

Submitted

New York State Bar Association

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Testimony
of
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Joint Legislative Public Hearing
on the
Proposed 2019-20 Public Protection Budget

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I am Michael Miller, President of the New York State Bar Association, the largest voluntary state bar association in the nation. On behalf of our 70,000 members, I thank you for the opportunity to submit testimony regarding the Unified Court System's budget proposal and issues of importance to both the public and the legal profession that are affected by the proposed Public Protection Budget.

Access to justice will be the primary focus of my remarks, and it is the centerpiece of the Association's legislative priorities. We submit that legitimate budgetary concerns should not reduce 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.

In that regard, funding of legal services for those in need, both civil legal services and indigent criminal defense services, is a high budget priority for the State Bar Association. Inclusion of appropriate funding in both the proposed Judiciary Budget and the proposed Executive Budget is treated in more detail later in this testimony. However, I want to make a preliminary statement regarding one particular feature of the proposed Executive Budget – a proposal in Part DD of the Public Protection and General Government Budget, S.1501/A.2005 that would increase New York's Biennial Attorney Registration Fee in order to generate revenue for the state's public defense system.

The New York State Bar Association strongly objects to this proposed increase. Providing indigent criminal defense is a constitutional mandate. The mandate is a state obligation, a societal responsibility, and it should be paid for from the general fund and not by a charge on the legal profession.

Judiciary Budget Request

The State Judiciary's budget requests **\$2.18 billion, an increase of \$42.7 million (2.0%)** over current year funds.

The request seeks funds so that the court system may fulfil its mission to deliver justice in accordance with the rule of law. A significant component of the mission that this budget request would fund is Chief Judge Jane DiFiore's Excellence Initiative -- the evaluation of court operations and administration with the goal of overall "operational and decisional excellence." A primary focus of the core mission of the Initiative is the fair and prompt adjudication of each case in the court system. We support this effort to eliminate delay and backlogs in court operations, while still ensuring access to justice for all.

The Judiciary's submission states that "this budget will enable the courts to pursue their mission to provide justice efficiently, fairly and with excellence." The New York State Bar Association enthusiastically supports that goal and the funding to facilitate it.

Funding Civil Legal Services

Funding for civil legal services has been among the State Bar's highest priorities for many years. Unfortunately, the need for civil legal services continues to be a significant concern.

Proper state funding of critically-needed programs and resources is necessary to meet the urgent needs of low-income New Yorkers to protect the essentials of life. New York's lawyers have shown their commitment to voluntary pro bono efforts, contributing an estimated two and one-half million hours each year in voluntary pro bono legal services to the indigent. However, these voluntary efforts alone are insufficient to meet current needs. Ultimately, society as a whole, acting through its government, must provide adequate public funding.

In an era when some federal policymakers continue efforts to defund 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, or access to health care. The New York State Bar Association strongly supports the inclusion of \$85 million for civil legal services within the Judiciary's Budget request, the same level requested last year and included in the final 2018-2019 Public Protection Budget.

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 the Legislature created 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 several years the Judiciary Budget has included a \$15 million allocation for the IOLA Fund to help offset the low revenues due to low interest rates and a reduced number of real estate transactions. We support the inclusion of this item in this year's budget and appreciate the Legislature's recognition of the importance of this funding in previous years. We strongly urge you to continue your support for this appropriation. Accordingly, we recommend that the Legislature:

- Approve the Judiciary Budget, to ensure access to justice and proper operation of the courts;
- Approve the Judiciary's request of \$85 million for civil legal services; and,
- Approve the Judiciary's request for \$15 million to support the Interest on Lawyers Account (IOLA) Fund.

PROPOSED EXECUTIVE BUDGET

Indigent Criminal Defense

Our Association has long been a leader in advocating for the provision of legal services for the poor and otherwise disadvantaged. Over 100 years ago, NYSBA created a special committee dedicated to that issue and endorsed the concept of public defenders to provide representation to indigent criminal defendants.

In 2004, then-Chief Judge Judith S. Kaye created the Commission on the Future of Indigent Defense Services to examine New York State's indigent criminal defense system.

The Commission's 2006 report 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 finding was both alarming and disheartening. Since then, there have been developments in New York State to address this issue. In 2010, state leaders created the Office of Indigent Legal Services, an important step that the State Bar Association strongly supported. In 2014, the state entered into a settlement in the case of Hurrell-Harring v. State of New York, agreeing to provide sufficient additional funds to assure adequate legal representation for indigent criminal defendants in five of New York's counties outside of the City of New York.

We commend the Governor and the Legislature for previous action to extend the substance of the Hurrell-Harring settlement to counties throughout the state.

This is a critical step to improve indigent criminal defense services in New York State. However, as previously discussed, we strongly object to funding the proposals in part by increasing the Biennial Attorney Registration Fee, which attempts to transfer to lawyers the societal obligation to fund constitutionally-mandated indigent criminal defense.

The Association continues to support a statewide, state-funded system with an independent entity to oversee quality and delivery of public defense services, as part of the 2019-20 budget, to ensure that indigent defendants receive effective representation in New York State's criminal justice system.

Discovery in Criminal Justice Matters

Litigants in civil lawsuits in New York State have the opportunity through the process of "discovery and inspection" or "disclosure" to learn about facts and evidence that are the basis for their opponent's case. Under New York's criminal discovery statute, however, defendants are either delayed in obtaining access to comparable information, or entirely denied access.

In a criminal case, defendants routinely receive limited information which often is turned over so late that it is virtually impossible for defense counsel to properly investigate, secure and use any potentially exculpatory evidence, fairly weigh a guilty plea offer, or develop a trial strategy.

Reform of New York's criminal discovery rules would accomplish two key goals:

- it will help innocent or over-charged defendants fairly prepare for trial; and
- it will encourage guilty defendants to plead guilty, based upon a fair review and evaluation of the evidence in the possession of police and prosecutors, without needless and costly delays.

Unless a criminal defendant is fortunate enough to be charged in one of the counties where the District Attorney has rejected restrictive discovery according to the statute and maintains an "open-file" policy, his or her lawyer would be unable to fully advise the defendant about the strength of the prosecution's case or to help fully assess his/her options.

The discovery standards for criminal cases in New York are among the most restrictive in the country. They are contrary to modern statutes enacted in the majority of other states and their approach has been criticized by national authorities on the topic.

This issue is a legislative priority for the Association and we urge that reform be accomplished this year.

Voter Participation

In 2012, we established the Association's Special Committee on Voter Participation, to identify ways to increase voter participation. In bringing together the diverse group of lawyers who made up the Special Committee, care was taken to assure that the Committee was balanced, especially as to possible perspectives on voting issues.

The topic of voter participation is among the Association's state legislative priorities.

As the Special Committee's Report points out, voting in the United States is one of our most fundamental rights, ensuring our ability to participate in the electoral process. However, the rate of voter participation in New York State is frequently ranked among the lowest in the nation. Measures to remove barriers to registration and voting and to encourage participation, while maintaining the integrity of the process, could go a long way to improve civic engagement and enhance our democracy.

The Report's primary conclusion is that the State of New York needs to modernize its system for registering voters. If implemented, such modernization would result in a significant increase in voter participation. Such a change would also promise increased efficiency and accuracy in the voter rolls and a reduction in cost. The Report makes several specific recommendations, as follows:

- Modernizing the voter registration system. For example, offer New Yorkers expanded registration opportunities whenever they engage in a transaction with a state agency;
- Develop a program for voluntary pre-registration of 16 and 17 year-olds;
- Permit Election-Day and Same-Day Registration;
- Enhance practices involving online registration;
- Adopt a program for Early In-Person Voting (through the weekend, and possibly three days in the previous week) before Election Day;
- Improve ballot design; and,
- Address deceptive practices that are designed to discourage voter participation, and provide criminal penalties for deceptive practices that suppress voting.

We are pleased that the Legislature and the Governor have moved quickly to enact several bills on this State Bar legislative priority.

Gender Expression Nondiscrimination Act (GENDA)

The Association strongly supports proposals that would prohibit discrimination based on gender identity or expression. New York State has the opportunity to enact a statewide, comprehensive law to explicitly protect gender-variant individuals from discrimination. GENDA would make it illegal to fire someone from a job, evict them from an apartment, deny them a loan or refuse them service in a restaurant simply because their appearance does not conform to their birth sex. It would also protect gender variant individuals from violence by adding gender identity and expression to New York State's bias crime laws.

Gender-variant individuals are not protected from discrimination under current New York State or federal law. Such individuals, whose gender identity or appearance, dress or roles do not conform to their birth sex face discrimination in all aspects of life including, but not limited to, housing, employment, education and public accommodations and are also particularly vulnerable to hate crimes. There are numerous documented cases where gender-variant individuals have been denied employment, fired from jobs, denied advancement in their profession or otherwise harassed in the workplace. They have also been denied housing, rooms in hotels, refused service at restaurants and denied adequate medical care.

Gender-variant individuals are the objects of a disproportionately high level of physical and mental violence and abuse. In the workplace, discrimination can occur if an employer discovers that an applicant or an employee once went under a name synonymous with a different gender, or merely if a male individual does not appear to be sufficiently masculine, or a female sufficiently feminine in appearance or mannerism.

In enacting policy to address the issues faced by gender-variant people, New York State would not be establishing a new or unique policy. Rather, it would be extending to New York residents rights that are already afforded to citizens in a number of other jurisdictions. Several states and the District of Columbia currently have laws prohibiting discrimination on the basis of gender identity or expression. In New York State, a number of local municipalities prohibit discrimination on the basis of gender identity or expression. Governor Cuomo recently issued state-wide regulations prohibiting New York State agencies and their managers, supervisors and employees from discriminating on the basis of gender identity, transgender status or gender

dysphoria.

Enacting GENDA is an important step in protecting transgender and gender variant individuals in employment and housing, and in protecting their safety, so that they can enjoy the financial and social stability necessary to become fully integrated and productive members of their communities. Doing so is necessary to counteract the pervasive discrimination faced by transgender and gender variant individuals.

The Association has long supported this legislation, and we are pleased that it was passed by the Legislature and signed into law by the Governor.

Adequate Funding for the Commission on Judicial Conduct

The Commission on Judicial Conduct has as its mission the responsibility for investigating complaints of misconduct against judges and, where appropriate, disciplining judges for ethics violations. After eight years of working with relatively flat budgets the Commission is under-resourced and understaffed.

As a result, the Commission's current staffing level is at 38 staff members, which is down from 50 staff members in recent years.

The Commission's funding has not kept pace with its record caseload. Office rent has increased more than \$400,000 since 2010. Its budget, however, has increased only \$290,000. The result of this relatively flat funding has been to prolong the time it takes to discipline the guilty and exonerate the innocent.

The Commission's work is critical to ensuring the public's trust and confidence in our judiciary. Accordingly, we urge the Legislature to provide proper funding for the Commission, so that it may vigorously pursue its mandate, and provide the public with reason to trust in the integrity of our judicial system.

We have many excellent and hard-working judges in New York State. Regrettably, as in every field of human endeavor, there are a few who do not meet the necessary standards. The Commission is the body charged with enforcing rules of judicial conduct, and it must be funded to perform this necessary work.

Solitary Confinement

The Association strongly supports policy to restrict the use of solitary confinement. The NYSBA's House of Delegates in January 2013 approved a Report and Resolution presented by the NYSBA Civil Rights Committee recommending the profound restriction of the use of solitary confinement; adoption of strict criteria for its use; prohibition of sentences in excess of 15 days; and limitation on the number of special housing units.

It is clear that solitary confinement harms all individuals. Long term solitary confinement is not a productive tool for prison administrators seeking to deal with problematic inmates. Far from furthering legitimate correctional objectives, it serves to aggravate the very conditions it seeks to alleviate. Dangerous inmates are often made more erratic, weak and vulnerable inmates are made more so, and the prospect of meaningful rehabilitation and reentry into society is also rendered more difficult; and in some cases, functionally impossible.

Solitary confinement, if used at all, should be measured in *days*, not years, months, or even weeks, ensuring that all prisoners, regardless of their conditions of confinement, have some minimal measure of interactive activity so that their psyche does not begin to deteriorate. Preventing psychological harm to inmates encourages institutional safety, security and discipline by preventing the development of serious mental illnesses which exacerbate the problems solitary confinement-style detention is intended to solve.

A pressing need exists for stringent criteria, protocols and safeguards for separating violent or vulnerable prisoners, including clear and objective standards to ensure that prisoners are separated only in limited and legitimate circumstances for the briefest period and under the least restrictive conditions practicable.

It is imperative that New York State restrict such confinement by adopting clear and objective standards to ensure that prisoners are separated from the general prison population only in very limited and very legitimate circumstances and only for the briefest period and under the least restrictive conditions practicable.

Parental Representation and Increasing Rates for Assigned Counsel and Attorneys for the Child

The State Bar Association has long been involved in addressing issues affecting families, children and the law. The Committees and Sections of the Association have prepared numerous reports and proposals on these important issues, which have been adopted as policy of the Association. Two key reports recently approved by the Association relate to parental representation and increasing assigned counsel rates including representation by attorneys for the child. While these issues are not currently part of the budget conversation, they are important issues to which we wish to draw your attention and for which we ask your consideration.

First, this past April the Association's House of Delegates approved a report by our Committee on Families and the Law in support of state funding and oversight of mandated parental representation provided to indigent parents. The New York State Constitution guarantees the right to counsel to indigent parents in matters involving fundamental liberty interests in the parent-child relationship. Indeed, high-quality representation is essential to protect fundamental familial rights and interests. With reform well underway in criminal defense, similarly intense attention needs to be focused on improving parental representation. Chief Judge DiFiore empaneled a commission chaired by former Presiding Justice Karen Peters to study and report on these issues. A preliminary report by that commission is expected in the near future. The importance of the commission's work cannot be overstated. This is an issue of statewide concern with diverse considerations.

Second, this past June the Association's House of Delegates approved a report on the need

to increase assigned counsel rates, including rates for attorneys for the child, in New York. The report states that present hourly rates for assigned counsel must be amended to reflect appropriate compensation consistent with the increases that have occurred for the judiciary, elected district attorneys, and compensation for assigned counsel in federal criminal cases. Increasing the rates would stem the threat of the exodus of lawyers from representation panels due to the low compensation rates which results in an acute shortage of appointed counsel severely undermining the processing of criminal and family court cases.

Moreover, the last increase in assigned-counsel rates was in 2004, when they were increased to \$75 per hour, in and out of court, for all matters under County Law Section 722. That is, felonies, violation of probation in connection with a felony conviction, appeals, parole representation, family court representation, and post-judgment motions. Fees of \$60 per hour, in and out of court, are paid for representation of a parson charge with a misdemeanor or lesser offence and no felony. Rates of compensation to assigned counsel should be increased to prevent the exodus of practitioners from panels across the state. The resulting shortage of lawyers to represent indigent defendants undermines the administration of justice in New York State.

Conclusion

In closing, New York State Bar Association respectfully submits that legitimate budgetary concerns should not evolve into short-sighted justification for diminishing "access to justice" in New York, thereby inflicting costly and unjustifiable damage to our institutions.

"Access to justice" is the primary focus of the Association's legislative priorities. That concept helps distinguish and define us as a nation where freedoms flourish under the rule of law.

Only in America can an impoverished and possibly unpopular individual invoke the power of the world's most prestigious legal system to protect his or her rights. That has been, and must continue to be, a source of great pride and great strength for all New Yorkers and all Americans.

We urge you to remain committed to protecting against erosion of that right, and to ensuring the public's trust and confidence that our system provides access to that right.