



Testimony  
of  
Claire P. Gutekunst  
President  
New York State Bar Association

Joint Legislative Public Hearing  
on the  
Proposed 2017-18 Public Protection Budget

January 31, 2017

I am Claire P. Gutekunst, President of the New York State Bar Association, the largest voluntary state bar association in the nation. On behalf of our 72,000 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.

The State Bar Association, with members skilled in all disciplines of the law, is a statewide voice for attorneys licensed to practice in New York and an advocate for the public interest. 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.

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 D of the Public Protection Budget [S.2006/A.3006] 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 Judiciary is also seeking a capital appropriation in the amount of \$15 million to rebuild the technology and security infrastructure necessary to support the work of the courts.

The initial focus of Chief Judge Janet DiFiore's Excellence Initiative is on court fundamentals – the Judiciary's core mission to fairly and promptly adjudicate each of the millions of cases filed in the New York State courts every year. Working closely with Administrative Judges and local court administrators, and consulting the bar, prosecutors and other partners in the justice community, the Office of Court Administration (OCA) has undertaken an extensive examination into the causes of the backlogs, bottlenecks and delays in adjudicating cases. The funding increases sought in this year's Judiciary Budget are designated principally to implement solutions to those barriers to justice and the New York State Bar Association supports those increases.

## 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, 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 2016-2017 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, the New York State Bar Association requests 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.

In 2016, we supported legislation, S.8114 (DeFrancisco)/A.10706 (Fahy), to ensure adequate statewide funding and oversight regarding indigent criminal defense services. As you know, the Governor vetoed that legislation on December 31, 2016.

We commend the Governor for proposing in his Executive Budget to extend the substance of the Hurrell-Harring settlement to counties throughout the state. This would be 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. Further, we oppose provisions of the Governor's legislative proposal that would diminish the independence of the Office of Indigent Legal Service by providing inappropriate authority to the Division of the Budget regarding plans to implement improvements

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 2017-18 budget, to ensure that indigent defendants receive effective representation in New York State's criminal justice system.

### 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 all but two 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" and subject to change by the relevant Constitutional Convention Commission in 1967. 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.

In 2015, the Governor's Commission on Youth, Public Safety and Justice 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 would be phased in in the coming years. This report serves as an excellent basis for resolution of this critical matter.

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

### Wrongful Convictions

Wrongful convictions cast serious doubt on a fundamental assumption of our criminal justice system – that the innocent are protected. It is essential that our criminal justice system ensure that the innocent remain free and that the guilty are not free to commit more crimes. The eradication of wrongful convictions is critical to maintaining the public’s trust and confidence in our criminal justice system. Two of the root causes of wrongful convictions – false confessions and flawed eyewitness identification procedures – must be addressed.

In 2009, the Association’s Task Force on Wrongful Convictions released a comprehensive report that examined all aspects of the issue, including the factors that can result in wrongful convictions. The Task Force members included some of the state’s top judges, prosecutors, defense attorneys, legal scholars and criminal justice experts.

In studying 53 wrongful convictions in New York, the State Bar Task Force report identified six major contributors to wrongful convictions:

- 1) Misidentification of the accused by the victim and/or one or more eyewitnesses. In 36 of the 53 cases, misidentification was cited as a major cause of the wrongful conviction, or in 68 percent of the cases.
- 2) One or more general errors by a government actor, such as a prosecutor, member of law enforcement or judge (58 percent).
- 3) Errors by an attorney representing the falsely accused, usually a failure to fully investigate or to offer alternative theories and/or suspects (36 percent).
- 4) Errors in the handling or preservation of key forensic evidence and/or the failure to use DNA testing (26 percent).
- 5) The extraction and use of what turned out to be a false confession made by the accused (12 percent).
- 6) The admission and reliance by the jury on what later was determined to be false testimony by a jailhouse snitch or other informant. (8 percent).

These contributors are consistent with what other organizations have found.

In some wrongful convictions, there is often more than one contributing factor.

Based on its extensive research and hearings, the State Bar Task Force recommended ways to address wrongful convictions, including:

- 1) Videotaping interrogations to ensure that innocent suspects have not been improperly coerced into making false confessions and to support the validity of confessions made by guilty suspects; and
- 2) Improving police lineups to avoid the intentional or unintentional influence of witnesses, thereby reducing the number of mistaken identifications and freeing police to pursue the actual perpetrator.

In 2015, the New York State Bar Association, the District Attorneys Association of the State of New York (DAASNY), and the Innocence Project (IP) reached an agreement on a bill to require the recording of custodial interrogations in certain serious crimes and to allow the admissibility of photographic arrays when enhanced identification procedures are used. The Governor's budget narrative mentions this agreement, and the proposed budget includes legislation that is based on the bill agreed to by NYSBA, DAASNY, and IP. Enactment of this legislation would be a positive step toward addressing wrongful convictions and building public trust and confidence in New York's criminal justice system.

### Veterans Treatment Courts

The 2012 report of the New York State Bar Association Special Committee on Veterans recommended legislation to expand Veterans Treatment Courts, thereby enhancing access to the justice system for deserving military veterans and increasing public trust and confidence in our system of justice.

American military veterans are unique members of our society who have unique problems that may inhibit their transition from active military service to a normal civilian life. Veterans Treatment Courts provide an effective means for

recognizing the needs of veterans, while ensuring public safety and benefit for our communities.

Many veterans struggle with the effects of trauma from their service and from post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), mental illness, and substance abuse or addiction. Veterans Treatment Courts follow therapeutic and collaborative approaches similar to models used by drug and mental health courts. Within the framework of the criminal justice system, these models involve a court-based system of assessments, treatment, review hearings, and graduated sanctions geared to avoiding incarceration when possible.

If left untreated, these conditions can and do cause disruption of families, the loss of employment, and triggering of actions that result in criminal prosecution. Such adversity for veterans often leads to abuse of alcohol and drugs, which accelerates a downward spiral toward increasingly-severe consequences.

In the context of criminal court, Veterans Treatment Courts depend on the collaboration of practitioners and judges, along with the U. S. Department of Veterans Affairs and other treatment providers in the community so that the veteran recovers and the risk of recidivism is reduced or eliminated. Similarly, such an approach may be used in civil court to assist veterans faced with loss of employment, government benefits, or housing, and other crises that prevent them from living normal lives and contributing to the community.

Components of the Veterans Treatment Court Model. Although the Veterans Treatment Court is a relatively recent development (the first court was created in Buffalo in 2008), certain principles or components have been recognized as necessary to meet the objective of providing afflicted veterans with the means to obtain treatment and services, normalize their lives, and carry on as contributing members of society.

Necessary components of a successful program involve the following:

- Voluntary participation by veterans;
- Coordination of activities with federal agencies, community-based service providers and local agencies;
- Mentoring by other veterans;
- Flexibility for local officials; and,
- Tracking outcomes.

Accordingly, we support the Governor's proposal to permit transfer of qualified cases across county lines to a Veterans Treatment Court. Further, we support the Governor's proposed appropriation of \$1 million to enhance the operation these courts across the state.

#### 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 to deal with civil legal matters, the Association in 1976 helped establish PLS. One year later, the United States Supreme Court 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 – that impoverished or unpopular individuals should be able to invoke the power of the world's most advanced legal system to protect their rights.

PLS helps inmates resolve problems and 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 are pleased the Governor has included \$2.2 million for PLS in his proposed budget and we respectfully urge that the Legislature approve adequate funding for PLS in the 2017-18 budget.