

Submitting Testimony



NEW YORK STATE BAR ASSOCIATION

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Testimony

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Joint Legislative Public Hearing
on the

Proposed 2015-16 Public Protection Budget

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I am Glenn Lau-Kee, President of the New York State Bar Association, the largest voluntary state bar association in the nation. On behalf of our 74,000 members, I thank you for the opportunity to submit testimony regarding the Unified Court System's budget proposal and to address some related issues of importance to both the public and the legal profession.

The New York State Bar Association, with members skilled in all disciplines of the law, is the statewide voice of the profession and an advocate for the public. Our members are involved in every aspect of the legal system, enabling us to speak from a broad and balanced perspective. We hope you will find our comments constructive as you face the challenges of this budget cycle.

BUDGET OF THE UNIFIED COURT SYSTEM

New York's courts adjudicate millions of disputes, both great and small, and guarantee a "day in court" to all people, including the weak, the poor and the unpopular, as well as those who rely on our courts to resolve their business and commercial disputes, which is important to the state's economy and to ensuring that New York continues to be the business, financial and legal center of the world. The courts are also central to our criminal justice system and matters involving family relationships. In short, the effective operation of the court system is crucial to maintaining an orderly society.

New York's judicial branch is recognized as one of the largest and busiest court systems, not only in the United States, but in the world. We should be proud of its ability to hear and solve so many cases in so many different areas of the law.

2014-15 JUDICIARY BUDGET REQUEST

The Judiciary budget currently seeks cash funding of \$1.86 billion for General Fund State Operations to support court operations.

The State Bar supports funding that would provide for the newly created Family and City Court judges, maintain full operation of courthouses, and allow the courts to fill critical positions needed to provide service to the public, including clerks and court officers.

A primary concern of the State Bar in recent years has been the budget cuts that have resulted in the Judiciary's inability to keep courtrooms open beyond 4:30 pm.

We recognize that keeping courtrooms open later necessarily requires some overtime costs. However, during trials and other courtroom proceedings, there are significant and detrimental costs, especially to those participating in these proceedings resulting from closing the courtroom at 4:30 pm. According to the Office of Court Administration, the budget requested by the Judiciary would provide the resources necessary to ensure that appropriate proceedings will not have to be disrupted due to the need to avoid overtime costs.

In addition, the Judiciary's proposal is intended to maintain, and modestly add, to the workforce of the courts to address the impact of recent budget cuts on the operations. Practitioners have often commented on the difficulties in recent years of getting their matters heard because of delays in such routine functions as moving papers and calendaring cases.

The Judiciary reports that in recent years the non-judicial workforce has been reduced by almost 2,000 employees. This reduction has clearly had a significant impact on court operations. In many courthouses there have been insufficient court officers and court clerks to fully staff all courtrooms, with a reduction in security and resulting delays in courtroom proceedings. At times back office staff has been needed to open courtrooms, with the result that back office functions are deferred, causing a growing backlog in the processing of judgments and motions. Consequently, budgets in recent years have had a real impact on court operations – an impact felt by litigants and their counsel, by jurors, and by judges and court personnel.

In sum, we urge funding that addresses the severe impact of previous budget cuts on New York's courts and that ensures adequate access for all to the justice system.

Funding Civil Legal Services

I turn now to an issue that has been among the State Bar's highest priorities for many years: funding for civil legal services. Unfortunately, the need for civil legal services continues to be a significant concern.

It has long been the position of this Association that it is the obligation of the State to provide a stable funding mechanism for civil legal services. To that end, it is important to reiterate our view that New York State should: 1) create a permanent Access to Justice Fund in the State budget; 2) provide for administration and oversight of this Fund by an appropriate office, such as one within the Judiciary; and 3) work with the legal community to ensure that access to justice receives sufficient support, attention and priority. The funding proposals in the Judiciary budget for civil legal services move us in this direction.

Support for IOLA

The State Bar was one of the original advocates for the formation of the Interest on Lawyer Account ("IOLA") Fund. The IOLA Fund, which was created by the Legislature in 1983, is funded by the interest earned on moneys held by attorneys for clients and deposited in interest-bearing accounts at the discretion of attorneys and law firms. The accumulated interest is transferred to the IOLA Fund, where it is used to provide grants to legal service providers around the

state. Concern in recent years has stemmed from the impact that low interest rates have had on the Fund.

For the past five years the Judiciary budget has included a \$15-million allocation for the IOLA Fund to help offset the declining revenues due to low interest rates and the decline in the number of real estate transactions. We support the inclusion of this item in this year's budget proposal and appreciate the Legislature for its recognition of the importance of this funding in previous years. We strongly urge you to continue your support for this appropriation.

Task Force To Expand Access To Civil Legal Services

Chief Judge Jonathan Lippman established the Task Force to Expand Access to Civil Legal Services in New York as part of his efforts to ensure equal justice for all citizens. The Task Force includes judges, lawyers, business executives, and labor leaders from all parts of the state. During the fall the Chief Judge, for the fifth consecutive year, presided over a set of public hearings in each of the state's four Judicial Departments. Members of the State Bar Association participated in these hearings. I was privileged to have personally participated in the hearings held in Albany, Manhattan and Staten Island. These hearings continued to assess the extent and nature of the unmet need for civil

legal services throughout the state in order to help formulate recommendations to bridge the access to justice gap.

At the end of last year, the Task Force released its fifth report on this issue, which, as with the first four reports, provides recommendations to address the need to provide counsel to low-income New Yorkers in civil cases. The findings of the Task Force are clear. The quality of justice in New York's courts is diminished and the rule of law undermined when so many New Yorkers go without legal representation in matters that involve day-to-day life. More than 1.8 million litigants still attempt to navigate the complex civil justice system without a lawyer each year. Representation by counsel is still unavailable for most low-income tenants in eviction cases, parents in child support matters across the state, and borrowers in thousands of consumer credit cases filed in New York City.

Based on preliminary data, the Task Force reports that the funding you have previously provided is making an impact on the civil legal needs of low-income New Yorkers. In its 2014 report, the Task Force report recites the following:

The Task Force also considered that last year the number of unrepresented litigants in civil cases was reduced from 2.3 million to 1.8 million, a 22 percent decrease, and an estimated 2.5 million hours of pro bono work were contributed. Combining that data and considering anecdotal feedback from civil legal services providers, the

Task Force reached a preliminary estimate that, rather than meeting at best 20 percent of the civil legal needs of low-income New Yorkers in matters involving the essentials of life, New York may be meeting close to 30 percent of those needs.

Among the findings of the 2014 Report of Task Force are the following:

- a. A continuing unmet need exists for civil legal services for low-income families and individuals in all areas of the state.
- b. The continuing unmet need for civil legal assistance in all areas of the state has a negative impact on the functioning of the courts, businesses and government, and a profound impact on vulnerable families and individuals.
- c. New initiatives can streamline and enhance client service delivery, help limit the costs of providing civil legal services, and reduce court expenditures and litigation costs for represented parties.
- d. Judiciary civil legal services funding provides substantial economic benefits to New York State and a return of approximately six dollars for every one dollar of funding.

The State Bar applauds the Task Force for continuing the important work to help address the crisis faced by New Yorkers and our court system because of unmet civil legal needs.

Lawyers are committed to doing their share. Pro bono efforts by the bar have been extensive. The bar contributes an estimated two and one-half million hours a year in voluntary pro bono legal services to the indigent. However, these voluntary efforts alone are insufficient to meet the needs of the indigent. Ultimately, society as a whole, acting through its elected leaders, must provide adequate public funding.

In an era when some members of Congress continue to call for the elimination of the Legal Services Corporation, the need for responsible action in New York State is all the more critical. New York must provide a steady source of funding targeted to ensuring legal representation to protect the “essentials of life” – housing, preventing or escaping from domestic violence, access to health care – reliably and quickly. The New York State Bar Association strongly supports the Judiciary’s \$70 million request for civil legal services.

PROPOSED EXECUTIVE BUDGET

ETHICS REFORM

Let me comment briefly on ethics reform contained in Part Q of the Public Protection and General Government Budget, which is being included in the budget discussions.

There has been a good deal of discussion about making more comprehensive the disclosure that legislators should be required to make. The Association’s Task Force on Government Ethics supported enhanced disclosure when it issued its report in 2011. However, the complex question of attorneys having to reveal confidential information is always an issue when this subject is discussed. Let me offer a proposal that the Association believes balances the need for enhanced disclosure while protecting clients from having certain information made public.

And I emphasize that confidentiality is intended to protect the client, not the attorney.

Under the Rules of Professional Conduct, a lawyer must keep confidential information that is privileged or “likely to be embarrassing or detrimental to the client if disclosed.” In certain cases, disclosure is surely detrimental to the client. For example, consider a client not publicly named who is under criminal or disciplinary investigation and who retains a lawyer; or a client who senses spousal difficulties and consults with a lawyer about possible matrimonial actions; or a business whose financial condition is not publicly known and which consults with a bankruptcy attorney. It would be injurious to all of these clients if their having consulted with a lawyer becomes publicly known.

Having noted this, the Association also understands that attorneys are not immune from outside influences. The need for transparency in government requires a balancing of the obligation of client confidentiality against the need for disclosure of a public official’s financial relationships. The Association, thus, begins with the proposition that professionals, including attorneys, be subject to the same disclosure requirements as other officials.

However, for the reasons we have set forth, we note that the need for client confidentiality outweighs the need for public disclosure in certain circumstances. Where confidentiality is paramount, the attorney should be able to file a statement

with an ethics official that does not disclose the name of the client but does reveal the circumstances that require that the client not be identified. The attorney's judgment should not be subject to review, but the statement itself must be truthful. A false statement would be subject to sanction, including discipline for violation of the Rules of Professional Conduct. The statement, like other disclosure documents, should be publicly available. This will enable the public to know of the reasons for non-disclosure and judge as to whether there are legitimate reasons supporting confidentiality. Once a public filing has been made relative to a client's matter, any previous exemption from disclosure should immediately come to an end.

In addition, attorneys should not be subject to disclosing the income received from a particular representation. It is sufficient to disclose that the attorney has received income within the category noted from the client. Again, this avoids intrusion into the attorney-client relationship.

The Association believes that the public is well-served by the participation of attorneys in government. Attorneys understand the law and our constitutional principles, and are commonly exposed to a broad range of business, governmental and societal interests. Their training and experience make them well suited for government service. The proposal the Association has set forth will, hopefully, not discourage lawyers from government service, while, at the same time, requiring public disclosure in all instances except those that might harm their clients.

INDIGENT CRIMINAL DEFENSE

At the request of then Chief Judge Kaye, the Commission on the Future of Indigent Defense Services examined New York State's county-based indigent criminal defense system. The Commission concluded that there is "a crisis in the delivery of defense services to the indigent throughout New York State and that the right to the effective assistance of counsel, guaranteed by both the federal and state constitutions, is not being provided to a large portion of those who are entitled to it." This is an alarming and disheartening finding in a state once lauded for its progressive policies to ensure that people of lesser means are not marginalized.

In 2010, the Office of Indigent Legal Services (the "Office") was created. The State Bar views the creation of the Office as a step in the right direction toward the establishment of an independent indigent defense commission with comprehensive powers to oversee and supervise the operation of New York's public defense system.

Given the important function of the Office – to provide support and relief to localities in fulfilling the mandate of the U.S. and New York constitutions – the Legislature should appropriate the funds necessary to expand the operation of the Office and maximize the funds appropriated from the Indigent Legal Services Fund (ILSF) to county governments.

Hurrell-Harring v. State

Last fall, the state agreed to settle a class-action lawsuit (*Hurrell-Harring v. State*) that accused New York State of failing to provide adequate legal defense for the poor in five counties (Suffolk County on Long Island and four upstate counties: Ontario, Onondaga, Schuyler and Washington). The state agreed to pay for significant improvements in those counties.

Office of Indigent Legal Services Director, Bill Leahy, observed, in reaction to the settlement, that it represents the first time since 1965, when the State delegated to each individual county the State's duty to provide counsel to those who are indigent and entitled to representation, that the State has accepted its responsibility to provide representation in upstate New York.

In this settlement agreement, the State has accepted:

- the responsibility to ensure that each person charged with a crime in these five counties is represented by counsel at arraignment;
- that ILS caseload/workload standards are implemented; that dedicated funding will be provided to implement specific quality improvements; and
- that the state will undertake its best efforts to pay in full for these long-needed changes.

Director Leahy went on to say that there are three requirements for the successful implementation of the settlement in the 5 counties:

- 1) a continuation and strengthening of the cooperative working relationships that already exist among county government officials, county indigent defense providers and ILS, a goal to which we pledge our energy and expertise;

- 2) full funding of the ILS FY 2015-2016 budget request for a Settlement Implementation Unit, headed by an experienced chief implementation attorney; and
- 3) the state's fulfillment of its fiscal commitments in the settlement.

Funding To Implement The Settlement In *Hurrell-Harding*

Since its inception, the Office has begun to meet the enormous challenge that faces the state in meeting the constitutional mandate. The recent settlement of the *Hurrell-Harring* case was an important step. However, that settlement, to which the state is now committed, imposes significant obligations on the part of the Office. Clearly, there needs to be adequate funding to support this settlement. Without such funding, the state will not be able to meet its obligations and would, once again, be facing the risks of litigation. Thus, having entered into the settlement, the state must support the Office with adequate funding for this purpose.

Operational Funds

In addition, we support the request of the Office for operating funds to:

- Add sufficient staff to accelerate improving the quality of representation in every locality;
- Establish regional support centers; and,
- Establish an appellate resource center.

These are important objectives that will continue the progress that has already been made.

Local Assistance Funds

Further, we support the Office's request for local aid funding to:

- Continue remediation of excessive caseloads and inadequate support services, supervision, and oversight in upstate counties;
- Extend the program to provide counsel at first appearance; and,
- Provide Requests For Proposals, to address deficiencies in assigned counsel programs, create model upstate parental representation offices, and create wrongful conviction prevention centers.

Funding for local aid has had a significant beneficial impact on the work done by providers, and it is important that this statewide effort be continued and expanded. The Office needs to continue to increase support and relief to localities in fulfilling the mandate of the U.S. and New York constitutions to provide the effective assistance of counsel for indigent criminal defendants. There is particular need to increase the aid to localities by \$20 million to address caseloads and services in counties not directly impacted by *Hurrell-Harring* and \$8 million regarding counsel at first appearance.

RAISING THE AGE OF CRIMINAL RESPONSIBILITY

New York is one of only two states in which children who are age 16 and over cannot be prosecuted as juvenile delinquents and, consequently, must be prosecuted as adults in the criminal justice system. In the overwhelming majority of states, most children cannot be charged criminally as adults until they attain age

18. The New York Family Court Act's establishment of age 16 as the threshold of adult criminal jurisdiction was deemed to be "tentative" by the relevant Constitutional Convention Commission and subject to change. Recent research has proven conclusively that children under the age of 18 have significantly diminished judgmental capabilities. Children in New York 16 years and over could benefit from programs and services available only for children found to be delinquent in Family Court and hence not convicted in a criminal court.

The Governor's Commission on Youth, Public Safety and Justice recently recommended raising the age of criminal responsibility, prosecuting nonviolent youths in Family Court instead of criminal courts, removing minors from adult prisons and making it easier for some juvenile offenders to forever seal their criminal cases. In particular, the plan would provide that the age of criminal responsibility move to 17 in 2017 and 18 in 2018. This serves as an excellent basis for discussion.

Significant budget issues must be addressed in connection with reforms to raise the age of criminal responsibility in New York States. We strongly urge that the Governor and the Legislature work during the current budget process to take the necessary steps to accomplish this long-overdue reform.

PRISONERS LEGAL SERVICES (PLS)

The Governor has included in his proposed Executive Budget funding for an important program that the Association helped initiate after the Attica riot -- Prisoners Legal Services ("PLS").

Based on the concern that prisoners in New York State lacked access to lawyers in order to deal with civil legal matters, the Association, in 1976, helped establish PLS. One year later, the Supreme Court of the United States ruled that the states have an affirmative obligation to ensure that convicted felons have adequate, effective and meaningful access to courts, *Bounds v. Smith*, 430 U.S. 817 (1977). In 1978, the State of New York began to fund PLS as a state program.

PLS helps to provide equal access to our system of justice for those who are incarcerated and would otherwise be deprived of such access. The program reflects one of the State Bar's highest priorities -- the concept that the impoverished or unpopular individuals should be able to invoke the power of the world's most advanced legal system to protect his or her rights.

We believe that PLS helps inmates resolve problems and that it reduces tensions associated with incarceration. We also believe that PLS helps to foster a sense of fairness, thereby enhancing the positive attitudes and behavior of prisoners. It also helps in the development of sound correctional policy. One of

the greatest values of PLS is that it works to avoid the conditions of confinement that resulted in the devastating Attica riot.

PLS is -- and should remain -- a vital, integral part of the state's correctional structure and a critical component of public safety.

We respectfully urge that adequate funding for PLS be included in the 2015-16 enacted budget.

AN ADDITIONAL PROPOSAL –

Funding for the creation of the Albany Regional Legal Services Center.

In closing, let me turn to a proposal that we at the State Bar developed. I believe that a very small portion of the surplus budget funds could help the indigent in accessing legal services and enhance the ability of providers to offer their services.

The Association proposes that \$5M in state funding be used for the creation of a legal services center in Albany. With the state's surplus, there is now an opportunity to make a one-time investment that could be very meaningful in terms of improving the access of people needing legal assistance to available services and enhancing the ability of lawyers to provide these services.

In far too many cases, people with no legal experience are forced into court without a lawyer, and face loss of their apartment or home, or loss of custody of a child, or denial of benefits to which they are entitled. The center would enhance

the legal services available to low-income individuals. The Albany-based center could offer a unified intake system that could direct clients to an appropriate provider. Capital District legal services providers could also work with clients at the center or out of their current offices.

The center also could offer legal service attorneys (including pro bono attorneys) office space to meet with clients and serve as a center for training, computer technology resources and a library. It could also be valuable for out-of-town attorneys for the indigent who have arguments in the Third Department and Court of Appeals, with a moot courtroom where attorneys could prepare for their arguments. It would serve a critically important function by allowing enhanced opportunities to bring together providers in the region to address access to justice in a more coordinated and efficient manner.

This proposal is supported by the Legal Aid Society of Northeastern New York, Empire Justice Center and the Legal Project, all of which provide services in the Capital District.

The State Bar Association urges that a one-time capital investment of \$5 million be appropriated from surplus funds to establish the civil legal services center in Albany.

CONCLUSION

Access to justice has been the primary focus of my remarks, and it is the centerpiece of the Association's legislative priorities. We submit that the court system should be adequately funded to ensure access to justice for the poor, the weak, and the vulnerable. The ability of an impoverished or unpopular individual to invoke the power of the world's most prestigious legal system to protect his or her rights is, and should continue to be, a source of great pride and great strength for all New Yorkers. We urge you to remain committed to protecting access to justice and to ensuring the public's trust and confidence in our justice system.

