

State Courts: Enabling Access

Jonathan Lippman

Abstract: In New York, millions of civil litigants each year fight for the necessities of life without the aid of a lawyer because they are unable to afford one. While the state courts strive to provide access to justice for all constituents, this ideal becomes a promise unfulfilled due to the lack of available civil legal services for low-income populations. In this essay, I discuss access to justice in the state courts from the perspective of my role as Chief Judge of the State of New York. I examine the enormity of the unmet need in New York and around the country and discuss the measures I have taken as head of the New York State court system to address the crisis. These efforts have resulted in a substantial increase in state funding for civil legal services, the establishment of the Task Force to Expand Access to Civil Legal Services in New York, annual hearings in each of New York's four Judicial Departments, and the development of programs designed to spur the legal community (including law students) to greater involvement in pro bono work.

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Our courthouses lie at the very heart of our communities, in every sense. In the words of U.S. Supreme Court Justice Lewis Powell, "For much of our history, the courthouse has served not just as a local center of the law and government but as a meeting ground, cultural hub, and social gathering place."¹ The courthouse, above all other public spaces, embodies our most deeply held common values: our commitment to fairness, due process, and equal justice for all. In this way, the courts are the institutions that protect our individual rights and liberties and preserve the rule of law.

Access to justice is fundamental to all democratic societies, and it is a bedrock principle of our nation. The World Justice Project describes it as

the ability of all people to seek and obtain effective remedies through accessible, affordable, impartial, efficient, effective, and culturally competent institutions of justice. Well-functioning dispute resolution systems enable people to protect their rights against infringement by others, including powerful parties and the state.²

That principle is ingrained in the Constitution of the United States, and delivering equal justice to all

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who come before the courts (from the very rich to the very poor) is at the very heart of our federal and state judicial systems. But what is really happening behind our courthouse doors? Are we living up to the guarantee of access to justice embedded in our nation's laws and founding principles?

Most individuals would be surprised – if not shocked and appalled – to learn how poorly the United States compares to other countries in providing access to civil justice. When the American Bar Association established the World Justice Project to assess and advance the “rule of law” throughout the world, the Project created an index to measure each country's performance across several dimensions. The United States, as expected, performed well in most dimensions, with the notable exception of the civil justice category, where (as of 2012 – 2013) it was ranked as 22nd out of 97 surveyed countries; 12th out of the 16 countries in Western Europe and North America; and 19th out of 29 high-income countries (among the high-income countries that scored higher are Singapore, Japan, the Republic of Korea, Estonia, and Hong Kong). When ranked by the civil justice sub-factor of whether people can access and afford civil justice, the United States was 28th out of 29 high-income countries, ahead only of the United Arab Emirates.³

When people on such a grand scale are unable to obtain the legal advice and representation necessary to solve their civil legal problems, our system of justice has broken down. In criminal cases in the United States, the Supreme Court has long recognized a constitutional right to counsel.⁴ However, although the government must supply an attorney to criminal defendants who cannot afford one, no such right exists in civil matters. Yet the issues at stake in civil cases involving the necessities of life – such as adequate housing, family stability, personal safety free from domestic

violence, access to health care and education, and subsistence income and benefits – can be every bit as critical to an individual's existence and well-being as the very loss of liberty itself.⁵

One of the most difficult contemporary challenges to fulfilling the nation's promise of equal access to justice in the state courts today is the lack of resources to provide free legal counsel to civil litigants who cannot afford to hire an attorney. The difference between the level of free legal assistance available and the level necessary to meet the needs of low-income Americans is often referred to as the “justice gap.” Our efforts to try to close that justice gap in New York – and enable access to justice for all – are the focus of my essay.

For those who are poor or low-income, finding the funds to hire an attorney can be nearly impossible, although some free help does exist. Nonprofit organizations, such as the Legal Aid Society, provide free legal assistance to those who may be defending a civil lawsuit brought against them or who need to begin a civil case to enforce their rights. They are referred to as “civil legal services providers.” The client must meet the organization's income eligibility requirement, which is usually stated as a percentage of the federal poverty level, generally ranging from 125 to 200 percent of that level. For example, an eligibility limit of 200 percent of the 2013 poverty level of \$23,550 per year for a family of four would be \$47,100.⁶ Families of four with higher incomes would be ineligible for free services. Furthermore, because these legal service organizations themselves have limited resources, eligibility does not guarantee a free lawyer. They are able to serve only a portion of otherwise eligible clients: one out of two in many parts of New York State and one out of eight or nine in New York City. The justice gap, therefore, far exceeds these organizations' capacity to fill it.

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The problem of the justice gap is most acute in the state courts, where 98 percent of the litigation commenced in the United States is brought. They are, in many ways, the emergency rooms for society's worst ailments. All types of personal crises become matters on a court docket, especially in an economic climate like that of the United States since the global financial crisis. Following the downturn in 2007, a noticeably larger share of the New York State courts' four million new case filings per year reflected crises resulting from economic issues, and many involved the people who endure the worst consequences of a weak economy: poor and low-income individuals. Filings skyrocketed in matters involving home foreclosures, consumer debts, family violence and custody disputes, and matrimonial conflict.

Meanwhile, the numbers of people appearing in court without an attorney continued to grow. At last count, that number exceeded 2.3 million per year, including 98 percent of tenants in eviction cases, 99 percent of borrowers in consumer credit cases within New York City, 95 percent of parents in child support matters,⁷ and 46 percent of homeowners in foreclosure cases.⁸ Sadly, many of these matters involve the most vulnerable members of society – the elderly, single parents, children, the disabled and mentally ill, abuse victims – in cases that are potentially devastating to them and their families.

Regrettably, the same economic downturn that has caused more people to end up in court also shrank the resources of providers of free civil legal services. The nonprofit organizations I previously described depend heavily on an unstable combination of federal, state, local, and private grants: uncertain and unpredictable revenue streams subject to the vagaries of politics, the condition of the economy, or both.

The federal Legal Services Corporation (LSC), created by Congress in 1974, is the

nation's largest funder of civil legal services providers. LSC is headed by a bipartisan board of directors whose eleven members are appointed by the President and confirmed by the Senate. When the LSC was proposed to Congress, the need for neighborhood law offices was poignantly described:

Here each day the old, the unemployed, the underprivileged, and the largely forgotten people of our Nation may seek help. Perhaps it is an eviction, a marital conflict, repossession of a car, or misunderstanding over a welfare check – each problem may have a legal solution. These are small claims in the Nation's eye, but they loom large in the hearts and lives of poor Americans.⁹

Currently, LSC awards civil legal assistance grants to more than 130 nonprofit legal aid programs with more than 800 offices nationwide. Those numbers represent only a portion of the legal programs in the United States, and only a small number of those programs are in New York State. In 2012, LSC grants helped nearly two million people. However, as a federal agency, its funding is determined by Congress and is therefore dependent on the federal budget and the political winds of the day. Funding for LSC has recently been cut deeply and it is vulnerable to further cuts by a deficit-occupied Congress.

Another major source of funding for civil legal services comes from Interest on Lawyer Trust Accounts programs, usually referred to as IOLTA programs (IOLA in New York). These programs pool the interest earned on accounts for client funds held in trust by lawyers. That interest income is used primarily to provide civil legal aid to the poor and support improvements to the justice system. Revenue for these programs, therefore, is entirely dependent on interest rates. With interest rates at an all-time low, IOLTA revenues have dropped dramatically. In New York, revenues are

less than a quarter of what they were just a few short years ago, dropping from \$36 million to \$8 million. This has had a drastic impact on the civil legal service providers who depend on these programs for their very survival.

Why should we as a society be concerned about dwindling resources for free legal services in civil cases involving the essentials of life? From a practical standpoint, when vast numbers of individuals come to court without an attorney, it affects the entire court system, including other litigants who do have legal representation. Indeed, represented parties and their lawyers repeatedly communicate that they much prefer it when the other parties in a case have lawyers. Cases with unrepresented parties take longer to settle and litigate, which results in delays for litigants in other cases, a clogged court docket, and, ultimately, an increase in the court system's overall costs.

More important, judges have reported the numerous ways in which the lack of counsel leads to a lack of justice: judges are sometimes unable to ascertain the facts of the case because the unrepresented party cannot properly present evidence, unrepresented litigants sometimes fail to present evidence on issues indispensable to proving their cases, their examination of witnesses and their legal arguments are often ineffective at best, and many such litigants are confused about the issues and have little or no knowledge of the law. A concept as familiar to practicing lawyers as "service of process" (delivering papers to a party in legal action, particularly those that give notice of the party's involvement in the case) can be confusing and complex to an unrepresented litigant.

If a case is in the middle of trial and an unrepresented party tells the judge she or he has no idea how to question a witness or respond to an objection to the admission

of evidence made by another party's lawyer, the judge cannot intervene to help no matter how important it may be to the litigant's case. Judges, of course, must maintain neutrality and cannot legally or ethically provide legal advice or legal assistance to a party who happens to be unrepresented. *Jonathan Lippman*

New York's early responses to the crisis in civil legal services included opening more help centers in high-volume courthouses, expanding volunteer lawyer-for-a-day programs that provide lawyers for poor litigants when they enter New York City courthouses, and expanding pro bono programs throughout the state. Although these innovations have been and continue to be essential, they are not nearly enough to provide adequate protection of the fundamental rights of so many litigants who cannot afford counsel.

As the steward of the state court system, I question whether our judiciary can fulfill its constitutional mission when millions of low-income people are being denied access to justice because they cannot afford to pay a lawyer to protect their interests and that of their families. The judiciary cannot stand by idly and ignore the possibility that justice is not truly being done in our courtrooms. I believe that the judiciary and the legal profession have an obligation to stand up for civil legal services for poor and low-income individuals. The key is to exercise strong and visible judicial leadership and work toward a systemic approach to providing a substantial and stable source of funding for civil legal services.

In 2010, the New York judiciary developed a plan to address the state's justice gap, recognizing that the unequivocal commitment of state government to fund civil legal services is vital to the goals of ensuring equal justice. We committed ourselves to holding annual hearings to assess both the extent of the need for civil legal services for low-income New Yorkers

and the amount of resources necessary to fill that need. The hearings are now held annually in each of the four Appellate Division Judicial Departments in our state. I personally preside over each hearing along with the leaders of the Judiciary and the New York State Bar Association. We also established the Task Force to Expand Access to Civil Legal Services, which supports the annual hearings and studies potential new initiatives to increase access to civil legal services. Helaine Barnett, a former Chair of the LSC, chairs the Task Force, and its members include judges, lawyers, business executives, academics, labor leaders, and others from across New York State.

During the first four years of hearings (2010 – 2013), testifying witnesses included indigent litigants, legal service providers, business and religious leaders, prominent legislators, executive branch officials, economists, law professors, and judges. The stories of the litigants who testified at the hearings in particular illustrate the dire need for legal services experienced by many people in crisis. One litigant from Uzbekistan, for example, described the horrific abuse she suffered from her husband, which included isolation, repeated beatings, and rape. He made threats against her parents in their home country and called them on speaker phone while he beat her. She attempted to escape many times, but her husband always tracked her down. It was only when she found help from a free legal service provider that she was able to divorce, get an order of protection, and obtain sole custody of her daughter. Her husband now faces felony criminal charges.¹⁰ Another witness, a small business owner, lost his source of income when he developed a chronic medical condition and was unable to work. He fell behind on his mortgage and nearly lost his co-op apartment in a wrongful foreclosure sale. Once he found a legal services provider to assist him free of charge, he was able to

reverse the foreclosure and remain in his home.¹¹

Also with the help of a legal services provider, a man whose home was flooded while he was in the hospital undergoing cancer treatment was able to obtain relief from his landlord and find alternate housing. Other witnesses described how having a lawyer enabled them to recover from major debt or escape indentured servitude. A twenty-five-year-old college student with muscular dystrophy was able to maintain the transportation benefits he needed to stay in school and sustain an independent existence.¹² Again and again over the three years of hearings, the personal stories of litigants illuminated the essential role that lawyers play in resolving serious problems and avoiding future harm.

Based on the hearings and the Task Force's own extensive research, including input both from experts and from those "in the trenches," the Task Force issued four reports with recommendations for action, which have prompted a number of reforms.¹³ The most significant recommendation was that the judiciary budget include funding to support civil legal service providers. By including funding in our budget, we make clear that preserving civil legal services for the poor is not a tangential issue for the courts, but rather is at the very heart of our constitutional mandate to foster equal justice. In an endorsement of this initiative, the New York State Legislature issued a joint resolution of support requesting that the Chief Judge report each year on unmet needs and the resources needed to meet those needs.

Although it is not feasible for every person with a legal problem to be provided a lawyer at public expense, we are prioritizing our resources, focusing on providing counsel for those people seeking the "essentials of life," which the Task Force defined as including four major categories: 1) housing, including evictions, foreclo-

asures, and homelessness; 2) family matters, including domestic violence, children, and family stability; 3) access to health care and education; and 4) subsistence income, including wages, disability and other benefits, and consumer debts.¹⁴

In spite of very difficult economic times, the judiciary budget now provides substantial funding for civil legal services, with the support of the legislative and executive branches: \$12.5 million in FY2011 – 2012, \$25 million in FY 2012 – 2013, and \$40 million in FY 2013 – 2014. Additionally, the judiciary budget included \$15 million in rescue funding for IOLA in each of those years. As recommended by the Task Force, I appointed an oversight board to oversee the process of obtaining grant requests and making grant awards. The board made awards to fifty-six civil legal services providers for FY 2011 – 2012 and to sixty providers for FY 2012 – 2013.

Preliminary data for the \$12.5 million provided in 2011 – 2012 shows that the funding enabled providers to give direct representation to more than 125,000 clients and that more than 733,000 additional individuals either benefitted from that work (for example, as class action members or household members other than the client) or received indirect legal assistance from projects such as clinics, workshops, help desks, hotlines, brief legal advice, and referrals. For the second year ending March 31, 2013, \$25 million in funding enabled providers to give direct representation to more than 267,000 clients and otherwise assist another 3.5 million individuals (approximately 1.65 million benefitting from the client representation and another 1.85 million receiving indirect legal assistance). Additionally, this funding has enabled other access-to-justice enhancements, such as expanding pro bono programs and encouraging new collaborations among legal service providers to achieve efficiencies. In short, in the first

two years of the program, the new state funding provided a significant lifeline to nearly four million New Yorkers in need.

Through the hearings and the Task Force, a systemic annual process to fund civil legal services with state funds has been implemented. This funding not only provides help for people in need, but also produces significant economic benefits for the state. At the hearings, business leaders, bankers, property owners, health care providers, and government and community leaders testified that increasing access to legal assistance benefits their institutional performance and financial bottom lines. Providing pro bono assistance to the Task Force, consulting firms estimated that investing in civil legal services to prevent domestic violence in New York State can achieve annual savings of \$85 million in the costs associated with assistance for survivors of domestic violence. Additionally, anti-eviction legal services programs save approximately \$116 million annually in averted shelter costs. Further, an expert analysis of the impact of federal funds brought into New York through the provision of free legal services concluded that the investment of a single dollar in legal services funding generates approximately six dollars in combined cost-savings, benefits obtained, and economic activity for New York State.

This does not mean that money alone can fill the justice gap; the amount of funding needed would simply be too great. Therefore, the Task Force has also been pursuing noneconomic measures to help make the most effective use of existing resources to help close the gap. One initiative was to increase the involvement of law schools and law students in enhancing access to justice. The Task Force convened a day-long conference in 2012 and 2013 attended by representatives from all fifteen of New York's law schools, as well as by judges, bar leaders, legal services provid-

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ers, practicing attorneys, and court administrators. A major outcome was the formation of a statewide council composed of administrative deans from each law school and a representative selection of legal services providers and bar leaders from around the state, who are now working to foster coordination and collaboration in programs that increase access to justice for low-income or vulnerable New Yorkers. A third law school conference took place in May of 2014. Another Task Force proposal was to examine the potential for expanding the use of non-lawyers to help bridge the justice gap. In response, I formed an advisory committee to explore that subject and design a pilot project to test the idea, and the group is currently at work.

The Task Force has also urged that court forms and procedures in the sprawling court system be simplified and made uniform – which would benefit unrepresented parties – and such efforts are ongoing. Further, the court system will continue with established programs to assist the unrepresented, such as CourtHelp, an online resource containing legal and procedural information and a growing list of do-it-yourself interactive forms; help centers staffed by attorneys and court clerks, who provide procedural and legal information as well as referrals to attorneys, legal clinics, and other services; and on-site volunteer lawyer programs that provide assistance at the courthouse. The Task Force also directed recommendations to the community of legal services providers, encouraging more preventive and early-intervention legal assistance so that, where possible, disputes could be resolved without involving the courts. We also took steps to encourage increasing collaboration among providers in order to avoid duplication of effort and to minimize costs. Finally, we also decided that a comprehensive approach to closing the justice gap has to involve the entire legal community work-

ing together, as well as more volunteer pro bono programs from law schools, bar associations, law firms, and the courts.

The pursuit of equal justice for all has been the hallmark of the legal profession since its inception. Every attorney has an obligation to foster the values of justice, equality, and the rule of law. Although attorney ethics rules may vary in their specifics from state to state, most acknowledge that every lawyer has a professional responsibility to provide legal services to those unable to pay. In other words, it is not just the judiciary that is obligated to ensure access to justice; it is the entire legal profession. While acknowledging that many New York lawyers already do a substantial amount of volunteer legal services, several recent court initiatives have been focused on increasing pro bono services by all New York lawyers.

The necessity of pro bono legal services is starkly evident in the event of a natural disaster, as was the case in the aftermath of Hurricane Sandy in October 2012. The storm devastated the homes and property of tens of thousands of New Yorkers. In addition to physical damage, however, it also left behind a host of legal problems for individuals and businesses, including: insurance-related issues; accessing benefits; healthcare; bankruptcy; and determining the responsibilities of landlords, tenants, and homeowners. The bar displayed its typical generosity and responsiveness: legal service providers and bar associations sprung into action to help the victims of the storm recover, filing for FEMA and Disaster Unemployment Insurance benefits, answering immigration status questions, documenting and filing insurance claims, and addressing many other civil legal needs of individuals and small businesses.

One recent initiative intended to increase the level of pro bono work by attorneys is

the Attorney Emeritus Program. Its goal is to engage seasoned lawyers in pro bono projects under the auspices of civil legal services providers, thereby enhancing the capacity of those providers to serve clients. Attorneys who might otherwise retire are now linked with programs that provide them not only with any necessary training and supervision, but also with resources a retired attorney would not likely have, such as access to offices and staff and malpractice coverage.

Furthermore, in 2013, I announced that as a condition of admission to the New York State bar, applicants would be required to demonstrate having performed at least 50 hours of law-related pro bono service to the poor, or equivalent public service work. In addition to easing the justice gap by providing assistance to legal services providers and pro bono programs (all of which must be done under the supervision of an admitted attorney), the requirement provides law students with a deeper understanding of the problems confronted by segments of society that have little access to legal resources and institutions. New York is the first state in the country to require pro bono services prior to bar admission. Through this program, New York law students will come to embrace the core values of the legal profession, first and foremost of which is service to others. This admission requirement will help make pro bono legal services to the poor a part of a new attorney's DNA – a commitment that, we hope, will endure throughout his or her legal career.

Most recently, in direct response to a Task Force recommendation in its 2012 report, New York's biennial registration process now requires all attorneys to report both the number of volunteer pro bono hours they have provided to the poor and the financial contributions they have made to legal services providers. The dual pur-

pose of this requirement is to obtain accurate information about pro bono work done by the bar, and to increase attorney awareness of the need for pro bono services.

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The rule of law – arguably the very bedrock of our society – loses meaning when the protection of our laws is available only to those who can afford it. Our courthouses, which are some of the most important structures in American life, must be accessible to litigants from every segment of society. We might as well close the courthouse doors if we are not able to provide equal justice for all – our very reason for being in the Judiciary and the legal profession.

The pursuit of justice is the ultimate goal of the courts. It is this pursuit that makes our mission so absolutely critical to the well-being of our nation and its people, who in a difficult economy need the courts more than ever before. My fervent hope is that our comprehensive efforts toward enabling access to justice in the New York state courts will significantly reduce the justice gap. Every society is judged by how it treats its most vulnerable citizens. We can and should be judged by whether we are “enabling access” to the courts for each and every person – rich and poor, high and low alike.

- ¹ Lewis F. Powell Jr., “Foreword” to John O. Peters and Margaret T. Peters, *Virginia’s Historic Courthouses* (Charlottesville, Va.: University of Virginia Press, 1995), ix.
- ² Mark David Agrast, Juan Carlos Botero, Joel Martinez, Alejandro Ponce, and Christine Pratt, *World Justice Project Rule of Law Index 2012 – 2013* (Washington, D.C.: The World Justice Project, 2013), 27, http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf.
- ³ *Ibid.*, 175.
- ⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- ⁵ Many have argued that there should be a right to counsel at least in some civil cases, but a full discussion of the issues is beyond the scope of this essay. For example, see American Bar Association Recommendation 112A (2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.
- ⁶ The poverty guidelines are updated periodically in the *Federal Register* by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).
- ⁷ The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York, November 2010*, 1, <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>.
- ⁸ A. Gail Prudenti, 2013 *Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009*, <http://www.nycourts.gov/publications/pdfs/2013ForeclosureReport.pdf>.
- ⁹ Richard M. Nixon, “Special Message to the Congress Proposing Establishment of a Legal Services Corporation,” May 5, 1971, <http://www.presidency.ucsb.edu/ws/?pid=2998>.
- ¹⁰ Testimony at the Chief Judge’s Hearings on Civil Legal Services. See <http://www.nycourts.gov/ip/access-civil-legal-services/public-hearings.shtml>.
- ¹¹ *Ibid.*
- ¹² *Ibid.*
- ¹³ The Task Force’s reports are available at <http://www.nycourts.gov/ip/access-civil-legal-services>.
- ¹⁴ The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York, November 2010*, 5.