

New York State Bar Association

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Testimony

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Joint Legislative Public Hearing
on the
Proposed 2018-19 Public Protection Budget

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I am Sharon Stern Gerstman, President of the New York State Bar Association, the largest voluntary state bar association in the nation. On behalf of our membership, I thank you for the opportunity to submit testimony regarding the Unified Court System's budget proposal and other issues of importance to both the public and the legal profession.

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, are high budget priorities for the State Bar Association. Inclusion of appropriate funding in both the proposed Judiciary Budget and the proposed Executive Budget are treated in more detail later in this testimony.

JUDICIARY BUDGET REQUEST

According to the Office of Court Administration (OCA), the State Operations budget requests \$2.23 billion, an increase of \$44.4 million over current year funds. Additional necessary appropriations requested by the Judiciary would require a slightly higher amount.

The budget increase request for State Operations funds will allow for "adequate court staffing, especially in clerk, court officer, interpreter, court reporter, and other courtroom and back office positions that are critical to providing a high level of service to the public," according to the Judiciary's budgetary request to the Governor and the Legislature. The increase requested will also allow the judiciary

to “incrementally restore” a number of programs that were cut due to budget constraints in previous years.

The initial focus of the 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, OCA has undertaken an extensive examination into the causes of the backlogs, bottlenecks and delays in adjudicating cases.

The Association supports the proposed budget increase for the Judiciary, and wishes it were even higher in that funding has still not been restored to 2010 levels. As policymakers address many challenging budget issues, we strongly urge that you consider that the operations of the court system have not fully recovered from those devastating cuts years ago.

Funding Civil Legal Services

Funding for civil legal services is an issue that 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.

New York’s lawyers have shown their commitment to voluntary pro bono efforts, but proper funding of critically-needed programs and resources is necessary. Pro bono efforts by the bar have been extensive. The bar contributes 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 – reliably and quickly. The New York State Bar Association strongly supports the inclusion of funds for civil legal services within the Judiciary’s Budget request.

Support for IOLA

The State Bar was one of the original advocates for the formation of the Interest on Lawyer Account (“IOLA”) Fund. The IOLA Fund, which was created by the Legislature in 1983, is funded by the interest earned on moneys held by attorneys for clients and deposited in interest-bearing accounts at the discretion of attorneys and law firms. The accumulated interest is transferred to the IOLA Fund, where it is used to provide grants to legal service providers around the state. Concern in recent years has stemmed from the impact that low interest rates have had on the Fund.

For the past 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 the number of real estate transactions. We support the inclusion of this item in this year’s budget and appreciate the Legislature for its having recognized the importance of this funding in previous years. We strongly urge you to continue your support for this appropriation.

Accordingly, the 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

Discovery in Criminal Justice Matters

Litigants in civil lawsuits in New York State have the opportunity by way of the process referred to as “discovery and inspection” or “disclosure” to learn about facts and evidence that are the basis for the other side’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.

Indigent Criminal Defense

Our Association has long been a leader in advocating for the provision of an adequate criminal defense 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 settlement in the case of *Hurrell-Harring v State of New York*, assuming adequate funding in five of New York's counties outside of the City of New York.

We commend the Governor and the Legislature for continuing their efforts 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.

The Association continues to support, as part of the 2018-19 budget, a statewide, state-funded system with an independent entity to oversee quality and delivery of public defense services, to ensure that indigent defendants receive effective representation in New York's criminal justice system.

Bail Reform

We commend Governor Cuomo for the recently-released framework for a bail-reform package, which would:

- Create a presumption that defendants facing misdemeanor and non-violent felony charges be released without cash bail, either on their own recognizance or with non-monetary conditions imposed by the court, such as supervised release monitored by a pretrial services agency, absent of a record of bench warrants for non-appearance;
- Allow monetary bail, but does not require its use, in remaining cases, after an individualized assessment of the nature of the case and the defendant's personal and financial circumstances;
- Require the court, in cases when bail is set, to give the defendant a choice between cash or bail industry bonds and an alternative form of bail that the judge will set, such as an unsecured or partially secured bond; and,
- Allow the court, in cases involving domestic violence or other serious violence, or if, while on pretrial release, a defendant commits a crime or willfully fails to come to court, to order a defendant to be held in jail pretrial if the court finds, after due process, that the defendant poses a high risk of not returning to court or poses a current threat to the physical safety of a reasonably identifiable person or persons.

Many courts rely solely on cash bail or insurance company bond to secure a defendant's future appearances, despite the availability of alternatives that are set forth in the Criminal Procedure Law. The Governor's proposal seeks to balance the needs of communities while minimizing financial hardship for low-income defendants.

We support the Governor's framework for reform and we urge the Legislature to enact legislation that will adequately meet those objectives.

Voter Participation

In 2012, then-President Seymour James Jr. established the Association's Special Committee on Voter Participation, to identify ways to increase voter participation. In bringing together the twenty-one 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:

Modernization of Registration

The voter registration system in New York is a creation of the New York Constitution as well as statute. Over the years the Legislature has imposed numerous and detailed requirements for registration of voters. As a result, more

than 100 sections of the state Election Law – virtually all of which were written before the age of computers and the Internet – address issues relating to registration.

In order to substantially increase registration and voter participation, we strongly recommend that the registration process be modernized so that:

- (1) Voter registration opportunities are affirmatively offered to New Yorkers whenever they engage in a transaction with a state agency, as a seamless and electronic part of that agency's existing process; and,
- (2) Voter registration opportunities are also made available online, just as they are now available by regular mail.

Moreover, as in existing law, to assure the integrity of the process, we recommend that when registering at a state agency, all registrants be required to provide appropriate identification to confirm their status as eligible voters and provide a “wet signature” that will be retained as a permanent record.

Pre-Registration of 16 and 17 Year-Olds.

As a complement to modernization of registration, we also recommend that a program for the voluntary pre-registration of 16 and 17 year-olds be developed. New Yorkers aged 18 to 24 have the lowest rate of registration in the state. The experience in other states and countries indicates that pre-registration of students before they reach 18 will significantly increase voter participation in that younger age group.

Election-Day and Same-Day Registration

Although it would require a Constitutional Amendment, we also recommend that the state take the steps necessary to permit Election-Day or, if there is early voting, Same-Day Registration – that is, registration at the polls at any time and place when the polls are open. The evidence is that such a practice, which is now used in several other states, will increase both registration and voter turnout.

Given the time it would take for a Constitutional Amendment and the need for further consideration of Election-Day or Same-Day Registration before it could be adopted, we urge that, in the interim, to the extent practicable, Same-Day or Election-Day Registration be considered for adoption at the local level, consistent with the freedom afforded to towns and villages under the

Constitution. Such initiatives at the local level could serve as a valuable first step for the rest of the state.

Online Registration

Many states have fully automated their voter registration process through their motor vehicle departments, with the result that their DMV offices collect and transmit voter registration to election officials electronically so that they may be uploaded directly to the voter registration systems. Other states, including New York, have partially automated systems.

We endorse the Governor's online registration initiative as an important step in fully implementing online registration in New York.

On balance, we submit that because it would result in a greater increase in voter registration, it would be best to have the registration option at various government agencies, not just at DMV. Thus, steps should be taken to enhance practices involving online registration, whether by administrative regulation or legislation if necessary.

Early In-Person Voting

As an important change in the voting process, we recommend that a form of In-Person Early Voting be adopted. The practice of affording voters the option of voting in person earlier than Election Day has proved to be extremely popular in other states and we would expect it to be welcomed by those in New York. In-Person Early Voting makes it easier for many voters to get to the polls and, for some, it permits them more time on a non-working day to consider the ballot and then vote more carefully. Depending on how it is managed, it can also reduce lines and waiting time.

We urge that an Early In-Person Voting program be adopted that extends the time for voting back through the weekend before Election Day and, at the most, up to three additional days into the previous week. Although that would be less of an expansion of the voting period than in other states that have adopted early voting, it would nevertheless make the voting hours more convenient for most of those who have difficulty voting on a particular Tuesday and it should also be sufficient to allow for the problems of most voters with varying days off or who cannot vote on certain days because of religious observance. It should also permit sufficient time for those who vote early but

encounter specific problems, such as the need to prove they are registered. The relatively shorter period would at the same time serve to preserve a community spirit and leave a more concentrated period for mobilization of voters. That could itself permit a greater voter turnout.

We believe that a Constitutional amendment would be necessary before such Early In-Person Voting is permitted.

Other Recommendations Relating to Voting

Beyond early voting we believe there are three additional important changes that should be implemented to make the voting process more accommodating for voters:

- Improve ballot design to minimize voter confusion and mistakes by boosting the minimum font size to 12 points; clear away clutter such as the required "closed fist" (with pointing finger) symbol at the head of rows and columns; simplify voting instructions; and provide ballots in multiple languages to encourage voting among those for whom English is not their first language.
- Expand recruitment and training of polling place workers and improve conditions for them to alleviate some of the difficulties voters face at their polling places; and,
- Address deceptive practices that are designed to discourage voter participation, and change New York's laws to provide criminal penalties for deceptive practices that suppress voting. In particular, we recommend boosting penalties to reflect existing penalties for voter registration fraud, including creating a Class E felony punishable by up to 4 years in prison.

We believe that, if implemented, the above-referenced changes would have a very significant impact on voter participation, perhaps, even bringing New York's rates of registration and voter participation up to levels above 80% within a few years.

ADEQUATE FUNDING OF 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. The Commission has worked with relatively flat budgets for the last several years. As a result, the Commission's current staffing level is at 41.5 staff members, which is down from 55 staff members in recent years. This year, the Governor proposed a two percent increase in the Commission's budget. The proposed increase will cover increased costs related to rent.

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.

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.