EQUAL JUSTICE AT RISK:
CONFRONTING THE CRISIS IN CIVIL LEGAL SERVICES

The Honorable Jonathan Lippman*

I am honored and privileged to have been asked to speak at my alma mater, the New York University School of Law, which has such a long and rich history of serving the public and working for a just society.

I would like to share some thoughts with you tonight about one of the most daunting challenges confronting our justice system, the crisis in civil legal aid for the poor, and what the judiciary and the profession—both here in New York and around the country—can do to foster access to justice at a time of economic hardship for our nation and for state judiciaries. The country is dealing with serious and seemingly intractable fiscal problems very much reflected here in our state.

On April 1, 2011 New York attempted to close a $10 billion deficit by adopting a new budget that contains traumatic spending cuts at the state and local levels, including an unprecedented $170 million or 6.3% reduction in the judiciary’s budget request.1 At the same time, the economic crisis, and the ongoing recession, has pushed the highest number of Americans into poverty since the U.S. Census Bureau started publishing poverty figures in 1959.2

State court dockets are swelling with cases related to the economic downturn. When families can’t pay their mortgages or rent, when people default on credit card payments or child support obligations, when frustrations over household finances boil over into domestic violence, it all ends up as a matter on a court docket. State courts

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2. See Sabrina Tavernise, Poverty Rate Soars to Highest Level Since 1993, N.Y. TIMES, Sept. 14, 2011, at A1 (reporting that the 46.2 million Americans living in poverty represented the highest total ever reported by the Census Bureau).
are truly the emergency room for the ills of society, and our caseloads are proof of that fact.

Activity in our courts is countercyclical. When the economy goes south, the need for legal services rises. Yet our mission in the courts transcends these developments. We must hear and resolve each and every case that is filed with us in the best economic times and the worst, and maybe especially in the worst. We are constitutionally bound to deliver justice. Our doors must be open to all. Unfortunately, millions of our neighbors today desperately need the protection of our laws but cannot afford a lawyer to help them deal with life-altering legal problems such as saving their homes from predatory lenders, recovering back wages from employers, ending abuse by a violent spouse or partner, obtaining custody of a child, and so many others. Last year alone, 2.3 million litigants appeared in the New York courts without a lawyer, including 98 percent of tenants in eviction cases, 99 percent of borrowers in hundreds of thousands of consumer credit cases, 95 percent of parents in child support matters, and, until recently, two-thirds of homeowners facing foreclosure proceedings.3

According to the latest federal poverty data, state-wide in New York, 2.8 million people—nearly 15 percent of our population—are living below the poverty level,4 and in New York City that figure rises to a staggering 20.1 percent of residents.5 These numbers do not take into account the estimated six million working poor in our state who live below 200 percent of the poverty level—$44,700 a year for a family of four—and cannot possibly afford to hire a lawyer.6 It is no wonder then that the providers of civil legal services to the poor in New York City are turning away eight or nine clients for every one that they serve. Many of our courtrooms in New York are standing-room only, filled with unrepresented litigants, frightened and vulnerable people—the elderly on fixed incomes, single parents, the disabled and mentally ill, abuse victims, and so many more.


6. Id. at 3.
And just as the need for free legal services for poor and low-income Americans is at an all-time high, the resources available to provide those services are becoming more limited than ever before. Funding for the Legal Services Corporation in Washington is under siege, and in New York our New York State Interest on Lawyer Account Fund (IOLA Fund), traditionally the leading source of state funding for civil legal services, has seen its revenues plummet to a fifth of what they were just a few short years ago—from $32 million to $6.5 million. In response, we’ve been redoubling our efforts both within the judiciary and in partnership with the bar to assist the unrepresented, opening more Offices for the Self-Represented in our high-volume courthouses, expanding Volunteer Lawyer for the Day programs that provide lawyers for poor litigants when they enter our New York City courthouses, and expanding pro bono programs throughout the state.

All of these creative efforts are helpful in easing the access to justice problem, but they do not come anywhere close to solving the problem. The needs are simply too overwhelming. I have become convinced that the totality of what we are doing in New York and, as far as I can see, around the country is simply not enough. It is simply not enough to rely on the wonderful good works of the bar and on a patchwork of unreliable revenue streams that constantly fluctuate with the ups and downs of the economy and the political winds of the day.

What is needed, I believe, is the unequivocal commitment of state government to fund civil legal services—a commitment backed by the public fisc. And while I recognize that this is a very tall order in these difficult economic times—like going directly into the teeth of a hurricane—the bottom line is that access to justice is one of the most fundamental obligations we owe our citizenry, and it must be treated as such. I have also come to the belief that the judiciary, as an institution, must take a strong and visible leadership role on this issue because we cannot properly carry out our constitutional mission of providing equal justice under the law when millions of people are appearing in court without a lawyer to guide them through adversarial proceedings that involve the very necessities of life.

As judges and lawyers, we are all witnesses to how the lack of civil legal aid can unbalance the scales of justice and prove devastating to the lives of our fellow citizens and their families. We cannot stand by passively and consider litigants faceless numbers on crowded
court dockets without regard to whether they are represented, without regard to whether they are able to protect their rights, and without regard to whether justice is really and truly being done. We cannot stand by when equal justice is so seriously at risk.

In New York, the thrust of our efforts has been to develop a systemic approach to this critical problem. I am convinced that without the infrastructure—the plumbing, if you will—to ensure stable, consistent, and ongoing funding for civil legal services now and for the future, legal service providers will, in large numbers, literally have to shut their doors.

In order to systematically achieve what is needed in New York, I began on Law Day 2010 by forming the Task Force to Expand Access to Civil Legal Services in New York (Task Force). The Task Force is chaired by the former president of the federal Legal Services Corporation, Helaine Barnett, to whom I am so grateful for agreeing to take on this incredibly challenging assignment of leading the Task Force, consisting of judges, lawyers, business executives, and labor leaders from all parts of the state.

Last fall, with the Task Force’s assistance, I personally presided over four public hearings around the state to assess the extent and nature of the unmet civil legal needs. I was joined at each hearing by Helaine Barnett, individual members of the Task Force, the highest level of leadership of the state judiciary, and the New York State Bar Association. We all recognized that if the judiciary and the legal profession did not stand up for civil legal services for the poor in a time of crisis, no one else would. If not us, who? We were able to get the State Senate and Assembly to adopt a joint resolution endorsing these hearings and requesting that the chief judge report and make recommendations annually to the governor and the Legislature on the findings of the hearings, the work of the Task Force, and the need for additional resources.

What we learned from last year’s hearings is that New York is, at best, meeting only 20 percent of the civil legal services needs of its low-income residents. The Task Force recommended, and I adopted the recommendation, that the judiciary include $25 million for civil legal services in its budget for the 2011–2012 fiscal year as part of a four-year phased-in effort to increase annual funding by $100 million.9

In New York, treating funding for civil legal services, including legal assistance that helps keep cases out of court, as part and parcel of

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the judiciary budget makes total sense to me. The message it sends is simple. As far as the judiciary is concerned, ensuring access to justice goes to the very heart of our constitutional mission.

Just as important as keeping our courthouse doors open is the substance of what is actually happening behind those doors. Justice, to be meaningful, must be accessible to all, both poor and rich. If we don’t have that, we might as well shut the courthouse doors.

Increasing court funding without ensuring access to justice would be a hollow victory; adequate funding is not just an end in itself. Giving state courts in New York and elsewhere the resources they need is the only way to enable them to fulfill their constitutional and ethical function as the protector of the legal rights of all Americans, regardless of means.

Despite the deep cuts imposed on the judiciary, the final budget approved by the governor and the legislature included $12.5 million in new funding for civil legal services, which was distributed to fifty-six non-profit legal services organizations, and $15 million to the judiciary to rescue IOLA. In total, $27.5 million in state funding was appropriated for civil legal services under the umbrella of the judiciary budget. This is a proud accomplishment for the legal community in New York, especially in light of the economic tsunami that we in New York, and around the country, recognize as today’s reality.

Most importantly, we established a vital precedent and template for our state and others by implementing a systemic annual process to provide state funding for civil legal services, making them an integral part of the judiciary’s overall budget.

The process begins with the Legislature’s request that we hold hearings to assess the gap in civil legal representation for the poor. Based on the hearings, we recommend the amount of funding that the judiciary needs in order to close, or at least narrow, the gap, and the Legislature and the governor act on our request. We have undertaken


While sometimes necessary and justifiable on a pragmatic level, it is my firm belief that reliance on revenue streams like IOLA, or on court fees that fluctuate with the economy, is not the answer. Access to justice cannot be a “pay-as-you-go” enterprise. It cannot depend on funding that is unstable by nature and that, while intended to make the justice system more available, often erects new obstacles to access, like higher filing fees.

Civil legal assistance for poor and vulnerable litigants should come out of state general fund money. It is a basic responsibility of state government—every bit as important as other fundamental priorities of a civilized society. We do not say that this year we are eliminating public schools to serve our children, or hospitals to treat our sick, or courts to deliver justice because the economy is bad. Likewise, we cannot say that we will not fund civil legal services for the indigent because it is too difficult to afford. Access to justice is not a luxury, affordable only in good times. It is a bedrock principle in a society based on the rule of law, and it transcends the vagaries of our economy.

Beyond the compelling legal and moral justifications, assuring civil legal assistance for the poor and the working poor makes sense on many other levels. What too many people fail to recognize is that expanding civil legal representation at public expense actually pays for itself many times over.

At hearings over the past two years, business leaders, bankers, property owners, healthcare providers, and government and community leaders testified that increasing access to legal assistance benefits their institutional performance and financial bottom lines. We heard again and again that civil legal services save our state and local governments hundreds of millions of dollars a year by enabling people to pay their bills, preventing unwarranted evictions and homelessness, avoiding foster care placements and other social services costs, and bringing federal funds into the state.\footnote{See \textit{Task Force Report 2011}, supra note 3, at 23–28.}

We developed a public record that justified the funding of civil legal services as making good economic sense for our state. The Task Force concluded that New York receives a total return of close to five
dollars for every dollar spent to support civil legal assistance for the poor.14 We are focusing first and foremost on providing counsel for those people who come to our courthouses seeking the essentials of life: a roof over their heads, family stability, personal safety free from domestic violence, and access to healthcare, education, or subsistence income and benefits. We seek to provide legal assistance that can help resolve these issues without even having to come to court. That is the best way we can make immediate and meaningful progress to help the most vulnerable among the poor and working poor.

Money for civil legal services is surely the major part of the equation, but we also critically need a comprehensive, multi-faceted approach that involves the entire legal community working together to foster more self-help programs for the unrepresented. We need more pro bono programs from law schools, bar associations, law firms, and the courts. One such effort is the court system’s Attorney Emeritus Program, which targets an under-utilized pro bono resource: retired and senior lawyers. This includes the baby boomers who are nearing retirement age and want to continue having a meaningful role in the legal world.

We are all responsible for doing the hard and necessary groundwork to make sure that equal justice is a reality and not just an ideal. Litigants in civil proceedings should receive representation in keeping with the ethos of the Supreme Court’s decision almost fifty years ago in the landmark case of Gideon v. Wainwright,15 a case that was not just about the constitutional right to counsel for criminal defendants, but also a clarion call to recognize our societal obligation to give legal assistance to human beings facing life transforming crises in our courts. Clarence Earl Gideon’s trumpet, forever memorialized in Tony Lewis’s Pulitzer Prize winning book,16 sounds for all those whose basic human needs are at stake in a legal system that must be meaningful for each and every one of us, whether in criminal or civil cases and regardless of means.

Make no mistake: the issues at stake in civil cases involving the necessities of life can be every bit as critical to one’s existence and well-being as the very loss of liberty itself. I am not suggesting that each and every person with a legal problem should have legal representation at the public’s expense. There is no way our government could possibly provide a lawyer to every poor person in every civil matter. Instead we need a measured, common sense approach that rec-
ognizes our obligations to the less fortunate among us, while at the same time prioritizing our resources, particularly in light of today’s fiscal realities.

We are seeing more and more new ideas and approaches designed to increase funding for counsel in civil matters, to increase lawyer volunteerism, and to otherwise expand the availability of counsel in civil cases involving the necessities of life. These ideas are manifest in pilot projects in California, Philadelphia, Boston, and elsewhere across the country, and in the template that we have developed in New York for the systemic public funding of civil legal services.

The growing momentum is supported by the endorsement of influential national organizations like the Conference of Chief Justices and the American Bar Association, which adopted resolutions in support of, respectively, leadership by chief judges in expanding funding for civil legal assistance and the establishment of government-provided legal counsel as a matter of right at public expense to low-income persons where basic human needs are at stake.

We are incrementally creating a climate that may one day enable courts of law to affirm what the court of public opinion will have already recognized: that equal justice and fundamental fairness require public funding of legal counsel in civil cases involving basic human needs. Each time a state or local legislature, or a bar association, or a law school expands the availability of counsel in its own domain, we come one step closer to this goal.

Each time another task force or study shows the positive benefits to litigants and society of providing counsel, and each year that we

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obtain significant funding in the judiciary budget for civil legal services in New York, we come one step closer to making the scales of justice evenly balanced for all.

Without question, all of these efforts are part of a larger, ongoing process to foster a social understanding that fundamental fairness is not possible in our courts unless there are lawyers to help people with civil matters implicating fundamental human needs.

At the hearings we have conducted in New York, we have heard from the poor, the working poor (educated and uneducated alike), immigrants, members of a wide range of racial and ethnic groups, young mothers, and the elderly about how free civil legal services salvaged their lives and prevented them from falling off the societal cliff and through the cracks of the safety net, and allowed them and their family members to contribute to society and their local community.

The public hearings also allowed us to assemble a diverse coalition representing a consensus in support of public funding of civil counsel. It sends a powerful message when such a broad and diverse group manages to join together across very different political and ideological perspectives to speak out in support of civil legal services for the poor. We must combine the human stories with the empirical data that can inform policy makers and provide a strong factual basis for change.

It is absolutely critical that we quantify, through statistically reliable studies, the cost savings to our government and society derived from the provision of counsel. We can and must create a record that justifies the public funding of civil legal services as a good investment that makes economic sense for our country and states.

The alleged unaffordability of public funding of civil legal services has long proven to be one of the most insurmountable arguments in this area. It is a fallacy. We cannot afford not to fund civil legal services for the well-being and stability of our society and our institutions, for the ethical underpinnings of our democratic way of life, for the financial bottom line of our state and local governments, and for our constitutional and professional duty to foster equal justice for all, which is for us, as judges and lawyers, our very reason for being.

All of us, not only judges, lawyers, and law professors, but also lawmakers and people who care about equal justice in this state and country, can change the dialogue and ultimately the legal landscape of America when it comes to civil legal representation.

The rule of law, which is the bedrock of our profession and our society, loses its meaning when the protection of our laws is available only to those who can afford it. Any civilized society, going back to
biblical times, is judged by how it treats its most vulnerable citizens. And the admonition of the Old Testament, “[J]ustice, justice shall you pursue for rich and poor, high and low alike,”22 is just as relevant today as it was thousands of years ago. The pursuit of justice is what our noble profession is all about, and pursuing justice is what we must do if we are to maintain the ethical core and the very legitimacy of our legal system.

Thank you.