and Magistrate Judges and District and Magistrate Judges from the Western District of New York.

The results of the survey are striking:⁷⁸

- Female attorneys represented just 25.2% of the attorneys appearing in commercial and criminal cases in courtrooms across New York.
- Female attorneys accounted for 24.9% of lead counsel roles and 27.6% of additional counsel roles.
- The most striking disparity in women's participation appeared in

⁷⁶ Ben Hancock, *ADR Business Wakes Up to Glaring Deficit of Diversity*, Law.com (Oct. 5, 2016).

⁷⁷ Each questionnaire is attached hereto as [Appendix A](#).

⁷⁸ Survey results in chart format broken down by Court are attached hereto as [Appendix B](#).

complex commercial cases: women’s representation as lead counsel shrank from 31.6% in one-party cases to 26.4% in two-party cases to 24.8% in three-to-four-party cases and to 19.5% in cases involving five or more parties. In short, the more complex the case, the less likely that a woman appeared as lead counsel.

The percentage of female attorneys appearing in court was nearly identical at the trial level (24.7%) to at the appellate level (25.2%). The problem is slightly worse downstate (24.8%) than upstate (26.2%).⁷⁹

In New York federal courts, female attorneys made up 24.4% of all attorneys who appeared in court, with 23.1% holding the position of lead counsel. In New York State courts, women made up 26.9% of attorneys appearing in court and 26.8% of attorneys in the position of lead counsel.

One bright spot is public interest law (mainly criminal matters), where female lawyers accounted for 38.2% of lead counsel and 30.9% of attorneys overall. However, in private practice (including both civil and criminal matters), female lawyers only accounted for 19.4% of lead counsel. In sum, the low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil, ex parte applications and multi-party matters. Set forth below is the breakout in all courtrooms—state, federal, regional, and civil/criminal:

A. Women Litigators in New York State Courts

The view from the New York Court of Appeals is particularly interesting. The statistics collected from that Court showed real progress—perhaps as a result of female leadership of that court, now headed by Chief Judge Janet DiFiore and past Chief Judge Judith S. Kaye, as well as the fact that the Court has had a majority of women judges for more than ten years. Of a total of 137 attorneys appearing in that Court, female attorneys made up 39.4%. This percentage held whether the females were lead or second chair counsels. In cases in which at least one party was represented by a public sector office, women attorneys were in the majority at 51.3%. Of the appearances in civil cases, 30% were by female attorneys. The figure in criminal cases was even higher—female attorneys made up 46.8% of all attorneys appearing in those cases.

Similarly, female attorneys in the public sector were well represented in the Appellate Divisions, approaching the 50% mark in the Second Department. The picture

⁷⁹ The task force recognizes that the statistics reported herein may have been affected by which Judges agreed to participate in the survey and other selection bias inherent in any such type of survey. It thus is possible that there is a wider gap between the numbers of women versus men who have speaking roles in courtrooms throughout New York State than the gap demonstrated by the task force’s study.

was not as strong in the upstate Appellate Divisions, where, even in cases involving a public entity, women were less well represented (32.6% in the Third Department and 35.3% in the Fourth Department). Women in the private sector in Third Department cases fared worst of all, where they represented 18% of attorneys in the lead and only 12.5% of attorneys in any capacity versus 36.18% of private sector attorneys in the First Department (for civil cases).

Set forth below are some standout figures by county:

- Female public sector attorneys in Erie County represented a whopping 88.9% of all appearances, although the number (n=9) was small.
- Female attorneys in Suffolk County were in the lead position just 13.5% of the time.
- Although the one public sector attorney in Onondaga County during the study period was female, in private sector cases, women represented just 22.2% of all attorneys appearing in state court in that county.

While not studied in every court, the First Department further broke down its statistics for commercial cases and the results are not encouraging. Of the 148 civil cases heard by the First Department during the survey period for which a woman argued or was lead counsel, only 22 of those cases were commercial disputes, which means that women attorneys argued or were lead counsel in only 5.37% of commercial appeals compared to 36.18% for all civil appeals. Such disparity suggests that women are not appearing as lead counsel for commercial cases, which often involve high stakes business-related issues and large dollar amounts.

B. Women Litigators in Federal Courts

Women are not as well represented in the United States Court of Appeals for the Second Circuit as they are in the New York Court of Appeals. Of the 568 attorneys appearing before the Second Circuit during the survey period, 20.6% were female—again, this number held regardless of whether the women were in the lead or in supporting roles. Women made up 35.8% of public sector attorneys but just 13.8% of the private attorneys in that court. Women represented a higher percentage of the attorneys in criminal cases (28.1%) than in civil cases (17.5%).

The Southern District of New York's percentages largely mirrored the sample overall, with women representing 26.1% of the 1627 attorneys appearing in the courtrooms of judges who participated in the survey—24.7% in the role of lead counsel. One anomaly in the Southern District of New York was in the courtroom of the Honorable Deborah A. Batts, where women represented 46.2% of the attorneys and 45.8% of the lead attorneys.

The figures from the Western District of New York fell somewhat below those from the Southern District of New York, again mirroring the slightly lower percentages of female attorneys' participation upstate in state courts as well: 22.9% of the attorneys appearing in the participating Western District of New York cases were women, and 20.8% of the lead attorneys were women.

Overall, women did slightly better in state courts (26.9% of appearances and 25.3% of lead appearances), than in federal courts (24.4% of appearances and 23.1% in the lead).

C. Women Litigators: Criminal & Civil; Private & Public

As has been noted in other areas, female attorneys are better represented among lawyers in criminal cases (30.9%) than in civil cases (23.2%), regardless of trial or appellate court or state or federal court. The difference is explained almost entirely by the difference between female attorneys in the private sector (22.5%) compared to female attorneys in the public sector, particularly with respect to prosecutors and state or federal legal aid offices, which provide services to indigent defendants (totaling 37.0%).

Similarly, women made up 39.6% of the attorneys representing public entities—such as the state or federal government but just 18.5% of lawyers representing private parties in civil litigation.

Overall, female attorneys were almost twice as likely to represent parties in the public sector (38.2% of the attorneys in the sample) than private litigants (19.4%).

Across the full sample, women made up 24.9% of lead counsel and 27.6% of additional counsel.

All these survey findings point to the same conclusion: female attorneys in speaking roles in court account for just about a quarter of counsel who appear in state and federal courts in New York. The lack of women attorneys with speaking roles in court is widespread across different types of cases, varying locations, and at all levels of courts.⁸⁰

⁸⁰ The survey did not include family or housing courts. Accordingly, the percentage of women in speaking roles who appear in those courts may be higher, especially in family court as that area of the law tends to have a greater percentage of women practitioners. *See Vivia Chen, Do Women Really Choose the Pink Ghetto?: Are women opting for those lower-paying practices or is there an invisible hand that steers them there?*, *The American Lawyer* (Apr. 26, 2017) <http://www.americanlawyer.com/id=1202784558726>.

D. Women in Alternative Dispute Resolution

The view from the world of ADR is slightly more favorable to women, although more progress is needed. Two leading ADR providers gathered statistics on the proceedings conducted by their neutrals. In a sample size of 589 cases, women were selected as arbitrators 26.8% of the time and selected as mediators about half the time (50.2%). In a small sample size of two cases, women provided 50% of the neutral analyses but they were not chosen as court referees in either of those two cases.

Data from another major ADR provider revealed that women arbitrators comprised between 15-25% of all appointments for both domestic and foreign arbitrations.

IV. Going Forward: Suggested Solutions

The first step in correcting a problem is to identify it. To do so, as noted by this report and the ALM Intelligence study referenced above in its “Gender Diversity Best Practices Checklist”—the metrics component—firms need data.⁸¹ Regular collection and review of data keeps the “problem” front and center and ideally acts as a reminder of what needs to be done. Suggesting solutions, such as insisting within law firms that women have significant roles on trial teams or empowering female attorneys to seek out advancement opportunities for themselves, is easy to do. Implementing these solutions is more challenging.⁸²

Litigation Context

A. Women’s Initiatives

Many law firms have started Women’s Initiatives designed to provide female attorneys with the tools they need to cultivate and obtain opportunities for themselves and to place themselves in a position within their firms to gain trial and courtroom experience. The success of these initiatives depends on “buy in” not only from all female attorneys, but also from all partners. Data supports the fact that the most successful

⁸¹ Daniella Isaacson, ALM Intelligence, *Where Do We Go From Here?: Big Law’s Struggle With Recruiting and Retaining Female Talent* (Apr. 2017) at 12; see also Meghan Tribe, *Study Shows Gender Diversity Varies Widely Across Practice Areas*, The Am Law Daily (Apr. 17, 2017) <http://www.americanlawyer.com/id=1202783889472/Study-Shows-Gender-Diversity-Varies-Widely-Across-Practice-Areas>.

⁸² A summary of the suggestions contained in the report are attached hereto as [Appendix C](#). Many of the suggestions for law firms contained in this report may be more applicable to large firms than small or mid-size firms but hopefully are sufficiently broad based to provide guidance for all law firms.

Women’s Initiative programs depend on the support from all partners and associates.⁸³

One suggestion is that leaders in law firms—whether male or female—take on two different roles. The first is to mentor female attorneys with an emphasis on the mentor discussing various ways in which the female attorney can gain courtroom experience and eventually become a leader in the firm. The second is to provide “hands on” experience to the female attorneys at the firm by assigning them to work with a partner who will not only see that they go to court, but that they also participate in the courtroom proceedings. It is not enough simply to bring an associate to court and have her sit at counsel table while the partner argues the matter. Female associates need opportunities to argue the motion under the supervision of the partner.⁸⁴

Similarly, instead of only preparing an outline for a direct examination of a witness or preparing exhibits to be used during a direct examination, the associate also should conduct the direct examination under the supervision of the partner. While motions and examinations of witnesses at hearings and trials take place in the courtroom, the same technique also can be applied to preparing the case for trial.

Female attorneys should have the opportunity early in their careers to conduct a deposition—not just prepare the outline for a partner. The same is true of defending a deposition. In public sector offices—such as the Corporation Counsel of the City of New York, the Attorney General of the State of New York, District Attorney’s Offices and U.S. Attorney’s Offices—junior female attorneys have such opportunities early in their careers and on a regular basis. They thus are able to learn hands-on courtroom skills, which they then can take into the private sector after government service.

Firm management, and in particular litigation department heads, also should be educated on how to mentor and guide female attorneys. They should also be encouraged to proactively ensure that women are part of the litigation team and that women on the litigation team are given responsibilities that allow them to appear and speak in court. Formal training and education in courtroom skills should be encouraged and made a part of the law firm initiative. Educational sessions should include mock depositions, oral arguments, and trial skills. These sessions should be available to all junior attorneys, but the firm’s Women’s Initiative should make a special effort to encourage female attorneys to participate in these sessions.

⁸³ See Victoria Pynchon, *5 Ways to Ensure Your Women’s Initiative Succeeds*, <http://www.forbes.com/sites/shenegotiates/2012/05/14/5-ways-to-ensure-your-womens-initiative-succeeds/#20a31614ff92> (May 14, 2012) (citing Lauren Stiller Rikle, *Ending the Gauntlet, Removing Barriers to Women’s Success in the Law* (2006)).

⁸⁴ Understandably, all partners, especially women partners, are under tremendous pressures themselves on any given matter. As a result, delegating substantive work to junior attorneys may not always be feasible.

Data also has shown that female attorneys in the private sector may not be effective in seeking out or obtaining courtroom opportunities for themselves within their firm culture. It is important that more experienced attorneys help female attorneys learn how to put themselves in a position to obtain courtroom opportunities. This can be accomplished, at least in part, in two ways. First, female attorneys from within and outside the firm should be recruited to speak to female attorneys and explain how the female attorney should put herself in a position to obtain opportunities to appear in court. Second, women from the business world should also be invited to speak at Women's Initiative meetings and explain how they have achieved success in their worlds and how they obtained opportunities. These are skills that cross various professions and should not be ignored.

Partners in the firms need to understand that increasing the number of women in leadership roles in their firms is a benefit, not only to the younger women in the firm but to them as well. Education and training of all firm partners is the key to the success of any Women's Initiative.

A firm's Women's Initiative also should provide a forum to address other concerns of the firm's female attorneys. This should not be considered a forum for "carping," but for making and taking concrete and constructive steps to show and assist female attorneys in learning how to do what is needed to obtain opportunities in the courtroom and take a leadership role in the litigation of their cases.

B. Formal Programs Focused on Lead Roles in Court and Discovery

Another suggestion is that law firms establish a formal program through which management or heads of litigation departments seek out junior female associates on a quarterly or semi-annual basis and provide them with the opportunity to participate in a program that enables them to obtain the courtroom and pre-trial experiences outlined above. The establishment of a formal program sends an important signal within a firm that management is committed to providing women with substantive courtroom experience early in their careers.

Firm and department management, of course, would need to monitor the success of such a program to determine whether it is achieving the goals of training women and retaining them at the firm. One possible monitoring mechanism would be to track on a monthly or quarterly basis the gender of those attorneys who have taken or defended a deposition, argued a motion, conducted a hearing or a trial during that period. The resulting numbers then would be helpful to the firm in assessing whether its program was effective. The firm also should consider ways in which the program could be improved and expanded. Management and firm leaders should be encouraged to identify, hire, and retain female attorneys within their firms. Needless to say, promoting women to department heads and firm management is one way to achieve these goals. Women are

now significantly underrepresented in both capacities.⁸⁵

C. Efforts to Provide Other Speaking Opportunities for Women

In addition to law firms assigning female litigators to internal and external speaking opportunities, such as educational programs in the litigation department or speaking at a client continuing legal education program, firms should encourage involvement with bar associations and other civic or industry groups that regularly provide speaking opportunities.⁸⁶ These opportunities allow junior lawyers to practice their public speaking when a client's fate and money are not at risk. Such speaking opportunities also help junior attorneys gain confidence, credentials, and contacts. In addition, bar associations at all levels present the prospect for leadership roles from tasks as basic as running a committee meeting to becoming a section or overall bar association leader. These opportunities can be instrumental to the lawyer's growth, development, and reputation.

D. Sponsorship

In addition to having an internal or external mentor, an ABA publication has noted that, although law firms talk a lot about the importance of mentoring and how to make busy partners better at it, they spend very little time discussing the importance of, and need for, sponsors:

Mentors are counselors who give career advice and provide suggestions on how to navigate certain situations. Sponsors can do everything that mentors do but also have the stature and gravitas to affect whether associates make partner. They wield their influence to further junior lawyers' careers by calling in favors, bring attention to the associates' successes and help them cultivate important relationships with other influential lawyers and clients—all of which are absolutely essential in law firms. **Every sponsor can be a mentor, but not every mentor can be a sponsor.**

Sponsorship is inherent in the legal profession's origins as a craft learned by apprenticeship. For generations, junior lawyers learned the practice of law from senior attorneys who, over time, gave them

⁸⁵ Lauren Stiller Rikleen, *Women Lawyers Continue To Lag Behind Male Colleagues*, Report of the Ninth Annual National Association of Women Lawyers National Survey On Retention And Promotion Of Women In Law Firms (2015).

⁸⁶ It is noteworthy that, as of January 1, 2017, women comprise nearly 36% of the New York State Bar Association's membership but comprise only 24% of the Commercial and Federal Litigation Section's membership.

more responsibility and eventually direct access and exposure to clients. These senior lawyers also sponsored their protégés during the partnership election process. Certain aspects of traditional legal practice are no longer feasible today, so firms have created formal training and mentoring programs to fill the void. While these programs may be effective, there is no substitute for learning at the heels of an experienced, influential lawyer. This was true during the apprenticeship days and remains so today.

Because the partnership election process is opaque and potentially highly political, having a sponsor is essential. Viable candidates need someone to vouch for their legal acumen while simultaneously articulating the business case for promotion . . .⁸⁷

As Sylvia Ann Hewlett, founding president of the Center for Talent Innovation (formerly Center for Work-Life Policy), explained in a 2011 Harvard Business Review article “sponsors may advise or steer [their sponsorees] but their chief role is to develop [them] as leader[s]”⁸⁸ and “‘use[] chips on behalf of protégés’ and ‘advocates for promotions.’”⁸⁹ “Sponsors advocate on their protégés’ behalf, connecting them to important players and assignments. In doing so, they make themselves look good. And precisely because sponsors go out on a limb, they expect stellar performance and loyalty.”⁹⁰

Recommendations for successful sponsorship programs include the following activities by a sponsor for his or her sponsoree:

- Expand the sponsoree’s perception of what she can do.
- Connect the sponsoree with the firm’s senior leaders.

⁸⁷ Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine (Jan./Feb. 2013) (http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html) (emphasis added).

⁸⁸ Sylvia Ann Hewlett, *The Right Way to Find a Career Sponsor*, Harv. Bus. Rev. (Sept. 11, 2013) <https://hbr.org/2013/09/the-right-way-to-find-a-career-sponsor>.

⁸⁹ Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine (Jan./Feb. 2013) (http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html).

⁹⁰ Sylvia Ann Hewlett, *Mentors are Good. Sponsors Are Better*, N.Y. Times, Apr. 13, 2013, <http://www.nytimes.com/2013/04/14/jobs/sponsors-seen-as-crucial-for-womens-career-advancement.html>.

- Promote the sponsoree’s visibility within the firm.
- Connect the sponsoree to career advancement opportunities.
- Advise the sponsoree on how to look and act the part.
- Facilitate external contacts.
- Provide career advice.⁹¹

Of course, given attorneys’ and firms’ varying sizes and limited time and resources, firms should consider what works best for that firm and that one size does not fit all.

E. Efforts by the Judiciary

Members of the judiciary also must be committed to ensuring that female attorneys have equal opportunities to participate in the courtroom. When a judge notices that a female associate who has prepared the papers and is most familiar with the case is not arguing the motion, that judge should consider addressing questions to the associate. If this type of exchange were to happen repeatedly—i.e., that the judge expects the person who is most familiar with the issue take a lead or, at least, some speaking role—then partners might be encouraged to provide this opportunity to the female associate before the judge does it for them.

All judges, regardless of gender, also should be encouraged to appoint more women as lead counsel in class actions, and as special masters, referees, receivers, or mediators. Some judges have insisted that they will not appoint a firm to a plaintiffs’ management committee unless there is at least one woman on the team. Other judges have issued orders, referred to earlier in this report, that if a female, minority, or junior associate is likely to argue a motion, the court may be more likely to grant a request for oral argument of that motion. Many judges are willing to permit two lawyers to argue for one party – perhaps splitting the issues to be argued. In that way, a senior attorney might argue one aspect of the motion, and a more junior attorney another aspect. Judges have suggested that it might be wise to alert the court in advance if two attorneys plan to argue the motion to ensure that this practice is acceptable to the judge. Judges should be encouraged to amend their individual rules to encourage attorneys to take advantage of these courtroom opportunities. All judges should be encouraged to promote and support women in obtaining speaking and leadership roles in the courtroom. All judges and lawyers should consider participating in panels and roundtable discussions to address these issues and both male and female attorneys should be invited and encouraged to attend such events.

⁹¹ Kenneth O.C. Imo, *Mentors Are Good, Sponsors Are Better*, American Bar Association Law Practice Magazine, (Jan./Feb. 2013) (http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/mentors-are-good-sponsors-are-better.html) (emphasis added).

F. Efforts by Clients

Clients also can combat the gender disparity in courtrooms. Insistence on diverse litigation teams is a growing trend across corporate America. Why should corporate clients push for diverse trial teams? Because it is to their advantage to do so. According to Michael Dillon, general counsel for Adobe Systems, Inc., “it makes sense to have a diverse organization that can meet the needs of diverse customers and business partners in several countries” and diversity makes an organization “resilient.”⁹²

A diverse litigation team also can favorably impact the outcome of a trial. A team rich in various life experiences and perspectives may be more likely to produce a comprehensive and balanced assessment of information and strategy.⁹³ A diverse team is also better equipped to collectively pick up verbal and nonverbal cues at trial as well as “read” witnesses, jurors and judges with greater insight and precision.⁹⁴

Additionally, the context surrounding a trial—including the venue, case type, and courtroom environment—can affect how jurors perceive attorneys and ultimately influence the jury’s verdict.⁹⁵ Consciously or not, jurors assess attorney “[p]ersonality, attractiveness, emotionality, and presentation style” when deciding whether they like the attorney, will take him or her seriously, or can relate to his or her persona and arguments.⁹⁶ Because women stereotypically convey different attributes than men, a female attorney actively involved in a trial may win over a juror who was unable to connect with male attorneys on the same litigation team.⁹⁷ Accordingly, a team with diverse voices may be more capable of communicating in terms that resonate with a broader spectrum of courtroom decision-makers.⁹⁸

⁹² David Ruiz, *HP, Legal Depts. Ask Firms for Diversity, Make Efforts In-House*, Corporate Counsel (Apr. 5, 2017) <http://www.corpcounsel.com/id=1202783051167/Legal-Depts-Ask-Firms-for-Diversity-Make-Efforts-InHouse>.

⁹³ Craig C. Martin & David J. Bradford, *Litigation: Why You Want a Diverse Trial Team*, INSIDE COUNSEL, Oct. 14, 2010, <http://www.insidecounsel.com/2010/10/14/litigation-why-you-want-a-diverse-trial-team?slreturn=1495741834>.

⁹⁴ *Id.*

⁹⁵ Ann T. Greeley & Karen L. Hirschman, “*Trial Teams and the Power of Diversity*,” at 3 (2012).

⁹⁶ *Id.* at 5.

⁹⁷ *Id.*

⁹⁸ Craig C. Martin & David J. Bradford, *Litigation: Why You Want a Diverse Trial Team*, Inside Counsel (Oct. 14, 2010) <http://www.insidecounsel.com/2010/10/14/litigation-why-you-want-a-diverse-trial-team?slreturn=1495741834>.

Further, a diverse trial team can increase the power of the team’s message. A diverse composition indirectly suggests that the truth of the facts and the principles on which the case is based have been “fairly presented and are universal in their message.”⁹⁹ This creates a cohesive account of events and theory of the case, which would be difficult for an opposing party to dismiss as representing only a narrow slice of society.¹⁰⁰

The clear advantages of diverse trial teams are leading corporate clients to take direct and specific measures to ensure that their legal matters are handled by diverse teams of attorneys. General Counsels are beginning to press their outside firms to diversify litigation teams in terms of gender at all levels of seniority.¹⁰¹ Many corporate clients often directly state that they expect their matters will be handled by both men and women.¹⁰²

For example, in 2017, General Counsel for HP, Inc. implemented a policy requiring “at least one diverse firm relationship partner, regularly engaged with HP on billing and staffing issues” or “at least one woman and one racially/ethnically diverse attorney, each performing or managing at least 10% of the billable hours worked on HP matters.”¹⁰³ The policy reserves for HP the right to withhold up to ten percent of all amounts invoiced to firms failing to meet these diverse staffing requirements.¹⁰⁴ Oracle Corporation has also implemented an outside retention policy “designed to eliminate law firm excuses for not assigning women and minority attorneys to legal matters.”¹⁰⁵ Oracle asks its outside firms to actively promote and recruit women; ensure that the first person with appropriate experience considered for assignment to a case is a woman or a minority; and annually report to Oracle the number and percentage of women and

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse*, New York Times (Apr. 2, 2017) https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?_r=1.

¹⁰² Ann T. Greeley & Karen L. Hirschman, “*Trial Teams and the Power of Diversity*,” at 2 (2012).

¹⁰³ Jennifer Williams-Alvarez, *HP, Mandating Diversity, Will Withhold Fees From Some Firm*, Corporate Counsel (Feb. 13, 2017) <http://www.corpcounsel.com/id=1202779113475/HP-Mandating-Diversity-Will-Withhold-Fees-From-Some-Firms>.

¹⁰⁴ *Id.*

¹⁰⁵ *Hiring Women and Minority Attorneys – One General Counsel’s Perspective*, <http://corporate.findlaw.com/human-resources/hiring-women-and-minority-attorneys-a-general-counsel-s-perspec.html#sthash.HNE30g5o.dpuf> (last visited June 1, 2017).

minority partners in the firm.¹⁰⁶ Similarly, Facebook, Inc. now requires that women and ethnic minorities account for at least thirty-three percent of law firm teams working on its matters.¹⁰⁷ Under Facebook’s policy, the firms also must show that they “actively identify and create clear and measurable leadership opportunities for women and minorities” when they represent Facebook in legal matters.¹⁰⁸

Corporate clients can follow the examples set by their peers to aid the effort to ensure that female attorneys have equal opportunities to participate in all aspects of litigation, including speaking roles in the courtroom.

G. ADR Context

The first step to solving any issue is to recognize and start a dialogue.

Accordingly, the dialogue that has begun amongst ADR providers and professionals involved in the ADR process is encouraging. One important step that has been undertaken is the Equal Representation in Arbitration pledge—attested to by a broad group of ADR stakeholders, including counsel, arbitrators, corporate representatives, academics, and others—to encourage the development and selection of qualified female arbitrators.¹⁰⁹ This pledge outlines simple measures including having a fair representation of women on lists of potential arbitrators and tribunal chairs.¹¹⁰ Other important steps to encourage diverse neutrals have been taken by leading ADR providers, including diversity commitments as described above.

Finally, those who select neutrals must make every effort to eliminate unconscious biases that effect such selection. They also must continually remember to recognize the benefit of diversity in the composition of neutrals that lead to better and more accurate results. If corporate counsel, together with outside counsel, make the same efforts to diversify the selection of neutrals, as they do when hiring outside counsel, then there may be a real change in the percentage of women selected as neutrals in all types of cases –

¹⁰⁶ *Id.*

¹⁰⁷ Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse*, New York Times (Apr. 2, 2017) https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?_r=1.

¹⁰⁸ *Id.* Some corporations have gone further, even firing law firms because they are run by “old white men.” Laura Colby, *Law Firms Risk Losing Corporate Work Unless they Promote Women*, Bloomberg (Dec. 9, 2016) <https://www.bloomberg.com/news/articles/2016-12-09/corporate-america-pressures-law-firms-to-promote-minorities>.

¹⁰⁹ *See Take the Pledge*, Equal Representation in Arbitration, <http://www.arbitrationpledge.com/pledge> (last visited Mar. 31, 2017).

¹¹⁰ *Id.*

including in particularly large commercial disputes.

V. Conclusion

Unfortunately, the gender gap in the courtroom and in ADR has persisted even decades after women comprised half of law school graduates. The federal and state courts in New York are not exempt from this phenomenon. There is much more that law firms, corporate counsel, and judges can do to help close the gap. Similarly, the limited number of women in ADR serving as neutrals and appearing in complex commercial arbitrations is startling. While one size does not fit all, and the solutions will vary within firms and practice areas, the legal profession must take a more proactive role to assure that female attorneys achieve their equal day in court and in ADR.

The active dialogue that continues today is a promising step in the right direction. It is the task force's hope that this dialogue—and the efforts of all stakeholders in the legal process—will help change the quantitative and qualitative role of female lawyers.

Task Force on Women's Initiatives*

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*The task force especially thanks former Section Chair Mark A. Berman, Ganfer & Shore LLP, for his leadership and unwavering support and dedication to the women's initiative and this report. The task force also thanks Section Executive Committee Member Carla M. Miller, Universal Music Group, for her significant contributions to the task force and David Szanto and Lillian Roberts for their invaluable assistance in analyzing the survey data set forth in this report.

APPENDIX A

JUDICIAL FORM FOR TRACKING COURT APPEARANCES

Identify your court (e.g. SDNY, 1st Dep't; 2d Cir; Commercial Div. N.Y. Co) _____

I. *Type of Case*

- A. Trial Court Criminal ___ (for federal court) Civil ___
(please specify subject matter e.g. contract, negligence, employment, securities)
B. Appeal Criminal ___ (for federal court) Civil ___

II. *Type of Proceeding*

- A. Arraignment ___ B. Bail Hearing ___ C. Sentencing ___ (for federal court)
D. Initial Conference ___ E. Status/Compliance Conference
F. Oral Argument on Motion ___ (please specify type of motion e.g. discovery, motion to dismiss, summary judgment, TRO/preliminary injunction, class certification, in limine)
G. Evidentiary Hearing ___ H. Trial ___ I. Post-Trial ___ J. Appellate Argument ___

III. *Number of Parties (total for all sides)*

- A. Two ___ B. Two to Five ___ C. More than Five ___

IV. *Lead Counsel for Plaintiff(s)* (the lawyer who primarily spoke in court)

- | | | |
|-----------------|-----------------|-----------------|
| Plaintiff No. 1 | Plaintiff No. 2 | Plaintiff No. 3 |
| Male ___ | Male ___ | Male ___ |
| Female ___ | Female ___ | Female ___ |
| Public ___ | Public ___ | Public ___ |
| Private ___ | Private ___ | Private ___ |

V. *Lead Counsel for Defendant(s)* (the lawyer who primarily spoke in court)

- | | | |
|-----------------|-----------------|-----------------|
| Defendant No. 1 | Defendant No. 2 | Defendant No. 3 |
| Male ___ | Male ___ | Male ___ |
| Female ___ | Female ___ | Female ___ |
| Public ___ | Public ___ | Public ___ |
| Private ___ | Private ___ | Private ___ |

VI. *Additional Counsel for Plaintiff(s)* (other lawyers at counsel table who did not speak)

- | | | |
|-----------------|-----------------|-----------------|
| Plaintiff No. 1 | Plaintiff No. 2 | Plaintiff No. 3 |
| Male ___ | Male ___ | Male ___ |
| Female ___ | Female ___ | Female ___ |
| Public ___ | Public ___ | Public ___ |
| Private ___ | Private ___ | Private ___ |

VII. *Additional Counsel for Defendant(s)* (other lawyers at counsel table who did not speak)

- | | | |
|-----------------|-----------------|-----------------|
| Defendant No. 1 | Defendant No. 2 | Defendant No. 3 |
| Male ___ | Male ___ | Male ___ |
| Female ___ | Female ___ | Female ___ |
| Public ___ | Public ___ | Public ___ |
| Private ___ | Private ___ | Private ___ |

ADR FORM FOR TRACKING APPEARANCES IN ADR PROCEEDINGS

- I. Is this an arbitration or mediation? _____ If it is a mediation, is it court ordered? ____
- II. Type of Case (please specify) (e.g., commercial, personal injury, real estate, family law)

- III. If there is one neutral, is that person a female? _____
- IV. If there is a panel, (a) how many are party arbitrators and, if so, how many are females? ____
(b) how many are neutrals and, if so, how many are females? ____
(c) is the Chair a female? _____
- V. Assuming the panel members are neutrals, how was the neutral(s) chosen?
1. From a list provided by a neutral organization? _____
2. By the court? _____
3. Agreed upon by parties? _____
4. Two arbitrators selected the third? _____
- VI. Number of Parties (total for all sides) _____
- VII. Amount at issue (apx.) on affirmative case \$_____ Counterclaims, if any \$_____
- VIII. Lead Counsel for Plaintiff(s):
(lawyer who primarily spoke) (other lawyers who did not speak, including local counsel)
Male____ Male ____
Female____ Female ____
Government ____ Government ____
Non-Government____ Non-Government ____
- IX. Lead Counsel for Defendant(s):
(lawyer who primarily spoke) (other lawyers who did not speak, including local counsel)
Male____ Male ____
Female____ Female ____
Government____ Government ____
Non-Government____ Non-Government ____
- X. Was the Plaintiff a female or, if a corporation, was the GC/CEO/CFO a female? _____
- XI. Was the Defendant a female or, if a corporation, was the GC/CEO/CFO female? _____
- XII. Was this your first or a repeat ADR matter for these parties or their counsel? If repeat, please describe the prior proceeding(s) in which you served and at whose behest and whether the proceeding involved the same or a different area of the law.

APPENDIX B

TABLE 1
SUMMARY OF FINDINGS

Category	# Men	# Women	% Women
Total - Sample-wide	3886	1309	25.2%
Trial level -all	1805	592	24.7%
Appeal level - all	1007	340	25.2%
Upstate Courts -all	1154	409	26.2%
Downstate Courts -all	2103	694	24.8%
Federal Courts - all	1890	611	24.4%
State Courts - all	1725	635	26.9%
All Courts - Parties of 1	561	259	31.6%
Parties of 2	2532	910	26.4%
Parties of 3-4	681	224	24.8%
Parties of 5+	587	142	19.5%
All Courts - Lead Counsel	3430	1 135	24.9%
All Courts - Additional Counsel	456	174	27.6%
All Courts - Private Civil Lawyers	1688	384	18.5%

TABLE 2
DETAIL DATA CITED IN REPORT

Category	# Men	# Women	% Women
Total - Sample-wide	3886	1309	25.2%
New York Court of Appeals	83	54	39.4%
Court of Appeals - Public Attorneys	39	41	51.3%
Court of Appeals - Civil Cases	42	18	30.0%
Court of Appeals - Criminal Cases	41	36	46.8%
New York Appellate Divisions			
First Department - Civil Cases		148	5.37% (commercial cases)
Second Department - Public Attorneys	64	63	49.6%
Third Department - Lead Counsel	200	44	18.0%
Third Department - Public Attorneys	31	15	32.6%
Third Department - Private Attorneys	168	24	12.5%
Fourth Department - Public Attorneys	209	114	35.3%
Erie County	190	70	26.9%
Erie County - Public Attorneys	1	8	88.9%
Suffolk County	176	28	13.7%
Onondaga County	95	35	26.9%
Onondaga County - Private Attorneys	14	4	22.2%
United States Court of Appeals for the Second Circuit	451	117	20.6%
Second Circuit - Public Attorneys	102	57	35.8%
Second Circuit - Private Attorneys	338	54	13.8%
Second Circuit - Civil Cases	331	70	17.5%
Second Circuit - Criminal Cases	120	47	28.1%
Southern District of New York	1203	424	26.1%
SONY - Lead Counsel	931	306	24.7%
Western District of New York	236	70	22.9%
WDNY - Lead Counsel	221	58	20.8%
Trial level - all	1805	592	24.7%
Appeal level - all	1007	340	25.2%
Upstate Courts - all	1154	409	26.2%
Downstate Courts - all	2103	694	24.8%

Category	# Men	# Women	% Women
Federal Courts -all	1 890	611	24.4%
Lead Counsel	1595	478	23.1%
State Courts - all	1725	635	26.9%
State Courts - Lead Counsel	1672	613	26.8%
State Courts - Civil Cases	2896	874	23.2%
State Courts - Criminal Cases	628	281	30.9%
State Courts - Public Cases	692	428	38.2%
State Courts - Private Cases	2172	524	19.4%
All Courts - Parties of 1	561	259	31.6%
Parties of 2	2532	910	26.4%
Parties of 3-4	681	224	24.8%
Parties of 5+	587	142	19.5%
All Courts - Lead Counsel	3430	1135	24.9%
All Courts - Additional Counsel	456	174	27.6%
All Courts - Private Civil Lawyers	1688	384	18.5%

APPENDIX C

SUMMARY OF RECOMMENDATIONS

1. The Law Firms

- Women's Initiatives
 - Establish and support strong institutionalized Women's Initiatives with emphasis on the following:
 - Convincing partners to provide speaking opportunities in court and at depositions for junior attorneys
 - Training and education on courtroom skills
 - Leadership training
 - Guest speakers
 - Mentorship programs
- Formal Programs to Ensure Lead Roles in Court and Discovery
 - Establish a formal program through which management or heads of litigation departments ensure that junior associates are provided with speaking opportunities in court and at depositions.
 - Track speaking opportunities in court and at depositions on a quarterly basis
- Promote Outside Speaking Opportunities
 - Provide junior attorneys with internal and external speaking opportunities.
- Sponsorship
 - Establish and support an institutionalized Sponsorship Program.

2. The Judiciary

- Ask junior attorneys to address particular issues before the Court.
- Favor granting oral argument when a junior attorney is scheduled to argue the matter.
- Encourage attorneys who primarily authored the briefs to argue the motions or certain parts of the motions in court.
- Appoint qualified women as lead counsel in class actions and as members of steering committees as well as special masters, referees, receivers, and mediators.
- Include as a court rule that more than one attorney can argue a motion.

3. The Client

- Insist on diverse litigation teams.
- Monitor actual work of diverse team members.
- Impose penalties for failure to have diverse teams or teams where diverse members do not perform significant work on the matter.

4. ADR Context

- **Fair representation of women on lists of potential arbitrators and mediators.**
- Corporate counsel should demand diverse neutrals on matters.
- Stress the benefits of having a diverse panel of decisionmakers for arbitrations.
- Instruct outside counsel to consider diversity when selecting neutrals and monitor such selections.

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
THE OTESAGA, COOPERSTOWN, NEW YORK
JUNE 15-16, 2017**

PRESENT: Members Karina E. Alomar, Alyssa M. Barreiro, Jonathan B. Behrins, Earamichia Brown, Matthew J. Coseo, Norman P. Effman, Margaret J. Finerty, Michael L. Fox, Michael W. Galligan, Sharon Stern Gerstman, Sarah E. Gold, Henry M. Greenberg, Claire P. Gutekunst, Richard M. Gutierrez, Bryan D. Hetherington, Scott M. Karson, Elena DeFio Kean, Stuart J. LaRose, Peter H. Levy, Michael Miller, Steven E. Millon, Domenick Napoletano, Bruce J. Prager, Sandra Rivera, William T. Russell, Jr., Carol A. Sigmond, David H. Tennant, Sherry Levin Wallach.

Guests: James A. Barnes, Donald C. Doerr, Mark S. Gorgos, Brian J. Malkin, Edwina Frances Martin, Thomas E. Schimmerling, Michelle H. Wildgrube, and Lisa M. Yaeger.

Ms. Gerstman presided over the meeting as President of the Association.

1. Ms. Gerstman called the meeting to order, and Jonathan B. Behrins, Norman P. Effman, Margaret J. Finerty, Sarah E. Gold, Richard M. Gutierrez, William T. Tussell, Jr. and Carol A. Sigmond were welcomed as new members of the Executive Committee.
2. Approval of minutes of meeting. The minutes of the March 31, 2017 meeting were accepted as distributed.
3. Consent Calendar.
 - a. Confirmation of Audit Committee appointments.
 - b. Rescission of change of name of Lawyer Assistance Program.

The consent calendar, consisting of the items listed above, was approved by voice vote.

4. Report of the Treasurer. Mr. Karson, in his capacity as Treasurer, updated the Executive Committee with respect to the results of operations for the first four months of 2016. The report was received with thanks.
5. Board Development and Orientation Session. Led by Associate Executive Director Elizabeth Derrico, the committee members participated in a board development session to discuss review Association governance and policy. Ms. Gerstman led a discussion of liaisons' roles in facilitating communication, providing guidance on policy and procedure, and encouraging sections and committees to undertake projects. She asked liaisons to maintain regular contact with their groups, encourage them to submit reports for consideration by the Executive Committee and/or House of Delegates and comment on reports submitted by other groups, and to be mindful of the need for diversity. She outlined the reimbursement policy for liaisons attending section and committee meetings.

Ms. Gerstman also reviewed the responsibilities of Vice Presidents, as set forth in the By-laws, to promote relations with local bars and members in their respective districts. She noted the importance of informing local bar leaders, including those of minority and specialty bars, of Association initiatives and encouraged them to advise the Association of local bar concerns.

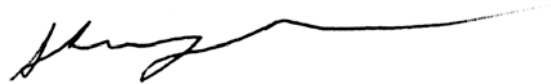
6. Report of Lawyer Assistance Committee. Lisa M. Yaeger, the committee's chair, together with committee secretary Thomas E. Schimmerling, presented an informational report reviewing the committee's and the Program's activities during the prior year. The report was received with thanks. The committee then presented an award to Claire P. Gutekunst for her support of the Program during his presidency.
8. Report of staff leadership. Pamela McDevitt, Executive Director, Elizabeth Derrico, Associate Executive Director, and Jason Nagel, Managing Director of IT Services, highlighted staff efforts with respect to staff changes, enhancement of non-dues revenue, technology, and membership initiatives. The report was received with thanks.
9. Report and recommendation of Committee on Committees. Donald C. Doerr, chair of the committee, reviewed the committee's report and recommendations with respect to the operation of 16 committees. After discussion, motions were adopted with respect to the following:
 - a) A motion was adopted to approve the recommendation to discharge the Task Force on Gun Violence, with the understanding that the President will identify another Association entity to address these issues.
 - b) A motion was adopted to approve the recommendation to discharge the Special Committee on Re-Entry.
 - c) A motion was adopted to approve the recommendation to discharge the Committee on Youth Courts.
 - d) A motion was adopted to approve the remaining recommendations contained in the report.In addition, Ms. Gerstman asked the committee to consider the development of guidelines for members' service on committees.
10. Proposal to create a Committee on Transportation. Ms. Gerstman outlined a proposal to create a Committee on Transportation to address issues relating to regulation, technology and infrastructure. She noted that the Association does not have an existing section or committee that addresses these topics. After discussion, a motion was adopted to approve the creation of the committee. A mission statement will be prepared for approval by the Executive Committee.
11. Report of President. Ms. Gerstman highlighted the information contained in her printed report, a copy of which is appended to these minutes.
12. Report re legislative activities. In her capacity as chair of the Committee on legislative Policy, Ms. Rivera updated the Executive Committee on the 2016 state legislative ses-

sion, particularly with respect to the Association's legislative priorities. Special Counsel Richard Rifkin updated the Executive Committee with respect to the Association's Federal legislative activities. The report was received with thanks.

13. Report and recommendations of Committee on the New York State Constitution. In his capacity as chair of the committee, Mr. Greenberg reviewed the committee's report on whether to support the holding of a constitutional convention, noting the arguments both for and against a convention and outlining the committee's reasoning for support. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
14. Report and recommendations of Environmental and Energy Law Section. In her capacity as Executive Committee liaison to the section, Ms. Rivera outlined the section's report with recommendations as to steps New York State might take to address climate change. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
15. Report of Committee on Continuing Legal Education. James A. Barnes, chair of the committee, together with Katherine Suchocki, Senior Director of Continuing Legal Education, outlined initiatives the committee is pursuing to develop innovative products, improve marketing, and utilize new technology. The report was received with thanks. In addition, Ms. Gerstman thanked immediate past committee chair Ellen G. Makofsky for her service as chair of the committee during the past year and her work in ensuring a smooth transition.
16. Report re public interest pilot membership program. In his capacity as a member of the Committee on Membership, Mr. Hetherington, together with committee member Edwina Frances Martin, reported on the progress of the reduced dues category for public interest attorneys pilot project. They noted that a number of providers have agreed to participate and that they are trying to enlist the support of the three largest legal services providers. The report was received with thanks.
17. Report of Committee on Membership. Committee vice chair Michelle H. Wildgrube updated the Executive Committee on recruitment campaigns aimed at solo/small firm lawyers and efforts aimed at younger lawyers, with a focus on personal outreach. The committee is conducting "road shows" in several counties. She encouraged members of the Executive Committee to work collaboratively with the Membership Committee in these efforts. The report was received with thanks.
18. Proposal to create a Committee on Cannabis Law. Brian J. Malkin, chair of the Food, Drug and Cosmetic Law Section, outlined a proposal to create a committee to address issues surrounding the use of cannabis products, noting that these issues affect multiple Association sections. After discussion, a motion was adopted to approve the creation of a committee, subject to the development of a name and stated purpose to be approved by the Executive Committee.

19. New Business.
- a. Committee appointment process. Ms. Gerstman observed that members of the Executive Committee had been copied on a letter raising concerns about the rotation of members from a committee and sought input from members as to a response. After discussion, Ms. Gerstman thanked the members for their recommendations.
 - b. Letter regarding First Department Presiding Justice. Ms. Gerstman reported that the Association had been asked to sign a letter to the Governor requesting the retroactive designation of Hon. Peter Tom as Presiding Justice of the Appellate Division, First Department. After discussion, it was agreed that Ms. Gerstman will decline the request.
20. Date and place of next meeting. The next meeting of the Executive Committee will be held on Friday, November 3, 2017 at the Bar Center in Albany.
21. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE
CONFERENCE CALL MEETING
AUGUST 22, 2017**

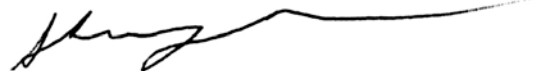
Members Participating: Karina E. Alomar, Alyssa M. Barreiro, Matthew R. Coseo, Norman P. Effman, Michael L. Fox, Sharon Stern Gerstman, Sarah E. Gold, Taa R. Grays, Claire P. Gutekunst, Richard M. Gutierrez, Andre R. Jaglom, Scott M. Karson, Elena DeFio Kean, Sherry Levin Wallach, Peter H. Levy, Michael Miller, Domenick Napoletano, Sandra Rivera, Carol A. Sigmond, David H. Tennant.

Guests: Hon. Denise A. Hartman, Cheryl F. Korman, Timothy P. Murphy.

Ms. Gerstman presided as President of the Association.

1. Report and recommendations of Committee on Courts of Appellate Jurisdiction. Cheryl F. Korman and Timothy P. Murphy, co-chairs of the Committee on Courts of Appellate Jurisdiction, together with committee member Denise A. Hartman, outlined the committee's comments on proposed uniform rules of the Appellate Division for submission to the Office of Court Administration. After discussion, a motion was adopted to approve the report and recommendations for submission as the comments of the Association.
2. Passing of chair of Corporate Counsel Section. Ms. Gerstman reported that Jana S. Behe, chair of the Corporate Counsel Section, had passed away suddenly on August 19. Information concerning visitation and memorial services would be circulated to the Executive Committee.
3. Adjournment. There being no further business to come before the Executive Committee, the meeting was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary