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Rural Justice in New York State: Challenges and Recommendations

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Editor's Foreword

Scott Fein, Esq., Chairman of the Government Law Center Advisory Board, graciously agreed to be the Guest Editor for this issue of the *Journal* devoted to access to justice in New York's rural communities. Scott is a thoughtful analyst of New York's legal landscape, so it is fitting that he would assemble these experts to discuss how the legal system can meet the needs of rural New Yorkers.

The authors of this issue of the *Journal* provide us with a portrait of rural New York and the existing barriers to legal services, current solutions to breaking down those barriers, and the potential for new and innovative programs that can provide further help.

I would like to thank our Student Executive Editor for this issue, Gabriella Romero, Albany Law School, Class of 2017, for her professionalism and enthusiasm and ready response to last-minute editing requests. She and her Albany Law School colleagues, Cylas Martell-Crawford, Bradley Murray, Grace Nealon, Carl Raffa, Alyssa Rodriguez, Daniel Siegel, and Tyler Stacy, all members of the Class of 2018, worked extremely hard to help create this issue. My thanks also to the staff of the New York State Bar Association, most especially Pat Wood, for their help, expertise and most especially their patience. And last, my thanks to Andy Ayers, Director of the Government Law Center, for his enthusiasm for this project, and to the Government Law Center's Rural Law Institute in particular.

Finally, I take full responsibility for any flaws, mistakes, oversights or shortcomings in these pages. The errors are entirely my own. Your comments and suggestions are always welcome at rbail@albanylaw.edu or at Government Law Center, 80 New Scotland Avenue, Albany, New York 12208.

Rose Mary Bailly

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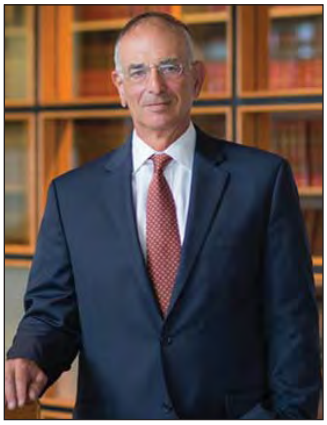
Introduction: Access to Justice in Rural New York

By Scott Fein

Rural New York offers beautiful vistas, serenity, and tightly knit communities. The allure is undeniable, but so is the gritty reality of economically precarious lives, isolation and barriers to government services including those required for the administration of civil and criminal justice. In 2014, Albany Law School, concerned about the resources available to support the administration of justice in rural New York, held a "Summit on Legal Support and Outreach for Rural New York."

The insights and the underlying data provided at the Summit were sobering. Rural New York makes up approximately 80 percent of the State's landmass, yet is home to only 8 percent of the State's population. Personal income is 60 percent below urban counterparts, one of 14 rural households have no access to a vehicle, and public transportation is available in only 27 percent of rural regions.

For those who find themselves in the criminal justice system or seek civil justice, obstacles loom. There is one lawyer for every 1,000 residents, a ratio less than one tenth of the lawyer-to-resident ratio state-wide. Low income residents in rural areas receive inadequate or no professional legal assistance for an estimated 86 percent of their issues with legal implications. More than 90 percent of those rural residents who appeared in court for civil matters did not have counsel. Courts in a significant number of rural areas report that on the average at arraignment counsel was "seldom or never present." Those residents seeking access to counsel or public defenders are frequently stymied by complex financial eligibility filings. The rural justice gap is particularly acute on Tribal Lands where the right to counsel is not obligatory for all offenses.



New York State has begun to tackle some of these issues. Efforts are under way to enhance internet and technology to foster legal assistance. The Office of Court Administration has provided enhanced training and funds to increase the availability of counsel and enhance the skill of those who serve in our Justice Courts. Barriers to financial eligibility for access to court appointed counsel are being simplified. But, the justice gap remains.

This volume of the *Journal* seeks to build upon Albany Law School's Rural Summit and to further explore impediments to the administration of justice and its implications in rural areas of our State. We have invited those familiar with these issues to contribute to this volume and offer recommendations that may serve to improve access to, and the quality of, justice.
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Editorial Office
GLP Journal
Government Law Center
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
518.445.2329

Send Address Changes to:
New York State Bar Assoc.
One Elk Street
Albany, New York 12207
518.463.3200
mrc@nysba.org

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Cover Photo: Brett Carlsen/The New York Times/Redux

Behind The Scenery: A Rural New York Portrait

By Susan L. Patnode, Julie A. Davies and Lisa A. Frisch

Susan L. Patnode

Julie A. Davies

Lisa A. Frisch

Introduction

The overarching challenge when considering issues facing rural New York is the concept of access. There are obvious access to justice issues, but access challenges for all human services present obstacles for rural residents. Obstacles include lack of public transportation, inadequate safe and affordable housing, physical isolation, persistently stalled economic development, limited access to quality health care, fewer education and employment opportunities, far fewer grant and philanthropic resources, and the gap in access to technology. When attempting to address the lack of vital legal resources in rural areas, these obstacles must be considered and addressed, lest the programs that are developed only respond to part of the problem—and sometimes create problems of their own. Importantly, new programs must be crafted *with*, and not *for*, our rural neighbors and on-going evaluation and replication of promising responses must be part of the process.

I. What Is "Rural" New York?

In the State of New York, "rural" is defined and designated by law as "counties within the state having less than 200,000 population, and the municipalities, individuals, institutions, communities, programs and such other entities or resources as are found therein."[1] Under that definition, 44 of New York's 62 counties are officially designated as rural. [2] Rural New York encompasses over 41,000 square miles, which is over 85 percent of the state's physical area. In comparison, rural New York is geographically about the size of Virginia. Rural New York's total population is nearly 3.5 million, which is comparable to the total population of Connecticut. When we talk about rural New York, we are talking about a large geographic area with a substantial population. We know that in the political scheme of things states like Virginia and Connecticut would not be neglected and shut off from resources. Yet in New York, legal and human services to rural counties are sparse, and that sparseness results in unfair encounters with the legal system and persistent, generational poverty. It is very important to note, however, that the actual rural regions of New York State go far beyond the State definition. In fact, in every Upstate county that is considered "urban" there are large portions of the county that are clearly rural in character and are impacted by the challenges that are described throughout this article.

II. Why Does Addressing Rural Issues Matter?

The day following the 2016 Presidential election, political pundits, the news media, pollsters, and others expressed disbelief in the outcome. For organizations working in rural areas, the outcome was less of a surprise. Reviewing the voting patterns in New York, of the 44 rural counties, 43 voted for Donald Trump. This in a state where Hillary Clinton had wide support for her service as a United States Senator.

While no one can definitively know the reason for the vote count, it has been suggested that Candidate Trump responded to the perception that rural concerns are largely ignored. His campaign has been credited with recognizing that the aggregate voice of rural America was indeed powerful. The campaign accused sitting politicians of not recognizing or properly addressing rural concerns. Although there have been years of policymakers' attempts to at least raise awareness of rural issues, the reality is our responses have been inconsistent, and sometimes somewhat tone deaf to the realities of rural America. This focus on "Small Town" America, as well as the divisiveness stoked between those who reside there and the "Coastal Elites," apparently was successful. On Election Day 2016, many in those rural communities came together to form a substantial demographic as demonstrated in the election results map of the United States by county.[3] This newly formed, fairly cohesive group of potential voters was assisted by technology and social media and became a strong and powerful voice. Whatever one's politics, it is imperative that policy leaders across all professions develop tools for listening and, more importantly, implementing rural policies that truly fit the needs of rural communities.

III. How Are Rural Issues Unique?

On the surface, the basic needs for all New Yorkers (housing, employment, health care, education, etc.) are very similar. The difference for rural New Yorkers is in the details, and the details are primarily about access.

A. Housing

Most low-income rural New Yorkers are renters. According to the U.S. Government Housing Assistance Council, "Renters in rural areas are more likely to have

affordability problems and are twice as likely to live in sub-standard housing than are rural owners."[4] Often, this means old farmhouses with inadequate heating systems, wells and septic systems that are not working properly. In addition to the problems facing renters, there are two unique rural housing problems. First, since incomes are lower and much of the housing stock substandard, banks are reluctant to offer conventional mortgages for low-income homeowners. This often is circumvented by home purchase through "land contracts." While land contracts can offer an opportunity for a low income person to begin to build equity in an asset, these types of housing purchases have little protections. The buyer doesn't obtain the deed until all payments have been made and there are no recording requirements. Sellers on land contracts can acquire liens on the property, taxes can be unpaid, or an unscrupulous seller could sell to another party without the buyer's knowledge. Second, mobile homes are a common form of low-income housing, but there are few resources to protect mobile home buyers or tenants. According to the National Housing Assistance Council, approximately 80 percent of mobile homes are "owned" by the resident, but only 14 percent of those homeowners own the land where the mobile home is placed.[5] Thus, an eviction means the costly expense of moving a trailer to a new location, or if the mobile home is too old, New York State law forbids its transport, essentially leaving the homeowner "homeless." Finally, there are virtually no shelters for the homeless in rural New York. This presents issues for the homeless person or family, but also impacts the County Department of Social Services, which must find and pay the costs of alternative shelter. Often, rural homeless people resort to staying in barns, empty hunting camps and people's porches. In the summer months, they may find a campsite at state parks where they can temporarily stay, but before long they must pack up their meager belongings and move again. It is an exhausting cycle that could be avoided by providing protections on the front end rather than allowing this unnecessary spiral into homelessness.

B. Transportation

Establishing a rural public transportation system that is adequate for travel to work, health care appointments, and shopping is a persistent challenge for policymakers. Often assessments of need result in the allocation of resources and the design of new transportation models, usually in the form of more public buses. These public buses are rarely able to meet the needs of rural residents. The bus routes, which cover vast distances, do not mesh with work hours, child care, health care needs and the pick-up and drop-off points are sometimes miles from the desired destination. Take, as an example, Clinton County, which occupies 1,037 square miles and has a total population of 81,073. Of that total, 24,254 are employed and 17.5 percent of the population is living in poverty. The average time for travel to work is 25 minutes each way.[6] To illustrate the points made above, see the following public bus schedule for one of the four rural routes across Clinton County.[7] Note that while technically the buses do travel across the county each day, the times that transportation is available to and from towns is extremely limited. This expensive and well-intentioned transportation program fails to meet the real needs of employed people. The result is that most often these buses travel the back roads with few, if any, riders.

C. Health Care

Access to quality health care is a challenge facing rural New Yorkers. The U.S. Department of Health and Human Services 2016 map of Rural Healthcare Facilities in New York clearly shows the distances between medical service locations.[8] Compounding the sparseness of services, there is a general lack of health care specialists and experienced surgeons practicing in rural New York. When a rural New Yorker faces a health crisis, most times the emergency medical services system is staffed by local volunteers. These volunteers receive training, and anyone living in a rural area can attest to the local EMS volunteer commitment to efficiency and excellence. Yet, in urban and metropolitan areas the EMS team members belong to teams that are professionally trained and salaried. Contrast that with rural, local Emergency Squads that are usually joined with the local volunteer fire department. These rural organizations do not receive public revenues, but instead rely on donations and proceeds from events like chicken barbecues and bake sales. This example illustrates the resiliency of rural communities, but also of the disparity in health resource allotment. Beyond emergency care, rural hospitals are facing tremendous financial strains, with an alarming number considering closing altogether. Hospital closings not only harm ill patients who need local medical attention, but rural hospitals are often one of the county's primary employers. When a rural hospital closes it has the same devastating economic effect as the closure of a major manufacturing facility.

D. Domestic Violence in Rural Areas

With the passage of the Violence Against Women Act in 1994 (VAWA), the response to domestic violence has most certainly improved in this country. It's important to remember that prior to VAWA and prior to state efforts such as New York's Family Protection and Domestic Violence Intervention Act of 1994, arrests were rarely made in crimes against spouses (primarily wives) but were treated as "family trouble" veiled by privacy unless it spilled out into the public view. There has been a great deal of effort to improve our responses since that time; however, positive change in our system's responses to domestic violence has been spotty, and overall, difficult to sustain. Even our less than stellar response to domestic violence is not equal across the urban/rural divide. All victims face major obstacles including mental and physical health, injury and sexual assault, economic security, and legal is-

sues, made exponentially more challenging by social and geographic isolation and almost total lack of resources.

In addition to the limited access to support services for victims, rural domestic violence is exacerbated by familial connections with those in positions of authority; a level of acceptance of patriarchal society and conversely a lack of cultural acceptance for alternative lifestyles; vast distances for victims to travel for assistance, transportation barriers; the stigma of abuse; lack of available shelters, and generational poverty as a barrier to care, among other challenges. In small communities there are often relationships and connections among health care providers, law enforcement officers, and abuse victims. Therefore, some people may be reluctant to report abuse, fearing that their concerns will not be taken seriously or that their reputations may be damaged.[9] Perpetrators of domestic violence often use isolation as a way to control their victims, break them down psychologically and keep them away from potential support. In rural areas, there is often stark, physical isolation that tightens the grip that abusers have over their victims. The lack of next door neighbors, or people in the apartment upstairs, makes the abuse harder to identify and report. Everything—the grocery store, the gas station, the school, the hospital, the court and sometimes family—most everything is located miles away.[10]

Most every family in rural communities has access to at least one firearm, and rural victims are more likely to have been threatened or physically harmed with a weapon. Studies have shown a higher rate of severe domestic violence and of domestic homicide in rural areas. This increased severity of abuse in rural areas is reflective of the prevalence and community acceptance of firearms and the distance to emergency medical assistance, often with hospitals many miles away. This distance can make the difference between a felony assault and a homicide. Additionally, rural abusers are twice as likely to threaten to kill their victims and 2.5 times as likely to destroy property. Rural women are more likely to be deprived of sleep by their abuser and more likely to experience sexual abuse.[11]

This physical isolation contributes to the social isolation that many victims experience.[12] They are cut off from their families, friends, co-workers, potential services—their batterer tells them they are alone and have no one to help them, and that is too often a reality. Many victims in rural areas do not have cars, and fewer rural than urban victims have access to either landlines or cell phones. Cell service itself is spotty, and cell phones can be used by abusers to track and stalk their victims (which is an urban problem as well). The lack of a telephone adds to the challenges that domestic violence advocates and prosecutors experience when trying to make contact with the victim. This isolation and a feeling of entrapment is also exacerbated by a lack of access to education, job opportunities, or child care.

Rural victims cannot quickly run to the neighbor's house for help, or otherwise easily identify ways to get immediate help. Even calling the police or an ambulance takes much more time, as they may be clear across the county when the call comes in, or attending to an accident or other emergency. Domestic violence services, such as support groups, court advocacy, or shelters, are most often located in more populated areas. Resources are scarce for all domestic violence programs, so programs tend to have to be geared towards the largest numbers of victims. It is important, however, to not only provide more adequate funding, but also find creative and cost-effective ways for domestic violence programs to reach more underserved victims. Many rural victims are frightened at the prospect of going to a shelter, and terrified when it is in a city where they may rarely if ever have visited before, which is far from their support systems or children's school. As stated, the Family Courts are located in more urban settings, and the already discussed lack of transportation, as well as trepidation of going to an unfamiliar place to ask for help, makes reaching out to the courts almost impossible. There is little transitional housing for *any* victims, but the overall dearth of housing in rural communities makes it particularly burdensome for rural victims to leave their abusers. Weighing abuse versus homelessness is a most difficult choice. Further, rural victims who are Native Americans, LGBT, immigrants or elderly, as examples, are even more vulnerable and difficult to reach.

Another rarity in rural communities are lawyers. The vast majority of lawyers gravitate to urban or larger suburban areas in which to practice. Depressingly high law school loans make the idea of moving to a small town to practice law nearly impossible. Only larger firms can keep salaries somewhat in line with the costs of law school, and this unfortunately keeps many attorneys in the city. The attorneys who are located in rural areas are often incredibly overworked—sometimes playing multiple legal roles in the community. They are less likely to have received specialized CLE training in domestic violence and shy away from doing pro bono, as they feel like they do their share of "pro bono" when their clients can no longer afford their rates as cases drag on. Similarly, non-profit civil legal services programs or Legal Aid offices have inadequate rural resources. Unfortunately, victims of abuse desperately need attorneys to help them find safety and independence from their abusers. Without civil legal information and assistance, victims are less likely to obtain an order of protection, or successfully obtain custody of their children. This truly can be a matter of life and death.

Earlier, we distinguished between rural and urban communities, but it is particularly important to note that there is no singular rural experience in America. There are many regional differences that impact rural "culture" and further impact the challenges that those in these communities face when seeking services and assistance. For example, in New York State alone, rural communities can

include expansive farmland in Delaware County, Indian reservations in Seneca County, Adirondack wilderness in Essex County or desolate, abandoned factory towns in the Leatherstocking region. Each of these diverse rural areas come with their own sets of challenges. But often, even in our attempts to be responsive to rural victims, we tend to make inaccurate assumptions that all rural areas are alike and that responses that are developed should be equally effective, no matter where the victims live.

E. Education and Employment

Higher Education rates for residents of New York's rural counties are significantly lower than for their urban counterparts. According to a recent USDA report, the rural-urban gap in college completion is growing, and in rural counties a lower education rate is linked to unemployment rates and higher poverty.[13] Financial and geographic barriers are the most obvious causes. However, the necessary support from both inside families and communities is also a very real factor. Since education is directly related to employment outcomes, the impact for the individual, as well as for the economic health of a region, presents greater challenges. Comparing four upstate New York rural counties (St. Lawrence, Cattaraugus, Yates and Washington) to four upstate New York urban counties (Monroe, Erie, Onondaga and Albany) presents some dramatic differences. The average percentage of the population having a degree in higher education is 19.8 percent for the rural counties and 35.2 percent for the urban counties. Although not as great a difference, the total percentage of the population employed is 59.1 percent for the rural counties and 64.1 percent for the urban counties.[14]

F. Economic Development

When navigating the highways through upstate New York, the scenic beauty of mountains, lakes and open landscape never fails to impress. As one exits these main thoroughfares and meanders through the rural towns, the picture is entirely different. While the decline of American manufacturing is well documented, in rural New York it is painfully visible. In town after town, ruins of once-prosperous factories no longer support local employment. Once bustling main streets are now replaced by vacant storefronts, boarded up buildings and the occasional business. The towns and villages are not the only places on the decline. Family farms, once the mainstay of America's economy, have all but disappeared. Instead, abandoned farmhouses, falling-down barns and rusted farm equipment are a common rural New York scene. These bleak economic realities pose a tremendous barrier to sustainable employment for those families who have lived there for generations. Adding to the burden is the factor that much of rural New York lags behind the rest of the State in the technology resources now necessary for almost all employment.

G. Grant and Philanthropic Resources

Funding for human service agencies from government grants is generally based on population size and does not take into consideration the specific challenges to rural program delivery. In the case of philanthropic funds directed to rural areas, the picture is even bleaker.

> A new federal study shows that rural communities get a disproportionately small share of foundation grants. Whichever way you slice it, rural communities aren't getting a proportionate share of foundation grants compared to the relative size of the rural population, a new report says. Researchers found that rural communities, which accounted for 19 percent of U.S. population in 2010, received only about 6 to 7 percent of foundation grants awarded from 2005 to 2010.[15]

IV. Should Geography Determine Justice?

In the Spring of 2006, Debra Lyn Bassett published an article, entitled "Distancing Rural Poverty" in the *Georgetown Journal on Poverty Law and Policy*. In her article she said, "Our society distances rural poverty. We don't want to see it, we don't want to talk about it, and we don't want to think about it."[16] We clearly need to look at it, talk about it, and hopefully think about it in order to develop a strategic way to improve legal services for rural New Yorkers." Ms. Bassett goes on to say, "The physical and psychological 'Distancing' of rural poverty contributes to discrimination against the rural poor—discrimination on the basis not only of race and of class, but also on the basis of place." The "Distancing" of rural poverty suggests a geographical divide but, in fact, the distancing is both physical and psychological.[17]

In rural New York, there is discrimination based on place for issues dealing with access to justice. Only 26 of New York's 44 rural counties have a legal services office. That is not because the Legal Services programs do not care about low income rural New Yorkers; it is because there is limited funding available. Further, across the country private foundations grant only 1 percent of their funds to rural areas. More often than not, the allotment for state and federal resources is based solely on the population in a region, which obviously disadvantages rural areas where service delivery is met with many obstacles.

V. What Are New York's Rural Justice Challenges?

Rural New York's economic, geographic, and social realities significantly exacerbate the barriers that moderate and low income rural New Yorkers face when accessing legal assistance. In addition, there are critical issues of access stemming from the current legal system in rural New York. This system is typified by the town and village

courts and Family Court, which are the two major entry places where rural people come to interface with the civil justice system.

A. New York's Town and Village Courts

Aside from the conventional Office of Court Administration's system of courts across the state, New York has a unique and locally funded system of town and village courts. According to the New York Unified Court System's website, there are close to 1,300 town and village courts, with nearly 2,200 local justices. These local courts handle over two million cases each year.[18] Among the unique features of these courts is that they are locally controlled and the justices are elected in local elections. To those who do not practice in these courts it may come as a surprise that town and village justices are not required to have law degrees and, in fact, the majority do not. Despite this fact, these courts have "broad jurisdiction and they hear both civil and criminal matters."[19] The Unified Court system reports that "many New Yorkers will have their first and only court experience" in one of these justice courts.[20]

Much has been written about the "uneven justice" of the town and village courts and efforts are being made at the State level to address this issue. Serious civil matters that affect housing, income and safety are heard every day in these small courts by justices who are not lawyers. In smaller courts, there may be no prosecutor or defense attorney present for all proceedings. This reality can unwittingly lead to unequal justice. Again, place matters. Cities with populations over 20,000 qualify for "City Court" designation, and those judges must be attorneys.[21] Cities have that benefit, most rural towns and villages do not. Undoubtedly, most non-attorney justices are dedicated to their positions; however; it is challenging for lay justices to preside over increasingly complex legal issues, which can put procedural safeguards at risk. Without the assurance of procedural safeguards, there can be dire consequences. Low income people often purchase homes with land contracts, only to find out the seller owes a mortgage that is now in foreclosure. The rural poor are targets for predatory lending and for illegal debt collection practices. Illegal evictions can take place because there is no one to enforce eviction procedure. These are examples of discrimination based on place. When one is facing a serious legal matter that could result in homelessness, safety issues or significant loss of income there should be an attorney in the room.

B. County Family Courts

There is an 18-b indigent defense plan in each county. Judges in Family Court determine if someone will receive free counsel.[22] In many working poor households, each member of the family may work several jobs to stay afloat, and consequently, do not qualify for assigned counsel. Clearly, affording a private attorney is out of the question for the vast majority of these individuals, who are making salaries far less than the median income of those in urban areas. They often cannot access a legal services attorney nor are there local resources, extensive pro bono programs, or court clerk staff who can help them navigate through the legal system, again leaving rural litigants out in the cold.

C. Over-Fiduciary in the Justice System

There is a tendency to stigmatize and judge those who need assistance, and over-familiarity sometimes complicates responses. This adds to the challenges facing rural residents in need of services. Accessing an already onerous rural justice system can be negatively impacted by the relationships between attorneys, court staff, and judges. Danielle Martell, staff attorney at the Legal Aid Society of Mid-New York, calls this process "home-towning."[23] Any attorney who has ever practiced in a court will recognize this "Good Old Boy Network"—sometimes overly chummy behavior between some lawyers and judges, even in more urban courts—but the "smallness" of the rural justice system increases the extent of this problem exponentially. Some examples of home-towning include speaking negatively about the opposing party or the victims in front of the judge; making moral judgments about clients based on "personal knowledge" of the party outside of court; portraying themselves as friends of the judge in an effort to obtain an advantage during negotiations; and suggesting or using friends as appraisers in a case in an effort to low ball the opposing party. Some local attorneys will imply to an out of town attorney that they somehow don't understand the case because they're not from the area. Certainly, there are far fewer attorneys in rural areas, so it stands to reason that those practicing in certain courts will develop connections and relationships, and certainly not all attorneys in this situation take advantage of these relationships. This natural familiarity in the rural justice system can cast a long shadow—intentional or not—on a case proceeding.

VI. Where Are the Solutions?

The challenges and barriers that stunt legal and other human service delivery in rural areas often get attention on the state level. Unfortunately, after an "action plan" is developed, there is often no effective, long-term implementation strategy, stemming from a lack of resources and a lack of understanding of the complexities of the diverse, rural communities. If one looks to the rural community for input and leadership, it is possible to craft reasonable, cost-effective solutions.

A. Build on Local Strengths

In every county there are community members committed to improving the quality of life for its residents. These leaders understand the local needs of their communities and are vital in any effort to develop effective solutions. One of the mistakes made when planning programs for rural areas is that well-meaning "outsiders" try

to solve a problem from afar. This does not work. These resilient, resourceful communities do not often appreciate someone from the outside telling them how something should be done. Rural service delivery should become a priority. In order to accomplish that, we need to set broad-based goals, with broad questions such as: What are the unmet local legal needs? Who needs services? Who is and who is not receiving these services? Which parties should be at the table to design a solution?

B. Consider Successful, Rural, Non-Legal Models

There are existing, successful rural models that have addressed "access" issues. A good example of a successful model is the rural Health Care Network movement. There are at least 45 rural Health Care Networks in New York that have a broad base of stakeholders, and are devoted to increasing access to health care. In this model, the Network works together, identifies problems, and creates a delivery system to solve those problems. The Tele-Medicine rural project is an example of an effective delivery system that responds to the fact that if someone in an outlying area had a stroke, there was no way to get the person the medical attention needed within the first three critical hours. Now, through training, technology, and urban-rural resource sharing, a system is being put into place that will quickly identify a stroke victim and get them the emergency help they need to survive.

C. Leverage Existing Rural Networks

In rural New York there is a well-developed system that has a library in virtually every small town. Cornell University has Cooperative Extension offices in every county. There is a Magistrates Organization in every rural county. Community colleges often have services for the broader community. Senior Citizens are engaged more and more in community service through agencies and organizations. These local programs work because the networks provide strength and cohesiveness. Community partnerships between agencies and faith-based organizations, at the grassroots level, have had substantial impacts in the lives of rural residents. Rather than trying to create new and expensive delivery systems, the Judiciary, local county bar associations and local legal services offices can work within these existing networks to create viable programs that significantly increase access to justice in rural regions.

D. Evaluate Technology

New York State's Connect New York Broadband Program is currently in its final, third phase with a goal of providing access to high-speed internet to all New Yorkers by the end of 2018.[24] While statewide access to the internet is clearly necessary for residents to be connected to critical services, it remains a concern that many low income New Yorkers will not be able to afford the equipment or the services. Community libraries provide terminals and online access, but in smaller communities the available times are extremely limited. Many low income people now have smart phones that allow them to be online, but in cases where computers, printers and scanners are necessary, such as the filing of legal forms, there is no access. Using remote technology to provide information and assistance to those seeking civil legal help has become more widespread, especially connecting lawyers in more urban areas with clients with little access to civil legal assistance. National, state, and regional legal services organizations and bar associations have developed web-based programs providing brief advice to underserved, low-income individuals. Using such methods as linking urban volunteer attorneys to clients isolated by geography, disability, lack of transportation or circumstance, will potentially work to leverage services from more resource rich areas to assist in filling the rural justice gap.

Although there have been numerous projects that do provide links from more resource rich communities to rural areas and important financial support from funders, it is vital that we consider the real impacts on the rural client in need and develop comprehensive evaluation strategies. The use of technology is an exciting development in our attempt to improve access to justice, but we must recognize the limitations and the hard fact that technology alone cannot solve the vast access-to-justice obstacles faced by our rural communities.

E. Place-Based Funding

Nearly all funding for the provision of human services to the poor is disbursed based on population. It is no different in the case of Legal Services. Government funders and Foundations alike almost always allocate the amount of funds awarded to an organization based on the number of people to be served. In the case of legal services for the poor, it is the number of people below the poverty level living in the service area. The data collection used to evaluate the success of these programs is then counted in numbers of individuals who have received services. In spite of much smaller populations, rural organizations are still expected by funders to plan and build service delivery models similar to their urban counterparts with far fewer financial resources and a much smaller staff. Recently, however, there is a positive, new perspective about rural resource distribution. For example, the national Rural Policy Institute has written about rural human services, proposing that funding should be place-based, and one size does not fit all.[25] To fund programs purely on population is a form of discrimination that shuts out these very low-income New Yorkers who are desperately underserved.

Conclusion

The geographic and social barriers to obtaining resources for economic development, health care, education, domestic violence, affordable housing, and home-

lessness prevention all present challenges for both low and moderate income rural New York residents. It also can be argued that the obstacles presented by the rural legal realities are what maintain the rural status quo. It is true that the simple fact of geography makes accessing almost all social supports extremely challenging, complicating access to justice. It is possible, however, to improve access to a quality legal system that allows every New Yorker to be treated fairly and to seek redress in the courts. It is vital that "place" be factored in when resources are allotted. Furthermore, programs must be developed with the input, guidance and leadership of the local, rural communities. With adequate and appropriate resources, local providers can develop effective programs that are tailored for individual community needs. As a society, we must consider the needs of such a major demographic in our country and understand that access to justice must be a priority for all of our citizens, rural and urban alike.

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Susan L. Patnode, Esq. is the former Executive Director of the Rural Law Center of New York. Through the Center she engaged in community collaborations and partnerships designed to address systemic rural issues impacting access to justice. In addition, Ms. Patnode is an adjunct faculty member at the State University of New York where she has offered courses in Family Law, Social Services Law and Women and the Law.

Julie A. Davies is the Acting Executive Director of the Rural Law Center of New York. The Rural Law Center is committed to focusing attention on the legal and economic needs of low-income, rural New Yorkers. Ms. Davies has worked in the legal services field for over 20 years in Development and Grants Management, serving most recently as the Program Director for the Rural Law Center.

Lisa A. Frisch is the Executive Director of The Legal Project, which was founded by the Capital District Women's Bar Association in 1995. She has held that position since 2003. The Legal Project is an award-winning not-for-profit organization addressing the civil legal needs of the working poor, with a special representation program for domestic violence survivors. Lisa holds a graduate degree from the State University of New York at Albany School of Criminal Justice and is the author of a number of publications on the issue of the justice response to domestic violence. Her entire career has been dedicated to issues impacting women, the poor and others in need—always in public service or non-profit work.

Bridging the Justice Gap in Rural New York

By Kristen Wagner

Kristen Wagner

Introduction

All across the state, low-income New Yorkers are unable to receive the legal assistance they need to address their fundamental needs. Serious gaps in access to civil justice persist due to inadequate public funding. Given that free and low-cost civil legal services are scarce, it is especially difficult for rural communities to access the services that do exist as they are often concentrated in urban areas where the population is concentrated. This is a unique problem that deserves special attention and innovative solutions. This article seeks to provide some insight into the gaps in access to justice in rural New York, innovative solutions that organizations in several states, including New York, have developed to address this problem, and how New York can seek to better address this problem in the future.

I. Background

In 2010, more than 90 percent of low-income New Yorkers who appeared in court for civil matters did not have legal counsel. In response to this crisis, former Chief Judge Lippman created the Task Force to Expand Access to Civil Legal Services in New York "as part of a comprehensive effort to provide counsel to low-income New Yorkers in civil cases."[1] In 2015, the Task Force was changed to a permanent commission, the Permanent Commission on Access to Justice. In addition to providing support for the preparation of the Chief Judge's annual statewide hearings to assess unmet needs for legal representation in civil legal proceedings involving fundamental human needs, the Commission also provides assistance in developing the Chief Judge's report and recommendations to the Legislature and the Executive about the level of public resources necessary to meet those needs.[2] The Commission's mission also encompasses "the expansion of access to civil legal services and the improvement of access to justice generally."[3]

Since 2010, the Permanent Commission on Access to Justice has recommended that "(1) a reliable source of state funding for civil legal services be established; and (2) non-monetary initiatives be developed and implemented to enhance access to justice for low-income individuals facing civil legal challenges to the essentials of life." In 2010, a funding goal of $100 million in state funds dedicated to the provision of civil legal services was set. In 2016, Under Chief Judge DiFiore, this goal was met. This level of funding yields an estimated return of $10 for every dollar invested in civil legal services, totaling $1 billion. As a result, over 453,000 New Yorkers receive state-funded civil legal services. This is an increase of approximately 60 percent since 2010.[4]

In addition to the Permanent Commission on Access to Justice, the New York State Courts Access to Justice Program was also created. This program's mission is

> "to ensure access to justice in civil and criminal matters for New Yorkers of all incomes, backgrounds, and special needs, by using every resource, including self-help services, pro bono programs, and technological tools, and by securing stable and adequate non-profit and government funding for civil and criminal legal services programs."[5] The New York State Courts Access to Justice Program developed several resources that helped facilitate this decrease, including Court Help Websites, DIY Forms, a Mobile Legal Help Center, and the Attorney Emeritus Program. Since 2010, through the work of the New York State Courts Access to Justice Program, and others, the percentage of unrepresented New Yorkers in civil matters has decreased to 80 percent.[6]

Summarizing the work of the Permanent Commission on Access to Justice and the New York State Courts Access to Justice Program shows the commitment that New York State has made to closing gaps in access to justice, through both the court system and the private bar. And while improvements have been made in increasing state funding and representation in civil matters, severe gaps in access to justice remain across the state.

On a national scale, over 60 million Americans live at or below 125 percent of the Federal Poverty Level. This portion of the population includes 6.4 million seniors, more than 11 million people with disabilities, over 1.7 million veterans, and about 10 million rural residents. That means over 16.6 percent of the American population lives in rural America, and 75 percent of rural households had at least one civil legal problem in the past year. A survey of approximately 2,000 adults living at or below 125 percent of the Federal Poverty Level revealed that in in 2016-2017, 71 percent of low-income households experienced at least one civil legal problem, and 86 percent of these problems received "inadequate or no legal help."[7]

The Legal Services Corporation "defines the justice gap as the difference between the civil legal needs of low-income Americans and the resources available to meet those needs."[8] According to the survey that the Legal Services Corporation conducted, the most common types of civil legal issues experienced by low-income rural Americans are health (43 percent), consumer and finance

(40 percent), and employment (25 percent). However, this population seeks legal assistance for only 22 percent of their civil legal problems, receiving inadequate or no legal assistance for about 86 percent of all of their problems. The top reasons why low-income rural Americans do not seek legal assistance for many of their civil legal problems are: deciding to deal with the problem on their own (26 percent), not knowing that their problem was a legal problem (21 percent), and not knowing where to turn for legal assistance (18 percent).[9]

The total population of New York State was an estimated 19,745,289 in 2016.[10] About 15.4 percent of the state's population (approximately three million people) were living in poverty. The median household income was around $59,269, with 85.6 percent of the population attaining a high school education or higher; 9.7 percent of the population did not have health insurance, and the total population included 828,586 veterans.[11] In 2015, 16.2 percent of New York's rural population was in poverty, whereas 15.4 percent of New York's overall population was in poverty.[12] In 2016, the unemployment rate in rural New York was 5.4 percent where it was 4.8 percent statewide.[13] 19.8 percent of New York's total population was living below 125 percent of the Federal Poverty Level.[14]

When most people around the world, and even the United States, think of "New York" they think of New York City. However, New York City accounts for only five of New York State's 62 counties. In 2016, 1,380,908 people lived in New York's 44 rural counties (that is approximately 7 percent of New York's total population).[15] These counties and their approximate populations are: Allegany (47,077), Cattaraugus (77,677), Cayuga (77,861), Chautauqua (126,504), Chemung (86,322), Chenango (48,579), Clinton (81,073), Columbia (60,989), Cortland (48,070), Delaware (45,523), Essex (38,102), Franklin (50,409), Fulton (53,828), Genesee (58,482), Greene (47,508), Hamilton (4,542), Herkimer (62,613), Jefferson (114,006), Lewis (26,865), Livingston (64,257), Madison (71,329), Montgomery (49,276), Ontario (109,828), Orleans (41,346), Oswego (118,987), Otsego (60,097), Putnam (98,900), Rensselaer (160,070), Saratoga (227,053), Scoharie (31,317), Schuyler (18,099), Seneca (34,777), St. Lawrence (110,038), Steuben (96,940), Sullivan (74,801), Tioga (48,760), Tompkins (104,871), Ulster (179,225), Warren (64,567), Washington (61,800), Wayne (90,798), Wyoming (40,791) and Yates (24,923).[16]

Rural New York takes up 80.3 percent of the state's land mass. Its average per capita income in 2016 was $18,767, and personal income for the rural New Yorker is 59 percent below that of his or her urban counterpart. Furthermore, one out of 14 rural households has no access to a vehicle and public transportation is available in 27.2 percent of rural regions.[17] These details paint a picture not only of the vastness of this population, but also of the unique struggles they face. The mere fact that many low-income New Yorkers have no means of transportation means they physically cannot access justice. If an individual has no means by which to travel to a legal service organization or government office to obtain the information and potential legal representation that he or she needs, there are very few alternate means through which this person can access justice.

II. Innovative Programs in New York

The need for civil legal assistance and the barriers to accessing that assistance are undeniable in rural New York. As a result, low-income tenants, debtors, and others often face significant risks when appearing in court without an attorney. Several staffed civil legal service organizations serve rural communities across New York, including the Rural Law Center of New York, Legal Assistance of Western New York, Legal Aid Society of Northeastern New York, and others, and many of them rely upon pro bono attorney volunteers to help them meet the needs of local communities. In order to improve and expand the reach of these pro bono projects in rural communities, several organizations have developed innovative solutions.

The Legal Services Corporation has granted funding to several civil legal service organizations in New York State to facilitate innovative programs to address the gaps in access to justice that many rural New Yorkers face. One program is the Judges' Best Practices CLE and Pro Bono Program, created by the Rural Law Center of New York in 2003. This program was developed to provide continuing legal education programs to attorneys working in rural areas while improving private attorney involvement in serving low-income individuals. "Since rural practitioners often practice alone, or in small firms, they often do not have the resources available in urban areas. Therefore, they routinely face difficulties of time and distance when trying to meet their mandatory Continuing Legal Education (CLE) requirements."[18]

Through this project, the Rural Law Center travels to rural counties throughout New York State to deliver continuing legal education presentations in partnership with the local judiciary, bar associations, and regional legal aid organizations. The project's unique model had local judges designing and teaching the curriculum.[19]

> This model serves the needs of all partners in the project. The judges are able to demonstrate their court's specific expectations and thereby elevate the level of practice. Practicing attorneys receive useful information and guidance from the local courts. And most importantly, attending attorneys (in lieu of registration fees) agree to provide pro bono services that are administered by the local legal services program or the local bar association.[20]

More recently, the Legal Services Corporation granted a Pro Bono Innovation Fund in the amount of $362,559 to the Legal Aid Society of Northeastern New York to use from October 2015 through November 2017 to work in collaboration with Legal Assistance of Western New York and the Volunteer Legal Services Project of Monroe County on a technology project designed to close the gaps in access to justice for low-income rural New Yorkers, using the pro bono assistance of urban attorneys.

The project is referred to as "Closing the Gap" (www.closingthegapny.org). It uses a remote services delivery model whereby technology is used to "bridge the divide between pro bono and legal aid resources in urban areas and low-income rural communities."[21]

With this funding, a virtual platform was created with the help of ProBono.net/LawHelp to connect rural clients with urban volunteer attorneys. The Closing the Gap technology facilitates limited scope assistance from pro bono volunteers from across the state by providing a way through which attorneys can conduct virtual interviews with rural clients using web-based video and chat functions alongside document sharing and editing features in conjunction with Law Help Interactive Software, which allows for real time document preparation of pro se pleadings.[22] The project started with a focus on housing and certain types of consumer cases, and includes an active campaign to recruit, support, and sustain volunteers and clients in using the new system, which is a scalable technology infrastructure that creates efficiencies, expands services, and lowers the cost of serving rural areas.[23]

Another ongoing technology project in New York State that is designed to help bridge the gaps in access to justice is New York Free Legal Answers. In 2016, as part of the American Bar Association's Free Legal Answers project, the New York State Bar Association began hosting New York's Free Legal Answers website. Based on a model designed by Tennessee Alliance for Legal Services, called Online Tennessee Justice, Free Legal Answers is a "virtual legal advice clinic" where individuals who qualify for the service, based on income, can post civil legal questions online that are answered by pro bono volunteer attorneys. In New York, the Pro Bono Services Department of the New York State Bar Association administers ny.freelegalanswers.org, the Free Legal Answers site.

Any attorney who is admitted to and in good standing in New York may volunteer for Free Legal Answers. While individuals and attorneys from all parts of New York State may use the service, it is especially useful for rural New Yorkers who might otherwise face barriers to accessing civil legal advice. One needs only an internet connection to use NY Free Legal Answers. In this day and age where many people have a smart phone, the internet is at most people's fingertips, regardless of income level. And even if someone does not have personal access to the internet, public libraries across the state provide free access to the internet.

The New York Free Legal Answers service was launched in August 2016 and was marketed to the public at large starting in October 2016. Since then, over 670 eligible clients have registered for the service. 231 questions have been posted to the site, 68 percent of which have been responded to by a volunteer attorney. The remaining 32 percent were responded to by the Free Legal Answers site administrators, making referrals to local legal service providers when such providers are more suited to respond to the individual's specific question, or if the question has not been responded to by a volunteer attorney within 30 days or by an indicated legal deadline. The top legal issues that arise on Free Legal Answers include: family, divorce, custody, housing or property owned, debts and purchases, and employment.

The top three regions from which Free Legal Answers volunteer attorneys come are New York County, Westchester County, and Albany County. While most of the clients are from New York City (New York County (256); Queens County (29); Bronx County (21); and Kings County (49)), at least 315 (or approximately 47 percent) of the Free Legal Answers clients come from areas of New York State outside of New York City. This demonstrates how Free Legal Answers is effectively connecting pro bono volunteer attorneys with many clients in rural regions of New York State. While these numbers are small compared to the entire population of the state, it is undeniable that a technology-based, remote, limited scope service such as this is a viable approach when addressing the gaps in access to justice in New York State.

Technology is an emerging theme in addressing gaps in access to justice across the state and it is undeniable that it will continue to play a large role. During the Chief Judge's Hearings on Civil Legal Services on September 27, 2016, former Chief Judge Lippman testified to the importance of "leveraging technology and existing pro bono resources."[24] He went on to point out the particular importance of technology in meeting the needs of low-income rural New Yorkers by stating,

> Technology is extremely important, particularly in rural areas in our state, where technology can fill the gap in these large districts that we have in New York, that people cannot get to legal services, and technology can again bridge the gap. The single portal initiative by the Legal Services Corporation using technology where you come into one electronic portal, and then you go out and you get sent to where you need help, either electronically or in person is very important.[25]

III. Innovative Programs in Other States

Many states across the country are developing innovative projects to bridge the gaps in access to justice within their rural communities. The Legal Services Corporation has funded several of these projects in the past and continues to fund several innovative projects of this nature. For example, Utah Legal Services created a Skype clinic to facilitate regular meetings between attorneys and clients in different parts of the state. These clinics were held at community locations like shelters and public libraries, which are equipped with the necessary technology to facilitate the meetings between clients and attorneys.[26] Similar to the Closing the Gap program in New York, this innovative approach leverages technology to connect rural clients with volunteer attorneys from other areas of the state.

A. Texas[27]

Another example of a project aimed at assisting rural communities is the Lone Star Legal Aid's food stamp outreach project. This project was funded by both the Legal Services Corporation and the United States Department of Agriculture to increase participation in the food stamp program by educating potential consumers about the benefits and availability of the program, providing eligibility screening, and assisting with applications for those who chose to apply for the program. This included a bilingual outreach team that conducted the community events. The team included four paralegals and a managing attorney.

B. Indiana[28]

A similar community outreach project is the rural subsidized housing initiative developed by Indiana Legal Services to address the rural communities' housing needs, including preventing the termination of subsidized housing benefits, improving the quality and habitability of housing, and providing opportunities for home ownership. This initiative offered various services, including legal education to the public, collaborating with public housing authorities to draft policies, transactional assistance to housing councils seeking tax exempt status, and direct representation of tenants to address specific legal issues like eviction and termination of benefits. The project operated out of one of the Indiana Legal Services offices and was staffed by an Equal Justice Works fellow.

C. California[29]

The Superior Court of California in Butte County created a Regional Self-Help Center in collaboration with two other counties, similar to those created by the New York State Courts Access to Justice Program, to provide legal information and court documents to self-represented litigants in the three counties involved in the project. Staff held regular office hours to serve walk-in clients and offered workshops. The workshops were webcast and recorded. Videoconferencing was also available, which assisted with limited English proficiency clients and helped staff in remote locations.

D. Minnesota I[30]

The Southern Minnesota Regional Legal Services partnered with Farmers Legal Action Group, Mid-Minnesota Legal Assistance, and Legal Services of Northwest Minnesota to implement the Minnesota Family Farm Law Project. This project provided legal services to low-income farmers who were faced with losing their homestead. Staff provided representation, consultation, and negotiation services to clients during mediation. The project operated in collaboration with state and local bar associations and relied on volunteer attorneys and bar associations located in rural areas. Over 30 law firms participated in the project.

E. Alaska[31]

In addition to funding these rural-focused projects in the past, the Legal Services Corporation is currently funding several projects designed to address the legal needs of low-income rural communities across the country. Alaska Legal Services Corporation has been granted the funding to build a Pro Bono Training Academy for volunteer lawyers who lack relevant expertise to represent low-income Alaskans, particularly Alaska Natives, who live in extremely remote locations throughout the state. Alaska Legal Services will partner with the University of Washington School of Law, an expert in distance learning, to develop a free online training curriculum for pro bono attorneys. The training curriculum will focus on five practice areas of need. Law professors and project staff will also develop the distance learning curricula and will engage law students in summer externships and in school-year clinics to help develop pro se materials for clients. The project will also create additional online resources, including forms, manuals, pleadings, and brief banks, for volunteers.

F. Georgia[32]

Another project funded by the Legal Services Corporation, called Lawyers for Equal Justice, was recently kicked off. Lawyers for Equal Justice is a freestanding nonprofit incubator program that was established by the State Bar of Georgia, the Access to Justice Commission, and the Georgia's five law schools. The incubator is designed to support recent law graduates in establishing practices that use technology, alternative fee arrangements, new models of practice, and enhanced pro bono to serve the state's large population of underserved low-income clients. The project will coordinate pro bono opportunities to the incubator, will oversee and track pro bono cases and case outcomes, and will coordinate trainings and mentoring of incubator attorneys with legal aid advocates. The incubator attorneys will handle basic poverty law cases, including family, consumer, administrative law, simple wills and advance directives, and housing with an emphasis on cases in rural areas. It will also incorporate policies for pro bono into the business plans for a solo or small firm practice. The project will develop two toolkits on incubator-pro bono best practices for law schools and legal aid.

G. Iowa[33]

Iowa Legal Aid's 2016 Pro Bono Innovation Fund Project, the Pro Bono Revitalization Project, will focus on creating a pro bono program, with the help of outside consultants, which will make Iowa's pro bono program more strategic, efficient and effective in referring appropriate cases to pro bono attorneys. The project will also work to enlist the help of judges and attorneys to educate volunteer attorneys about the benefits of pro bono services. Through a structured and targeted approach, Iowa Legal Aid will be creating a well-supported and long-lasting pro bono program that will assist in serving clients in need and serve as a model for other legal services organizations looking to establish an effective pro bono program.

H. Minnesota II[34]

As with many legal service organizations across the country, Southern Minnesota Regional Legal Services

is challenged in the delivery of legal assistance to low-income persons in the rural parts of its service area. In addition to geographic barriers, the significant and growing immigrant and refugee populations in southern Minnesota present additional barriers to legal service delivery. Southern Minnesota Regional Legal Services 2016 Pro Bono Innovation Fund project will address these challenges by now including volunteer attorneys performing "legal check-ups." Through "legal check-ups" volunteer attorneys will provide advice and brief services; cases requiring extended representation will be referred to other volunteer attorneys or staff. With the Lawyers Advancing Wellness project, Southern Minnesota Regional Legal Services hopes to take its legal services to a level that will be a replicable model for collaboration around rural access and healthy outcomes through legal interventions affecting the social determinates of health.

I. New Mexico[35]

New Mexico Legal Aid is created a web-based statewide coalition of pro bono attorneys, law students, and paralegals to assist low-income families in some of the poorest communities in the country. Using the organization's DirectLaw pro bono web portal, attorneys who are concentrated in urban areas will have access to web-based resources and communicate online and via video-conferencing with clients, with a focus on underserved rural families and single-parent households. The project will train law students and paralegals to use the DirectLaw system to provide remote research and other support for pro bono attorneys. New Mexico Legal Aid will also partner with the Southwest Women's Law Center and the New Mexico Women's Bar Association to build the statewide coalition by conducting a One Woman, One Case campaign to expand the number of attorneys who can handle family law matters and other legal issues that address persistent poverty.

J. Virginia[36]

The 25th Judicial Circuit in Virginia includes some of the most rural counties in Virginia with more than 250,000 people living below the poverty line according to the 2013 census data. Most of the counties have no history of organized pro bono engagement by the private bar. Blue Ridge Legal Services seeks to achieve universal pro bono participation by attorneys in the 25th Judicial Circuit by working with the Circuit's 12 judges as well as the leadership of the various bar associations in the Circuit. The project is a pilot of the Virginia Access to Justice Commission, which seeks to test the effectiveness of engaging the judiciary in encouraging the private bar to undertake pro bono to meet the civil legal needs of the region's low-income clients. The project envisions the creation of a pro bono planning committee composed of the local judiciary, bar leaders, and legal aid representatives to develop and implement a plan for expanding pro bono participation among the Circuit's rural bar associations. The project will also seek to engage the only law school in the Circuit, Washington and Lee Law School, in a collaborative effort to identify the best ways to incorporate law students into the new pro bono efforts.

K. Nationwide[37]

The Rural Summer Legal Corps Program established by Legal Services Corporation and Equal Justice Works launched the summer of 2016 and funded by private donations through Legal Services Corporation's Campaign for Justice. Over the course of 8-10 weeks, 30 law students will be working with legal aid organizations in rural communities around the country.[38]

IV. Trends, the Future, and the Role of Pro Bono Service

When New York and other states' past and existing efforts to close the gaps in access to justice for low-income rural communities are surveyed, several trends rise to the surface: (1) technology facilitating remote pro bono legal assistance; (2) collaborative partnerships between different types of entities, such as legal service organizations, law schools, and bar associations; and (3) community outreach and education. As these trends and practices continue to be expanded and refined, we will learn much about what has the most impact on the civil legal needs of our rural communities.

Having a clearer picture of the unmet civil legal needs of New York's low-income rural population, the efficacy of various service delivery models and collaborative partnerships will help organizations, the judiciary, and others across the state to better develop innovative programs to close the gaps in access to justice. However, the fact remains that little can be accomplished without significant funding. Until adequate funding is secured to staff programs enough to serve the entire low-income population of New York, pro bono volunteerism of attorneys across the state is needed to help fill the gaps in service.

Pro bono volunteerism has its own barriers. In New York State, all attorneys have an aspirational goal of completing at least 50 hours of pro bono service each year.[39] This goal is easier to attain for some attorneys than others. For instance, large law firms often encourage pro bono service and even provide training, resources, and support to complete such service. Conversely, solo and small firm attorneys in urban and rural areas are lacking the time and resources to meet this goal. Oftentimes these attorneys, especially those serving low-income and rural populations, are struggling to get paid for the regular work that they do. However, the expectation to do pro bono work remains embedded in the profession.

Programs like the Rural Law Center's Judges' Best Practices CLE and Pro Bono Program, Closing the Gap, and Free Legal Answers are designed to specifically ease the burden of doing pro bono work for all kinds of attorneys as well as address the unique struggles that rural communities face. One major factor is location. Rural clients may have to travel long order to obtain the services they need, or they might simply have limited or no access to transportation. The fact that most attorneys, law firms and legal service organizations are physically located in more populated regions does not help. This is where

technology can play a major role in closing the justice gap for our rural communities. Knowing that most people have access to the internet either at home, on their mobile device or at their local public libraries, being able to connect clients and pro bono attorneys to each other through the internet makes it easier for attorneys to volunteer and for clients to get connected with the services they need.

Another factor is education and training for both community members and attorneys. Low-income residents of rural communities have needs and face problems that are unique to them; they do not necessarily share the same civil legal needs of low-income rural New Yorkers. Community outreach and education is critical to individuals understanding what their needs and rights are, and what services are available to meet those needs and secure those rights. Similarly, attorneys need to understand the legal issues faced by rural New Yorkers and the unique ways they are handled by the judiciary in various locations. That is where continuing legal education and other training become vital in bridging this gap. When communities and lawyers are better educated about the civil legal landscape of rural New York, they will be able to better connect and achieve justice.

The overarching factor here, without which the first two will fail, is collaboration. No single entity can achieve all of the things that need to be done in order to bridge the justice gap in rural New York. It is critical that all players involved collaborate with each other in order to create programs. There are many pieces to the puzzle that can only be assembled if the judiciary, civil legal service providers, pro bono attorneys, and community leaders work together.

New York is on the right path given the work of the Permanent Commission on Access to Justice and continued dedication of the Chief Judge. New York's gaps in access to justice improve becomes smaller each year, but are far from being bridged. All members of the legal community must continue to work together to push for more public funding, educate each other about our communities' unmet needs, and encourage each other to step up and do our part. Through emerging technologies, continued outreach and education, and even more effective collaboration, the bridge will eventually be built.

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Kristen Wagner is the Director of Pro Bono Services at the New York State Bar Association. Kristen is a graduate of Smith College and the Elisabeth Haub School of Law at Pace University. In her role as Director of Pro Bono Services, Kristen provides guidance to bar associations, law firms, law schools, and other entities in doing pro bono work.

Access to Counsel in Local Courts in Rural New York State

By Andrew Davies and Alyssa Clark

Introduction

For indigent people accused of a crime, one of the most important indicators of access to justice is whether they have access to a lawyer in court. Such access to counsel is, of course, guaranteed by both the Federal and New York State constitutions, and further protected by the United States Supreme Court decision *Gideon v. Wainwright* in 1963[1], and the New York State Court of Appeals decision in *People v. Witenski*,[2] holding that those unable to afford counsel should have access to it free of charge.[3]

Yet actually providing access to counsel for indigent people has proven a challenge both nationally[4] and in our own state, where the complexity of our court system and systems for providing counsel each present real logistical obstacles.

It was a little over 10 years ago that the late Chief Judge Judith Kaye said that she had never heard "the word crisis so often, or so uniformly, echoed" as when hearing testimony on the state of indigent defense in New York.[5] She appointed the *Commission on the Future of Indigent Defense Services*, which wrote:

> [T]he indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with…effective legal representation…. [I]t is a misnomer to call it a "system" at all.[6]

Some of the Commission's strongest words were reserved for New York's rural Justice Courts. Numbering over a thousand, geographically dispersed and often sparsely resourced, these are the courts of first resort for all criminal matters arising within their geographic jurisdiction. Yet, as the commission noted, counsel was frequently absent, even as decisions about defendants' liberty were being made. The real challenge here was logistical, and as late as 2008 it was reported that "prosecutors, defense lawyers and justices alike expressed the view that it is simply not feasible to require that counsel be present when arrestees are arraigned at late hours or on weekends in the Justice Courts."[7] But the Constitutional issue remained. "The widespread abrogation of the right to counsel for the indigent defendant in these courts is simply unacceptable," Judge Kaye's Commission would conclude.[8]

Within a month of the Commission reporting its findings, Judge Kaye created a second, separate Commission to look at the state's court structure. Again, the language was strident. New York has "the most archaic and bizarrely convoluted court structure in the country."[9] Among the sources of that complexity was the administrative bifurcation in the support and oversight of rural courts. While the Office of Court Administration oversaw and funded County Courts, City Courts, and Appellate Courts from the state capital, Justice Courts were administered by towns and villages. Stories of persons whose right to counsel was denied or delayed proliferated.[10]

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The Commission even noted that "there appeared to be a lack of clear understanding among some Town and Village court justices as to the basic question of which cases trigger the right to counsel."[11]

In the years following these commission reports, the Office of Court Administration acted to ameliorate many of the problems identified. Supervising judges were appointed to work with local courts on issues that included securing the right to counsel. New recording equipment and other computer equipment was provided, and a technology help desk was established. The Town and Village Court Resource Center was redeveloped, new training was provided, and resources were provided to courts to facilitate legal research, language interpretation, and streamlined financial controls.[12] A grant program was established for localities to apply for grants of up to $30,000 for construction, security, technology and other needs.[13]

In particular, an Action Plan set out steps to train judges on the right to counsel, work to resolve scheduling problems that prevented counsel's presence, and increase record keeping on indigence determinations.[14] Yet the sheer enormity of the logistical task of guaranteeing access to counsel in rural courts in New York meant that it was still not always provided.

In this article, we focus on two specific issues in the provision of access to counsel in New York's rural courts. The first is the provision of counsel, in person, at a defendant's first appearance in court—a simple rule which, in its implementation, imposes a range of logistical challenges that are especially acute in rural areas. The second, is the process for determination of whether a defendant is financially eligible to receive counsel free of charge—a necessary step, but one which can result in the imposition of signifi-

cant bureaucratic obstacles to appointment, endangering both the defendant's constitutional rights and the efficient, effective functioning of small, rural courts.[15]

In Part I, below, we describe rural courts in New York, noting their under-resourced and geographically dispersed nature, and the challenges providers of counsel face when trying to reach them all. In Part II we discuss the procedural and logistical aspects of two particular policy problems in securing access to counsel: finding ways to secure the physical presence of counsel during arraignment sessions, and determining a defendant's financial eligibility. In Part III we describe recent efforts to improve access to counsel in rural courts by addressing both of these problems.

I. Courts and Counsel in Rural New York

A. Courts

Understanding the challenges of providing access to counsel in New York's rural courts requires first an understanding of the nature of those courts. As of February, 2017, Justice Courts numbered 1,215 across the state and employed over 2,000 individual judges.[16]

They preside over misdemeanor cases and arraignments in felony cases as well as a wide range of civil matters. Magistrates are elected on a four-year cycle, are not required to be lawyers, and have the authority to impose fines and jail sentences of up to one year, authorize search warrants, impose orders of protection, and assign free legal counsel.[17]

When a person is arrested in New York State, they are required to be brought before a local criminal court "without unnecessary delay."[18] For a substantial majority of residents of upstate New York, that court is not a City Court overseen by the Office of Court Administration, but is a local Justice Court, operated by the local town or village government.[19] In 2016, 193,723 arraignments were reported to the Department of Criminal Justice Services (hereinafter DCJS) in non-New York City counties, of which 87,935, over 45 percent, occurred in Justice Courts.[20]

Because of the "unnecessary delay" rule, arraignments may occur in any one of these courts at any time of the day or night, including at times other than during regularly scheduled court sessions.

Justice Courts do generate some revenue for localities. In 2016, they collected a total of approximately $259 million in fine and fee revenue, of which municipalities retained approximately 51 percent, with the rest reverting to state or county governments.[21] Notwithstanding that revenue, rural localities often struggle to sufficiently fund Justice Courts. The small populations, seasonal employment, and predominance of lightly taxed agricultural land in rural areas create serious shortages in available funding for courts and other services.[22]

As a consequence of these funding struggles, facilities in Justice Courts vary widely. Some are large courthouses with security, administrative support staff, and technology, but others lack basic necessities, "operating without clerks or other staff; without appropriate space for litigants, defendants and jurors; without modern court-related technologies; and with little semblance of security or court decorum."[23] Some court buildings are in disrepair; others are not convened in court buildings at all, and instead meet in alternative facilities ranging from gymnasia and fire stations to garages.[24]

Unlike their colleagues in state-operated courts, whose salaries are subject to quadrennial deliberation by the Commission on Legislative, Judicial and Executive Compensation, local justice salaries are at the discretion of the towns and villages themselves. Local justice salaries ranged, at last report, from less than $8,000 a year to over $50,000, with the majority at the lower end of the range, and all far below the six-figure amounts paid to state court judges.[25] Most judges serve part-time and maintain themselves through some other form of employment or business.[26] The dearth of support staff means that many are responsible for scheduling cases, taking payments from defendants, and reporting financial information to local governments and state agencies in addition to presiding over cases.

Continuing resource shortages in rural courts can mean that the logistical demands associated with assuring access to counsel can be difficult for rural courts to shoulder. Whether coordinating with local defender agencies to assure their presence at off-hour arraignment sessions, or establishing the bureaucratic processes required to determine a defendant's financial eligibility in ways that are both fair and efficient, rural courts face competing demands and serious resource shortages. We discuss those challenges with more specificity in Part II, but first we turn to the organizational and resource-specific issues faced by providers of counsel themselves.

B. Counsel

The provision of counsel is the primary responsibility of County governments. Counties outside of New York City contain an average of 21 Justice Courts, ranging from as few as six in Schenectady County in the Capital Region, to as many as 63 in Nassau County on Long Island.[27]

Because courts can convene *ad hoc* to perform arraignments at any time of the day or night, providing representation to defendants in all courts in a county—especially on those occasions when they first appear in court—is extremely challenging.[28]

Providers in rural areas face specific challenges. The population density of attorneys themselves varies enormously by geography. Whereas in Manhattan data from the U. S. Census Bureau show that no fewer than one in every 18 people is a qualified lawyer, in rural counties like Lewis, Tioga and Orleans, the ratio is less than one in every 1,000.[29] As a consequence, one county in the western part of the state has a panel of 11 attorneys available to receive

assignments to provide representation, only three of whom actually live within the county. Approximately half of the county's entire budget for representation goes toward reimbursing attorneys for time and mileage spent traveling.[30] In another county, jail overcrowding has resulted in defendant clients being moved to an adjacent county jail that is almost two hours, by drive, away. When we recently examined the bills for service of attorneys in a rural county in the center of the state, we found lawyers traveled an average of 195 miles per case.[31]

County responsibility for administration and funding of counsel across New York has resulted in similar variation in resource levels to those seen in courts. In 2012, the most generous county spent almost four-and-a-half-times as much per case as the least generous.[32] As with courts, those differences related clearly to differences in county tax bases and other economic and political factors.[33] Underlying this variety, however, is a more basic and permanent truth: that the resources that providers of representation have available to them are almost always inadequate to the job they are assigned. In 2015, just 15 of the 138 programs providing indigent legal services across the 57 non-New York City counties met even basic caseload standards.[34]

County-level struggles to provide access to counsel have received periodic attention and relief. In 2002, the Indigent Legal Services Fund was created to disburse state aid to counties pursuant to a formula, eventually supplementing county spending by about 20 percent.[35] Following the creation of the Office of Indigent Legal Services (hereinafter ILS) in 2011, new funding to provide counsel at first appearance, and new standards to standardize eligibility determination procedures, have come into being.[36] We shall return to those initiatives in Part III. But first, we turn in Part II to describe what is known already about the contours of access to counsel in rural New York.

II. Access to Counsel in Recent History

In seeking to fulfill its responsibilities to improve access to counsel across the state, ILS has engaged in a series of research projects in recent years to identify the size and scope of the access to counsel problems. In this section, we review the findings of some of these studies.

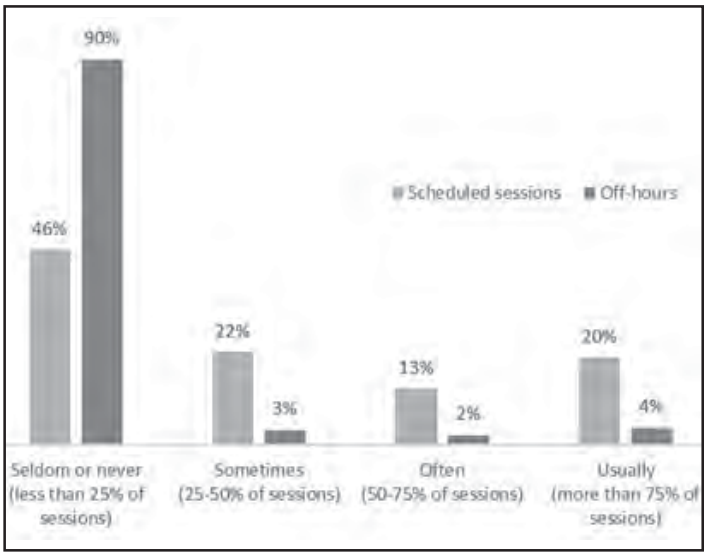
A. Access to Counsel at a Defendant's First Appearance in Court

The requirement that a defendant have access to counsel at his or her first appearance in court is well-settled law, but not such well-settled practice. In 2010, the New York Court of Appeals held in *Hurrell-Harring et al. v. the State of New York* that denial of counsel at a defendant's first appearance in court was a "basic denial of the right to counsel under *Gideon*."[37] Yet, as the state's then-Chief Judge Jonathan Lippman would note the following year, "defendants in our vitally important Town and Village Courts, the courts closest to the people, are routinely arraigned and sometimes even jailed in lieu of bail—all without a lawyer present to argue for their pretrial liberty or to begin to prepare their defense."[38]

In order to understand the size of this problem, we conducted a survey in 2014 of all justices then active in the town and village courts. 1,018 responded—47 percent of judges statewide, representing over 66 percent of Justice Courts.[39]

These judges were, of course, in a better position than anyone else in the court system to report on how often counsel was present when defendants first appeared in court. Their answers provided clear evidence that the absence of counsel at arraignment sessions in Justice Courts was a continuing challenge statewide. During regularly scheduled sessions—prearranged times when the court was open and available to process defendants at arraignment—just 33 percent of judges reported counsel was usually or often present. At times other than regularly scheduled sessions—that is, at times when the court convened on an emergency basis to arraign a defendant immediately—that number dropped to just 6 percent. Indeed, during the latter type of session, fully 90 percent of judges indicated counsel was "seldom or never" present[40] (full results shown in Figure 1).

Figure 1: Responses to "How Often Is Counsel Present During First Appearance Sessions?"[41]
(1,018 Town and Village Justices surveyed in 2014)



B. Financial Determination of Access of Counsel

Courts may deny access to free counsel to persons able to afford it themselves.[42] But the decision on who is "unable to afford" counsel, and the process for making that determination, can become so complex that it effectively functions as a barrier to access to counsel for even legitimate applicants. According to research we conducted in 2015, courts at that time generally required written applications from defendants seeking counsel,[43] with some also requiring documentation such as paystubs, tax returns, or proof that they were a welfare recipient.[44] Applicants fail-

ing to provide all required documents could face delays or denials in assignment of counsel.[45] In almost three-fourths of counties defense lawyers reported that courts granted defendants access to counsel on a provisional basis while the financial review was being conducted, but courts in the remaining counties did not do so, denying access until after the eligibility process had been completed.[46] Ultimately, most courts found over 90 percent of defendants financially eligible,[47] but the demanding nature of the application process in some places could lead to delays in assignment and denials of access to counsel regardless of financial status.

There were at least 70 separate application procedures in place across the state in 2015, each with the potential to reach different determinations about the financial eligibility of similarly situated persons.[48] Defendants in some courts had to show their income was below the Federal Poverty Line to qualify for free counsel, while in others much higher limits were in place, or income was not determinative.[49] Some courts would disqualify applicants who owned cars or houses, while others considered defendants should not be required to liquidate those resources to hire an attorney. Some courts assumed applicants on welfare could use their checks to hire an attorney; others assumed the very fact they were receiving welfare meant they should get an attorney automatically.[50]

C. Judicial Opinions on Access to Counsel

When it comes to counsel at first appearance, judges are, as recently described by the President of the New York State Magistrates Association, the "linchpin to making this work."[51] Our 2014 survey revealed that judges were overwhelmingly in favor of defendants having access to counsel not only in recognition of defendants' constitutional rights, but also because counsel's presence helped the court itself. Interacting with uncounseled defendants at arraignments put the judge in an awkward position. As one wrote,

> [Judges must] choose either to let the defendant make major decisions or instead ignore everything they say and either take a not guilty on the defendant's behalf or refuse to take a plea at all. This is dangerous for the judge because it is an easy way to appear to show favoritism or some impropriety by being overly protective of defendants' rights…. [I]t would be better for the system, in my view, if there was a roving counsel assignment system.[52]

But judges also had serious reservations about the process of providing counsel at first appearances when such provisions would burden either courts or providers of representation.

> I understand that there is a pilot program now if an after-hours on-call counsel. That seems good in theory but if they need to cover a large area then some courts have to wait for long periods of time! Perhaps adding additional counselors would work better.
>
> More funding [is needed] so counsel could spend greater time with clients. It would allow for additional hiring of staff. The suggestion of counsel at first appearances is not practical as the first appearance is often outside of normal working hours and on weekends.[53]

When it came to eligibility determination, the overriding thrust of judicial opinion was again that defendants should be provided with counsel if they needed it. This is not to say that judges did not have concerns about the lack of effective vetting procedures for eligibility determination—some did. However, the large majority of judges adopted a procedurally precautious approach, preferring to assign counsel if any doubt existed as to the financial eligibility of the defendant. Vetting procedures, while necessary, were balanced against the need to process cases expeditiously and fairly, and avoid unwarranted denial of counsel.

> If [a] defendant states he does not have an attorney and wants one, he is assigned counsel and told that if it is later found that he can afford counsel that the public defender may ask for reimbursement.
>
> If it appears that the defendant is below the poverty level of income in this county, I approve it. If it is marginal or there is a question of eligibility, I approve it. If the charge is a felony and defendant doesn't want a lawyer, I assign a lawyer anyway.[54]

It has been our conclusion from the studies that we've conducted that while serious practical constraints attend providing access to counsel in Justice Courts in rural areas, judges and others have a clear appreciation for the value of doing so. While attempts were made following OCA's studies of the issue under Judge Kaye to alleviate the problems observed at that time, the geographic and logistical obstacles to providing counsel at first appearance persisted, as did diversity in the eligibility determination process. Next, we turn to recent efforts to tackle those specific issues.

III. Improving Access to Counsel

Since the reports commissioned by Judge Kaye that began this article were written, there has been significant attention and rapid change in access to counsel in rural New York. Recent efforts have begun to address the clear and persistent practical obstacles to providing counsel in large numbers of geographically dispersed courts both day and night. We review those initiatives in this Section.

A. Recent Expansions of Counsel at First Appearance

In 2013, ILS announced grants to 25 counties in upstate New York to provide counsel at defendants' first appearances in court.[55] Totaling $12 million across three years, the programs sponsored in those counties ranged from providing counsel in all first appearances at all times of day or night, to more limited initiatives to cover certain courts, certain case types, or certain times of day. In Monroe County alone, the public defender recently reported that "attorneys from the Monroe County Public Defender's Office have appeared at over 18,000 arraignments in the local courts" between 2014 and 2016—arraignments that would have been uncounseled prior to the grant program.[56] In 2017, the program was renewed and expanded to 30 counties with additional funding.[57]

In 2015, shortly after the onset of ILS' grant program, the state reached a settlement with five upstate counties in the case *Hurrell-Harring et al. v. The State of New York*, which required counsel to be provided at all arraignment sessions in all courts in those counties with funding from the state.[58] ILS, as the implementing agency, developed plans with each of the counties pursuant to that mandate, including Washington County, a rural county located partly within the Adirondack Park. Prior to the settlement, Washington had no program for providing counsel at first appearances at off-hour arraignments in the county's 24 Justice Courts.[59] In 2017, after a program had been developed and in operation for six months, the public defender reported his office had represented defendants at 731 arraignments during regularly scheduled court sessions, 100 additional unscheduled arraignments held during business hours, and a further 295 arraignments off-hours. The number of arraignments of any kind across the county for which counsel wasn't present was just seven.[60]

Then, on November 28, 2016, legislation was enacted into law authorizing the Chief Administrator of the Courts to adopt plans for establishing off-hour arraignment parts to "facilitate the availability of public defender or assigned counsel for defendants in need of legal representation at such proceedings" in all counties.[61] This initiative effectively allows counties to develop plans to centralize the processing of arraignment sessions, potentially simplifying the process of assuring counsel is present, while allowing cases to revert to the jurisdiction of local Justice Courts after the arraignment has taken place. And even more recently, on April 8, 2017, the governor and legislature agreed on a state budget that included statutory authority for ILS to develop and implement plans to extend statewide the reforms that guaranteed counsel's presence at arraignment sessions in the five *Hurrell-Harring* counties.

The roll out of these new programs is the subject of an ongoing federally funded research project headed jointly by ILS and researchers at SUNY Albany.[62] To date, the research team has concluded that through careful planning, respectful collaboration with stakeholders, incremental and locally controlled implementation, the assurance of state funding, and persistence in the face of adversity, providing counsel at first appearance is indeed possible—even in circumstances where the geographic and logistical challenges are forbidding.[63] Findings on the impact, if any, of counsel's presence on the actual bail decisions that courts make are expected next year.

B. New Standards for Financial Eligibility Determination

Among its other obligations as implementers of the *Hurrell-Harring et al.* settlement, ILS was also required to issue new standards for the determination of financial eligibility for counsel. Published in April, 2016, these laid out new, clear expectations about how financial eligibility could most effectively be determined.[64] Persons whose income is under 250 percent of the Federal Poverty Guidelines, or who are welfare recipients or are presently incarcerated, should be presumed eligible.[65] Non-liquid assets should only be considered if they are readily convertible to cash without causing undue disruption to applicants' lives, or those of their dependents.[66] Requirements for documentation may not be 'unduly burdensome,'[67] and counsel should only be denied if "the applicant is conclusively ineligible."[68]

In response to concerns from some counties that the application of these standards would result in significant increases in caseloads for public defenders, we conducted a pilot study of the impact of the implementation of the standards in five counties.[69] Each of the five counties had different eligibility determination procedures prior to the implementation of the new standards, but the impact of the new standards was relatively muted across all of them. Although the proportion of applicants deemed eligible for services increased in all the counties we studied, the increase was less than 4 percent on average, and no more than 6 percent in any county.[70]

Conclusion

Speaking before the White House Legal Aid Interagency Roundtable in Washington D. C. recently, the lead author of this article (Davies) joined the National Legal Aid and Defender Association and the International Legal Foundation to call for courts across the nation to begin tracking the proportion of defendants receiving publicly funded defense counsel.[71] It was Justice George Sutherland, writing for the United States Supreme Court in 1932 in the case *Powell v. Alabama*, who wrote that defendants required "the guiding hand of counsel at every step in the proceedings…."[72] And yet there hasn't been a serious attempt to capture the extent of access to counsel in criminal cases across the United States as a whole for over 20 years.[73]

The impediments to providing access to counsel in New York are significant. The geographic and logistical demands of bringing counsel and defendant into the same courtroom at the same time are unavoidable and cannot be overstated. The responsibility of making a sound, fair

decision on a person's eligibility for counsel is grave. And yet the signs are good that through the coordinated efforts of multiple agencies, the committed collaboration of state and local leaders inside and outside of government, and the continued determination of those working in courts to do justice better, counsel can indeed be provided in more places, and with greater equity, throughout the state.

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    > [R]ecent CJC decisions include a justice in the Town of Chesterfield (Essex County) who was censured in 2001 for jailing two sixteen-year-olds overnight to "teach them a lesson" for spitting, and who later sent them back to prison for ten days without advising them that they had a right to counsel.

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15. These two issues do not exhaust the panoply of barriers to access to justice in rural courts, which include the need for improved provisions for persons with mobility problems, persons who do not speak English, or the absence of private spaces in courtrooms for counsel and client to consult in confidence. Yet they do evoke two major and universal dimensions of access to counsel relevant to every person haled before a court in New York State.
16. These numbers were obtained by the authors through communication with researchers at the Office of Court Administration.
17. Estimates vary, but it is generally thought that around 25 percent of magistrates are lawyers. The Special Commission on the Future of N.Y. State Courts, *supra* note 7.
18. N.Y. Crim. Pro. L. § 140.20 (2014).
19. Alissa Pollitz Worden et al., *Court Reform: Why Simple Solutions Might Not Fail? A Case Study of Implementation of Counsel at First Appearance*, 14 Ohio St. J. Crim. L. 521 (2017).
20. Data obtained from New York State Division of Criminal Justice (DCJS). Researchers at DCJS reported that this number may in fact be an undercount because of problems in the reporting of data.
21. Approximately 46 percent went to the state and the remaining 3 percent to county governments. Data were extracted from http://www.osc.state.ny.us/localgov/finreporting/jcef/index.htm for all counties in 2016.
22. For the impact of rurality on court operations specifically, *see* E. Keith Scott et al., *Rural Courts: The Effect of Space and Distance on the Administration of Justice*, Nat'l Ctr. for St. Cts. (1977). For examples of the challenges of providing services in rural areas generally, *see* Sam M. Cordes, *The Changing Rural Environment and the Relationship between Health Services and Rural Development*, 23 Health Servs. Res. 757 (1989). For a detailed exploration of a New York example, *see* Sam Howe Verhovek, *A Rural New York County Mired in Poverty*, N.Y. Times (Apr. 18, 1992), http://www.nytimes.com/1992/04/18/nyregion/a-rural-new-york-county-mired-in-poverty.html.
23. The Special Commission on the Future of N.Y. State Courts, *supra* note 7, at 14.
24. Glaberson, *supra* note 10; Worden et al., *supra* note 19; Bellamy Partridge, Country Lawyer (3d ed. 1939).
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26. Glaberson, *supra* note 10. *See also* Doris Marie Provine, Judging Credentials: Nonlawyer Judges & the Politics of Professionalism (1986).
27. *Compare* 4th Judicial District, *Courts in Schenectady County*, N.Y. St. Unified Ct. Sys., https://www.nycourts.gov/courts/4jd/schenectady/ (last visited Oct. 8, 2017), *with* 10th Judicial District, *Nassau County*, N.Y. St. Unified Ct. Sys., https://www.nycourts.gov/courts/10jd/nassau/index.shtml (last visited Oct. 8, 2017).
28. Worden et al., *supra* note 19, at 535.
29. *Chart: Attorney Concentration by County*, N.Y. L. J. (June 16, 2014), http://www.newyorklawjournal.com/id=1202655922490/Chart-Attorney-Concentration-by-County.
30. The County is deidentified intentionally; information contained in internal ILS records.
31. Internal ILS analysis available from authors. For more on the problem of providing lawyers in rural places, *see* Hillary A. Wandler, *Spreading Justice to Rural Montana: Rurality's Impacts on Supply and Demand for Legal Services in Montana*, 76 Mont. L. Rev. 225 (2015). *See also* this program providing $12,500 stipends for lawyers willing to move to rural South Dakota: *Rural Attorney Recruitment Program*, S.D. Unified Jud. Sys., http://www.ujs.sd.gov/Information/rarprogram.aspx (last visited Oct. 14, 2017). This program was profiled in the New York Times. Ethan Bronner, *No Lawyer for Miles, So One Rural State Offers Pay*, N.Y. Times (Apr. 8, 2013), http://www.nytimes.com/2013/04/09/us/subsidy-seen-as-a-way-to-fill-a-need-for-rural-lawyers.html?mtrref=undefined.
32. *See* Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *Local Governance and Redistributive Policy: Explaining Local Funding for Public Defense*, *Law and Society Review,* 51 L. & Soc'y Rev. 313 (2017).
33. *Id.*
34. *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York—2015 Update*, N.Y. St. Office of Indigent Legal Servs. (Nov. 2016), https://www.ils.ny.gov/files/Hurrell-Harring/Caseload%20Reduction/Estimate%20of%20the%20Cost%20of%20Compliance%20with%20Maximum%22National%20

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36. *See Eligibility Standards*, N.Y. St. Off. of Indigent Legal Servs., https://www.ils.ny.gov/content/eligibility-standards (last visited Oct. 14, 2017).

37. *See Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 22 (2010) (referencing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

38. Jonathan Lippman, Remarks Delivered on Law Day 2011: The Legacy of John Adams: a Challenge for New York (May 2, 2011) (transcript available at https://www.ils.ny.gov/files/Law%20 Day%202011%20Lippman.pdf).

39. The difference in the percentages is accounted for by the fact that many courts have more than one judge presiding. The 2,187 judges we contacted presided in only 1,218 courts. The 1,018 responses we received came from 804, or 66 percent, of those courts.

40. Further analysis revealed that in rural courts with small caseloads counsel was still less likely to be present than in densely populated areas. Such courts were less likely to possess facilities needed to hold defendants temporarily until an arraignment could be conducted.

41. *Id.*

42. N.Y. County Law § 722 (LexisNexis 2017).

43. *Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement: Final Report*, N.Y. St. Off. of Indigent Legal Servs. 19 (Feb. 12, 2016), https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Background%20Study/Background%20Study%20Full%20FINAL%20021216.pdf.

44. *Id.* at 20 fig.1.

45. "Of the 71 application forms we collected, 27 (38%) included language indicating that the applicant will face a problem with the eligibility determination process if the applicant does not provide the documentation requested, with most indicating the application will be denied automatically." *Id.*

46. *Id.* at 33 fig.6.

47. *Id.* at 70 fig.14.

48. *Id.* at 5.

49. *Eligibility for Assignment of Counsel in New York*, *supra* note 43, at 46 fig.8.

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55. Joel Stashenko, *25 Counties Get Grants to Provide Counsel at Arraignments*, N.Y. L. J. (Aug. 8, 2013), https://www.ils.ny.gov/files/NYLJ%20Counsel%20At%20First%20Appearance%20Awards%20080813.pdf.

56. *Office of the Public Defender Annual Report*, Monroe County 4 (2016), http://www2.monroecounty.gov/files/pd/2016%20Annual%20Report.pdf.

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59. *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement: Final Plan*, N.Y. St. Off. of Indigent Legal Servs. 37 (Nov. 12, 2015), https://www.ils.ny.gov/files/Hurrell-Harring/Counsel%20At%20Arraignment/Hurrell-Harring%20Final%20Counsel%20At%20Arraignment%20Plan%20111215.pdf.

60. Kathleen Moore, *Public Defenders Making it to Arraignments in Washington County*, The Post Star (June 27, 2017), http://poststar.com/news/local/public-defenders-making-it-to-arraignments-in-washington-county/article_87f6d843-ff6f-5cb3-9330-db4a6f299743.html.

61. S.B. S7209A, 2015–2016 Leg. Sess. (N.Y. 2016).

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64. *Criteria and Procedures for Determining Assigned Counsel Eligibility*, N.Y. St. Off. of Indigent Legal Servs. (Apr. 4, 2016), https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Eligibility%20Standards/Eligibility%20Criteria%20and%20Procedures%20FINAL%22FULL%20April%204%202016.pdf.

65. *Id.* at 20.

66. *Id.* at 31.

67. *Id.* at 34.

68. *Id.* at 17.

69. Andrew Davies & Alyssa Clark, *The Impact of Eligibility Standards in Five Upstate New York Counties*, N.Y. St. Off. of Indigent Legal Servs. (Jan. 2017), https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Research/The%20Impact%20of%20Eligibility%20Standards%20in%20Five%20Upstate%20New%20York%20Counties%20-%20ILS%20report%20January%202017.pdf.

70. *Id.*

71. *Recommended Access to Justice Indicators for Implementation of Goal 16 of the UN 2030 Sustainable Development Agenda in the United States*, Colum. L. Sch. Hum. Rts. Inst. & The Nat'l Ctr. for Access to Just. at Fordham L. Sch. (Dec. 1, 2016), http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/written_submissions_for_civil_society_consultation_with_wh_lair.pdf.

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Andrew Davies is Director of Research at the New York State Office of Indigent Legal Services and post-doctoral fellow at the SUNY Albany School of Criminal Justice. His job is to track data on the provision of legal services around the state, and to push a research agenda for their improvement. He earned a PhD in criminal justice in 2012 from SUNY Albany and has published research on public defense in a variety of books, academic journals and law reviews.

Alyssa Clark is a Research Analyst at the New York State Office of Indigent Legal Services (ILS) and Ph.D. Student at the University at Albany, School of Criminal Justice. She earned an M.A. in Criminal Justice from the University at Albany in 2016.

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The Justice Courts: Leveraging Their Local Connections

By John Dow

In the mid-1950s a Temporary Commission on the Courts (popularly known as the Tweed Commission, named after its chairman, Harrison Tweed) considered proposing that the Justice Courts be reby county-level District Courts, and that Magistrates Courts be replaced with courts of limited jurisdiction.[1] In its final report, however, the Commission rejected this proposal in favor of preserving a portion of the existing system, with certain reforms.[2] The Commission noted opposition to the abolition of the Justice Courts from the Legislature and from communities across the state.[3] At the request of Governor Averell Harriman, the Judicial Conference rejected the Commission's recommendation in favor of a broad reorganization of the courts.[4] That proposal and others in 1965, 1973, and 1979 all failed to leave the Legislature or survive a referendum.[5] What each of these proposals shares is the same fatal flaw: a willingness to ignore the salient local ties of the Justice Courts. Without a doubt, Justice Courts play a pivotal role in New York's justice system and consequently they must seek to uphold the same standard of justice that New Yorkers expect and deserve in every case, and in every court. New Yorkers rely heavily on Justice Courts—there are about 1,215 of them—and they are the face of the justice system seen by litigants in at least two million cases each year.[6] An appreciation for the deeply rooted independence of each Justice Court, an independence that the state Constitution entrusts to the Legislature and the local governments themselves, will ensure that litigant's rights and local oversight of Justice Courts are protected in a balanced fashion. Unless the Justice Courts are maintained, many New Yorkers would be without a local court, and would have to travel significant distances to seek redress for their petitions. As we work to ensure a high standard of justice for all New Yorkers, and as we discuss the current level of access to justice in rural areas of New York State, we should begin by understanding the history of the Justice Courts.

I. Ancestors of the Justice Courts

Though the idea of having lay judges dates back to at least the Romans, New York State's Justice Courts can trace their history to the English "conservators of the peace" of the 12th century. King Richard I gave English knights the power to keep the peace.[7] Initially, their powers were limited to policing the kingdom, but their role expanded during the 13th and early 13th centuries; eventually, due to both practical and political necessity, King Edward III expanded the conservators' powers even further.[8] To mitigate some of the unrest brought about by the Hundred Years' War and the spread of the Black Death, the English Parliament ratified these expanded powers in 1361 as the Justice of the Peace Act. Conservators were officially given the new title "Justice of the Peace" and the authority to apprehend, indict, and try criminals.[9] Justices of the Peace were required to dispense their powers through regular general court sessions, or special court sessions.[10] Though the powers granted to English Justices of the Peace have expanded over the centuries, modern English Magistrates retain largely unchanged core powers and responsibilities.[11]

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II. Justice Courts in New York

English settlers brought their Justice of the Peace system with them when they settled in North America during the 17th century. The system helped to deliver judicial oversight to rural areas without the expense of statewide bureaucracy.[12] The system opened "[t]he doors of justice near their own homes," and provided "a cheap and speedy remedy" for minor criminal and civil disputes.[13] Despite receiving limited pay and assistance most of these early justices, as is the case with their modern equivalents, were dedicated public servants. Like English Magistrates, these early courts exercised limited jurisdiction over initial arraignments and non-felonies. Jurisdiction over some civil matters would be added in the 18th century.[14] New York's 1777 and 1821 Constitutions each created state courts, but also left the local courts from the colonial era intact.[15] New York State's first judiciary article, in 1846, explicitly authorized the Legislature to continue this arrangement, as did the Constitution of 1894 and the 1925 Judiciary Article.[16] However, the voters did not grant the Legislature significant regulatory authority over town judges and judicial officers in these early acts. The Legislature responded to these limited mandates by only exercising their authority in the form of specific refinements to the Justice Courts.

Voters approved the current Judiciary Article in 1961.[17] This was the first serious change to the Justice Courts since the recommendations made by the Tweed Commission, from 1953 to 1958.[18] The Legislature made few changes to the Justice Courts under the more expansive regulatory powers granted by the Article.[19] First, to minimize conflicts of interest and ensure a better separation of powers, the Legislature would eventually abolish the non-judicial (i.e., legislative) functions of local justices. Local justices were also made subject to the same Code of Judicial Conduct as State-paid judges.[20] Second, towns

in western Suffolk County were organized into a District Court system.[21] Next, in 1967, state voters reaffirmed their desire to retain the Justice Courts by rejecting a broad package of constitutional reforms that would have largely eliminated the Justice Courts.[22]

In 1973 the Dominick Commission proposed that the village courts be abolished entirely, and that town courts be eliminated where District Courts were present, or otherwise have the types of criminal matters within their jurisdiction be reduced.[23] Unlike the Tweed Commission, the Dominick Commission did not shy away from its conclusion when it presented its ultimate findings. It stated that rather than reforming the courts around towns, increasing their resources levels, or limiting their jurisdiction, the Justice Courts should be abolished to ensure the accessibility and quality of the justice system.[24] This recommendation failed to gain support in the Legislature and it was largely ignored at the time it was presented.[25] However, some of the Dominick Commission's proposals were later embraced by the Legislature. These proposals included the establishment of a Chief Administrative Judge and the centralization of court administration.[26] More viable proposals, such as that of the New York State Bar in 1979, or the Office of the State Comptroller in 2006, also failed to gain significant support in the Legislature.[27] Both proposals focused on the utility or fiscal viability of the Justice Courts, but did not give equal attention to their status as a local connection between citizens and the court system.

III. Structure and Control of the Justice Court System

The New York State Constitution reserves for the Legislature unilateral authority to structure and oversee the financing of the Justice Courts, to set the qualifications for the office of town or village justice, and management of certain important structural controls.[28] The Legislature's most significant powers, such as the power to establish District Courts in lieu of town and village Justice Courts, are restricted. These powers may only be used with the consent of the voters of each affected jurisdiction. This restriction reflects the constitutional principle that the Justice Courts are hybrid institutions controlled by the State and by the localities in which they sit.[29] By contrast, the Constitution also reserves to the county, town, and village governments substantial powers over the Justice Courts. It is these powers that, with the Legislature's help, present the best chance for a balanced approach to increasing access to justice in rural areas and continuing the great work of the Justice Courts. For example, these powers allow each locality to staff, fund, and oversee the daily operations of its resident Justice Court as it sees fit.[30] Localities and their voters also have the power to merge the Justice Courts of adjacent towns. By contrast, a village's board of trustees may, without the consent of voters, decide not to have a Justice Court at all.[31] Perhaps surprising to some, the Office of Court Administration (OCA) and the State Judiciary have very little structural or operational control over the Justice Courts. The Judiciary has a limited statutory power to appoint justices to temporarily preside in a Justice Court.[32] The kinds of centralized budgeting and procurement, and administrative supervision that the OCA has over all of New York's trial courts, is inapplicable to the Justice Courts. Those functions are served by the municipality in which they sit. This constrains OCA's ability to influence the Justice Courts beyond its current advisory role. On the one hand, local control and flexibility have led to each Justice Court being administered for less cost than a state court with the same staffing level. However, due to redundancy or low caseloads, many Justice Courts still run at a deficit even though their operational expenses are low. OCA's statutorily restrained ability to oversee the Justice Courts also means that the centralized supervision of administrative personnel, centralized budgeting and procurement, and enforcement of standards the OCA brings to state courts can only be brought to bear on the Justice Courts in a limited fashion.

IV. Continued Utility of Justice Courts

Some criticisms of Justice Court operations, such as those referenced above, are valid and must be addressed to ensure a statewide standard of justice that litigants expect; however, they do not outweigh the significant benefits that the Justice Courts provide and are not sufficient to support the total abolition of the Justice Courts. Justice Courts provide important judicial and community support. For example, the proximity of town and village courts to litigants, especially in sparsely populated regions throughout much of upstate New York, should not be minimized. Where public transportation is limited, and distances to higher courts is significant, the convenience of access to courts becomes a factor in the state's ability to deliver justice. So long as a Justice Court is at least relatively local, litigants will incur lower costs and less hardship when appearing in court, possibly also increasing their rate of compliance with court orders.[33] Law enforcement agencies, where digital conferencing is not an acceptable option, will also incur lower transportation costs when they produce defendants.[34] Also, where staffed holding cells are not available, Justice Courts allow defendants to be quickly arraigned and transported to a detention facility or released on their own recognizance. At the very least, Justice Courts provide a valuable docket control function that could not be replicated by State-paid courts without significant efforts and expense.[35]

Though the benefits above might not be compromised by future careful changes or reforms to the Justice Courts, one must acknowledge that, despite criticisms and difficulties that might prompt those changes, the democratic phenomenon that is the Justice Courts handles a large volume of cases in a fair and efficient manner. The Justice Courts are a tremendous resource for justice, even in the modern era. Their special connection to the communities in which they sit, to the laws of New York State, and to

the idea of justice continues to sustain the legacy fostered by several centuries of history.[36] The scaffolding that several centuries have erected should not be taken down where fair adjudication, the right to counsel, and the rule of law can continue to be built up within that scaffolding. Within the current Justice Court system there are opportunities to implement additional support and advice or to allow a limited opt-out for defendants. These changes would improve the Justice Courts even beyond what was achieved in 2006.[37]

Providing legislative assistance or technical support to municipalities that wished to consolidate their Justice Courts might also be appropriate. At present, towns and villages face six or more different possible paths to consolidation, any one of which is daunting, and several of which must be taken to create a single local consolidated court.[38] Given the number of studies to determine the viability of consolidating Justice Courts being commissioned by municipalities across New York State, there is clearly a recognized need to examine the costs and benefits of Justice Courts. The decision to consolidate should remain a local one, albeit with statutory guidance, but the Legislature could act to make the process less onerous. The consolidation process could be greatly simplified without compromising local control of the Justice Courts.[39] Furthermore, consistent popular support for the Justice Courts should not be dismissed as parochialism, especially when the Justice Courts can be easily compared to the kinds of Community Courts or single-issue courts that are developing in urban areas. Community Courts are a New York State invention. Originating in New York City in 1993 with the Midtown Community Court model, such courts have all the powers of the judicial system, but also leverage community resources. In doing so, Community Courts not only seek to punish crime, but also to address its immediate impact on the community and the root cause of the offense. Community Courts are touted as a means to increase community connectedness with the court system, enhance appreciation for how crime affects communities, and lead to faster and more innovative sanctions. Community Courts, just like Justice Courts, are intended to be familiar with the needs of a neighborhood or other small area, allowing a swift and practical judicial response.[40]

As a state, we strive to craft utilitarian solutions to crime that deter, punish, and rehabilitate. Some Justice Courts could provide, instead of their current judicial functions, new services. At present, although Justice Courts strive to be trial courts and community resources, they sometimes lack the resources to excel in both roles. In many cases Justice Courts are already acting as Community Courts. If efficiency dictates that all Justice Courts should not continue as primary courts of limited jurisdiction, they can continue to be a staunch ally in a new role in the fight against some of the most serious challenges to public health and safety that currently threaten New York State. Justice Courts are well positioned to offer us new tools in the fight against opioid addiction, human trafficking, the sexual exploitation of children, mental health struggles, and juvenile justice concerns. Justice Courts could help to administer drug courts, diversion programs, or other alternative types of sentences along the lines of the "intermediate" or "intermittent" punishments used by the federal court system. It might also be possible to utilize Justice Courts in other arenas, including family law matters. Again, in many cases Justice Courts are already informally acting in these roles now.

A discussion of the structure of the Justice Courts is timely despite the rejection of a Constitutional Convention this past November. From the Legislature to social media there is a clear sense that the public is ready to reimagine the delivery of justice in New York. A repurposing or restructuring of the Justice Courts could take place within a greater discussion of the Unified Court System and Article VI of the State Constitution. For example, the 2007 Dunne Commission's suggestions could be adopted, leading to the creation of a two-tiered, consolidated trial court system. Then, the Justice Courts could be reorganized to fill any gaps that formed at the local level."[41] As suggested above, the Justice Courts could also form the foundation for any expansion of diversion programs or specialty courts that the new system required in addition to continuing their current functions. Also, should there be any interest in forming a Fifth Department and reapportioning the Judicial Districts, the Justice Courts should potentially be considered as a means to augment the District Courts if needed.

Conclusion

The Justice Courts are a unique asset with a long history of striving for the interests of the care of the people of New York State. Though their structure and operation were criticized several times over the last century, and some of these criticisms are valid, abolishing the Justice Courts would result in losing a weapon against some of the public safety crises of our time. As we seek to improve access to justice in rural parts of New York State, we must leverage the Justice Courts to do just that rather than viewing them as a possible obstacle. The local connection that centuries of Justice Court experience has built has always been meant to provide justice in a way that is tailored to the needs of each community in New York State, and that connection is as meaningful now as it ever was. By giving local governments the tools they need to maximize the impact of the Justice Courts, the ability to more easily improve them with a minimal net change in operating cost, and the option to give some Justice Courts different roles, we can ameliorate many of the challenges faced by New York State. Each of these things is possible without eliminating the substantial local control that municipalities have over Justice Courts.

Endnotes

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5. *See* Judge Judith S. Kaye, *New York State Unified Court System Action Plan for the Justice Courts*, State of NY Unif. Ct. Sys., 15 (Nov. 2006), http://nycourts.gov/publications/pdfs/ActionPlan-JusticeCourts.pdf.

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8. Rosaria Salerno, *The History of Justices of the Peace,* Mass. Justice of the Peace Assoc., https://www.mjpa.org/Resources/Documents/MJPA%20Manual%20Updated/MJPAhandbookfinal1.pdf (last visited Nov. 19, 2017).

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10. Please note that in England "magistrate" and "justice of the peace" are considered interchangeable terms. *See* Irving F. Reichert, *The Magistrates' Courts: Lay Cornerstone of English Justice*, 57 Jud. 138, 183 n.1 (1973).

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12. *See* Final Report *supra* note 3, at 12.

13. *People ex rel. Burby v. Howland*, 155 NY 270, 275-276 (1898).

14. Julius Goebel, Jr. & Raymond Naughton, *Law Enforcement in Colonial New York* 136 (1944) (as cited in Doris Marie Provine, *Judging Credentials: Nonlawyer Judges and the Politics of Professionalism* 27-288 (1986)).

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16. *See* Final Report *supra* note 3, at 13.

17. Comm. On NY State Constitution, *supra* note 15 at 20.

18. Simplified Court System *supra* note 1.

19. *See* N.Y. Const. of 1962, art. VI, § 17; Uniform Just. Ct. Act § 2300(b)(1). *See also* N.Y. Const. of 1962, art. VI, §17(a)-(b).

20. *See* N.Y. Const. of 1962, art. VI, §17(c); L 1976, ch. 739 (enacting Town Law § 60-a); Uniform Just. Ct Act § 105(d); 22 NYCRR [Rules of the Chief Administrator] § 100.4. *See generally* 22 NYCRR [Rules of the Chief Administrator] Part 100 (describing judicial conduct).

21. *See* N.Y. Const. art. VI, § 16; L 1962, ch. 811; NY Const. art. VI, § 16(a)- (c) (District Courts); NY Const. art. VI, §17(b) (town Justice Courts).

22. *See* Final Report *supra* note 3.

23. *See* Final Report, *supra* note 3.

24. *See* Judge Judith S. Kaye *supra* note 5.

25. *Id.* at 25.

26. Final Report, *supra* note 3, at 15.

27. *See* Final Report *supra* note 3, at 15.

28. *See* N.Y. Const. art. VI § 17(a), § 20(a); NY Const. art. VI, §§ 17(b), 30. *See generally* L 1966, ch. 898 (Uniform Justice Court Act), as amended.

29. *See* N.Y. Const. art. VI, § 17(b); N.Y. Const. art. VI, § 16(a)-(c).

30. *See* Final Report *supra* note 3, at 17.

31. *See id.*; *See also* N.Y. Village Law § 3-301(2)(a) (McKinney 2017); Uniform Just. Ct. Act § 106-a.

32. *See* UJCA § 106(2). *See also* N.Y. Jud. Law §12-b (repealed by L 1985, ch. 703 §3) (McKinney's 2017).

33. Special Comm'n on the Future of New York State Courts (written submission by Wade Beltramo, Counsel for the New York State Conference of Mayors and Municipal Officials) Special Comm'n on the Future of New York State Courts.

34. It must be acknowledged that where no local police force exists, or where defendants must be ferried to many local courts scattered around a county, transport costs and labor can be significant. Alternate options, such as web-conferencing, should be explored as a means to control these costs.

35. *Albany,* 133-135, Jun. 13, 2007, Special Comm'n on the Future of New York State Courts (testimony of Hon. Judith M. Reichler, New Paltz Town Justice); *Ithaca Hearing,* 129, Sept. 26, 2007, Special Comm'n on the Future of New York State Courts (testimony of Hon. Richard Miller, Johnson City Village Justice and former Union Town Justice).

36. Nearly half of the cases heard by Justice Courts do not involve local defendants. It is not mere convenience I argue should be preserved, but the connection between court and locality, and the respect for the court's authority that connection fosters.

37. *See generally* N.Y. Veh. & Traf. Law § 1198(5) (McKinney's 2017) (providing opportunity to clarify waiver or payment plan conditions); Uniform Just. Ct. Act §§ 201-208, 2001, 2005; N.Y. Crim. Proc. Law §§ 10.10(3)(d)-(e), 10.30 (McKinney's 2017)(some of many places to institute a limited opt-out).

38. *See* N.Y. Village Law § 3-301(2)(a) (McKinney's 2017);); *see also* Uniform Just. Ct. Act § 106b; Gen. Mun. Law art. 5-g; N.Y. Village Law § 3-302(3) (McKinney's 2017); N.Y. Pub.Off. Law § 3 (McKinney's 2017); N.Y. Town Law § 23; Village Law § 3-300(2)(b);N.Y. Gen. Mun. Law § 199-0; 22 NYCRR 214.2.

39. Final Report *supra* note 3; *see also* N.Y. Village Law § 3-301(2)(a) (McKinney 2017); Uniform Just. Ct. Act § 106-a.

40. *White Plains Hearing*, 93-94, 9/11/07 White Plains Hearing Tr. at 93-94, Sept. 11, 2007, Special Comm'n on the Future of New York State (Testimony of Gerald Geist, President, Association of Towns of the State of New York).

41. Special Comm'n on the Future of the New York State Court, *A Court System for the Future: The Promise of Court Restructuring,* New York Courts (Feb. 2007), http://www.nycourts.gov/reports/courtsys-4future_2007.pdf.

John Dow was formerly the Associate Counsel for State Senator Patricia Ritchie. He is currently the Assistant General Counsel for The Arc New York. He holds degrees from Colgate University and the Elon University School of Law.

Tribal Courts and Access to Counsel: The Breaking of *Gideon's* Promise in Indian Country

By Patrick Wood

"[L]awyers in criminal courts are necessities, not luxuries."[1]

Justice Hugo Black, writing for the majority in *Gideon v. Wainwright*.

Many Americans believe the rights and liberties secured to them by the U.S. Constitution are among the best and most comforting aspects of life in the United States.[2] These rights are a source of great pride for many Americans, and discussion of these rights continuously pervades American political discourse. However, the Constitution and Bill of Rights do not apply to tribal governments in administering criminal justice for tribal members.[3] While the Indian Civil Rights Act of 1968 (hereinafter ICRA) imposed upon American Indian tribes the obligations of upholding certain rights found in the U.S. Constitution, such as freedom of religion, freedom from unreasonable search and seizure, and the right to just compensation for the taking of property,[4] certain rights are "missing" from the list of enumerated rights in ICRA. Neither the federal government, nor the tribal governments, have any obligation to guarantee indictment by grand jury.[5] There is no inherent right to bear arms, and perhaps most astonishing to outside observers, there is no guarantee of a right to counsel, paid and provided for by the government (neither federal, state, nor tribal), at criminal trials held in tribal court.[6]

Tribes have the authority, when one tribal member commits a crime against other tribal members, to prosecute and punish the offender within their own system of justice. This is because of the tribes' inherent sovereignty, which predates both the Constitution and the establishment of the United States itself.[7] *United States v. Wheeler* noted, "An Indian tribe's power to punish tribal members is part of its own retained sovereignty."[8]

I. Historical Background

The precedent for tribal authority to subject their own members to legal punishment was set by the U.S. Supreme Court in the case *Ex parte Crow Dog* over 125 years ago.[9] The factual background of the case involved Crow Dog, a member of the Lakota Sioux Indians, killing a Lakota chief known as Spotted Tail.[10] In accordance with Sioux tradition, the tribal council of the Sioux dealt with the case, eventually demanding that Crow Dog pay restitution to Spotted Tail's family.[11] After the tribal council had rendered this decision, Crow Dog was tried in federal district court in the then U.S. Territory of Dakota.[12] At the conclusion of this trial Crow Dog was found guilty and sentenced to death.[13]

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The Supreme Court, however, ultimately spared Crow Dog's life, finding that a long history of general policy allowing tribal self-government, supported by numerous statutes and treaties, mandated that crimes committed by Indians against other Indians be left entirely to the tribes, absent an express intention by Congress to the contrary.[14] The Court went on to suggest that this was a wise policy, noting that subjecting Indians to federal jurisdiction "tries them, not by their peers, nor by the customs of their people, nor the law of their land" but by "white man's morality."[15]

While the effect of *Crow Dog* is still felt today and continues to shape resolutions of questions regarding jurisdiction over Indian-on-Indian crime, if Crow Dog killed Spotted Tail today, he would indeed be subject to federal jurisdiction. Largely in response to the holding in *Ex parte Crow Dog*, Congress passed the Major Crimes Act in 1885.[16] This law placed serious offenses committed by Indians on Indian land, such as murder and rape, under federal jurisdiction.[17]

The Lakotas had no real "court system" in the Western sense,[18] and The Major Crimes Act was Congress' way of expressing its surprise and disapproval that the high Court would allow a tribe exclusive power to administer criminal justice in such an "uncivilized" way.[19] It was just one of a number of ways in which American legislators, bureaucrats, and jurists attempted to impose the features of Anglo-American justice systems on Indian country during the late 1800s. According to Barbara L. Creel, Professor of Law and Director of the Southwest Indian Law Clinic in New Mexico, "In the later part of the 1800s, in addition to congressional encroachment on criminal jurisdiction…tribes suffered the imposition of the adversarial court system to displace or supplant indigenous justice systems by the Department of Interior."[20]

The first such court system, established by the Department of Interior and the Bureau of Indian Affairs, were the "Courts of Indian Offenses."[21] Conceived of by Secretary Henry Moore Teller, these courts sought to crack down on traditional Indian behavior and custom, to put an end to practices such as the "sun-dance," and to impose the adversarial-style court system in Indian

country.[22] One important difference between the Courts of Indian Offenses and typical American criminal courts, however, was that Indians tried in these courts were actually barred from being represented by counsel, whether retained or appointed.[23]

It was not until after the passage of the Indian Reorganization Act in 1934 that tribes were allowed to begin forming constitutional governments and organizing tribal courts.[24] These early tribal courts were organized largely as replicas of America's state and federal courts.[25] The contents of tribal constitutions initially required formal approval from the Bureau of Indian Affairs, leaving limited room for creativity and innovation.[26] Despite the pressure to adhere to the norms found within state and federal courts, the federal government still forbade the use of defense counsel by defendants in tribal courts until 1961.[27]

While much greater latitude is granted to tribes today to administer criminal justice as they see fit, these historical factors have left their mark. Many tribes still employ adversarial-style systems that incarcerate wrong doers. These tribes often have their own jails and there are about 75 of these Indian country jails currently in operation.[28] Other convicted criminals are sent to jails approved by the Bureau of Indian Affairs.[29]

Tribes are now allowed to resolve conflicts through tribal court systems that are not adversarial in nature. Some tribes have justice systems that are based on restorative justice, rehabilitation, or peacemaking rather than punishment,[30] and tribal court systems that are adversarial are permitted to operate in ways that distinguish them from typical federal and state courts. Since the *Gideon v. Wainwright* decision in 1963, defendants in federal and state courts are required to be provided with defense lawyers if they are indigent and facing charges penalized by incarceration.[31] However, one aspect of the tribes' freedom to deviate from legal norms is that they are not forced by the federal government to guarantee defense counsel to defendants too poor to afford their own (with some exceptions under ICRA and the Tribal Law and Order Act, which will be discussed later).[32]

This article will explore the benefits, feasibility, and drawbacks of guaranteeing the right to counsel across all of Indian country by providing indigent Indian defendants with defense attorneys at federal or state government expense in criminal cases conducted in tribal court. By examining the differences in the way Indian and non-Indian defendants are treated in criminal proceedings, fundamental issues of equality, fairness, and justice are highlighted, and the need for reform is illustrated. While tribal sovereignty is often vigorously defended by American Indians, this freedom not to guarantee counsel is one instance where tribal sovereignty may actually present a detriment to individual tribal members.

II. Tribal Jurisdiction and the Right to Counsel

The federal government often prosecutes the most major offenses committed on Indian reservations and provides counsel to the indigent in these proceedings, but in most cases, tribes are also able to prosecute the perpetrators of major crimes as long as their victims were tribal members.[33] Additionally, recent developments have established that tribes may prosecute Indian defendants *who are not members of the tribe* as long as they are charged with committing crimes on the tribe's land against tribal members.[34]

Tribes are generally without the power to exercise criminal jurisdiction over non-Indians, even when the victim is a tribal member and the crime was committed on an Indian reservation. This is the result of the Supreme Court's holding in *Oliphant v. Suquamish Indian Tribe* that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians,"[35] and the General Crimes Act, which was passed in 1817, continues to give the federal government jurisdiction over interracial crime on reservations (both when the perpetrator is non-Indian and the victim Indian, *and* when the perpetrator is Indian and the victim non-Indian).[36]

Even states occasionally exercise criminal jurisdiction over crimes on reservations. Congress passed Public Law 83-280 in 1953.[37] This law conferred on the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin the ability to exercise full criminal jurisdiction over Indian land within the boundaries of the state (although certain reservations were specifically excluded).[38] The law conferred on the other 44 states the option to exercise such jurisdiction.[39] Some states, such as Florida, have opted to do so.[40]

New York has the ability to prosecute crimes by a special act, 25 USCS § 232 *Jurisdiction of New York State over offenses committed on reservations within State*, which is a brief act that reads in its entirety:

> The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: *Provided*, That nothing contained in this Act [this section] shall be construed to deprive any Indian tribe, band, or community, or members thereof, [of] hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.[41]

When an American Indian is tried in federal or state court, they may be faced with an unfamiliar legal system,

face judgment by a jury that does not reflect the defendant's community, and stand before judges who do not share the same values and beliefs as the decision makers in the accused's tribe. However, in state or federal court, an indigent Indian defendant will have the right to counsel, provided at government expense, if the defendant is facing prison time.[42] This is not automatically the case in tribal court proceedings.

Tribes possess the inherent freedom not to apply the Bill of Rights to the U.S. Constitution and its guarantees to their constituency, but this has been curtailed significantly by the Indian Civil Rights Act (ICRA). Tribal governments now must guarantee to the people under its domain certain fundamental rights. The U.S. Supreme Court had given Congress the power to regulate and limit many of the powers of tribal governments, and after becoming concerned about high levels of corruption and authoritarian tendencies in tribal governments, Congress saw fit to pass ICRA to protect American Indians from the most flagrant abuses by tribal governments.[43] While concerns have arisen concerning ICRA's natural reduction of tribal powers of self-governance, the enforcement mechanisms and scope of the Act suggest it is fairly toothless. A tribal member who has suffered a legal wrong because of his government's violation of ICRA can collect neither money damages from the tribe nor an injunction to force the tribal government to stop violating the law.[44] Additionally, ICRA is not merely an application of the Constitution to tribal governments. Many rights, particularly rights of the accused, were not even provided lip service in the original language of ICRA.

Tribes thus have no obligation under the Constitution, ICRA, or any other federal or state law to provide counsel to criminal defendants facing less than a year in prison. However, in many cases tribes may actually wish to provide this right, but simply find themselves unable to do so. Providing such a guarantee might require resources that the tribe simply does not have.[45] Although some tribes such as the Navajo have taken it upon themselves to confer the right to counsel upon their members,[46] a shortage of both money and tribal lawyers makes this guarantee difficult to establish without outside help. Currently, the burden of providing defense counsel appears to fall squarely upon the tribe.[47]

III. The Tribal Law and Order Act, the Major Crimes Act, and Tribal Sentencing Authority

In 2010, The Tribal Law and Order Act was signed into law by President Barack Obama.[48] The purpose of this law was to strengthen tribal sovereignty and the sentencing authority of tribal courts. This act amended ICRA by inserting multiple provisions.[49] One of these provisions mandates that any tribe, when conducting proceedings involving a defendant charged with offense(s) subject to a sentence exceeding one year of imprisonment, "shall, at the expense of the *tribal government*, provide an indigent defendant the assistance of a defense attorney…."

The guarantees inserted into ICRA included not just assistance of counsel for those facing charges carrying over a year in prison time, but *effective* assistance of counsel "at least equal to that guaranteed by the United States Constitution."[50] Currently the landmark case defining this constitutional guarantee is *Strickland v. Washington*. The Court in *Strickland* announced the following two conditions that must be met in order to show that the right to "effective" assistance of counsel was violated and a judgment of conviction against the defendant was therefore invalid:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[51]

This test is rather difficult to meet. In layman's terms the test requires proof not only that one's counsel committed severe error, but also that this error significantly undermines confidence that the correct outcome was reached.

Another result of the Tribal Law and Order Act is that punishments resulting from criminal proceedings in tribal court carry a mandatory *maximum* of three years in prison per offense, and a maximum total of nine years when multiple offenses are charged, regardless of what these offenses are.[52] This is a threefold increase in sentencing authority from that which could be exercised prior to the Tribal Law and Order Act. Prior to the passage of the Act the maximum sentence was one year in prison and fines totaling $5,000 per offense.[53] Now tribes may impose sentences as long as three years per offense and fines as great as $15,000 per offense.[54] Shockingly, an Indian defendant who was not represented by counsel may now be sentenced for up to nine years of imprisonment *as long as no one charge carries a sentence exceeding one year of imprisonment*.[55]

This exact situation happened to an Indian man named Ronald F. Romero. Romero is an enrolled member of the Pueblo of Nambé. After being arrested following a domestic disturbance, Romero was charged with a multitude of offenses.[56] No one offense carried a punishment exceeding one year of incarceration, but after being convicted of several such offenses (having never been represented by counsel), Romero was sentenced to eight years of imprisonment.[57]

Romero's petition for habeas corpus was ruled moot after the Pueblo ultimately opted to commute his sentence.[58] However, Romero sought to continue with the appeal, alleging that the Pueblo violated his constitutional rights imposed an excessive sentence, and that despite the commutation Romero continued to be subject to serious collateral effects of the sentence.[59] Romero listed the possibility that his conviction could be used to enhance a conviction in a future case, that he could be impeached on these convictions in future proceedings, and the facts that such convictions removed him from eligibility for tribal office and employment in the tribe's casinos as specific examples of such collateral consequences.[60] The United States Court of Appeals for the Tenth Circuit was not persuaded, however, concluding "Romero did not demonstrate sufficient collateral consequences to establish a continuing case or controversy since he is no longer serving his tribal sentence. Accordingly, we AFFIRM the order of the district court dismissing Romero's petition as moot…."[61]

The *Romero* case and the alleged collateral consequences are important in demonstrating the real price of uncounseled tribal convictions. The harm done to a defendant convicted in tribal court goes beyond the fines and whatever jail sentence is imposed. After release, the convicted suffer from diminished employment opportunities and stigmatization by members of their community. These factors in turn may lead to depression, anger, and economic desperation, which can lead to more crime and self-destructive behavior.

Indian defendants facing any period of incarceration are of course free to hire defense attorneys *at their own expense.*[62] However, this is often prohibitively expensive. Outside tribal court jurisdiction, defendants of any race are typically guaranteed the right to counsel for any charge that would result in any period of actual imprisonment if found guilty. This is the case even when the total period of incarceration would be less than one year.[63]

Thankfully for Indian tribes, the Major Crimes Act continues to have the effect of reducing the amount of lawyers and resources that tribal governments would otherwise have to proffer to prosecute and incarcerate wrongdoers facing charges yielding over one year in prison. The federal government has essentially lightened the tribes' caseloads by subjecting Indians accused of murder, arson, robbery, and other high-profile felonies to federal court jurisdiction.[64]

Even though tribes may be able to try defendants for these crimes in an exercise of concurrent jurisdiction with the federal government,[65] tribes are highly incentivized to let the federal government deal with these cases. Allowing the federal court system to handle such cases alleviates the financial burden placed upon the tribe for providing counsel and prevents overcrowding in tribal jails. Additionally, the federal system allows for much longer sentences than does the tribal criminal court system. A tribe may feel that it is in their interest to hand the federal system a tribal member who has committed murder because the tribe has limited sentencing authority. Unlike the federal government, it cannot sentence a murderer to a life sentence, or even 25 years in prison.[66] Leaving the matter to the federal system is a tribe's best bet to prevent the most dangerous criminal element from returning to the reservation after only a brief stint of incarceration, and of course it saves the tribe the resources required to provide counsel in such high-stakes, lengthy criminal trials.

IV. A Policy Perspective

To a certain extent, the federal government has taken notice of the problem of Indian defendants being forced to proceed without counsel and has ameliorated it. The amended language of ICRA means that any defendant facing a charge carrying more than a year in prison has a right to an attorney, even if he is too indigent to afford one himself.[67] The rights of the accused in Indian country have come a long way since the days of the Courts of Indian Offenses, where defendants faced a total bar to being represented by counsel.[68] Now the right to retain counsel is afforded to all Indian defendants through ICRA.[69] These guarantees prevent the most flagrant abuses of the rights of Indian defendants. Also, the Major Crimes Act continues to redirect many Indian defendants from the tribal court system into the federal system where they will be represented by counsel.

However, this does not change the fact that the rule for Indians in tribal court is still remarkably different than the rule for all other indigent criminal defendants. All other defendants get a lawyer when facing a jail sentence of any duration, including even suspended sentences which do not result in any actual confinement.[70]

American case law consists of countless opinions relaying the importance of defense counsel, even for minor offenses.[71] Those who are not provided with effective assistance of counsel in state or federal court have often been successful in asserting both violations of the Sixth Amendment's right to counsel clause and the Fifth and Fourteenth Amendments' due process clauses.[72] Our jurisprudence has deemed access to effective counsel to be indispensable to a fair and functioning criminal justice system. The landmark case relating to assistance of counsel, *Gideon v. Wainwright*, left no room for ambiguity, declaring "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[73]

The United States, despite placing pressure on tribes to erect justice systems that mirror its own, has not seen fit to ensure that tribes have the resources to provide this indispensable right. We must ask whether it is really fair that a non-Indian facing six months in prison is entitled to defense counsel while a Native American facing the

same six-month sentence is not. This is the reality of our current system. It is perhaps worth re-emphasizing that Indians living on Indian reservations are indeed American citizens.[74]

It is true, however, that the universal American citizenship for Native Americans is less than 100 years old.[75] While some Indians acquired citizenship prior to its passage, it was the 1924 Indian Citizenship Act that made American citizenship universal to all Indians born in the United States.[76] The Act was born out of a desire both to assimilate the Indian into the mainstream American society and lifestyle, and to reward Indians for their contribution to the war effort in World War I.[77]

Now that the citizenship status of Native Americans has been settled for over 90 years, however, it is imperative that our government strive not to let the level of protections afforded to this demographic of citizens slip drastically below that provided to all others. This obligation exists despite the differences in customs and sentencing authority between tribal and nontribal court.

Congress' actions in 1991 to effectively overturn the U.S. Supreme Court decision in *Duro v. Reina* present a factor increasing the volume of uncounseled tribal court proceedings. The *Duro* case, decided in 1990, concluded that Indian tribes lacked authority under federal common law to exercise criminal jurisdiction over nonmember Indians.[78] Many groups, including numerous tribes, tribal attorneys, and even the Western Governors Association urged Congress to quash the *Duro* decision,[79] which it promptly did.[80]

The concern was a serious one. If tribes did not have jurisdiction to try non-member Indians, and the federal government only had jurisdiction to try non-member Indians when the offense constituted a "major crime" under the Major Crimes Act, there was seemingly no one left with the authority to punish non-member Indians who came onto the reservation to commit any other type of offense. Despite the wide-ranging support behind the actions of Congress to address the problem, however, this expansion of tribal sentencing authority results in more uncounseled criminal proceedings, and the defendants in these proceedings are especially vulnerable. Non-member Indians compelled to appear in a tribunal of a tribe to which they do not belong are already up against the odds. They face judgement by an alien community and a potentially alien system of justice (as tribes have great variety in their methods of administration of criminal justice). Combating this outsider effect is difficult enough, but the obstacles to a fair trial are stacked even higher when this non-member is forced to appear without representation by counsel.

On the other hand, to mandate that a tribal government follow certain rules and provide certain guarantees necessarily infringes upon the tribe's sovereignty. The question of which rights are truly fundamental is likely best left for the tribes themselves to decide. Many Indians disapproved of the original Indian Civil Rights Act due to the fact it did exactly the opposite, mandating that tribal governments be subject to several restrictions plucked straight from the federal constitution.[81] There is something grossly paternalistic about mandating that tribes spend their already limited resources in certain areas.

A practical solution, therefore, will remove at least part of the financial burden of fixing the problem from the shoulders of the tribes. It is unlikely that tribes do not wish defendants in their jurisdiction to have counsel. Any objection to supplying counsel likely derives from inadequate resources and not a moral objection to the proffering of this right.

V. Inadequate Resources to Provide Adequate Counsel

The federal government currently provides tribes with only a modicum of resources for tribal public defender offices.[82] As of 2007, the federal government was spending less than $1 million on such offices for all federally recognized tribes combined. Some tribes didn't see any of this money at all.[83] Even tribes that did see some federal subsidy money for public defense probably did not see enough to be able to meet the needs of their criminal justice system, even when this was combined with the tribe's resources. Tribes that don't receive money are forced to bear the costs of public defense completely on their own. Accordingly, some tribes do not sentence defendants to the kinds of sentences that would mandate assistance of counsel under ICRA, instead employing peacemaking or other methods of conflict resolution.[84]

Granted, some tribes choose this route because of cultural values, or a belief that their traditional means of conflict resolution are more effective or humane. However, a lack of money probably mandates this approach among at least a few tribes. A total of $1 million spread across 562 federally recognized tribes is a meager amount. Not only is public defense an area that becomes more effective with greater federal funding, but it is one that will ultimately determine whether the poorest American citizens are provided with justice and due process of law.

The federal government's ability to cultivate and spend resources is immeasurably greater than that of tribal governments. The first step in fixing this availability of counsel problem is for the federal government to step up its financial commitment to safeguarding the rights of the accused in tribal courts. State governments will have to play a role, too, at least in helping to fund the provision of lawyers for tribes that have obtained recognition by the state but not the federal government itself.

VI. The Right to Counsel as It Applies to Domestic Violence Defendants Tried by Tribal Courts

Congress, in an attempt to stymie the extremely high rate of domestic violence in Indian country, passed the Violence Against Women Reauthorization Act of 2013. Under this law tribes *may* prosecute, convict, and sentence both Indians and *non-Indians* who assault Indian spouses or dating partners.[85] Here is an anomaly where non-Indians are subject to tribal courts' criminal jurisdiction. Typically, if a non-Indian living in Indian country commits a crime on Indian land, he is immune from tribal criminal jurisdiction.[86] Instead, the non-Indian perpetrator will be tried in federal court if the victim is Indian, as the perpetrator is subject to federal jurisdiction under the General Crimes Act.[87]

While Congress was comfortable with expanding tribal power enough to grant tribes the right to try non-Indian defendants for domestic violence, it did not take the extra step of stripping these defendants of their right to counsel. This has left a double standard, where non-Indians accused of dating violence on reservations are subjected to the tribe's exercise of criminal jurisdiction, and also guaranteed attorneys, while Indians charged with the same crime under the same circumstances and living in the same location in Indian Country are not.[88] Surely it cannot be just to grant or deny this right among American citizens purely on the basis of race.

Additional problems arise when convictions of Indian defendants are secured after trials where the defendants were not represented by counsel, and then these convictions are used by other courts and institutions to make decisions regarding the former defendants in other matters. This is precisely the argument made by professor Barbara L. Creel in the amicus brief she authored and submitted in the Supreme Court case of *United States of America v. Michael Bryant Jr.*[89] In this case, the government sought to enter the respondent's prior convictions for domestic violence into evidence to prove he was a habitual offender, and thus guilty under federal law of a felony offense.[90] These convictions, however, were the result of tribal court proceedings in which the respondent, Michael Bryant Jr., was not provided with assistance of counsel.[91] Had Bryant been any race but Indian, he would have received assistance of counsel for his defense during these proceedings.

Mr. Byrant was convicted of this felony offense in federal district court.[92] The Ninth Circuit then tossed the conviction, holding that Mr. Byrant's uncounseled tribal court convictions could not be counted as "predicate" offenses because such convictions would have been invalid in state or federal court due to a Sixth Amendment violation caused by Bryant's lack of counsel.[93] The Supreme Court of the United States then reversed and remanded the Ninth Circuit's decision.[94] Bryant's convictions complied with ICRA and were valid when entered. The Supreme Court held that this was sufficient to use the convictions as predicate offenses.[95]

Bryant illustrates that the harms that come from an individual defendant going unrepresented in tribal court can now carry over into areas beyond the initial tribal prosecution. Furthermore, decisions like the Supreme Court's in *Bryant* serve to further marginalize an already marginalized community. American Indians are free to hire a defense attorney at their own expense, but hiring lawyers is expensive and Indians possess higher rates of poverty and unemployment than any other racial demographic in the country.[96] In many cases, the cost to a tribal member of hiring the services of a private attorney would be laughably prohibitive, as a substantial number of the nation's *poorest 1 percent* of people are Indian reservation residents.[97]

A demographic already known to be experiencing economic, social, and legal ills not felt by other Americans should be afforded more protections, not less. When uncounseled convictions are allowed to be used as incriminating evidence or "predicate offenses" in other proceedings, American Indians are not only seeing injustices stack up, but are essentially being punished in a unique way that stems from their disqualification from a basic right. No other racial demographic could have uncounseled convictions used against them in this manner.

Even if the Supreme Court had upheld the Ninth Circuit's decision, the absence of a fundamental right, like access to counsel, has far-reaching consequences. Providing this right at federal or state government expense will not make up for centuries of mistreatment of American Indians, but not doing so amounts to tacit acceptance that this pattern may continue.

VII. Foreseeable Problems

As with nearly any proposal calling for government action, one of the obstacles to implementation is the financial cost to the government. Currently the Gross Federal Debt is $19.9 trillion.[98] The federal deficit is $590 billion, 3.2% of national GDP.[99] As such, heightened expenditures on public defense for federally recognized tribes will be unlikely unless Congress is thoroughly convinced of its importance by their constituents, federally recognized tribes, interest groups, and legal professionals.

Even if all federally recognized tribes received adequate funding for public defense offices, staffing them might prove difficult. Indian country suffers from a dearth of trained lawyers, and recruiting non-Indian lawyers to these offices might also be problematic. Part of the problem stems from the fact that many Indian reservations have such a sparse population to begin with that lawyers may not be attracted to such areas and may actually worry about receiving a caseload *too light* to justify their position as a full-time employee.

In New York for instance the Shinnecock Reservation is home to about 504 people, the Onondaga Reservation to about 468, and the Poospatuk Reservation a mere 271.[100] Lawyers may be averse to committing themselves to serving such rural areas. Additionally, some larger tribes have their own bar exam,[101] and non-Indians may be reluctant to relocate and pass a new bar exam to practice in these areas where their clients may distrust them because of their "outsider" status.

A large part of the problem stems from simple unawareness. In this regard, the work of people like Professor Barbara Creel is commendable. Penning law review articles, amicus curiae briefs, and public comments are all excellent ways for professionals to bring this issue to light. Increased visibility and interest in uncounseled tribal court proceedings will go a long way towards mitigating these problems by spurring Congressional interest and serving as a call-to-arms for defense attorneys to consider tribal court work.

Conclusion

For over half a century, state and federal courts at all levels have consistently held that providing poor defendants with defense attorneys in criminal trials is essential to ensuring a fair trial. This right affecting the fairness of the accused's trial should apply to all American citizens, including American Indians. Tribal sovereignty is to be respected, however, and as such it would be in error to mandate that the tribes not only recognize this right but spend large sums of their limited resources on guaranteeing it. Therefore, federal and state governments should pick up the tab. Indian reservations today suffer from high rates of poverty, crime, and unemployment. There is a very real need for federal and state governments to contribute financially to the social prosperity of Indians and the protections of their rights generally. Denying Indians a basic, fundamental right constitutes an unacceptable failure of these governments to uphold their responsibilities to this community.

Endnotes

1. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).
2. Jennifer Harper, *Poll: U.S. 'Loves' Technology, Constitution*, Wash. Times (June 8, 2010), http://www.washingtontimes.com/news/2010/jun/8/poll-us-loves-technology-constitution/.
3. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896) ("It follows that as the powers of local self-government enjoyed by [the Indian nations such as] the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.").
4. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201–203, 82 Stat. 73, 77–78 (codified as amended at 25 U.S.C. §§ 1301–1303 (2012)).
5. *See id.* These rights are not listed in the original 1968 language nor the amended language. *See id.*; *see also* 25 U.S.C. §§ 1301–1303.
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8. *United States v. Wheeler,* 435 U.S. 313, 328 (1978).
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15. *Id.* at 571.
16. Philip J. Prygoski, *From Marshall to Marshall: The Supreme Court's Changing Stance on Tribal Sovereignty*, 12 Compleat Law. 14 (Fall 1995).
17. 18 U.S.C. § 1153 (2012).
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21. *Id.* at 338–39.
22. *Id.* at 339.
23. *Id.* at 340.
24. *Id.* at 342.
25. *Id.* at 342–43.
26. *Id.*
27. *Id.* at 341.
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30. *See* Robert V. Wolf, Ctr. for Court Innovation, Widening the Circle: Can Peacemaking Work Outside of Tribal Communities? 4 (2012) ("Peacemaking is used to handle a wide range of matters in Indian country. Navajo peacemakers handle civil and criminal matters, including domestic violence, gang activity, fighting, disorderly conduct, public intoxication, and driving while intoxicated.").
31. *Gideon v. Wainwright*, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).
32. Creel, *supra* note 6.
33. *See United States v. Wheeler*, 435 U.S. 313 (1978); Stephen L. Pevar, The Rights of Indians and Tribes 130, 135 (4th ed. 2012).
34. *See United States v. Lara*, 541 U.S. 193 (2004).
35. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).
36. *See* Chriss Wetherington, *Criminal Jurisdiction of Tribal Courts over Nonmember Indians: The Circuit Split*, 1989 Duke L.J. 1053, 1060

("The General Crimes Act, passed in its original form in 1817, provides the federal government with broad jurisdiction over all crimes involving an Indian and a non-Indian that occur in Indian country.").

37. *Frequently Asked Questions About Public Law 83-280*, U.S. Att'y's Office, Dist. of Minn., https://www.justice.gov/usao-mn/Public-Law%2083-280 (last updated May 1, 2015).
38. 18 U.S.C. § 1162 (2012).
39. Pevar, *supra* note 33, at 142.
40. *Id.* at 116.
41. 25 U.S.C. § 232 (2012).
42. *See Alabama v. Shelton*, 535 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).
43. *See* Steve Russell, *Indian Civil Rights Act (1968)*, Encyclopedia.com, http://www.encyclopedia.com/history/united-states-and-canada/north-american-indigenous-peoples/indian-civil-rights-act-1968 (last visited Oct. 16, 2017).
44. *Id.*
45. Gary Fields, *Native Americans on Trial Often Go Without Counsel*, Pitt. Post-Gazette (Feb. 1, 2007), http://www.post-gazette.com/life/lifestyle/2007/02/01/Native-Americans-on-trial-often-go-without-counsel/stories/200702010357 ("Many tribes never see 'a single penny for indigent defense' from the government.").
46. Navajo Nation Code Ann. tit. 1, § 7 (2010), http://www.navajocourts.org/Harmonization/NavBillRights.htm.

> [N]or shall any person be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation.

47. Fields, *supra* note 45; *see also* Michelle Rivard Parks, Tribal Judicial Institute, Tribal Law and Order Act: Enhanced Sentencing Authority (2015), https://www.bja.gov/Publications/TLOAESAQuickReferenceChecklist.pdf.
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49. Parks, *supra* note 47.
50. *Id.*
51. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).
52. *See* Parks, *supra* note 47.
53. *Id.* at 2.
54. 25 U.S.C. §1302.
55. *See* 25 U.S.C.S. § 1302(a)(7)(D) (LEXIS through PL 115–64).
56. *See Romero v. Goodrich*, 480 Fed. Appx. 489, 490 (2012).
57. *Id.*
58. *Id.* at 494.
59. *Id.* at 490–92.
60. *Id.* at 493 (2012).
61. *Romero*, 480 Fed. Appx. 489, 494 (2012).
62. 25 U.S.C. §1302 (a)(6).
63. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).
64. 18 U.S.C.S. §1153 (LEXIS through PL 115–64).
65. *See* Pevar, The Rights of Indians and Tribes, 130, 135 (2012).
66. *See* 25 U.S.C.S. § 1302(a)(7)(D) (LEXIS through PL 115–64) (forbidding a total penalty greater than imprisonment for a term of nine years).
67. 25 U.S.C.S. § 1302(c)(2) (LEXIS through PL 115–64).
68. Creel, *supra* note 6, at 340.
69. 25 U.S.C.S. § 1302 (a)(6) (LEXIS through PL 115–64).
70. *Alabama v. Shelton*, 535 U.S. 654 (2002).
71. *See, e.g.*, *Alabama v. Shelton*, 535 U.S. 654 (2002); *see, e.g.*, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *see, e.g.*, *Gideon v. Wainwright* 372 U.S. 335 (1963).
72. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *see Gideon v. Wainwright* 372 U.S. 335 (1963).
73. *Wainwright*, 372 U.S. at 344.
74. 8 U.S.C. § 1401.
75. *Native American Citizenship: 1924 Indian Citizenship Act*, National Park Service, https://www.nps.gov/jame/learn/historyculture/upload/Native-American-Citizenship-2.pdf.
76. *Id.*
77. *Id.* This source includes a quote from Joseph K. Dixon, "an active proponent of assimilating the 'vanishing race' into white society," stating:

> The Indian, though a man without a country, the Indian who has suffered a thousand wrongs considered the white man's burden and from mountains, plains and divides, the Indian threw himself into the struggle to help throttle the unthinkable tyranny of the Hun. The Indian helped to free Belgium, helped to free all the small nations, helped to give victory to the Stars and Stripes. The Indian went to France to help avenge the ravages of autocracy. Now, shall we not redeem ourselves by redeeming all the tribes?

78. *Duro v. Reina*, 495 U.S. 676, 679 (1990).
79. *See* Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 American Indian L. Rev. 109, 117 (1992) ("[T]he Senate enacted the permanent solution, and the President signed it into law on October 28, 1991.").
80. *Id.* at 110.
81. Pevar, The Rights of Indians and Tribes, 241 (2012).
82. *See* Fields, *supra* note 45.
83. *Id*.
84. *See* Wolf, *supra* note 30, at 4.
85. 25 U.S.C.S. § 1304 (b)(1) (LEXIS through PL 115–68).
86. U.S. Dep't of Justice, Indian Country Criminal Jurisdictional Chart (Dec. 2010), https://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf (last visited 11/20/16).
87. *See* Wetherington, *supra* note 36, at 1060.
88. Brief of Professor Barbara L. Creel and the Tribal Defender Network as Amici Curiae Supporting Respondent, United States v. Bryant, 136 S. Ct. 1954 (2016):

> (The new statutory scheme specifically designed to combat domestic violence in Indian country reaffirms tribal criminal jurisdiction over non-Indians, but also guarantees that non-Indians have greater rights to due process and representation by counsel than do Indians charged with the same crimes and facing the same terms of incarceration. Indeed, while non-Indian defendants who will be charged with domestic violence in tribal court are required to have access to the full panoply of rights afforded to defendants outside of tribal courts, Indian defendants

may be convicted or led to plead guilty to charges of domestic violence without the benefit of any appointed counsel.).

Brief available at http://www.americanbar.org/content/dam/aba/publications/supreme_court/preview/briefs_2015_2016/15-420_Amicus_res-_ProfCree.authcheckdam.pdf.

89. *See id.*

90. *See United States v. Bryant* 136 S. Ct. 1954, 1962 (2016).

91. *See id.* at 1964.

92. *Id.*

93. *Id.* at 1957.

94. *Id.* at 1966.

95. *Bryant*, 136 S. Ct. 1954, 1966 (2016).

96. Suzanne Macartney et al., U.S. Census Bureau, Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007–2011 (2013). Last visited 12/10/16 at https://www.census.gov/prod/2013pubs/acsbr11-17.pdf; Katherine Peralta, *Native Americans Left Behind in the Economic Recovery*, U.S. News and World Report (Nov. 27, 2014), http://www.usnews.com/news/articles/2014/11/27/native-americans-left-behind-in-the-economic-recovery.

97. John Koppisch, *Why are Indian Reservations So Poor? A Look at the Bottom 1%*, Forbes (Dec. 13, 2011), http://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/#1933bc0d337a.

98. U.S. National Debt Clock, http://www.usdebtclock.org/ (last visited Dec. 3, 2016).

99. *Id.*

100. New York Indian Reservations, Native Heritage project (Mar. 22, 2012), https://nativeheritageproject.com/2012/03/22/new-york-indian-reservations/.

101. For example; the Mashantucket Pequot Tribal Nation has a bar exam, the instructions for taking the exam can be found at http://www.mptnlaw.com/docs/bar%20application%20procedures.pdf (Last visited 12/11/16). The Navajo Nation also administers a bar exam; information about this exam can be found at http://www.navajolaw.org/New2008/examination_4-2.htm (Last visited 12/11/16).

Patrick V. Wood is a member of the Albany Law School Class of 2018. While earning a bachelor's degree in Political Science at the State University of New York at Geneseo, Wood discovered his interest in the Fourth, Fifth, and Sixth Amendment rights of Americans accused of crimes. He hopes to spend his professional life after graduation ensuring that defendants of marginalized demographics get the protections to which they are entitled under the United States Constitution.

Tribal Injustice: The Past, Present, and Future of the Violence Against Women Act

"The rights of every man are diminished when the rights of one man are threatened."[1]

By Marcella Sgroi

The political climate seems to be ever-changing, especially as our nation unwinds from a divisive campaign season. While we as a state and as individuals are anticipating dramatic changes in the political and judicial landscape, all the while tribal nations have long faced judicial barriers throughout history. The focus of this article is on the administration of tribal justice, specifically as it relates to the Violence Against Women Reauthorization Act 2013, first by way of a brief explanation of criminal jurisdiction on tribal lands; second, by way of the initial enactment of the Violence Against Women Act; third by a discussion of the reauthorization of such act; and fourth, by an analysis of the effectiveness of the approved pilot programs thus far and of a recent Supreme Court ruling.

Marcella Sgroi

I. Criminal Jurisdiction on Tribal Lands

The pathway to prosecution of crimes occurring on tribal lands has long required a complex analysis, or as many before me have opined, a jurisdictional maze.[2] As with most rules, there are always exceptions, and often exceptions to those exceptions, and as you may well be anticipating, criminal jurisdiction on tribal lands unquestionably follows suit.[3]

Tribal nations, as sovereign nations, have the authority to create tribal court systems.[4] In theory, the creation of tribal courts authorizes Indian nations to seek justice for crimes committed within "Indian country," meaning the lands controlled by the tribe within the metes and bounds of the reservation, as defined in federal law.[5] The Supreme Court decision in *Oliphant v. Suquamish Indian Tribe* considerably limited the scope of tribal court jurisdiction, holding that tribal courts lack inherent jurisdiction over non-Indians who commit crimes in Indian country. [6] Further, the court noted that "…these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians."[7] Tribal court jurisdiction was limited further by the court decision in *Duro v. Reina*, which, at a very basic level, provided that tribal courts could not prosecute Indians who were non-members of the tribe.[8] Legislatively, Congress eliminated this limitation by defining "powers of self-government" and "Indian," thereby granting tribal courts criminal jurisdiction over all Indians.[9]

The decision in *Oliphant* and subsequent congressional actions provide the scope of authority of tribal courts; however, to take a step backward, determining whether a criminal action belongs in tribal court requires a separate analysis. Such analysis generally begins with determining which sovereign has proper criminal jurisdiction, the federal government, the state, or the Indian nation, while taking the following factors into consideration: the type of crime, the race of the perpetrator, and the race of the victim.[10]

Congress has granted federal courts criminal jurisdiction in Indian country as provided in the General Crimes Act and the Major Crimes Act. The General Crimes Act notes that "…the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."[11] There are express exemptions to this provision: (1) crimes committed by an Indian against another Indian or their property, (2) any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or (3) when exclusive jurisdiction over the offense has been or can be secured to the Indian tribe.[12] Moreover, as per the Major Crimes Act, certain crimes listed in this act fall under the purview of federal jurisdiction without regard to the race of the victim or perpetrator.[13]

When is it proper for a state to intervene? States may exercise criminal jurisdiction for crimes committed in Indian country when the crime is entirely between non-Indians, or where Congress has expressly granted authorization.[14] At present, Public Law 280 transfers criminal jurisdiction from the federal government to the state government for certain specifically identified states, namely: California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska.[15] Of note, states are permitted to acquire jurisdiction pursuant Public Law at section 280 should they so choose. As noted above, the *Oliphant* decision played a role in shaping the authority of tribal courts. In a more recent decision, the Court in *United States v. Lara* held that Congress has the Constitutional authority to lift the restrictions on tribes' criminal jurisdiction over nonmember Indians.[16] The Court's decision in *Lara* gave Congress the constitutional power to pass, for the first time, legislation that breaks down the barrier that now prohibits a tribe from exercising criminal jurisdiction over non-Indians.[17]

II. The Violence Against Women Act

The Violence Against Women Act (VAWA) was originally enacted in 1994 and was part of the Crime Control and Law Enforcement Act of 1994.[18] VAWA provided various grant programs for state, local, and tribal govern-

ments.[19] The original text of VAWA contained a sunset provision, which caused certain substantive provisions to expire in five years, thereby requiring that these provisions be reauthorized. The provisions of VAWA have been reauthorized, each time with amendments and new protections, in 2000, 2005, and most recently in 2013.[20] The time period between 2005 and 2013 reauthorizations is longer than the five-year period noted above, because 2012 was the first time the provisions of VAWA had expired and without a reauthorization vote. Congress voted on and passed the reauthorization act of 2013 on February 12 by a 78-22 vote in the Senate and February 28 by a 286-138 vote in the House.[21]

The most notable example in the original VAWA, with respect to tribal communities, was the S.T.O.P. (Services, Training, Officers, Prosecution) Violence Against Women Grant. The stated purpose of the S.T.O.P. grants

> …is to assist States, State and local courts (including juvenile courts), Indian tribal governments, tribal courts, and units of local government to develop and strengthen effective law enforcement and prosecution strategies to combat violent crimes against women, and to develop and strengthen victim services in cases involving violent crimes against women.[22]

The provisions in VAWA mandated a report of the first year accomplishments of the S.T.O.P. grants program through December 31, 1995, which was completed by The Urban Institute, and the report concludes that after the first year of implementation, relatively few state or territorial S.T.O.P. program plans addressed the needs of Indian tribes and that few states mentioned tribal communities as part of their intent to expand victim services because of language, cultural, or access issues.[23] Further, the states that did mention tribal communities as part of their implementation plans specifically noted the following initiatives: establishing a special unit on one reservation, establishing shelters and rape crisis services on reservations within the state, and assisting tribal governments.[24]

III. The Reauthorization Act of 2013

Senator Murkowski once stated:

> This ought not to be a Republican issue or a Democratic issue. It ought not be a woman's issue. It is an issue that should bother all of us when we cannot stand together and help those who have been victims of domestic violence.[25]

On March 7, 2013 President Obama signed the VAWA Reauthorization Act of 2013. The Reauthorization of VAWA in 2013 established the special domestic violence criminal jurisdiction that expanded a tribe's authority to prosecute crimes committed by non-Indians against Indians on tribal lands.

The sponsor of the Reauthorization of 2013 noted that among its purposes were the following: "transforming the criminal justice and community-based response to abuse by bolstering and streamlining the programs, grants, and coalitions created by VAWA and expanding the reach of VAWA to meet the remaining unmet needs of victims." [26] The Reauthorization of 2013 did not pass with unanimous support; many representatives voiced concerns with the proposed protections as they related to tribal authority. Some members feared the lack of constitutional protection for non-Indian defendants, while proponents focused on the high rates of violence against women on tribal lands and the right of Indian victims to live without fear of violence or rape.[27] Largely at issue was section 904, tribal jurisdiction over crimes of domestic violence.

The Reauthorization of 2013 at proposed section 904 amended the Indian Civil Rights Act of 1968.[28] The revised language reads, "the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons."[29] This authority does not extend to crimes where the parties involved are both non-Indian.[30] An added limitation provides that a tribe exercising special domestic violence criminal jurisdiction may only do so when the defendant: (1) resides in the Indian country of the participating tribe, (2) is employed in the Indian country of the participating tribe, (3) is a spouse, intimate partner, or dating partner of either a member of the tribe or an Indian who resides in the Indian country of the participating tribe.[31] Further, the criminal conduct falling under special domestic violence criminal jurisdiction includes domestic violence and dating violence, and violations of protective orders.[32]

Though the act still contains limitations on the criminal acts under the authority of the tribes, the Reauthorization of the VAWA in 2013 was a monumental legislative act. VAWA was reauthorized in March of 2013, with an effective date of March of 2015, although early enforcement authorization was granted to a limited number of tribes through a pilot program.

A. Federal Recognition: What Does It Mean to Be a Federally Recognized Tribe?

Federal recognition of an Indian tribe is an official acknowledgment from the United States that a tribe is a sovereign entity, and that recognition creates a relationship between the tribe and the federal government. Federal recognition is especially important with regard to a tribe's eligibility for programs and services created by Congress, such as the protections explained above. Accordingly, tribes without federal recognition have diminished access, or no access at all, to federal funds and benefits. The federal recognition process is set forth in 25 C.F.R. 83 *et seq.*, but federal recognition can also be achieved through an act of Congress, a Presidential executive order, or federal court decision. Presently, according to the Bureau of In-

dian Affairs, there are 567 federally recognized American Indian and Alaska Native tribes and villages.[33]

IV. Under the Pilot Program

The Reauthorization Act of 2013 was not effective until March of 2015; however, the Justice Department selected tribes to participate in a pilot project, allowing them to exercise criminal jurisdiction over domestic and dating violence when a non-Indian man is involved. The tribes were the Sioux Tribes of the Fort Peck Indian Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Tulalip Tribes of Washington, the Pascua Yaqui of Arizona, and the Tulalip of Washington State.

The pilot program was available to these select tribes only if the tribe's criminal justice system fully protected the right of the defendant as per federal standards. If this threshold requirement was met, the tribe could apply to the new pilot program for an eligibility determination by the Justice Department, and if approved, for an effective date.

A. Special Domestic Violence Criminal Jurisdiction: The Pascua Yaqui Tribe

The Pascua Yaqui Tribe is a federally recognized tribe located in Arizona, with a reservation that extends over 2,200 acres. The tribe has about 19,000 members, with about 5,000 members living on the reservation.[34] In an article by the *Washington Post*, the Pascua Yaqui tribal police chief described how tribal police had dealt with non-Indian offenders involved in domestic incidents with Indian victims in the past, "We would literally drive them to the end of the reservation and tell them to beat it… and hope they didn't come back that night. They almost always did."[35]

As noted above, the Pascua Yaqui Tribe was one of the tribes selected for early implementation of the protections under the Reauthorization Act of 2013, which began in February of 2014.[36] Alfred Urbina, the acting Attorney General of the Pascua Yaqui Tribe, testified at a Senate hearing in May of 2016. During this testimony, Attorney General Urbina spoke about the tribe's experience with the Special Domestic Violence Criminal Jurisdiction (SDVCJ). Specifically, Attorney General Urbina noted that the Pascua Yaqui Tribe obtained the first conviction of a non-Indian perpetrator of a crime of domestic violence in July of 2014. Since implementation of the pilot program's protections, the tribe has prosecuted 22 cases involving non-Indians, and the tribe has obtained eight criminal convictions.[37] Further, Attorney General Urbina noted that most of the perpetrators had extensive criminal backgrounds in the State of Arizona, and that on average these offenders were contacted by tribal police at least six times prior to the expanded jurisdiction provided by the Reauthorization Act of 2013.[38] At the time of the testimony, three of the offenders already prosecuted had since reoffended with the same victim.[39] Attorney General Urbina noted that, at the time of his testimony, seven cases had been dismissed due to issues related to the Supreme Court decision in *United States v. Castleman*.

In addition to the five tribes that were approved to participate in the pilot program, eight tribes have implemented SDVCJ, and to date, there have been no federal appeals challenging a charge or conviction under SDVCJ.[40]

B. *United States v. Castleman*

As it relates to Special Domestic Violence Criminal Jurisdiction and tribal justice, the decision in *Castleman*, in March of 2014, is cause for concern whenever a tribe is evaluating misdemeanor arrests under the new SDVCJ authority.[41] James Castleman pled guilty to intentionally or knowingly causing bodily harm to the mother of his child in 2001, a misdemeanor charge.[42] As per federal law, conviction of a misdemeanor crime of domestic violence prohibits an individual from possessing a firearm.[43] Mr. Castleman was federally indicted when it was discovered that he and his wife were purchasing firearms and reselling them.[44] Mr. Castleman challenged his indictment on the grounds that his previous conviction for intentionally or knowingly causing bodily harm to the mother of his child did not quality as a misdemeanor crime of domestic violence; he contended that it did not involve "the use or attempted use of physical force."[45] The Supreme Court held that Mr. Castleman's conviction did qualify as a misdemeanor crime of domestic violence under federal law, as under federal law "physical force" is satisfied by the degree of force supporting a common law battery conviction, and "that at common law, the element of force in the crime of battery was satisfied by even the slightest offensive touching."[46] Further, the Court reasoned that "Congress presumably intends to incorporate the common-law meaning of terms that it uses, and nothing suggests Congress intended otherwise here."[47] In a report compiled by Attorney General Urbina, the Pascua Tribe believes that the *Castleman* decision could be problematic for tribes because when a tribe is charging a crime of domestic violence under VAWA that does not involve physical contact, it may not qualify as a misdemeanor crime of domestic violence under federal law. Of note, under VAWA, the term "domestic violence" is defined as violence committed by a current or former spouse or intimate partner of the victim.

V. The Barriers to Justice

> [R]emoving legal barriers alone will be ineffective unless the discretion that allows informal norms to guide decision-making is constrained or meaningful incentives to change norms are created.[48]

Undoubtedly, the protections under VAWA have had a significant impact on improving justice on tribal lands, yet there is still room for improvement. Federal funding plays an integral part in the future success of VAWA, and despite the need for an adequate level of federal funding, the protections granted to tribes under the Reauthorization Act of 2013 are still fairly limited with regard to the

relationship between the perpetrator and the victim in crimes of domestic violence. At this point, it is unclear whether the current presidential administration will continue to provide the level of funding needed to sustain the grant programs under VAWA and whether the provisions pertaining to SDVCJ will be expanded.

Perhaps acts of domestic violence can be viewed as cyclical, often escalating with each occurrence. In an effort to end the cycle of abuse, from a law enforcement perspective, the ability to charge an offender with a crime like stalking may end the cycle of abuse before it becomes a crime involving force. Following this line of thinking, guidance and clarification may be needed to better assist tribes to evaluate and address crimes associated with domestic violence that do not have an element of force, thereby allowing tribes to use the authority granted to them under VAWA to the fullest. Moreover, Congress could seek to amend and expand the definition of domestic violence under the relevant provisions of VAWA. Particularly, it could include language expanding domestic violence to not only include acts involving force, but other acts of abuse generally associated with forceful crimes of domestic violence, such as, stalking. An inclusion of this nature could be met with opposition; those opposed may argue that this provides broad authority that could lead to miscategorizing crimes as acts of domestic violence, when they may have not been.

Looking forward, the past successes of VAWA indicate that great strides can be made with determination and great advocacy, and however unpredictable the future of VAWA may be, the ultimate power to effectuate change remains with us, as individuals and as a community.

Endnotes

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3. *See id.*
4. *See* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137 (2004).
5. 18 U.S.C. § 1151 (2012).
6. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
7. *Id.*
8. *Duro v. Reina*, 495 U.S. 676 (1990).
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10. *See* Robert T. Anderson, Bethany Berger, Philip P. Frickey & Sarah Krakoff, American Indian Law: Cases and Commentary 274-76 (2d ed. 2010).
11. 18 U.S.C § 1151 (2012).
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13. 18 U.S.C. § 1153 (2012).
14. *See* Cohen's Handbook of Federal Indian Law § 6.04, at 1-6 (Nell Jessup Newton ed., 2012).
15. Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162 (2012), 25 U.S.C. §§ 1321-1326 (2012), 28 U.S.C. § 1360 (2012)).
16. *United States v. Lara*, 541 U.S. 193 (2004).
17. *Id.*
18. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.
19. Women's Issues: Economic, Societal, and Personal (Dorothy V. Stickle ed., 2008).
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28. 25 U.S.C. § 1304 (2012).
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Barriers to Providing Civil Legal Services to Rural Clients: A Case Study, Some Innovations, Some Thoughts, but No Final Answers

By Victoria M. Esposito

I. What Rural Clients Face: A Case Study

In October 2015, John Doe[1] called the Albany office of the Legal Aid Society of Northeastern New York (LASNNY) for help. He, his partner, and their five children were renting an apartment in Greene County, one of the rural counties within the office's service area. They had complained to their landlord numerous times about the problems with the apartment, including a refrigerator which had stopped working, lack of heat, broken windows, and a broken light fixture. The landlord refused to replace the refrigerator unless Mr. Doe made payments toward the new refrigerator. Their rent was on voucher from the Department of Social Services, but they had complained to DSS, also without getting any results. They were not facing eviction at this point, but simply wanted to know what rights they had.

Mr. Doe was referred to a staff attorney who specializes in giving advice to clients who cannot (for whatever reason) be represented fully. The attorney explained the pros and cons of withholding rent, discussed the warranty of habitability, and advised the client to work through DSS and Code Enforcement to document the problems with the apartment. Mr. Doe's case was closed as an advice-only case.

In July 2016, Mr. Doe's partner called back. No repairs had been made, and they had withheld rent after having informed the landlord they were doing so. The situation was exacerbated because Mr. Doe had found part-time minimum wage work at McDonald's and their DSS assistance had been reduced by far more than it should have been. While that was being straightened out, they had offered the landlord a partial payment, but it had been refused, and the landlord had subsequently begun an eviction proceeding for nonpayment in the city court.

There was still no attorney available, but between the first and second calls LASNNY had begun a program called Closing the Gap. LASNNY's Closing the Gap coordinator matched Mr. Doe up with an attorney in Albany. She agreed to represent him in the limited capacity of drafting an answer; she then interviewed him by phone and drafted an answer to the eviction petition. As required by law, that answer carried a disclaimer specifying that Mr. Doe was a pro se litigant and that the attorney's role was limited to helping with the answer. When Mr. Doe next appeared in court, however, the judge noted that he had been assisted by an attorney and refused to hear the case without that attorney being present in court, even though the client and the documents both explained that the attorney was not representing him. He adjourned the case. The volunteer attorney was willing to appear with Mr. Doe if necessary, but she was not experienced in landlord-tenant law and was not certain that would be for the best.

Victoria M. Esposito

Fortunately, by then LASNNY had hired an attorney to handle landlord-tenant matters in the rural counties closest to the Capital District and was able to assign him the case. The attorney worked with Mr. Doe to amend his answer and began preparing to represent him in court. While the case was pending, an inspection by the county Department of Health found that the apartment was not habitable. DSS paid to relocate the family to a motel, nineteen miles away from the apartment. Because of the small space, they were forced to leave many of their belongings—including a severely disabled child's wheelchair—in the apartment under dispute. They had to pay for taxis to travel back and forth, including to get to court and to show their attorney the apartment. The case went to trial in September 2016, with Mr. Doe filing cross-claims for monetary damages based on partial eviction and the warranty of habitability. Both Mr. Doe and the landlord filed written briefs; while the court was making its decision the landlord contacted Mr. Doe a number of times and offered to re-rent him the apartment if he would just drop the suit. The court issued a decision in March 2017, granting Mr. Doe a 100 percent rent abatement for three months (approximately three thousand dollars), three thousand dollars in consequential damages, and one thousand dollars in punitive damages.

Mr. Doe's case provides an excellent snapshot of several barriers facing rural litigants in New York today, some of the ways in which LASNNY has tried to overcome those obstacles, and a testament to just why representation makes such a difference to litigants. In this article, I will briefly review the literature about the difference in outcomes for represented and unrepresented litigants, as well as the considerable body of literature about the problems with New York's system of justice courts. Next, I will discuss the specific initiatives which LASNNY is using to attempt to close the justice gap for our rural clients or potential clients, as well as the barriers which we have encountered along the way. Finally, I will discuss the non-

legal barriers which exacerbate, or cause, many of our clients' legal problems, and the limitations of the justice system in dealing with them.

II. Why Representation?

Since the late 1960s, lawyers and scholars have been carrying out empirical research on the difference in outcomes for represented and unrepresented litigants.[2] In New York, a famously progressive state where legal services receive $100 million per year from the judiciary and where the Chief Judge holds yearly hearings on access to justice, the outcome of these initiatives has been closely studied.[3]

In a 2016 survey of outcome-based studies, Emily Taylor Poppe and Jeffrey Rachlinski reviewed the types of laws or proceedings which had been studied over a period of years.[4] They also looked at whether the studies performed were observational or (less common) randomized, using both types of data to determine what the research actually shows about the value of representation in a particular type of case.[5] Of the types of cases or proceedings considered in this survey, LASNNY handles housing, administrative hearings/government benefits, family law, tax, and in certain circumstances, bankruptcy.[6]

Poppe and Rachlinski concluded that in virtually all these areas, and in studies performed from 1969 to 2013, the research overwhelmingly shows that having an attorney yields a better outcome in each of these areas.[7] This is echoed by reports to the Legal Services Corporation (LSC) from judges across the country[8] and by a 2013 report generated by the Conference of Chief Justices and the Conference of State Court Administrators.[9] This report went a step further, finding that the court system itself functions more smoothly and efficiently when more litigants are represented.[10]

In New York, the 2016 Report of the Permanent Commission on Access to Justice noted that although the number of evictions filed in New York City housing courts had remained stable, increased legal services for low-income tenants had reduced the number of residential evictions by 24% and the number of Orders to Show Cause by 14%.[11] Even the vice chairman of JP Morgan Chase testified before the Commission that his company believes that foreclosure defendants who are represented get fairer and more timely resolutions of their cases than unrepresented defendants.[12]

As the body of research confirming the importance of legal representation grows, however, the availability of legal assistance for those living in poverty has shrunk nationally. During the recent recession, the demand for legal services spiked as more families and individuals became eligible for legal assistance and faced problems such as unemployment, foreclosure, and eviction.[13] While this was happening, LSC funding was cut, even when adjusted for inflation, and IOLA monies, a longstanding source of funds for many legal services organizations, were reduced because of dropping interest rates.[14] This confluence strained the civil legal service infrastructure throughout the country and lessened the average amount available for each eligible resident.[15] Demand for civil legal services has lessened somewhat from its peak in 2012, but there is still greater demand than there was before the recession, and projections suggest that this will be the case for some time to come.[16] As I was finishing the first draft of this article in March 2017, President Trump proposed a federal budget for 2018-2019 with no money appropriated for LSC.[17] While this does not, of course, mean that this will be the final figure, it seems highly likely that LSC will be funded at lower levels than it has been over the last decades.

New York mirrors these trends. Approximately one-third of New Yorkers live at or below two hundred percent of the federal poverty guidelines, and are thus eligible for civil legal services provided by LSC-funded organizations.[18] New York's judiciary has increased funding for the state's civil legal services providers to $100 million per year; by comparison, in 2016 LSC funded *all its recipient organizations in the country* at $385 million.[19] Despite this high level of funding for New York organizations, Former Chief Judge Jonathan Lippman testified to the Permanent Commission in September 2016 that more than half of the people who seek civil legal services in New York are turned away because the organizations simply do not have the capacity to serve them.[20] This statistic, of course, does not capture those who have a civil legal problem, but for whatever reason, do not try to access services.

The widening gap between supply and demand has caused legal services organizations nationwide, particularly those in rural areas, to seek innovative and new ways to serve as many litigants as possible. LASNNY is no exception, and a later section of this article will describe our efforts in that area. However, these efforts and the barriers faced by our rural clients can only be understood in the context of the New York system of justice courts. A brief discussion of this system, therefore, is in order.

III. "An Obsolete and Antiquated Institution"

The town and village courts, which are collectively known as "justice courts," are a carryover from British jurisprudence.[21] The current system gets its structure from the Uniform Justice Court Act of 1966; the courts have been in existence in New York since the colonial era, and New York relies heavily on these courts in rural areas.[22] The courts' jurisdiction in civil cases is limited to claims of $3,000 or less[23]; they may hear equitable defenses but are otherwise courts of law rather than of equity.[24] Justice courts also have jurisdiction over misdemeanors and violations, and they hold arraignments and preliminary hearings for felonies.[25] The courts' judges are not required to have any qualification other than to have been elected

or appointed and to have undertaken the required training.[26]

Virtually any gathering of rural attorneys in New York includes eye-rolling stories about the problems with justice courts; I began practicing in very rural St. Lawrence County, and I certainly have my share of tales. Even so, I did not realize until I began to write this article that New Yorkers have continued to express their discontent with the justice court system since at least 1923. In an article published that year in the *Journal of the American Institute of Criminal Law and Criminology*, Bruce Smith summed up the findings of a year-long task force and legislative hearings: "The vigorous nature of the testimony adduced at the hearings, together with the striking degree of unanimity which was displayed, convinced the committee that the office of justice of the peace has almost outlived its usefulness in the State of New York."[27] Due to the constitutional nature of the justice of the peace and the "considerable body of public sentiment opposed to its abolition," the committee ultimately compromised by recommending that each town be limited to one or two justices.[28] In 1927, a state commission referred to the justice courts as an "obsolete and antiquated institution."[29]

Fast-forward to 2006 and, despite fairly regular calls for reform and oversight of the system, not much had changed.[30] *New York Times* reporters who spent an entire year reviewing and investigating the justice court system described local judges as individuals who had fewer licensing requirements than manicurists and hairstylists, and who routinely ran roughshod over the rights of the people appearing before them.[31] Despite some changes in the wake of this report, such as the requirement that all local court proceedings be recorded, by 2010 the *Times* wrote that efforts to reform the justice court system had stalled under pressure from the State Magistrate's Association and from local officials.[32]

The *Times* articles, and much of the research I have been able to find in this area, focus on criminal proceedings in the justice courts. This is not surprising, as criminal proceedings implicate issues such as personal freedom and a federal right to counsel; they are also far more stamped on the public imagination. In 2012, however, the Fund for Modern Courts examined summary eviction proceedings in the justice court system and presented its findings to the Task Force to Expand Civil Legal Services.[33] The report found that local judges often did not properly understand or apply the law and that tenants were disadvantaged as a result.[34] In coming to this conclusion, the authors of the report reviewed reports, training materials and similar memoranda, and the statutes governing summary proceedings.[35] They also interviewed attorneys who regularly practice in the courts, representatives of the Magistrates' Association, and representatives of the Office of Court Administration, and they reviewed the results of a survey of judges.[36]

Every major problem identified in the report hurt the tenants. For example, the authors of the report found that notice to tenants was often insufficient as a matter of law but also as a practical matter, with some tenants receiving literally no notice before a warrant of eviction was issued.[37] Tenants and their attorneys were often refused access to court records, and judges as a whole tended to help landlords, but not tenants.[38] Tenants who had attorneys sometimes received the protections afforded by the statute—but not always.[39] The informal observations of LASNNY's attorneys also suggest that at least some local courts afford more protection and due process to represented tenants than to unrepresented tenants in summary proceedings.

To sum up: virtually any client with a legal problem will get a better outcome if represented by an attorney. Both nationally and in New York, demand for civil legal services has gone up while funding has dropped, and this problem has only worsened since the recession. Finally, when civil litigants in New York appear before local court judges, they are often not afforded the protections or the due process to which they are entitled.

The practical effect of this is that legal services organizations must stretch their infrastructure and personnel to accommodate more clients, and needier clients, with less funding. They must simultaneously (and as tactfully as possible) do the extra work of educating the local court judges about what the law actually is.

IV. Specific Strategies the Legal Aid Society of Northeastern New York Employs in Rural Areas

A. Unbundling

"Unbundling," also known as "limited scope representation," refers to an agreement between an attorney and a client that the attorney will perform one or more discrete tasks which fall short of full representation. While this is not a new practice, it has gained new currency over the past decades, particularly in the legal services setting where advocates are continually trying to do more with less.[40] Unbundled services range from pro se clinics, to telephone advice, to assistance with pro se pleadings and answers, and as the demand for legal services has increased, so has the use of limited scope retainers.

At LASNNY's five offices, we have six attorneys and paralegals who specialize in giving clients telephone advice about their legal problems; this is generally the only legal service these clients will receive. On occasion, an intake specialist will refer a particularly difficult or meritorious case to a Legal Aid lawyer or private attorney for full representation. For the most part, however, the legal assistance ends when the call ends.

We also have a vibrant Attorney for the Day program in the Schenectady City Court, where a housing attorney appears on designated days to screen and represent eli-

gible clients. This generally means representation in settlement negotiations, although the attorney will occasionally accept a case for further representation in a hearing or trial. We have begun to adopt this model in one or two rural counties' Supreme Courts, where the attorney will screen foreclosure defendants on the spot and represent eligible clients in their settlement conferences. At times, we will sometimes enter into limited scope retainers to represent clients in foreclosure settlement negotiations only. Similarly, we will often assist clients with pro se answers, particularly in foreclosure and family law contexts.

LASNNY staff also offer self-help clinics in various areas of law. Some offices hold clinics that help clients fill out paperwork for uncontested divorces. The representation ends at the end of the clinic, and the client is responsible for filing and carrying out the remainder of the proceeding. Our staff also runs a clinic which helps consumers understand how to answer and defend against creditors' lawsuits; the clinic includes an overview of bankruptcy and a discussion of the tax implications of forgiven debt.

The research on the efficacy of advice or brief services is difficult, in part because legal services do not lend themselves to randomized studies and in part because there is a certain amount of self-selection. In one of a very few randomized studies in housing court, clients who received only legal advice had no clear substantive advantage in court—in other words, they were unable to lower their financial liability or increase their time in their homes appreciably more than litigants who received no legal advice. However, they were measurably better off than pro se defendants in terms of raising procedural issues such as affirmative defenses and defective service.[41] That said, a number of commentators have raised concerns that pro se clients are not adequately prepared for court by advice or brief service; they are also not equipped to object to inadmissible evidence, hearsay, or similar evidentiary problems. [42]

To be clear, very few, if any, legal services providers believe that limited services are a first or best choice for most clients. Some problems can be solved with phone advice, a pamphlet offering information, or a letter to an agency or other authority, but the majority of the problems we see are more complex than that. When the scope of representation is limited to negotiating a settlement, if the parties cannot agree, the client faces the prospect of carrying out litigation without an attorney. In a perfect world, we would offer full representation for all clients who require it. Given the time and financial constraints upon legal services providers, however, advice is often all we can offer. We rarely have any way of knowing whether the advice helps the client, or whether the client was ultimately able to prevail, but we hope and believe that the advice was better than nothing at all.

Mr. Doe's case study is one of those rare instances where we can gain insight into how legal advice helped him through the remainder of his case. During his first contact with LASNNY, Mr. Doe received advice about calling the authorities, about how to properly withhold rent, and about the possible ramifications of withholding rent. He called the County Health Department, which inspected the apartment, documented the egregious problems, and ordered the landlord to fix them. He further informed his landlord that he would be withholding rent until the conditions in the apartment were fixed, and it was only after this that the landlord filed the summary proceeding. We cannot know what would have happened if Mr. Doe had appeared pro se, offered the judge the Health Department letter, and explained that he was withholding rent because of the conditions in the apartment. What we do know is that he had a much stronger case because he took these steps, and that he took these steps due to the advice he received.

B. Closing the Gap

There is a considerable body of literature hailing technology as the newest, best, most efficient way to close the justice gap for low-income and rural litigants. [43] For the last decade and a half, the Legal Services Corporation has offered grant funding specifically for technological innovations in the field; the bulk of the funded projects helped pro se litigants with research or drafting, connected clients to a remote attorney (either a legal services attorney or a pro bono volunteer) who can advise them, or facilitated intra-agency communication over a large state or region.[44] These projects are particularly attractive to programs which, like LASNNY, cover large and remote areas.

All our offices serve some rural clients, and the Canton and Plattsburgh offices in particular serve clients in some of the largest and least populated counties in the state.[45] Public transportation in many areas is nonexistent or rudimentary, and this is a particular barrier to low-income clients who must sign legal papers, access services, and attend court or hearing dates. The reality of our grant funding also means that personnel who are funded by particular grants *must* perform certain kinds of work; they cannot cover for a colleague in a different area of law who is on family or medical leave, for example. Finally, private attorneys in rural areas are likely to be solo practitioners or in small firms, and they may not have the resources to meet the full demand for pro bono work.

Closing the Gap, a program which is funded through LSC's Technology Innovation Grant and run in partnership with Legal Assistance of Western New York (LAWNY) and Volunteer Legal Services Project of Monroe County (VLSP), is intended to deal with all those problems. If a rural, income-eligible client comes to LASNNY with a consumer or housing problem which brief legal services (such as drafting an answer) could help with, and if we do not have staff available to work on that problem, some private attorneys are able and willing to work remotely with the client to provide representa-

tion. This does not generally involve full representation through litigation, but the Closing the Gap volunteers will enter into a limited retainer to assist with answers, discovery requests, and legal advice. The volunteers meet with the client via video, and when they interview the client they use an interactive form to turn the client's responses into a pleading. This is stamped with the notation that an attorney helped the pro se client produce the document. While the client must still go to court alone, he or she will be armed with an answer that can raise or preserve defenses. The client will also have some idea of *how* to raise these defenses and what facts support them.

Since the program's inception in 2016, a total of 81 clients who would otherwise have had no legal help have received brief services through this program, 59 through LASNNY volunteers and 22 through LAWNY and VLSP. This one initiative offers a solution to many of the problems our rural clients face when seeking legal services: transportation, availability of staff, and availability of pro bono volunteers.

This program, while extremely helpful, is not a panacea. Particularly in local courts, some judges assume that the attorney represents the client fully and will not accept the pleadings or move the proceeding forward unless "the client's attorney" is also present. The program coordinator has begun giving each client a letter for the judge, explaining the program and the rule which allows an attorney to assist with pleadings only. While this is helpful in some cases, in other instances, the judge will not accept the papers. Particularly where the opposing party is represented by counsel, the answer may not be enough to conclude the client's case, and further litigation is required. Some volunteer attorneys are willing to help beyond the brief service of drafting an answer or similar documents, but others are not able to do so. This leads directly back to the conundrum discussed previously: while we believe that advice and brief service are better than nothing, there are some cases where the client demonstrably needs more help. Finally, at times the client's inability to access internet services—whether because of poverty, lack of infrastructure, or lack of transportation—makes it hard to connect with a volunteer online. Many places that offer public internet services, such as libraries, do not offer enough privacy to discuss a legal problem. While it is possible to work over the phone, this is a second choice because it does not allow for either party to pick up nonverbal cues during the interview.

Mr. Doe had to deal with a number of these barriers with his Closing the Gap assistance. He had to speak with his attorney on the phone, as he had neither internet access nor transportation to a suitable place. Despite the disclaimers on the paperwork which the volunteer had prepared and Mr. Doe's explanations, the judge would not accept or review the answer without "Mr. Doe's attorney" present. Simply having the answer did not solve Mr. Doe's problems or resolve his case, which ultimately moved forward to litigation. However, he went into the next phase with advice and with an answer which preserved some of the defenses and counterclaims he would ultimately raise and prevail upon at trial.

C. Systemic Advocacy

In 2015, LASNNY created the position of Advocacy Coordinator; our goal was to help case handlers identify recurring or systemic problems so that we could try to fix them at the source *in addition to* helping individual clients who are harmed by these problems. Systemic advocacy may include appellate litigation, affirmative litigation, informal advocacy or persuasion, Article 78 proceedings, in addition to requests in individual cases for punitive damages, retraining for officials, and similar broad-based relief. This type of advocacy is not specific to rural areas, of course, but given the scarcity of legal services and the barriers of distance and transportation in these areas, systemic advocacy is likely to be particularly important in our rural catchment areas.

Our systemic advocacy initiative officially launched in January 2016, so it is too early to generalize about the results. However, Mr. Doe's case is an example of an individual case which we believe will have far-reaching impact. The award of consequential and punitive damages in addition to a complete rent abatement should be an incentive for this landlord to maintain his numerous rental properties; we hope that it will also deter others from renting uninhabitable properties. Similarly, one of our advocates recently sought and received a ruling from the Greene County Court vacating a warrant of eviction issued by a local court. The town judge had denied a motion to dismiss based on an eviction petition that was so inadequate as to prevent our attorney and his client from forming any defense. In vacating the warrant, the county court judge reminded the town judge that an inadequate petition is jurisdictionally defective. Again, it is our hope and belief that this ruling will lead the town judge to follow the law more carefully, benefiting both represented and unrepresented litigants in that court.

As more fully discussed above, however, the justice court system has its own set of problems, and it would be naïve to believe that every case of this kind will fix a recurring issue. It is also particularly important to find the right case and client for this type of advocacy; so while this is a useful tool in fashioning broad-based relief, it can only be one tool among many.

V. Non-Legal Problems in Rural Areas

Our client base, and particularly our rural client base, has serious problems and needs which are not legal but which seriously hamper their ability to navigate the court system, to win their cases, and to seek legal help in the first place. While we try to suggest help or resources where we can, that is often beyond the scope of our representation, and often, of our competence. I am discussing

the most common problems briefly—not because I think these are problems that we as legal service providers can or should necessarily solve, but because they have to be a part of any serious discussion about the problems facing rural litigants and the challenges of representing these litigants.

A. Transportation

Transportation is the single biggest non-legal barrier our rural clients face. There is little, if any, public transportation available in many of our rural service areas. If clients do not have cars or gas money, it can be virtually impossible for them to get to court, let alone to meet with their attorneys to prepare for court. Some grants require LASNNY to get extensive paperwork from clients before we agree to represent them. If the client does not have transportation and cannot use a fax machine or scanner, we may not be able to represent that person in court simply because we are missing the paperwork we need for the file. Our attorneys will, when necessary, get the documents from the client at court before the scheduled appearance. However, this leaves no room for error. If a document is missing and the attorney only realizes the missing document a half hour before the client's case is called, we will be unable to represent the client. Clients who are receiving public assistance can often get volunteer drivers to bring them to their medical appointments or to hearings such as Social Security Disability or SSI hearings, but these drivers are not able to bring them to their attorneys' offices. Attorneys do, when feasible and necessary, meet clients at their homes or at public libraries or similar places. This, however, creates its own set of problems and concerns.

Public transportation is helpful, but can be prohibitively expensive for low-income litigants. For example, St. Lawrence County no longer has public transportation per se, but the local ARC chapter allows county residents to ride its buses for a very low flat fee. If someone cannot get to the scheduled bus stop, the bus will come pick them up—with a per mile charge for the route deviation. One client who used this service lived several miles outside the closest village with no transportation to the bus stop and had to pay well over $30 for the round trip, twice what she was expecting. By comparison, as of spring 2017, a round trip Trailways ticket between her village and our office costs $18—again, assuming a client can get to the bus stop. To be clear, I do not fault the ARC for needing to recoup their costs, and having any public transportation at all is better than nothing. However, $30 is a huge amount for anyone who falls within the federal poverty guidelines. Mr. Doe in our case study was forced to take taxis regularly as there was no other transportation available. Again, this is a huge expense for anyone living within the federal poverty guidelines and prohibitive for many.

Setting aside the cost for a moment, both finding transportation and working around the lack of transportation take a huge amount of time and energy. This can mean calls to DSS or a similar agency to find volunteers; it can mean finding a friend or family member who has a car and is willing to drive; it can mean rescheduling appointments or court appearances to coincide with SSI or disability or public assistance payments, when the client will have gas money. It can mean confirming and rescheduling these arrangements, once or twice or more times than that, and it can mean a default judgment against the client if the ride falls through and the attorney cannot successfully persuade the judge to adjourn the matter. Not every failure to appear or missed appointment is because of lack of transportation, of course, but this particular infrastructure barrier is common to every single one of our rural service areas, and it is one of the most problematic. It goes far beyond court, of course, affecting employment and standard of living. I have seen a client regularly hitchhike ten miles to work a minimum wage job—despite having been arrested more than once for hitchhiking—and walk that distance when no one would pick her up. I have seen a client without a driver's license give up a ride to his job because he was on probation, the person he was riding with was using drugs, and the client faced the possibility of jail time if the driver was caught.

Solving this problem is something that is beyond any one agency or entity. But it is in the interests of federal, state, and local municipalities as well as their residents to work towards making reliable transportation available. One partial solution might be to expand volunteer driver programs to include legal services and court appearances, but that would mean finding and coordinating a vast number of volunteers with ample time to provide these services, not to mention the increased cost of mileage reimbursement. Another partial solution could be expanding and emphasizing "place-based services," in which legal services and similar providers move closer to their client base. This is more difficult in rural areas, as the client base is so spread out and scattered; however, it might be possible to hold periodic clinics in remote areas to at least lessen the burden on clients.[46] A model like this would require a number of structural supports, including internet access and a secure and private meeting place. There is also the possibility of "one-stop shopping," so that one or two days per month civil legal services providers, victims' advocates, law enforcement, and social services agencies would be available for possible clients. This model is particularly appealing in cases involving domestic violence, where a victim may need all these supports in place to leave her abuser but where her movements are tracked and questioned. However, this would require not only the same infrastructure and supports that a clinic would, but a tremendous amount of planning and coordination among all the agencies involved. Technology, such as our Closing the Gap program, can help; however, it is largely dependent on the clients' own resources and may require them to travel to get to

a site with Internet service. And, of course, none of these models fully addresses the absolute need to be present at a courthouse on a particular date and time.

B. Mental Health Services

Many of our clients want or are required to seek mental health treatment. This can be mandated through Family Court, as part of a disability or employment case, or for a variety of other reasons; it can also, of course, be something that a client wants to do for his or her health and well-being.

Unfortunately, mental health services in rural counties are both scarce and overwhelmed. In some of our rural areas, it is not uncommon for a client to have to wait six months to a year for a first appointment with a therapist and longer to see a psychiatrist or psychologist. This is particularly problematic when a client is waiting for a disability or SSI hearing, as administrative law judges tend to consider whether a client who alleges disability due to mental health problems is seeking and following through with treatment. The delay also causes difficulties in these cases because the Social Security Administration privileges the opinions of psychologists and psychiatrists over therapists,[47] as well as the opinions of longstanding treatment providers over those of shorter duration. This is also a problem for parents who have been ordered to seek mental health treatment as part of a family court or similar case and for public benefits recipients who must show medical proof that they cannot work due to mental health conditions. This issue is magnified by the transportation problem, as many clients are simply not able to get to their treating professionals as often as they ought to.

As with the problems our client base faces with transportation, this is a huge issue that is beyond any one agency to solve. The bottom line is that the state and local mental health agencies in rural areas need more personnel. This requires more of everything, though: more money for salaries, more money for supervising staff, more incentives for practitioners to come to or remain in remote areas. Satellite offices for mental health clinics sound appealing in much the same way that place-based legal services do; while these might help with transportation problems, however, they would not improve overall access for the simple reason that the root problem is the lack of ample professionals in rural areas.[48] To fix this problem requires advocacy and education on a scale that LASNNY cannot perform (both by regulation and in practical terms), as well as understanding by state and local officials that their constituents in rural areas are suffering due to mental health shortages. It also requires that state and local officials *and their constituents* understand not only the human cost but the financial cost which comes from these shortages, whether that is couched in terms of clients' inability to get SSI, in terms of their inability to work, or through some other metric—and it requires political and community will that may not be present as we face continued economic uncertainty.

Conclusion

This article barely skims the surface of the barriers between our rural clients and access to legal services, and to do any more than that would require far more space and expertise than I have. LASNNY has been able to overcome some of these barriers by blending the traditional solution of pro bono attorneys with new and innovative technology in our Closing the Gap program, but this is not a full solution to our clients' problems. Similarly, while unbundled legal services and systemic advocacy both allow us to spread scarce legal services out among a large and scattered client base, neither can possibly serve the needs of all clients. Until we hit on a more nearly perfect solution or set of solutions, we continue to rely on the commitment, flexibility, creativity, and understanding of our advocates, our organization, and our partners in the public and private sectors.

Endnotes

1. Some details and the client's name have been changed to preserve anonymity.
2. Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 Pepp. L. Rev. 881 (2016).
3. Permanent Comm'n on Access to Just., N.Y. State Unified Ct. Sys., Report to the Chief Judge of the State of New York (2016), http://www.nycourts.gov/accesstojusticecommission/PDF/2016_Access_to_Justice-Report.pdf.
4. Poppe & Rachlinski, *supra* note 2.
5. *Id.*
6. *What We Do: Services*, Legal Aid Society of Northeastern New York, https://www.lasnny.org/what-we-do/services/ (last visited April 9, 2017).
7. *See* Poppe & Rachlinski, *supra* note 2, at 941-42. For outcomes in these specific areas, *see supra* note 2 at 900-09 (housing); 910-18 (administrative hearings and government benefits); 922-25 (family law); 928-30 (tax); and 930-31 (bankruptcy).
8. Legal Servs. Corp., FY 2017 Budget Request (2017), http://www.lsc.gov/media-center/publications/fy-2017-budget-request.
9. Conference of Chief Justices & Conference of State Court Adm'rs, The Importance of Funding for the Legal Services Corporation from the Perspective of the Conference of Chief Justices and the Conference of State Court Administrators (2013), http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Web%20Documents/LSC_WHTPR.ashx.
10. *Id.* at 3-4.
11. Permanent Comm'n on Access to Just., *supra* note 3, at 15.
12. *Id.*
13. *See* Legal Servs. Corp., *supra* note 8, at 6.
14. Times Union Editorial Bd., Editorial, *New York's Legal Dilemma*, Times-Union (Oct. 3, 2012), http://blog.timesunion.com/opinion/new-york%e2%80%99s-%e2%80%a8legal-dilemma/22290/.
15. *See* Legal Servs. Corp., *supra* note 8, at 2.
16. *Id.*
17. Office of Mgmt. & Budget, Exec. Office of the President, America First: A Budget Blueprint to Make America Great Again 5 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf.

18. Permanent Comm'n on Access to Just., *supra* note 3 at 7.

19. *Id.* at 5; Legal Servs. Corp., *supra* note 8, at 2.

20. Permanent Comm'n on Access to Just., *supra* note 3 at 11; Legal Servs. Corp., *supra* note 8, at 7.

21. Doris Marie Provine, Judging Credentials: Nonlawyer Judges and the Politics of Professionalism (1986). I am indebted to my childhood friend David Snow, Esq. for alerting me to Professor Provine's book, which is still one of the most comprehensive studies of New York's justice courts. Mr. Snow grew up in Virgil, New York, where Professor Provine served as a town justice for some years, and I grew up one township over in Lapeer, New York. *See* Bruce Smith, *Rural Justice in New York State*, 14 J. Am. Inst. Crim. L. & Criminology 284, 286-87 (1923).

22. Judith Kaye & Jonathan Lippman, N.Y. State Unified Court Sys., Action Plan for the Justice Courts (2006), https://www.nycourts.gov/publications/pdfs/ActionPlan-JusticeCourts.pdf; Provine, *supra* note 21, at 84-85

23. Uniform Just. Ct. Act §§201(a), 202, 204.

24. *Markese v. Cooper*, 333 N.Y.S.2d 63 (Monroe Co. 1972).

25. Criminal Procedure Law §§10.10, 10.30.

26. N.Y. Const. art VI, §20(c).

27. Smith, *supra* note 21, at 287.

28. *Id.*

29. William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. Times (Sept. 25, 2006), http://www.nytimes.com/2006/09/25/nyregion/25courts.html?mcubz=1 (citing a 1927 state report saying the same).

30. *Id.*

31. *Id.*

32. William Glaberson, *Reform of New York's Courts Stalls*, N.Y. Times (Jan. 7, 2010), http://www.nytimes.com/2010/01/08/nyregion/08courts.html?mcubz=1.

33. Amelia T.R. Starr et al., Task Force to Expand Access to Civil Legal Services, Summary Proceedings in New York's Town and Village Courts: Ideas for Improvement (2012), http://moderncourts.org/wp-content/uploads/2013/10/Summary-Proceedings-in-New-York-Town-and-Village-Justice-Courts-Ideas-for-Improvement.pdf.

34. *Id.* at 5-8, Exhibit. B.

35. *Id.* at 1.

36. *Id.*

37. *Id.* at 5-8.

38. *Id.* at 13, Exhibit B.

39. *Id.*

40. For an excellent overview of the history of unbundling, see Jessica Steinburg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 Geo. J. on Poverty L. & Pol'y 453 (2011).

41. D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessey, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 Harv. L. Rev. 901 (2013).

42. For a summary of the most common arguments made against unbundling, see Fern Fisher-Bradeveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 Fordham Urb. L.J. 1107 (2002).

43. Representative pieces include Raymond H. Brescia, Walter McCarthy, Ashley McDonald, Kellan Potts, & Cassandra Rivais, *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 Alb. L. Rev. 553 (2015), and James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra, & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 Harv. J.L. & Tech. 241 (2012).

44. *Technology Initiative Grant Award 2016*, Legal Services Corporation, http://www.lsc.gov/technology-initiative-grant-awards-2016 (last visited April 10, 2017). Technology Initiative Grants for 2009-2015 are available at http://www.lsc.gov/grants-grantee-resources/our-grant-programs/tig#Grants (last visited April 10, 2017).

45. Based on the 2010 census, St. Lawrence County's population density is 41.76, and that of Essex County is 21.94. *Table 2: Population, Land Area, and Population Density By County, New York State-2010*, N.Y. St. Dept of Health https://www.health.ny.gov/statistics/vital_statistics/2010/table02.htm (last visited April 10, 2017). For purposes of comparison, Albany County's population density at that same period was 581.87, and that of Greene County was 76.06. *Id.*

46. LASNNY's Canton office for some time held a very watered down version of this model at a local technical college. Many of the students there are non-traditional students, first generation college students, or both. Therefore, many of them qualified financially for our services, and we held monthly clinics to screen clients for eligibility and offer advice and brief service. Our offices similarly hold clinics at the Akwesasne reservation on the Canadian border and for our senior clients in various settings.

47. Some federal caselaw explicitly recognizes that in Northern New York, disability claimants simply may not have access to a primary physician and rely instead on physician assistants or nurse practitioners, whose opinions are then afforded extra weight. *Duell v. Astrue*, No. 8:08-CV-969, 2010 WL 87298 at *6 (N.D.N.Y. Jan. 5, 2010); *Mongeur v. Heckler,* 722 F.2d 1033, 1039 n.2 (2d Cir. 1983). To my knowledge, however, this has not been broadened to include counselors in lieu of psychiatrists.

48. A brief search of the Health Resources and Services Administration (HRSA) database, maintained by the Department of Health and Human Services, shows that every single rural county within LASNNY's service area has been designated as having a shortage of mental health professionals, either globally or among Medicaid-eligible patients. Medicaid-eligible patients, of course, form a large part of our client base. https://datawarehouse.hrsa.gov/Tools/HDWReports/Filters.aspx?id=198, accessed April 9, 2017.

Victoria Esposito is the Advocacy Coordinator at the Legal Aid Society of Northeastern New York, where she works with attorneys throughout the organization's 16-county service area to identify and solve systemic issues affecting low-income people. She is active in the New York State and Albany County Bar Associations and has previously served as an Assistant District Attorney for St. Lawrence County and taught paralegal students in various settings. Victoria lives in Albany with her husband and has two adult daughters.

Securing Safe and Habitable Housing for Low-Income Tenants in Rural New York: The Role of Landlords, Code Enforcement, and Courts

By Sujata Ramaiah and David Kagle

Introduction

Low-income tenants in Upstate New York who face serious housing condition problems rely on local officials and town and village justice courts to substantiate and adjudicate their complaints when landlords fail to make repairs. However, they are often unable to convince local code enforcement offices to promptly perform inspections or issue written repair orders. When code enforcement officers do cite landlords for violating the Property Maintenance Code, violations may persist for months without further enforcement action.

Further, tenants often correctly fear that code officers will actually put them out of their housing rather than order a landlord to make repairs. There is a widespread misconception (shared by code enforcement and law enforcement) that such code action is tantamount to an eviction, which makes it extremely difficult for tenants to secure repair of dangerous structures, or to retake occupancy once a home is repaired.

When tenants withhold rent, often the only apparent remedy for condition problems, many courts will simply issue a warrant of eviction, regardless of the severity of the defect, and often without a robust hearing. Legal Aid attorneys are often able to assist tenants in securing inspections and raising conditions defects in court, but their resources are limited. They are also unable to identify and address the full range of housing defects which code officers are trained to identify and cite. Thus, there is an urgent need for clear standards for the timing and content of local code responses, and for an accessible venue in which tenants may seek repair orders without facing loss of housing.

I. Rural Tenants Often Face Low-Quality, High-Cost Housing

Attorneys working at civil Legal Aid offices work with the lowest income individuals and families in the country. They are often on the verge of homelessness due to financial hardship or housing that is of such poor quality that it impairs the health and safety of its occupants.

As an example, Legal Assistance of Western New York, Inc.® (LawNY®) is currently working with a mother and her adult daughter whose half of a rented duplex has a severe roof leak. As a result, water entered the home over a long period of time, destroying the studs, sheetrock, and flooring in an upstairs bathroom. The landlord balked at requests for repairs, arguing that there was a second bathroom available in the apartment. Unfortunately, despite continuing deterioration, the code enforcement official gave the landlord six months to make repairs, resulting in a complaint filed against the code enforcement official.

LawNY® also works with many clients who experience bedbug infestations. These difficult-to-eradicate pests cause severe itching as well as psychological distress. Often landlords will refuse to treat the premises for many months, causing the problems to become even more severe.

Even when a landlord hires an exterminator, tenants are usually directed to follow a burdensome regime to prepare for treatments. This often includes washing and drying every item of clothing and bedding, then storing these items in airtight bags until treatment is complete. These treatments often fail regardless of the level of preparation, requiring repetition of the expensive and disruptive preparation process. Subsidized housing landlords, despite experiencing widespread infestations, frequently struggle to retain qualified pest control companies. Further, these landlords also give eviction notices, usually improperly, to tenants who, they claim, have not complied with bedbug preparation protocols.

A recent report by the Housing Assistance Council describes the housing conditions problems facing rural households, stating: "[a]ccording to 2009 American Housing Survey indicators of housing adequacy, 1.5 million or 5.8 percent of homes outside metropolitan areas are either moderately or severely substandard, a proportion slightly higher than the national rate."[1]

The article goes on to note that these problems have a disproportionate effect on rural renters, stating:

> Another 370,000 rural households have two or more housing problems. These households with multiple housing problems almost always experience cost burden in combination with either substandard or crowded conditions. Rural renters are [disproportionately] represented not only among households with problems, but in particular among households with multiple problems. Over half of rural and small town households with multiple problems of cost, quality, or crowding are renters.[2]

In addition to quality problems, low-income renters usually find their housing to be unaffordable. Federal guidelines on affordable housing state that families paying more than 30 percent of their income for rental costs and utilities are "cost burdened," and face difficulties affording food, clothing, transportation, and medical costs.[3]

Remarkably, there is no place in the United States where a tenant who earns the federal minimum wage can afford a two-bedroom apartment at fair market rental value.[4] To stay within HUD guidelines, the average American would need to earn $17.14 an hour in order to afford a one-bedroom apartment, which is over double what the federal minimum wage is today.[5] To afford a two-bedroom apartment on federal minimum wage would require, on average, 117 hours of work a week; in other words, nearly three full-time jobs.[6]

Table 1, below, demonstrates the percentage of renting households in each income category that spend greater than 30 percent of annual income on housing expenses across New York State, Bronx, and New York counties, and LawNY®'s service areas.[7]

The lowest-income renters pay the greatest percentage of their income on housing expenses, while such percentage decreases as a renter's income increases. In other words, low-income renters are more "cost-burdened" by HUD standards than higher-income renters.

Low-income tenants, paying more than they can afford for defective housing, face a challenging system and substantial risks. If they ask their landlord for repairs or contact the code enforcement official, they are frequently given an immediate eviction notice. Further, local code enforcement officials sometimes post premises as unfit to occupy without ordering a landlord to make repairs, which makes the faultless tenant abruptly homeless. Local town and village Justice Courts often issue warrants of eviction against tenants who have withheld rent in an effort to induce their landlord to make repairs. Sometimes this outcome occurs even after the court finds that the tenant owes no rent, due to deplorable conditions. These outcomes, and fear of these outcomes, contribute to the homelessness and inadequate housing of tenants who are already facing poor conditions. Such results may be averted when code enforcement officials consistently compel landlords to honor their legal obligations and when the courts carefully weigh tenant claims.

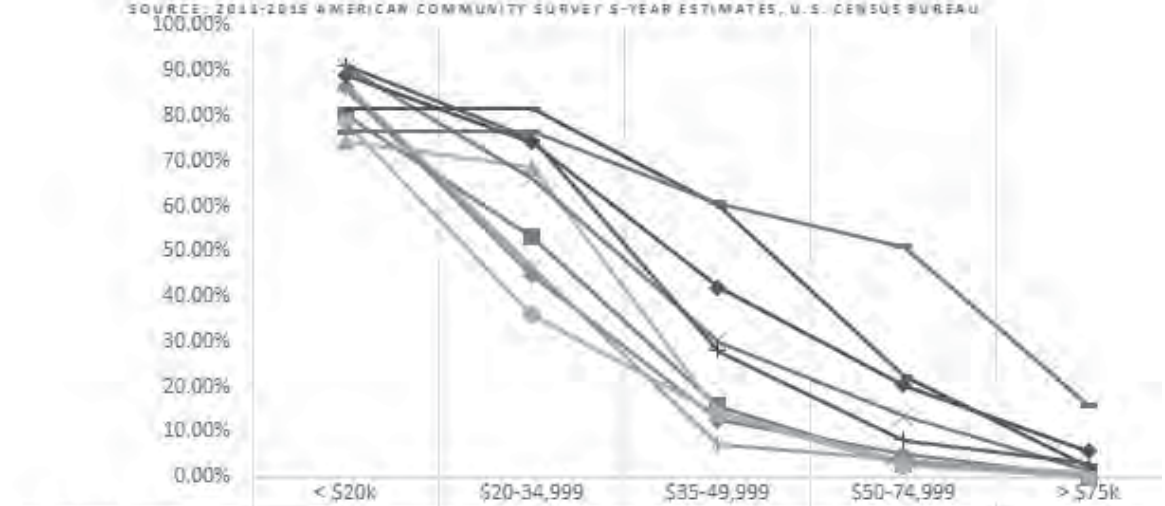
II. Mechanisms Available to Tenants Facing Conditions Problems

Landlords have a duty to repair defective conditions. Real Property Law § 235-b(1) provides that all landlords of rented residential premises are deemed to covenant and warrant that the premises "are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety."[8]

Where landlords breach this warranty after notice from tenants, they are liable for damages. These damages are ordinarily limited to an abatement or discount of rent.

TABLE 1. PERCENTAGE OF "COST-BURDENED" RENTERS BY INCOME GROUP

SOURCE: 2011-2015 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, U.S. CENSUS BUREAU



	< $20k	$20-34,999	$35-49,999	$50-74,999	> $75k
Bath LawNY	86.33%	44.63%	12.57%	4.98%	0.00%
Elmira LawNY	80.18%	52.99%	15.59%	2.88%	0.00%
Geneva LawNY	74.40%	68.50%	14.33%	3.37%	1.05%
Ithaca LawNY	90.70%	66.00%	30.06%	13.39%	1.26%
Jamestown LawNY	87.03%	46.06%	7.25%	3.90%	0.00%
Olean LawNY	78.75%	35.91%	13.85%	2.51%	0.00%
Rochester LawNY	91.11%	74.74%	27.91%	8.09%	2.89%
Bronx County	81.39%	81.39%	60.03%	22.14%	2.05%
New York County	76.38%	76.33%	60.64%	50.95%	15.74%
New York State	89.00%	74.01%	41.86%	20.37%	5.59%

For example, courts have awarded a 10 percent abatement for unsanitary conditions due to trash removal failure[9]; 10 percent of rent in damages because of unreliable heat and hot water, and faulty locks devalued services bargained for at lease signing[10]; 45 percent abatement for bedbug infestation where landlord's efforts and tenant's continued use of the property for its intended purpose mitigated abatement[11]; 80-100 percent abatement due to plumbing leaks[12]; a 20 percent abatement for "13 incidents of no hot water" combined with a 30 percent abatement for "17 instances of no heat."[13]

Landlords are liable for breaches of warranty unless defects are caused by "the misconduct of the tenant… or persons under his direction or control."[14] Landlords must show "deliberate or intentional act[s]" of the tenant led to the inhabitable conditions.[15] Thus, where bedbugs emanated from an empty apartment below the tenant's, festering in the tenant's apartment and causing him great discomfort, a constructive eviction defense was available because the tenant neither caused nor could remedy the infestation.[16]

Individuals and families who need housing often move into substandard homes promising the landlord that they will make the needed repairs. The landlord frequently offers to waive some rent in exchange for the repairs. However, landlords often disregard such agreements and demand payment of the full rent, regardless of a tenant's labor or the substandard quality of the leased property. As a matter of law, the landlord's duty to repair may not be waived under Real Property Law § 235-b(2).[17] Tenants cannot give up their right to request repairs by promising to perform the work themselves.

Further, landlords may not retaliate against tenants who, in good faith, request repairs or make a complaint to the code enforcement official or similar governmental authority. Retaliation includes substantially changing the terms of tenancy.[18] Substantial change in terms includes a refusal to continue or renew a tenancy. Landlords who violate this provision are subject to civil actions for damages, injunctive, and other equitable relief.[19] Accordingly, a tenant need not wait for a summary eviction proceeding to challenge the legality of an eviction notice.[20]

A rebuttable presumption of retaliation is created if a landlord serves a notice to quit, commences an action or proceeding to recover possession, or attempts to substantially alter the terms of tenancy within six months after a good faith complaint to an agency to secure lease or repair rights.[21] It should be noted that demanding rent and commencing nonpayment proceedings may not constitute retaliation unless the nonpayment proceeding is baseless.[22]

In sum, landlords are required to ensure that rented premises are in good condition. Tenants should neither be penalized nor forced to move simply because they request repairs. Questions of fact often arise regarding the date or adequacy of a tenant's notice to a landlord of conditions problems. Accordingly, upon observing defects, tenants should request repairs in writing and retain dated copies of these writings for later evidentiary use. This will be important evidence should subsequent proceedings ensue.

III. Code Enforcement Officials Are Charged With Identifying Defects and Ordering Repairs

When a landlord disregards a tenant's request for repairs, the local code enforcement official is authorized to identify defects and order repairs. New York State's Code Enforcement Officials are charged with enforcement of New York's Fire Prevention and Building Codes.[23] These standards are set out in the international codes, as modified by New York State supplements. The international codes and the New York supplements are incorporated into New York State regulations by 19 NYCRR § 1219.1.

Code defects frequently interfere with tenant health, safety and quality of life; but, state and local codes are not entirely co-extensive with the warranty of habitability.[24] Nonetheless, the Property Maintenance Code sets out relatively objective standards for the safety and habitable condition of residential premises. These standards include, but are not limited to, heating,[25] plumbing,[26] infestation,[27] and roofing.[28] Local governments may implement standards that are *more* stringent than those in the codes, provided they notify and seek approval from New York's Code Council.[29]

Economic theory suggests that efficacious building code enforcement may improve the housing conditions faced by low-income tenants without increasing rent or encouraging property owners to exit the rental market. By using legal and market forces, private actors may be encouraged to provide quality housing at costs in line with the public good.

> [F]irst, it may require landlords to make improvements which, except for bargaining costs, would have been in their interest—and in the interest of their tenants—to make anyway; second, it serves to tax away a substantial share of the rentier and monopoly profits earned by slum landlords; third, it fairly imposes a burden upon landlords who, like other members of the privileged class, have an obligation to exercise self-restraint in their ongoing dealings with the poor; fourth, it generates the same total amount of benefit to the poor tenantry, at a much reduced expenditure of *government* funds.[30]

IV. Code Enforcement Officials Often Post Structures as Unsafe, Rather Than Requiring Repairs

Instead of enforcing housing standards, code enforcement officials often summarily post a property as an unsafe structure, ordering all tenants and occupants to vacate immediately. Certainly, this is an appropriate step where there is imminent danger to anyone inside a struc-

ture. The 2016 Uniform Code Supplement modifies the Property Maintenance Code as adopted in New York:

> Imminent danger. The occupants shall vacate premises when there exists: 1. Imminent *danger of failure or collapse* of a building or structure which endangers life; 2. A structure where the entire or part of the *structure has fallen and life is endangered* by the occupation of the structure; 3. Actual or potential danger to the building occupants or those in the proximity of any structure because of *explosives, explosive fumes or vapors or the presence of toxic fumes, gases or materials*; or 4. Operation of *defective* or *dangerous* equipment. There shall be posted at each entrance to such structure a notice reading as follows: "This Structure is Unsafe and its Occupancy Has Been Prohibited by the code enforcement official." It shall be unlawful for any person to enter such structure except for the purpose of securing the structure, making the required repairs, removing the hazardous condition or demolishing the structure.[31]

Posting of a structure does raise constitutional issues. LawNY® recently represented a rooming house tenant, Katrina Breon, who had been summarily dispossessed from her room in the downstairs of a rooming house after a tenant complained about the use of a substance to kill bedbugs in the upstairs. Ms. Breon's room had neither been infested nor treated with the substance. Nonetheless, the code enforcement official for the Village of Bath posted the entire rooming house as an unsafe structure. He ordered Ms. Breon to leave her home and told her that she had to remove all of her property within 72 hours. The posting notice neither identified a hazard to Ms. Breon, nor offered her an opportunity to challenge the code enforcement official's decision.

As a result, Ms. Breon was immediately homeless, without warning. The landlords discarded her personal property. After issuing a notice of claim to the Village of Bath, Ms. Breon pursued damages against the landlords, the code enforcement official, and New York's Secretary of State, who is charged with implementing minimum standards for the enforcement of the codes. Ms. Breon argued that in failing to train local code officials on due process of law, despite having an affirmative obligation to implement minimum standards, the Secretary of State was responsible for the resulting deprivation of her housing and her property.

The District Court, Telesca, J. denied motions to dismiss by both the Village of Bath and the Secretary of State, applying principles of due process of law to Ms. Breon's situation.[32] Judge Telesca noted that granting a motion to dismiss the § 1983 action against the Village of Bath was an inappropriate request where the defendants had failed even to identify circumstances creating an imminent risk to the plaintiff.[33] The court concluded that a tenant in possession has a constitutionally protected interest in continued residency subject to due process protections.[34] Only in "extraordinary" and "truly unusual" circumstances could the State justify depriving a citizen of constitutional interests without a pre-deprivation hearing. Judge Telesca found that the Village had not shown, and could not show, such circumstances at the motion to dismiss stage.[35]

The court also recognized the Secretary of State's potential § 1983 liability because, in light of his responsibility for standards and training, he may have been personally involved in the deprivation of constitutional rights if he created "a policy or custom under which unconstitutional practices occurred or allowed the continuation of such a policy or custom."[36]

In response to the *Breon* decision, the State Department of Building Standards and Codes implemented changes to the 2016 (and now 2017) supplement to the Property Maintenance Code, recognizing that tenants and occupants have constitutionally protected property interests in their homes. This was further clarified by a technical bulletin which provides code enforcement officials with guidance on affording due process of law to tenants and occupants, including noting that:

> Basically, "due process" of law involves giving an owner or other occupant of a buildings [*sic*] "notice" and "opportunity to be heard" *before* the Authority Having Jurisdiction puts a "do not occupy" notice on a building. The "notice" should include:
>
> - notice of the Authority Having Jurisdiction's intention to put a "do not occupy" notice on the building;
> - notice of the Authority Having Jurisdiction's reasons for doing so (including citations to the specific Uniform Code sections that the Authority Having Jurisdiction claims to be violated);
> - notice of the right of the owner/occupant to be heard (that is, the right of the owner/occupant to present to some municipal official or body, other than the code enforcement official who proposes to put the "do not occupy" notice on the building, reasons why the owner/occupant believes that the code enforcement official's proposed action should not be taken); and
> - notice of the time within which the owner/occupant must request a hearing and the manner in which the owner/occupant must make that request.[37]

As clarified by the *Breon* decision, private tenants have constitutionally protected property interests in their homes. Code enforcement officials may not circumvent their obligation to enforce the codes by ordering structures vacated without a prior hearing, unless there is an

emergency. In most circumstances, even where a building is posted, the tenant is still in possession and may insist on repairs and the right to return home. Thus, even after posting a structure, code enforcement officials should enforce the code and require repairs unless a building must be torn down.

V. Rather Than Evicting Tenants, Code Enforcement Officials Should Consistently Apply Regulations to Enforce Housing Standards for The Benefit Of Tenants

Code enforcement officials continue to be uncertain of the available mechanisms for enforcement of the Property Maintenance Code, notwithstanding the statutory mandate that local governments have procedures in place for documenting and responding to complaints of code violations.[38] These officials often relate that they cannot do anything against a recalcitrant landlord other than post the property. However, it is not clear whether there is any mechanism in New York law that even allows for the posting of a structure and an order to vacate where there is no imminent risk to occupant safety.

Instead of posting property for non-emergency code violations, code enforcement officials may issue orders to remedy. For example, a code enforcement official who documents a complaint about bedbugs in an apartment complex should next determine if the condition constitutes a code violation. If so, any order to the landlord to remedy the problem should provide 30 days for compliance. The code enforcement official may also order that extermination start immediately.[39] Beyond the order to repair, code enforcement officials may initiate various civil or criminal proceedings against the property owner for failing to cure the bedbug infestation.[40]

Property owners who fail to comply with a lawful and duly served order to remedy may face a fine of up to $1,000 per day and/or imprisonment up to one year.[41] In addition to seeking criminal penalties, local governments can seek court orders in both Supreme and City Courts ordering property owners to correct ongoing defects.[42]

However, instead of documenting violations and ordering timely repairs, code enforcement officials often implement informal, even unwritten, measures to address defects. This leaves tenants who live in tenuous circumstances, unsure when or if the landlord will perform repairs. This also impairs tenants' ability to seek court remedies. Tenants would benefit from a standardized procedure and timeline for the identification and remedy of confirmed code violations.

VI. The Courts Should Seriously Entertain Tenant Defenses and Counterclaims

When landlords and code enforcement officials fail to secure needed repairs, a tenant's last option is the courts. Our Supreme Court does provide a venue to seek a remedy in some circumstances:

> Where the construction or use of a building is in violation of any provision of the uniform code or any lawful order obtained thereunder, a justice of the supreme court at a special term in the judicial district in which the building is located, may order the removal of the building or an abatement of the condition in violation of such provisions. An application for such relief may be made by the [S]ecretary, an appropriate municipal officer, or any other person aggrieved by the violation.[43]

Thus, where there is a documented uncorrected code violation, an aggrieved tenant may bring a Supreme Court action to secure repairs, but this remedy is not usually available to tenants. First, it requires a code enforcement official to timely document code violations and provide a copy of the record to the tenant. Next, the tenant must have the resources and time to prepare and pursue civil litigation. Thus, as a practical matter, the Supreme Court seldom provides a timely remedy for low-income tenants who lack heat, hot water or other basic services.

Instead, it is the local courts that ultimately hear most rural tenants' unresolved condition complaints. There are nearly 1,300 town and village courts, staffed by almost 2,200 justices who handle approximately two million cases a year.[44] Seventy-two percent are not attorneys, a percentage that increases in rural areas.[45]

LawNY® appears in numerous rural town and village justice courts across our service area. At their best, these courts are staffed by judges who understand each procedural step required for initiation of a summary proceeding including proper service of the appropriate pleadings. They listen to legal arguments by each side, and provide an opportunity for response. They give respondents an opportunity to appear with counsel. These courts understand the limited specific bases for maintaining summary proceedings, as well as common defenses. They engage litigants or their attorneys in discussions, and where necessary, hold robust hearings, allowing the parties to establish evidence in support of their claims. These judges come to the bench with an open mind, making no presumptions about the outcome of a case.

Yet, many of these courts continue to struggle with the process of hearing summary proceedings. Town and village courts have been strongly criticized for denying fundamental rights and procedural protections.[46] Despite substantial efforts by the Office of Court Administration at improvements, there are some local courts that still fail to hold robust and fair proceedings.

In recent years, courts have ruled in favor of landlords without first holding a hearing, even where there are disputed issues of fact. LawNY® has seen a village court lock its door during proceedings, in violation of Judiciary Law § 4. A court in one of our cases held proceedings prior to the time on the notice and issued a warrant of

eviction in the absence of the tenants, who were at the court, with counsel, on time. LawNY® has also represented tenants in cases in which a judge was prepared to proceed with a summary proceeding, although a petition had never been filed. In one such case, the judge ultimately dismissed the proceeding, then drafted a petition for the landlord and arranged for it to be served on the tenant in the courtroom, in violation of Judiciary Law § 16.

VII. Inconsistent Remedial Power Between Courts Disparately Impacts Rural Tenants' Access to Justice

Courts hearing housing matters have varying degrees of authority to affirmatively address condition problems. The Uniform City Court Act § 203 was recently modified, at the urging of the Advisory Committee on Local Courts, to expand equity jurisdiction to city courts to address housing quality problems. The committee recommended this change, noting that New York City's Civil Court already had limited equity jurisdiction to enforce compliance with housing codes. The committee noted that prior to passage of the new equitable powers:

> While the District Courts and the upstate City Courts also have general landlord and tenant jurisdiction, they do not, however, enjoy comparable equity powers. This lack of authority renders them far less effective as institutional means of preserving and protecting a community's housing stock. Moreover, it often requires parties to a landlord tenant dispute to go to several courts (i.e., lower court for summary judgment determinations, Supreme Court for injunctive relief) to get complete relief. This is inefficient and costly.[47]

Thus for many tenants, local courts in New York now provide equitable remedies for conditions problems. Both the tenant and public interest are more effectively served from a court order requiring the landlord to repair a leaking roof and related damage, even when the landlord was unwilling to do so while the tenant remained in possession of the property.[48] Tenants have the right to have repairs made and offset reasonable costs when: (1) landlord willfully refuses to make emergency repairs; (2) code enforcement remedies have been ineffective; and (3) landlord allowed violations to continue with purpose of forcing tenants to move.[49]

Local town and justice courts, however, do not provide a similarly robust and consistent venue for enforcing the right to habitable housing in rural New York. Unlike city courts, local town and justice courts do not have equitable jurisdiction to order repairs. Thus, tenants in these jurisdictions are forced to seek relief for conditions problems in other courts, or to wait until they are facing eviction to have a venue in which to argue for a rent reduction due to a landlord's refusal to perform basic repairs.

It is deeply inequitable that town and village courts have the authority to order tenants to be removed from their homes by law enforcement, but lack the authority to order landlords to repair these same homes upon a tenant's complaint. To add balance, village and town courts should carefully weigh properly asserted defenses and counterclaims. They should refrain from issuing a warrant of eviction unless a tenant has failed to pay an amount found to be due after appropriate rent abatement in a non-payment proceeding.

VIII. Local Courts Should Hold Procedurally and Substantively Robust Hearings in Summary Proceedings

Summary proceedings should not be called "eviction" proceedings any more than felony cases should be called "prison" cases; titling the case by the relief sought implies a presumption of the outcome. In light of the stakes in summary proceedings, the courts should be prepared to ensure that conditions defenses are fully heard and considered in proceedings that satisfy real property law, civil procedural requirements, and due process of law. Some of the requirements most salient to the presentation of warranty defenses follow.

Summary proceedings are commenced by service of a notice of petition and petition pursuant to Real Property Actions and Proceedings Law § 735. To establish the court's personal jurisdiction over respondents, petitioners must timely document that they have served each party with an independent possessory interest in the premises.[50] After service, tenants have the right to have their case heard in open court.[51]Additionally, if there are triable issues of fact, tenants are entitled to a jury trial.[52]

In response to a non-payment petition, tenants may file an answer and allege affirmative defenses.[53] Moreover, when alleging breach of the warranty of habitability, tenants are not required to present expert testimony to prove the breach or the extent of damages.[54] Additionally, tenants may seek a stay or an adjournment under appropriate conditions, if desired. Tenants have the right to a stay of proceedings if there is a documented code violation and the tenant deposits rent with the court.[55] They also may request an adjournment if time is needed to procure a necessary witness, such as a code officer.[56]

After holding a hearing in which a tenant has alleged a warranty defense, the court must determine the actual value of the premises before finding whether the tenant is in default.[57] For example, a court should determine the actual amount that a reasonable prospective tenant would agree to pay to move into a bedbug infested apartment, or for housing without functioning heat in winter, if these defects have been proven. The tenant should have an opportunity to pay the amount found to be due in order to preserve the housing. Only upon the failure to tender such payment should a tenant be faced with homelessness.

Instead, we have seen that courts will sometimes issue warrants of eviction even if they have found that no rent is due. Despite the importance of the courts in enforcing the right to habitable housing, the court, landlords and their attorneys often state that tenants should "just move" if they are unhappy with the conditions of the housing. This statement displays a fundamental misunderstanding of the case law and the protections afforded to tenants.

It is important that housing attorneys on both sides, as well as the court, remember that leasing real property comes with a duty to maintain that property and that failure to do so is a defense to a nonpayment eviction. Local courts should also remember that they have the power to stay proceedings and abate rent. When proceedings are instead held in rushed fashion, without procedural safeguards, low-income families are often needlessly rendered homeless.

We respectfully propose that local courts shift their goals when hearing so-called "evictions," particularly in cases of alleged non-payment. Landlords should collect any rent they are actually entitled to, as determined by the condition of the rental housing, but housing should be preserved and repaired when possible. Therefore, when a court finds that rent is due, it should give a tenant who has asserted a good faith warranty defense a reasonable opportunity to pay that amount. Warrants of eviction in non-payment cases should never be issued if the abatement is equal to or greater than a landlord's rent claim.[58]

Conclusion

This article summarizes the obligations of landlords, code enforcement officials, and courts to confront and correct code defects and to assign a fair value to defective housing, as well as some of the difficulties in enforcing these obligations. Three particular improvements would offer potential for tenants to maintain their housing while securing repairs.

First, tenants across rural New York would benefit from the establishment, by the State, of a standardized response to code complaints. Cities, towns, and villages have varying standards and timelines for responding to condition complaints, making it difficult to ensure prompt repairs of serious problems. Further, inconsistent documentation impairs the ability to assess the frequency and locality of defects or whether they have been corrected. Standardized statewide code responses and record keeping would provide valuable data to tenants and their advocates and assist them in securing prompt repairs. Records of code actions should therefore be publically available.

Second, there is a need for an efficient judicial process available to tenants statewide to promptly assess and adjudicate conditions problems. All renters should have the ability to bring an affirmative action in a local court to seek repairs. Also, in any summary nonpayment proceeding in which substantial conditions claims are raised, tenants should be offered a warranty hearing to determine the fair value of their home, with the opportunity (but not the requirement) to present evidence from the code enforcement official.

Third, the Department of Building Standards and Codes, the Department of Health, or other state agencies should affirmatively establish and support required landlord and code enforcement responses to the ongoing problem of bedbug infestations. Bedbugs severely impair quality of life for anybody affected. Low-income tenants and those in subsidized housing in particular lack the resources to ensure that the entire affected portion of a building is properly treated. The establishment of standards for landlord and code responses will ensure that structures are promptly and professionally treated, and that follow-up inspections and treatment are performed as appropriate.

Civil Legal Aid offices and their clients are often wary of contacting code enforcement officials due to a history of inappropriate postings and failures to secure repairs. Nevertheless, with respect to rental housing, both civil Legal Aid Offices and code enforcement officials have complementary roles in improving housing conditions by addressing defects. Therefore, coordination and cooperation between code enforcement officials and civil Legal Aid entities would provide for the improved maintenance and repair of housing for low-income individuals and families.

Endnotes

1. Hous. Assistance Council, Taking Stock: Rural People, Poverty, and Housing in the 21st Century 45 (2012), http://www.ruralhome.org/storage/documents/ts2010/ts_full_report.pdf.
2. *Id.* at 46–47.
3. U.S. Dep't of Hous. & Urban Dev, *Affordable Housing*, https://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/ (last visited Oct. 16, 2017).
4. *Id.*
5. Tracy Jan, *Here's How Much You Would Need to Afford Rent in Your State*, Wash. Post (June 8, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/06/08/heres-how-much-you-would-need-to-make-to-afford-housing-in-your-state/?utm_term=.948c48ea3cd6.
6. *Id.*
7. Bath LawNY serves Allegany and Steuben counties; Elmira LawNY serves Chemung and Schuyler counties; Geneva LawNY serves Livingston, Ontario, Seneca, Wayne, and Yates counties; Ithaca LawNY serves Tompkins and Tioga counties; Jamestown LawNY serves Chautauqua County; Olean LawNY serves Cattaraugus County; and Rochester LawNY serves Monroe County.
8. N.Y. Real Prop. Law § 235-b(1) (McKinney 2017).
9. *See Park W. Mgmt. Corp. v. Mitchell*, 47 N.Y.2d 316, 329–30 (1979).
10. *See Tower W. Assocs. v. Derevnuk*, 450 N.Y.S.2d 947, 951, 953 (Civ. Ct. 1982).
11. *Ludlow Props., LLC v. Young*, 780 N.Y.S.2d 853, 855, 857 (Civ. Ct. 2004).
12. *See Gottesman v. Graham* Apartments., Inc., 16 N.Y.S.3d 792 (Civ. Ct. 2015).
13. *Parker 72nd Assoc. v. Isaacs*, 436 N.Y.S.2d 542, 543–44 (Civ. Ct. 1980).
14. N.Y. Real Prop. Law § 235-b(1) (McKinney 2017).
15. *Bender v. Green*, 874 N.Y.S.2d 786, 792 (Civ. Ct. 2009).

16. *See Streep v. Simpson*, 141 N.Y.S. 863, 863–65 (App. Term 1913); *see also* Barnard Realty Co. v. Bonwit, 155 A.D. 182 (App. Div. 1913) (stating tenants could be neither the cause of the rat infestation or remedy the infestation or related putrid odors, they were justified in abandoning the property); but cf. *Ben Har Holding Co. v. Fox*, 263 N.Y.S. 695, 703 (Mun. Ct. 1933) (stating the presence of a few crickets does not justify constructive eviction because of recognition that rural areas are replete with various bugs, that tenants may carelessly invite bugs into their homes, and landlords can often do little to prevent this).
17. N.Y. Real Prop. Law § 235-b(2) (McKinney 2017).
18. N.Y. Real Prop. Law §§ 223-b(1–2) (McKinney 2017).
19. N.Y. Real Prop. Law § 223-b(3) (McKinney 2017).
20. *See Taylor v. Eli Haddad Corp*. 460 N.Y.S.2d 886, 894 (Sup. Ct. 1983) (stating "[n]othing in this section requires a ripened eviction before retaliation becomes actionable. Nevertheless, it does require the landlord to serve a notice to quit," but finding that plaintiff had not stated cause of action under N.Y. Real Prop. Law § 223-b for other reasons).
21. N.Y. Real Prop. Law § 223-b(5) (McKinney 2017).
22. *See 390 W. End Assocs. v. Raiff*, 636 N.Y.S.2d 965, 967 (App. Term 1995); *c.f. 601 West 160 Realty Corp v. Henry*, 705 N.Y.S.2d 212, 216–17 (Civ. Ct. 2000) (stating a retaliation defense may be used in non-payment proceedings where tenant continuously paid rent throughout his tenancy and was an active member of a tenant's association, facts suggesting that complaint of non-payment was pretextual).
23. N.Y Exec. Law § 376-a (McKinney 2017).
24. *See Park W. Mgmt. Corp.*, 47 N.Y.2d at 328.
25. 2015 Int'l Prop. Maint. Code § 602 (Int'l Code Council 2014).
26. 2015 Int'l Prop. Maint. Code § 501 (Int'l Code Council 2014).
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28. 2015 Int'l Prop. Maint. Code § 304 (Int'l Code Council 2014).
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30. Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor*, 80 Yale L.J. 1093, 1186 (1971) (emphasis in original).
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32. *Breon v. Perales*, No. 6:15-CV-6335(MAT), 2015 WL 7289399, at *8 (W.D.N.Y. Nov. 16, 2015).
33. *Id*. at *3.
34. *See id*. at *8.
35. *See id*. at *3–4.
36. *Id.* at *8 (quoting *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)).
37. N.Y. State Dep't of State: Dep't of Bldg. Standards & Codes, Technical Bulletin (September 28, 2016), https://www.dos.ny.gov/DCEA/pdf/TB-30XX-Due percent20Process-2016-09-27 percent20(002).pdf.
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39. N.Y. Comp. Codes R. & Regs. tit. 19, § 1203.5(f)(1) (2017).
40. N.Y. Comp. Codes R. & Regs. tit. 19, § 1203.5(g) (2017.)
41. N.Y Exec. Law § 382(2) (McKinney 2017).
42. N.Y. Uniform City Ct. Act § 203(a)(5) (McKinney 2017) ; N.Y Exec. Law § 382(3) (McKinney 2017); *Schanzer v. Vendome*, 2005 WL 1035584 at *4 (N.Y. Civ. Ct.).
43. N.Y Exec. Law § 382(2) (McKinney 2017); *see generally Tardibone v. Hopkins*, 842 N.Y.S.2d 864 (City Ct. 2007) (finding tenants could also seek an order from the City Court to correct violations).
44. Justice Court Task Force, Justice Court Manual, N.Y. State Unified Court System 7 (Jan. 31, 2015), http://www.nycourts.gov/courts/townandvillage/FinalJusticeCourtManualforUSCsite.pdf.
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48. *Tardibone*, 842 N.Y.S.2d 864, 865–66 (City Ct. 2007).
49. *Jackson v. Rivera*, 318 N.Y.S.2d 7, 8, 11 (Civ. Ct. 1971); *see also Martin v. 352 Cathedral Equities, Inc.*, 530 N.Y.S.2d 504, 506 (Civ. Ct. 1988) (stating that tenants' could file notice of pendency under N.Y. C.P.L.R. Section 6501 to effectively compel repairs where violations resulted in peremptory vacate orders, because notices of pendency further the goal of compelling present and future owners to comply with the law); *Maresca v. 167 Bleecker, Inc.*, 467 N.Y.S.2d 130, 132, 135 (Civ. Ct. 1983) (indicating that NYC and downstate tenants may petition court, under N.Y. Real Prop. Acts. art. 7-A, to appoint an administrator in charge of making necessary repairs when landlords fail to comply with orders to remedy "hazardous" and "immediately hazardous" housing code violations).
50. *Stanford Realty v. Rollins*, 615 N.Y.S.2d 229, 232 (Civ. Ct. 1994).
51. N.Y. Jud. Law § 4 (McKinney 2017).
52. N.Y. Real Prop. Acts. § 745(1) (McKinney 2017).
53. N.Y. Real Prop. Acts. § 743 (McKinney 2017); N.Y. C.P.L.R. § 404 (McKinney 2017)
54. N.Y. Real Prop. Law § 235-b(3)(a) (McKinney 2017).
55. N.Y. Real Prop. Acts. § 755 (McKinney 2017).
56. N.Y. Real Prop. Acts. § 745 (McKinney 2017).
57. *Park W. Mgmt. Corp.*, 47 N.Y.2d 316, 329–30.
58. Conditions requiring abatement may have been in existence longer than the claimed non-payment. Thus even a partial abatement may result in a finding that no rent is due.

David Kagle has been a Staff Attorney at the Bath office of Legal Assistance of Western New York, Inc. (LawNY) since 2013. He practices landlord-tenant law, and focuses on subsidized housing, condition defects and code enforcement issues. David graduated cum laude from Cornell Law School in 2008.

Sujata is the 2017-19 Hanna S. Cohn Equal Justice Fellow. [at Empire Justice Center in Rochester, NY] A graduate of the University of Denver Sturm College of Law and Syracuse University, she has extensive community service, community organizing and clinical experience at agencies that serve low-income people including the Public Defender's office, homeless shelters, nonprofits focused on child advocacy, and after school programs. Before attending law school, Sujata worked as an AmeriCorps paralegal in the Ithaca office of Legal Assistance of Western New York (LawNY) and as an advocate for the Legal Aid Foundation of Santa Barbara County in California. Sujata's Fellowship project will focus on investigating the root causes of the dismal graduation rate of students in the Rochester City School District (RCSD) and directly advocating for youth re-entering RCSD after long-term education interruptions.

Lacking Lawyers: A Rural Business' Disadvantage

By Taier Perlman

Taier Perlman

Running a business is hard. Whether located rurally or in a city, starting and running a successful business is a sophisticated endeavor that requires knowledge across diverse legal topics. Navigating the tapestry of laws and regulations applicable to the business, negotiating and managing multiple contracts, maintaining corporate formalities, complying with employment laws, applying for and maintaining permits, licenses, and certifications, health code and FDA compliance, and intellectual property protection, are just a sample of the range of issues a business should be proficient in. The absence of adequate legal business resources and counsel in rural New York is a palpable shortfall for rural economic development efforts, and is an access to justice issue.

Entrepreneurs and small business owners are not your typical demographic in discussions about access to justice. Their legal needs are not traditionally deemed high stakes, because they do not have an immediate impact on quality of life factors, like child support, criminal defense or eviction matters do. Yet, sustaining and developing businesses is vital to the quality of life and well-being of our State's rural communities. And, the farm families and small business owners that toil to provide goods and services for the public benefit, deserve access to lawyers and legal support too.

To address the shortfall of legal support and access to lawyers prevalent in rural New York, the Government Law Center at Albany Law School, funded by federal and community grants, has started an innovative pilot program, aimed at legally supporting rural businesses. The Rural Law Initiative offers free legal education and limited-scope representation to entrepreneurs, small businesses, and farmers in Upstate New York, in an effort to empower them to run stronger enterprises. Conjunctively, the Rural Law Initiative plans to produce scholarship on present-day rural law issues and develop a robust rural attorney network.

This article reviews the postulated reasons why rural communities suffer from a shortage of local practicing attorneys, and discusses how limited to no access to lawyers detrimentally impacts the growth and success of rural businesses. It ends with a brief discussion about broadening concepts of access to justice. Rural access to justice initiatives should be a holistic and collaborative community effort to support all vulnerable segments of the rural community, including entrepreneurs, small businesses and farmers.

Too Many Lawyers, Yet Too Few Rural Ones

Today America has more law school graduates, and more licensed attorneys on record, than at any point in history.[1] Ironically, even with this national surplus of lawyers, rurally based practitioners are few and far between. While nearly a fifth of Americans live in rural communities, only two percent of small law practices are located there.[2] Additionally, many rural lawyers are aging out of practice, with no interested successors.

New York has the greatest legal surplus of attorneys compared to any other state.[3] Yet, even with this surplus, attorneys shy away from rural practice. In fact, almost all New York-licensed attorneys practice in or around urban centers. As of 2016, there were approximately 177,035 licensed attorneys in New York State,[4] registered across New York's 62 counties. Of these 62 counties, 44 may be considered rural, defined for the purposes of this article, as a county without a major urban center. The 17 non-rural counties contain a whopping 169,388 licensed attorneys, which is approximately 96 percent of all the State's registered attorneys. What that effectively means is that the other 4 percent, or a total of just 7,647 attorneys, are presumably practicing in the other 44 counties.[5]

The query looms large: why in a state with an overabundance of lawyers do we see so few choosing to serve New York's 44 rural counties?

Upstate New York's Decline

Upstate New York (NY) was once the "in" place to be. For much of the 20th Century, it was home to sophisticated manufacturing and technology industries, lively cities and towns, excellent infrastructure from the heyday of the Erie Canal to the golden age of railroads, and a thriving population. The benefits of this boom reverberated through the countryside. It drew lawyers into small towns, who were able to sustain themselves advising businesses and the denizens of the communities where those businesses thrived.

The tides shifted elsewhere beginning in the 1980s—not just in Upstate NY, but across the country—when many American manufacturing-based businesses took operations overseas. Upstate NY's manufacturing sector, long its mainstay, took a much deeper loss then comparable manufacturing regions like Ohio.[6] Manufacturing jobs between 1990 and 2003 took a 31.8 % decline in Upstate's six big metros, where Ohio saw a 20.7 % drop.[7] Upstate NY fell below national averages in job growth during this time as well. For instance, Virginia, with nearly the same population, grew jobs nine times faster, and even "Rust-Belt" states, like Indiana, Wisconsin, and Minnesota, grew jobs at least four times faster than Upstate NY.[8]

Naturally, Upstate's loss of stable manufacturing jobs, and its slow job growth rate, instigated a decline in population. The lively cities and towns of yesteryear began to rapidly shrink as families, and whole communities migrated elsewhere. The Census Bureau estimated that between 1990 and 2002 Upstate NY lost close to a half a million people, including many 20 to 34 year olds, a crucial cohort for economic development.[9] Meanwhile, the state's largest metropolis—New York City—has been in a golden era, with population growth at an all-time high.[10]

Sadly, "[a]s the upstate economy has suffered a long, slow decline relative to the rest of the state and the nation, many of its communities have become especially dependent

on state aid."[11] In fact, Upstate's only significant job gains between 1990 and 2003 have been in government-funded jobs (i.e., prisons), and health care and social assistance jobs (i.e., county hospitals, nursing homes, institutions for the mentally disabled), largely funded by taxpayer dollars.[12]

In a taxpayer-dependent job market such as this, and a landscape with a shrunken and aging population, it's no wonder that lawyers are not especially lured into establishing practices in New York's rural counties.

The Difficulties of Rural Law Practice

There are professional and social reasons why lawyers gravitate towards work in urban centers over rural practice. In general, the challenges of solo or small firm practice are well documented, especially in rural areas, where professional isolation is very real and adds to a practitioner's stress-levels.[13] A lack of mentoring, professional development and networking opportunities is a major disadvantage. Not being able to talk through a legal issue with a peer, or check in with a mentor attorney more versed in an area of law, has a significant psychological impact.[14] Further, rural attorneys face unique legal practice obstacles: more frequent conflicts of interests that arise when you are the only lawyer in town, substantial travel burdens (time and cost) for court appearances,[15] the strain of running a general practice, and a client base that often cannot pay the full bill for services.[16]

Ironically, the need for rural practitioners is not solved by the over-supply of law school graduates competitively seeking law jobs in an over-saturated legal market. Studies have identified that the burden of law school debt, little to no practice-ready skill building, and the lack of an "ethic of service" culture in law school, combines to deter recent law graduates from starting their own practices.[17] Additionally, the scope of legal issues that a rural attorney needs to be competent in is vast and impressive, but can also be quite daunting for newly minted attorneys with limited to no practice-ready training from law school.

The rural justice gap that arises is unfortunate, particularly because rural practice can be sustainable, rewarding, and professionally challenging, especially when the known difficulties are handled wisely. Today, Upstate NY is poised to rebound economically, and lawyers can help accelerate that resurgence.

A More Complicated World Leads to More Complicated Businesses

Never has there been more of a need for competent lawyers in rural New York. For the businesses that have the gumption and wherewithal to operate in Upstate's challenging work climate, good counsel from a lawyer can be instrumental in running a stronger enterprise. Changing laws, more robust federal and state regulation, the rise of new sectors like solar energy production, new technologies, the integrity and sustainability of New York's agricultural sector, global markets and their impact on regional and local economies, workforce shifts and immigration policy, are just some of the forces that have added to the complexities of running a farm, a mom-and-pop shop, or manufacturing business in Upstate NY.

There is a growing need for new-age legal professionals in rural districts who are capable of handling the breadth and scope of emerging and complex legal issues impacting rural businesses.[18] Running a farm, for instance, is more complicated than it has ever been in history. Today, a typical farmer who wants to sell their product into the stream of commerce has to engage and comply with multiple regulatory authorities—the FDA, the USDA, the New York Department of Health, NYS Department of Agriculture and Markets, NYS Department of Conservation, for example. Additionally, they must maintain corporate formalities, prepare for farm succession planning, comply with federal and state employment laws, maintain licenses and certifications, and manage multiple contracts. All of this, in addition to the traditional farm work which takes hours a day, and includes gruel manual labor. Times have certainly changed.

Traditional access to justice discourse focuses on how a shortage of rural lawyers impacts vulnerable populations in rural communities. However, beyond the unmet legal needs of individual clients, this shortage of lawyers also hinders rural economic development.[19] Rural businesses are emblems of a rural community's strength and independence. In many cases, rural businesses create *the* job market of their communities, offering vital employment opportunities which, contrary to Upstate's job market trends noted above, do not strictly depend on taxpayer financing. A lawyer may be instrumental in buoying a rural business's success, stimulating rural economic development, and increasing quality of life factors for the entire rural community.

Broadening the "Access to Justice" Umbrella

Limited or no access to attorneys is certainly a critical "access to justice" metric. However, inserting more attorneys into rural communities will not necessarily cure unmet legal needs. As noted by Hillary A. Wandler: "a need may not necessarily be unmet or legal if the individual or entity experiencing the need does not see any benefit to addressing it or seeking counsel to address it."[20] The independent and self-sufficient lifestyle of many rural residents feeds this sentiment; not all rural residents feel disadvantaged from limited lawyers near them, particularly when they are used to handling their business matters on their own. However, while "we cannot always expect clients who need legal services to knock on a lawyer's door," we can conceive of the benefits that a law-based intervention will provide.[21]

Thus, in bolstering access to justice in rural communities, it "should be an aspiration of the entire rural community."[22] Pruitt and Showman "envision a productive feedback loop between lawyers and legal resources on the one hand, and non-profits and other community institutions on the other. Such inter-dependence would better serve both clients and lawyers."[23] Clients would more likely seek legal assistance when referred to a legal service provider by a trusted community organization, and lawyers would be able to offer community resources that respond to the clients' full range of needs.

The Rural Law Initiative embraces this broader access to justice approach by focusing on building partnerships with diverse and established service providers in our target rural communities. Our partners, who specialize in offering a diverse range of non-legal services, have realistic and useful knowledge about their rural community's unmet needs. Accordingly, they are excellent at identifying when legal assistance is truly needed, and when they reach the end of their expertise on a matter, they have the network and community trust to offer referrals.

The Rural Law Initiative exists to fill in the current legal void that exists for many rural businesses. In collaboration with our partners, we offer limited scope representation and legal education workshops on topics of law most relevant to rural businesses. This is a work in progress, and its success depends on a collaborative effort among various stakeholders.

If you are an attorney reading this article, please get involved. Your expertise and support is fundamental. The Rural Law Initiative (RLI) only offers limited scope representation, but many businesses require ongoing legal assistance. In an effort to bridge the access to justice gap that exists for rural businesses, the RLI is working on building an attorney referral network of lawyers willing to serve rural businesses, and who have expertise in the broad and unique legal issues that impact those businesses. Additionally, if you are an attorney who needs to fulfill pro bono hour requirements, RLI will be thrilled to integrate you into our work, either through leading an educational workshop, developing legal educational materials, or offering pro-bono consultations to our diverse clients.[24]

Conclusion

Businesses are often the bedrock of employment opportunities and community development in rural areas, so supporting them supports rural communities. Broadening the scope of access to justice to include this vital demographic enriches multi-stakeholder efforts at rural economic development, efforts which could increase quality of life for all rural residents. The Rural Law Initiative's law-intervention-based model is an effort to address the unmet legal needs of rural businesses, legal-needs which are becoming increasingly more complicated and dense in the 21st Century. While this initiative is not a solution to the shortage of attorneys in New York's rural counties, we hope that our programs and collaborative efforts connect rural businesses with qualified attorneys, empower businesses to run stronger enterprises, and inspire more lawyers to service the challenging and rewarding legal needs in rural Upstate NY.

Endnotes

1. Catherine Rampell, The Lawyer Surplus, State by State, N.Y. Times (June 27, 2011, 11:00 AM), https://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state/
2. Ethan Bonner, *No Lawyer for Miles, So One Rural State Offers Pay*, N.Y. Times (Apr. 8, 2013), http://www.nytimes.com/2013/04/09/us/subsidy-seen-as-a-way-to-fill-a-need-for-rural-lawyers.html?pagewanted=all&_r=1
3. Rampell, *supra* note 1.
4. These numbers were graciously shared by the NYS Unified Court System, Office of Court Administration's Attorney Registration Unit (OCA's Attorney Registration Unit), which maintains a database of licensed attorney-by-county annual statistics.
5. These are rough estimates calculated by the author from the 2016 figures of licensed New York Attorneys maintained by OCA's Attorney Registration Unit. Due to limited data availability on this subject, the author had to take a courageous stab at calculating numbers and percentages on her own, a practice skill that was not taught to her in law school.
6. Pub. Policy Inst. of N.Y.S., Could New York Let Upstate Be Upstate? 5 (May 2004).
7. *Id.* at 6.
8. *Id.* at 4. The Public Policy Institute of New York State reported that between 1990 to 2003, the job growth rate in and around Upstate's big metros (Albany-Schenectady-Troy, Binghamton, Buffalo-Niagara, Rochester, Syracuse, and Utica-Rome) was 2.3 percent. The national average in job growth was 18.7 percent. Virginia's job growth rate was 20.9 percent, Ohio was 10.4 percent, Indiana was 14.9 percent, Wisconsin was 21.3 percent and Minnesota was 24.7 percent. Upstate NY lags far behind.
9. *Id.* at 7. "Rolf Pendall, a demographer at Cornell University, has pointed out that if Upstate were a separate state, its growth as measured by the 2000 Census would lag behind every other state except North Dakota and West Virginia. Just as shocking, nearly 30 percent of new "residents" in Upstate New York during the 1990s were prisoners. (See "Upstate New York's Population Plateau," The Brookings Institution, Washington DC, August 2003.)"
10. Robert B. Ward, *The Two New Yorks*, NYSBA Gov't L. & J. at 89 (Vol.13. Summer 2011). "The 2010 Census found New York City's population at an all-time high of 8,175,133. Tourists increasingly flocked to the city, international immigration remained strong, personal income jumped, and a number of other economic indicators improved during the 1990s and 2000s."
11. *Id.* at 89.
12. Pub. Policy Inst. of N.Y.S. Report, *supra* at 6. "Any economy that gets all of its new job growth from the taxpayers is in deep, long-term trouble."
13. Hillary A. Wandler, *Spreading Justice to Rural Montana: Rurality's Impacts on Supply and Demand for Legal Services in Montana*, 76 Mont. L. Rev. 225, at 243 (Summer 2015).
14. The author will admit that she has already experienced the psychological strain of professional isolationism in serving the diverse and often sophisticated legal needs of rural businesses.
15. Hillary A. Wandler, *Spreading Justice to Rural Montana: Expanding Local Legal Services in Underserved Rural Communities*, 77 Mont. L. Rev. 235, at 236 (Summer 2016).
16. To clarify this point, lest it be misconstrued: while there are certainly members of rural communities (and urban communities) who may struggle to pay for legal services, the general practice nature of many rural law offices attract diverse clientele, including established and successful businesses, professionals, and other members who have the means to pay. Being one of the only lawyers in town minimizes the marketing and promotion costs that urban based practices require to stand out among their competitors. Additionally, rural practitioners can "identify the legal needs of potential clients who can afford to pay market prices for legal services—areas of law that could become the lawyer's so called 'bread and butter' legal work." (*Id.* at 242). I have recently spoken to a young rural practitioner who decided to open a practice in his hometown after graduating law school. Despite the earning difficulties of his first two years, he is currently doing quite well for himself, handling what he guessed to be 80 percent of the legal needs of his rural community.
17. Wandler, 76 Mont. L. Rev. 225 *supra* at 243. *See* also, Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. Rev 466, 472 (2014): "Lacking both the financial wherewithal and the practical legal skills to hang out the proverbial shingle, highly leveraged law graduates may seek large-firm experience and salaries as their only apparent choice, which necessarily places them in metropolitan areas."
18. Wandler, 76. Mont. L. Rev. 235, *supra* at 242. Wandler provides a long list of common subject matter areas arising for rural attorneys: Estate planning and powers of attorney; criminal defense; Indian law; disability, mental health, and public health advocacy; Bankruptcy law; family law, domestic violence and child welfare issues; agricultural law; rural development law, including historic preservation; environmental and natural resources law; rural property law; energy law; legal issues for small businesses and non-profits. The exposure to such a broad array of legal subject areas, and the need to develop competency in them, is one of the challenges (good and bad) of rural practice.
19. Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. Rev 466, 472-473 (2014).
20. Wandler, 76 Mont. L. Rev. 225, *supra* at 253.
21. Pruitt *supra* at 478.
22. *Id*. at 479.
23. *Id.*
24. Contact Taier Perlman, Staff Attorney of the Rural Law Initiative to get involved: (518) 445-3263, or tperl@albanylaw.edu.

Taier Perlman leads the Rural Law Initiative; there she combines her passion for counseling entrepreneurs and small businesses with her love for sustainable agriculture and farm-fresh food. A graduate of Brooklyn Law School, Ms. Perlman focused her studies on dispute resolution and legal counseling. She legally supports entrepreneurs, businesses, and farmers in rural New York.

Using Technology to Improve Rural Access to Justice

By Ray Brescia, Professor of Law, Albany Law School

Ray Brescia

Tens of millions of Americans struggle every day under the weight of an array of legal problems, and yet many do so without the assistance of a lawyer. According to most current estimates, roughly half of middle-income Americans and roughly 80 percent of low-income Americans have a legal problem that they must address, or try to address, without the benefit of legal representation. The budget of the U.S. Legal Services Corporation is presently in jeopardy, and some politicians in the nation's capital wish to eliminate funding for the agency in its entirety, which would impact millions of Americans from across the country, in its urban centers but also, perhaps most acutely, in its rural communities. In many such communities, the local non-profit legal services agency is a lifeline, the only source of potential free legal assistance, for members of those communities if they qualify for services or have a way of accessing them.

The "justice gap" in America, the difference between those who need legal assistance and those who can afford it or access it, is vast. But when many think about that justice gap, what often comes to mind is a low-income tenant in an urban housing court or a family from a low-income, inner-city community facing some predatory lending scheme. The face of the justice gap in America, in the perception of many, is urban. The reality is far more complex, and the rural justice gap is severe and growing, as lawyers—for-profit and non-profit alike—are dwindling in such communities. This article argues that non-profit legal services providers, volunteer lawyers, law schools, and even private lawyers should explore ways in which technology can improve access to justice in rural communities. While technology-enhanced legal practice can assist urban and rural communities alike, what I will focus on here is the promise such technology holds to close the justice gap in America's rural communities. In order to address this issue, this article proceeds as follows. First, it will discuss the state of rural access to justice. Second, it will explore the current state of technology-enhanced legal services and the promise such technology holds for addressing the justice gap in rural communities, with a focus on efforts mostly in New York State. Finally, it will assess the prospects of a technology-enhanced legal practice that strives to serve America's low and moderate income rural communities.

I. The Justice Gap in Rural Communities

The recently released report from the U.S. Legal Services Corporation (LSC) provides damning information on the state of the justice gap generally, which it appropriately calls the justice "gulf."[1] The LSC's main findings include the following:

- 70 percent of low-income households have experienced at least one civil legal problem in the last year;
- 70 percent of low-income Americans with civil legal problems reported that at least one of their problems affected them very much or severely;
- Those with legal problems seek assistance only 20 percent of the time, driven by the cost of services, not knowing that their problem is of a legal nature, or not knowing where to turn for help;
- An estimated 1.7 million low-income Americans will turn to LSC-funded programs for legal help and yet more than half of these will receive only limited help or no help at all.[2]

The data on rural access to justice are similarly striking. The LSC found that with respect to rural access to justice for the 10 million low-income Americans residing in rural communities as follows:

- 75 percent of low-income rural households experienced a civil legal problem in the past year, including 23 percent that have experienced more than six such problems;
- Low-income rural residents seek professional legal help for 22 percent of their civil legal problems;
- Low-income rural residents receive inadequate or no professional legal help for an estimated 86 percent of all their problems;
- The top reasons low-income, rural residents give for not seeking legal help include trying to deal with problem on their own (26 percent), they are not sure if the problem was legal in nature (21 percent), and they do not know where to look or what resources were available (18 percent).[3]

As the United States continues its steady march towards greater urbanization of its population, rural communities throughout the country are facing another troubling trend—the rapid decline in lawyers serving rural communities. Just as many other professionals are being drawn to the nation's urban settings, so too are new lawyers looking away from rural communities as places to engage in the practice of law. New York State is not immune to this trend. Recent analysis suggests that New York State has 177,000 attorneys that call it home.[4] While rural New York State makes up 80 percent of the land mass of the state,[5] a survey of New York lawyers found that only 7 percent of lawyers practice in rural areas in the state.[6] Nationally, the data is even more stark. Only 2 percent of small legal practices operate in rural areas even though 20 percent of the national population resides in such areas.[7]

Recognizing the threat that this rural justice gap poses to the fair access to legal services for all Americans, in its

August 2012 annual meeting of delegates the American Bar Association issued a resolution that resolved as follows:

> That the American Bar Association urges federal, state, territorial, tribal and local governments to support efforts to address the decline in the number of lawyers practicing in rural areas and to address access to justice issues for residents in rural America.. [and further] That the American Bar Association encourages state and territorial bar associations to develop programs to increase the number of lawyers practicing in rural areas and which address access to justice issues for residents in rural America.[8]

The report accompanying that resolution called "the main street attorney in rural America" an "endangered species."[9]

As part of the ABA's efforts to address the rural justice gap, the organization also created the Project Rural Practice Task Force (PRP), which made several recommendations to improve access to justice in rural communities. The first of these recommendations was that the ABA supports using technology and other forms of assistance to support newer lawyers moving to rural areas by providing them with technology-enabled support services and resources. The ABA also urges rural communities to offer incentives to attorneys who may wish to move to rural areas and encourages the use of technology to match communities in need with available lawyers. The ABA noted the creation of a website in South Dakota to carry out this last recommendation, calling it a "match.com for lawyers and communities."[10] In the next section, I will discuss just some of the ways in which technology can be used to help close the rural justice gap.

II. Technology and Rural Access to Justice

Ever since the late 1980s, lawyers have utilized the newest technologies to make their work more efficient and cost effective. When most lawyers still charge by the hour, time-saving efficiency gains are benefits that can be passed along to the client, making services more affordable. Similarly, in a non-profit agency that delivers free legal assistance, efficiency gains often mean that lawyers can serve more clients, stretching already thin resources to meet the overwhelming need. For example, before the days of electronic research, a lawyer was never quite sure whether she was citing a case that had not been overruled, as the painstaking work of "Shephardizing" a case never left one completely confident that every stone had been unturned, every pocket part checked and every update reviewed. Today, a lawyer can check a citation with a single click of the mouse, receiving up-to-date information about the status of a case or statute, leaving the lawyer confident that her brief is accurate and current with respect to the applicable law. Recent developments in artificial intelligence and machine learning are revolutionizing legal research, factual investigations, and contracting, as computers are reviewing and analyzing tens of thousands of pages of documents and decisions and reams of data to help lawyers find the right arguments, identify applicable precedents, understand evolving practices in the field, and provide effective services to their clients.

The internet has also revolutionized the way lawyers communicate with their clients. Lawyers advertise on the internet and some intrepid entrepreneurs are creating web-based interfaces through which customers receive assistance that is, more and more, starting to look like legal services, like preparing and packaging contracts, basic estate documents, and even provisional patents. Companies like LegalZoom are leading the way in this field. Similarly, the internet has proven a boon for lawyers in terms of providing a platform for finding clients, with companies like Avvo serving as a portal through which prospective clients can find lawyers.

In the non-profit space, the internet mimics the ways in which the for-profit legal services community is using it. The web serves low-income communities in a variety of ways, similar to the ways in which paying customers use it: serving a matchmaking function, by connecting prospective clients to organizations that could serve their legal needs, or supplying consumers with know-your-rights information for those who must face their legal needs without a lawyer. One example of this is the Empire Justice Center's Foreclosure Guide, a web-based interface that provides critical information and fillable forms and pleadings for those facing a mortgage foreclosure anywhere in New York State, in rural and non-rural communities alike. On this website, which can be viewed on a smartphone effectively so that it can be accessed even in the courthouse, pro se homeowners can gain critical information so that they can understand the foreclosure process, prepare documents they will need to appear in court to defend against a foreclosure proceeding, and gain critical insights about how to negotiate and respond to the foreclosing entity's legal arguments.[11] Digital tools like this can be a lifeline for pro se litigants who must face their legal problems without a lawyer.

Thus, the internet, together with other technologies available to the lawyer, is revolutionizing, and will continue to revolutionize, the practice of law. But what impact might these technologies have on closing the rural justice gap? One of the biggest hurdles to closing the rural justice gap for those who cannot otherwise afford an attorney, apart from the funding it would require to make sure every eligible American—whether he or she resides in a rural, urban, or suburban community—has access to legal assistance when facing a legal problem, is the distance a prospective client must travel to access legal services from a non-profit provider. By their nature, rural communities are spread out and there are great distances between population centers. Moreover, not every population center has a free legal assistance office. When I worked as a legal services lawyer in East Harlem in New York City, our clients could walk into the office seeking assistance without making a special trip. It could be part of their daily travels through the community, because the office was located on a fairly busy street in the center of the community. For rural communities, that type of convenience is not available for all but only to the few who are lucky enough to live near a rural law office.

Digital tools can enhance lawyers' ability to serve clients more directly, regardless of where the lawyer or the client resides, by harnessing the internet to provide a platform through which lawyers can communicate directly with clients and offer information on websites, even when that information and guidance is interactive. Indeed, through voice-over-internet and video chat capabilities, the internet offers lawyers who are based anywhere in the world the opportunity to provide direct advice and assistance to pro se litigants, even without having a physical presence in a client's community or meeting with them face-to-face. An example of this is the Closing the Gap internet portal[12] that serves as a web-based portal for lawyers who wish to assist low-income residents in the areas of housing and consumer rights without having a physical presence in those clients' rural communities. Like other for-profit platforms for matchmaking between lawyers and prospective clients, the Closing the Gap interface links pro bono lawyers with unrepresented individuals who are in need of assistance across 16 counties in Upstate New York. Lawyers admitted to practice in New York State can provide these services from anywhere in the world. The website does so much more than serve a matchmaking function, however. It also serves as a virtual community for lawyers and pro se litigants alike, providing a range of resources in the subject matter areas on which the site focuses and offering training and support to the lawyers who wish to provide services through the site.

One of the primary digital tools for reaching otherwise hard-to-reach clients is the internet. As the Legal Services Corporation's recent report shows, a significant number of low-income Americans obtain information about their legal problems by searching for it online. One of the primary means of doing so is the LawHelp network, which is a collection of websites designed to help low-income individuals find free and local legal aid, get access to legal and social service agencies, and obtain information about court processes and legal rights, with resources available in all 50 states as well as Puerto Rico, Guam, Micronesia and the U.S. Virgin Islands.[13] LawHelp Interactive is an online document assembly tool available in many states that can assist the self-represented to prepare court documents in many contexts.[14] In 2009 alone, the tool generated more than 145,000 forms.[15] New York's court systems support the use of this tool in many proceedings.[16]

These computer-assisted means of providing some form of access to legal information and guidance can be a lifeline for rural New Yorkers, and many are using LawHelpNY, the site within the LawHelp network that addresses the legal needs of New Yorkers specifically. A review of page views on the LawHelpNY website from individuals who identify the county where their legal problem arises within the state, yields results which show that, relatively speaking, users of LawHelpNY are seeking to resolve legal problems throughout the state, in urban and rural communities alike. For example, assessing the number of page views of the housing section of the site by the county in which the problem arose over a one-month period in early 2017 shows that there were roughly as many page views per 5,000 residents in each county in the state's urban counties, like Queens County, as there were in such rural counties as Gennessee, Oneida, and Ulster. Similarly, reviewing the page views in that section over a 12-month period yields similar results. There were roughly the same number of page views per 5,000 residents in urban counties as there were in Allegany, Lewis, and Ontario counties, three of the more rural counties in the state. These findings are tentative and preliminary, however. Only a fraction of users identify the county in which their problem arises, which might be different from their county of residence. Furthermore, this information tracks only page views and not unique users. LawHelpNY is exploring ways to get more granular and fine-tuned data about its users to have a more complete picture of the usage patterns on the site.[17]

To be clear, technology alone will not help close the rural justice gap in particular or the general justice gap affecting all low-income Americans. Resources are also needed. An example of one resource-intensive strategy is that South Dakota has instituted the Rural Attorney Recruitment Program through which lawyers who agree to work in counties with populations of fewer than 10,000 residents for five years can earn $12,000 per year while they serve those communities.[18] Communities could seek to institute more programs such as this. Loan forgiveness for lawyers who wish to serve in nonprofits and address the rural justice gap must continue.

At the same time, short of financial incentives and resource investments, if technology can serve a critical role in reducing the justice gap in rural communities at lower marginal cost than other strategies, there are a number of challenges ahead, which I will address in the next part.

III. What Is Needed to Use Technology to Help Close the Rural Justice Gap

Digital lawyering is no panacea.[19] Legal services delivered through digital platforms can never serve as a complete substitute for the value that a real lawyer offers to the individual in need of legal services. Lawyers serve many functions, and just one of them is providing technical legal services like filing an answer in an eviction case or preparing a will. Lawyers also provide advice and calm nerves, make clients feel better about their legal problem, and can give the client the confidence she needs to take on the system when the system is treating her unfairly. Digital legal services can only go so far in serving these lawyer's functions.

At the same time, when a carbon-based lawyer is not available, silicon-based services can serve some of the important functions of the legal profession. They can give the consumer critical information she can use to address her legal problem to the best of her ability. Armed with expert information, guidance, and fillable forms, a consumer can accomplish a lot that she might not be able to accomplish on her own. And if no living, breathing lawyer is available to serve her legal needs, some information and guidance is often better than no assistance. Digital platforms can help deliver meaningful, effective services in some contexts, and those interested in closing the justice gap, whether urban, suburban, or rural, will look to tap digital channels for delivering such

services where they can provide some measure of justice. But there are challenges to utilizing such channels to deliver legal assistance in some form, which I discuss, in turn, below.

A. Developing the Expertise to Build Effective Digital Delivery Systems

Just because someone is a good lawyer does not mean she can build an effective digital system for the delivery of legal services. First of all, there is the technical expertise that is needed to build websites and other systems. But a degree of assistance is out there for lawyers who wish to try their hand at developing digital delivery systems. The Center for Computer-Assisted Legal Instruction (CALI) has created plug-and-play modules for developing effective web-based interfaces that can walk pro se litigants through issues they are facing in court. Presently, court systems like New York State's have adopted some of these CALI-based programs that lead litigants through the process of filing for child support and submitting an answer in housing court, among other contexts.[20]

Such plug-and-play options can only take the lawyer, and the pro se litigant, so far, however. First, technical expertise on building digital systems is likely necessary in all but the most simple and straightforward contexts. CALI's A2J author, which is one of these easy-to-use programs where no computer coding is necessary, is certainly effective in many contexts, as the New York State court system's use of it in many substantive contexts proves. But some problems do not lend themselves to easy, digital responses through pre-packaged platforms. Indeed, there is a reason why digital outlets like LegalZoom are presently serving customers in a narrow class of cases: i.e., those that are more easily addressed using digital tools. More complicated problems probably require more sophisticated technical expertise, like the ability to code in programs such as Python and other systems. Some law schools are offering "Coding for Lawyers" classes,[21] but more in-depth digital expertise, more than one can learn in a single class or by dabbling in online courses, is probably necessary. Thus, the construction of effective digital systems in more complicated legal contexts probably requires that lawyers partner with computer engineers who can build robust and intuitive digital platforms. When building the Foreclosure Guide described above, we partnered with computer experts, faculty and students affiliated with the University at Albany who constructed the digital platform from scratch. We never could have learned the programming necessary to develop that program on our own. By partnering with computer engineers, lawyers can better build digital systems that can help deliver effective legal assistance.

In addition, while technical expertise is generally required to build sophisticated, effective, and intuitive systems that can deliver legal assistance that aids consumers in addressing their legal problems, lawyers also need a way to capture how they look at and address such legal problems, and must translate such strategies and approaches into step-by-step instructions for pro se consumers. They must conduct what is known as "business process analysis" for each such problem, and build process "models" that break down strategies for addressing a particular legal problem into their component parts, and developing guides for understanding and navigating those problems and deploying tactics for addressing them.[22] In other words, lawyers must develop an ability to translate what they learn in law school, and the expertise they hone through years of practice, into a "customer-facing" platform.

Much of what lawyers do, over time, becomes intuitive, and in a way, effortless and even rote. When building digital systems, lawyers need to combine their expertise with empathy. They need to understand how the lay person will see the problem and find a way to bridge the expert/non-expert divide through mechanisms that are accessible to the non-professional. If a consumer does not understand how to use a digital delivery system without further assistance, it is not an effective system. Thus, whether they consult with outside experts—or even potential consumers—lawyers will need to develop a methodology for using their knowledge while also embracing an appreciation for the ways in which non-lawyers will view the systems the lawyers create to address those non-lawyers' problems.

So, it is more than just technical, computer expertise lawyers may need to develop digital systems that can help close the justice gap. They will need insights for other disciplines—psychology, neuroscience, communications, linguistics—to help create effective digital platforms for the delivery of legal assistance to rural and non-rural consumers alike.

B. Developing Resources for Building Digital Delivery Systems

If it is not clear already, lawyers will need teams of experts that can help develop digital platforms for the effective delivery of legal services. Building such teams requires resources. While non-profits have long leveraged the private bar for the delivery of legal services, they can also seek to tap other professionals, like computer engineers, for volunteer assistance on such projects. Philanthropy can support such efforts, and groups like Pro Bono Net have proven quite successful in attracting donations from private foundations as well as the charitable arms of computer companies, like Microsoft. The Legal Services Corporation also offers the Technology Initiative Grant Program (TIG), through which legal services providers can seek funding to explore model programs that utilize technology to deliver legal assistance.[23] In addition, as we did with the Foreclosure Guide, legal services organizations can partner with academic institutions—law schools, computer science schools, business schools—to tap into the energy of the faculty, students and even the staff responsible for those institution's information systems, for assistance. Finally, entrepreneurial lawyers can also develop "low-bono" digital delivery systems that charge a modest fee for their services. Addressing the justice gap through digital platforms takes resources and those wishing to use such platforms in this way will need to get creative in how they marshal such resources to do so.

C. Digital Divide

Of course, if consumers cannot access the internet, or do not have mobile phones with internet access, all of the

digital tools in the world will not help close the justice gap in rural communities. The "digital divide" that affects low income people is particularly acute in rural communities, where rural broadband access is limited and cellular service is not as strong as it is in more densely populated communities.[24] Admittedly, without effective strategies for narrowing the rural digital divide, the ability of technology to close the justice gap in rural communities will be limited by this other divide. Addressing that other divide is beyond the scope of this article, however.

D. Digital "Language Access"

On a similar note, reliance on digital systems for the delivery of legal services will require that such systems are presented in ways that even those not "fluent" in the use of the internet will be able to navigate them. In communities where internet and mobile access is less prevalent, where digital systems are instituted to delivery legal assistance, great care is necessary to ensure such systems are accessible even to those who are not comfortable navigating the internet. Lawyers will need to ensure that their systems are user-friendly, even for those not used to utilizing digital platforms for accessing information and guidance, which emphasizes the need to consult with not just experts in web-design but also non-experts, i.e., the target audience, especially those not accustomed to using digital tools, to ensure the systems lawyers create are fully accessible to end-users regardless of their digital competency.

Conclusion

Strategies to reduce the justice gap in the United States come in many forms. Attention to improving access to justice must take into account the unique needs of rural communities throughout the nation. As with access-to-justice issues generally, technology holds out the promise of reducing the justice gap in all communities, but seems particularly well-suited to addressing the rural justice gap as it creates opportunities for lawyers and clients and pro se litigants to communicate in effective ways and lower the physical distance that stands as a barrier to improving rural access to justice. Digital tools can thus serve the important goal of closing the rural justice gap. Non-profits, volunteer lawyers, law schools and educational institutions of other disciplines must work together to develop the digital systems of today and tomorrow that can help improve access to justice for all Americans, including those in rural communities across the nation that face a significant, and growing, justice divide.

Endnotes

1. U.S. Legal Services Corporation, The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans 9 (June 2017).
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3. *Id.* at 48.
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Ray Brescia is a professor of law at Albany Law School, where he has taught for the last 11 years. Before joining the faculty at Albany Law, he was the Associate Director of the Urban Justice Center in New York City, where he served for nine years and founded and directed its Community Development Project. He holds a B.A. in Political Philosophy from Fordham University and a law degree from Yale Law School.

Fostering Excellence in the Town and Village Justice Courts

By Antonio Galvao

On February 22, 2017, Chief Judge Janet DiFiore delivered her first State of the Judiciary address and devoted a portion of her speech to the important role of the Town and village Justice Courts (Justice Courts) in our overall system of justice. Chief Judge DiFiore observed that there are close to 1,300 Justice Courts in New York with over 2,200 justices handling about two million cases a year.

> These are the courts where our residents outside of cities are most likely to find themselves should they have an interaction with the justice system, involving everything from a traffic infraction or a small claims case, to a landlord-tenant matter, or, on the criminal side, a misdemeanor or felony arraignment.

The Justice Courts located in the 57 counties outside New York City have broad jurisdiction. They hear civil actions involving amounts in controversy up to $3,000, landlord-tenant matters and applications to grant or modify orders of protection in family disputes. On the criminal side, the Justice Courts have the same jurisdiction as the New York City Criminal Court, the City Courts outside New York City and the District Courts on Long Island. As such, they try misdemeanors and lesser offenses and arraign serious felonies, including homicides. The Justice Courts also collect more than $250 million in fines and surcharges each year.

Given the Justice Courts' integral role and broad jurisdiction, it is critical that they have the capacity and resources to ensure due process in individual cases and to deal effectively with a complex network of state and local agencies to, among others, secure defendants in local and county jails, assign counsel to indigent defendants and report case dispositions to state agencies.

Despite the Justice Courts' pivotal role in our State, many of these local courts are underfunded and understaffed. While they are constitutionally part of the Unified Court System (NY Const., Art. VI, §§ 1(a), 17), financial responsibility for operating the Justice Courts rests with local governments rather than the State (L.1976, ch. 966; Unified Court Budget Act). Notwithstanding this constitutional structure, the court system has traditionally provided different substantial resources and services to support Justice Court operations. The Justice Court Resource Center, for example, provides confidential legal advice and research and other technical assistance to local courts that lack the resources to hire court attorneys or administrative staff.

Chief Judge DiFiore recently reaffirmed the court system's continuing strong commitment to "providing the crucial support and supervision necessary to run an excellent local court system." Indeed, the court system is taking a number of important steps to follow through on this commitment.

The Unified Court System's 2017-18 budget contains $4.5 million for the purchase of a comprehensive case management system for the town and village courts. The system will be donated to the Justice Courts, saving municipalities around the state a total of $1.5 million every year in licensing fees. While the case management system is already being used by most local courts, the state's purchase will bring additional benefits. Sensitive local court data will now be housed on the court system's secure servers rather than those of a private company. State ownership of the system will greatly facilitate needed upgrades in response to changes in the law. It will speed up and augment transmission of criminal case disposition data to the Division of Criminal Justice Services and the Department of Motor Vehicles, fine and surcharge collections to the State Comptroller's Office, and information relating to transfer of criminal cases to the state courts after local arraignment.

The court system's 2017-2018 budget also contains increased funding (from $2.45 to $3 million) for the Justice Court Assistance Program (JCAP). JCAP provides grants of up to $30,000 to localities to enable them to upgrade their Justice Courts in the areas of technology, security equipment, legal reference capabilities, Americans with Disabilities Act compliance, and to generally modernize court operations and improve efficiency and public services.

Since the JCAP program was established in 1999, the Justice Courts have received more than $35 million in resources and equipment. During the 2015-2016 JCAP cycle, awards were granted to 353 Justice Courts, with most of the funding directed toward construction, renovation and security upgrades.

This past February, the Court of Appeals, acting on the recommendation of the Administrative Board of the Courts, and following a public comment period, amended section 17.2 of the Rules of the Chief Judge to require that clerks of town and village courts undergo annual training. Continuing training and education has been required for town and village Justices since 1984. The growing complexity of the duties of court clerks warrant a continuing education requirement that addresses, among other issues, appropriate sealing and management of court records, financial control practices and responsibilities relating to collection of fines, reporting of criminal and vehicle and traffic case dispositions, uploading of orders of protection onto the state registry, and case transfer procedures.

The court system is also partnering with the Justice Courts to enhance access to language and interpreter services. The fact that many Justice Courts are located in rural, sparsely populated areas makes the provision of interpreter services particularly challenging. Beginning this April, a Task Force of Justices and staff, Justice Court Resource Center staff and affected stakeholders will assess the status of language access services in the Justice Courts. The Task Force will issue a report to the Chief Administrative Judge before the end of the year with its findings and recommendations designed to help local governments improve their language access services.

Another priority issue for the Justice Courts is ensuring the presence of counsel at arraignments. The court system is in the process of implementing recently enacted legislation authorizing rotating arraignment parts among Justice Courts in counties outside New York City. This legislation has its origins in the Court of Appeals ruling (*Hurrell-Harring v. New York*, 15 N.Y.3d 8 [2010]) reaffirming that the fundamental right of an indigent defendant to be represented by counsel attaches at the accused person's arraignment, both as a statutory obligation under New York and as a constitutional requirement under the United States Supreme Court's seminal decision in *Gideon v. Wainwright* (372 U.S. 335 [1963]).

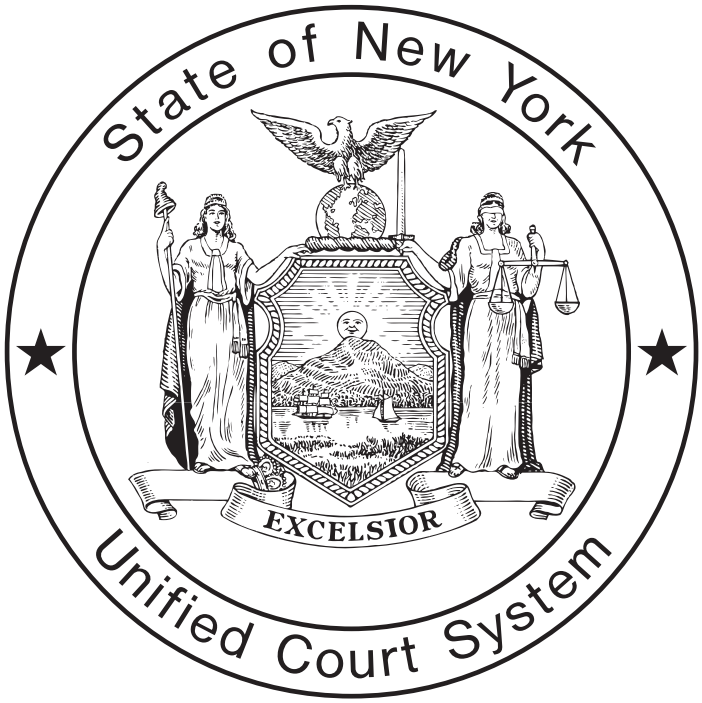
In practice, local courts and governments and indigent defense providers have struggled to meet this critical obligation in rural, sparsely-populated areas of the State. When a suspect is arrested at night or on weekends, it can be extremely difficult to find qualified defense counsel to appear at arraignments due to long travel times and the overall lack of qualified defense attorneys in the vicinity.

The legislation essentially authorizes a town or village Justice elected anywhere in a county to arraign an accused person on any crime anywhere in the county. The new law went into effect on February 26th, and the Office of Court Administration is presently consulting and working with affected stakeholders in several counties to develop plans for the designation of centralized or rotating off-hours arraignment parts that would facilitate the ability of assigned defense counsel to cover off-hours arraignments. When implemented, these local plans will help localities meet their obligation to provide counsel at arraignment in a more cost-effective and convenient manner.

Most people having an experience with the justice system outside New York City will do so in a Justice Court. They are truly the people's courts. In light of the fact that most of the Justices sitting in these courts are not lawyers, and that not all municipalities are able to provide adequate resources and staffing for their local courts, it is fortunate that Chief Judge DiFiore and the leaders of the state court system are committed to providing the support, training and resources necessary to foster a fair, efficient and well-functioning local court system that provides excellent justice services and due process to every litigant.

Permanent Commission on Access to Justice

REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK



NOVEMBER 2016

November 30, 2016

Honorable Janet DiFiore
Chief Judge of the State of New York
230 Park Avenue, Suite 826
New York, NY 10169

Dear Chief Judge DiFiore:

I am pleased to forward to you the seventh Annual Report of the New York State Permanent Commission on Access to Justice, the first to you as our Chief Judge.

The Permanent Commission was privileged to assist in the preparation of the public hearing on civil legal services, held at the Court of Appeals, led by you, the Presiding Justices of each of the Appellate Division Departments, the Chief Administrative Judge and the President of the New York State Bar Association. The testimony presented there by witnesses from across the state has helped demonstrate the extent and nature of the current unmet civil legal needs of low-income New Yorkers.

This Report, based in large part on the hearing's oral and written testimony, includes the Permanent Commission's findings on the continuing access-to-justice gap, along with an analysis of the substantial economic benefits to both low-income New Yorkers and New York State from investing in civil legal services. Based upon these findings, the Permanent Commission recommends that the present funding level be continued for fiscal year 2017-2018. During this period, the Permanent Commission will spearhead a major strategic planning effort, made possible by a $100,000 grant from the Public Welfare Foundation, with the goal of providing effective assistance for all in civil legal matters involving the essentials of life.

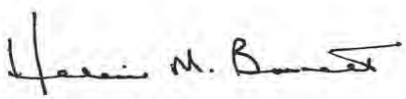
Further, for 2017, the Permanent Commission recommends consideration of court simplification in which family-related matters are heard in a single court, overseen by one judge, and suggests establishing two pilot projects to assess its efficacy. The Permanent Commission's numerous non-monetary recommendations, which are an essential part of its multi-faceted strategy for expanding access to justice, will also be continued in the new year. Among them are recommendations based on two major conferences that the Permanent Commission convened, at which you presented opening remarks: the fifth annual Law School Conference, focusing on the role of law schools in helping to close the justice gap; and the second Statewide Civil Legal Aid Technology Conference, helping to educate providers and identify resources for optimizing the use of technology in delivering services and streamlining operations. In addition, we recommend expansion of the role of non-lawyers, public libraries and pro bono service by government attorneys.

Members of the Permanent Commission, who represent diverse perspectives and bring to the Permanent Commission a breadth of experience, special insights and a commitment to increasing access to justice through creative solutions, are unanimous in supporting the findings and recommendations in this Report. They have made significant contributions of time and energy to our work throughout the year. The Permanent Commission was also ably assisted in its work by its Counsel, Jessica Klein, as well as by Lara Loyd, Chiansan Ma, Julie Krosnicki, Madeline Jenks and Grace Son, all from Sullivan & Cromwell, and by Lauren Kanfer, Barbara Mulé and Barbara Zahler-Gringer, from the New York State court system.

As you so aptly stated at your public hearing, we have made notable progress, but we cannot rest on our achievements as much more needs to be done. With your strong commitment to ensuring an accessible civil justice system, we are confident that we will move closer towards our shared mission of achieving access to justice for all.

We thank you for your support and resolve, and look forward to continuing to work together in the coming year.

Respectfully submitted,



Helaine M. Barnett
Chair, Permanent Commission on Access to Justice

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EXECUTIVE SUMMARY

In 2010, more than 90% of low-income New Yorkers appeared in court in civil matters without counsel.[1] The vast majority of these New Yorkers had little understanding of court procedures or the law. Each court proceeding posed potentially devastating consequences that went beyond the individuals and families involved—a family facing eviction, a veteran unable to collect service disability, children unable to attend a school responsive to their special needs, a woman trying to escape an abusive relationship or a father whose medical claims were denied. But these consequences were felt in our courts and our communities throughout the Empire State.

In response to this crisis of the unrepresented in our state's courts, former Chief Judge Lippman created the Task Force to Expand Access to Civil Legal Services in New York.[2] Under the leadership of Helaine M. Barnett, former President of the federal Legal Services Corporation, the Task Force, now the Permanent Commission on Access to Justice, has worked hard to reduce the number of unrepresented people in our civil courts. For the past six years, we have recommended that (1) a reliable source of state funding for civil legal services be established; and (2) non-monetary initiatives be developed and implemented to enhance access to justice for low-income individuals facing civil legal challenges to the essentials of life.[3]

This year represented an important milestone in our efforts. Our new Chief Judge, Janet DiFiore, has continued former Chief Judge Lippman's efforts to address the crisis of the unrepresented in our state courts. Chief Judge DiFiore is our new champion. This year, with her invaluable support, New York's Judiciary reached the funding goal set in 2010 of $100 million of dedicated state funds for the provision of civil legal services.[4] This level of state funding is estimated to yield a return of $1 billion—$10 for every dollar invested in civil legal services[5]—to the New York State treasury. The number of New Yorkers that currently receive such state-funded civil legal services now exceeds 453,000.[6] This represents *an increase of approximately 60% since 2010.* In New York City, more than one in four tenants, or 27%, who face eviction in the Housing Court, are now represented by counsel.[7]

On September 27, 2016, the Chief Judge, assisted by the Permanent Commission, held a public hearing to assess the extent and nature of unmet civil legal needs, "where fundamental human needs are concerned or the matter involves society's most vulnerable members."[8] The powerful testimony from judges, leaders of the academy, the bar, the business community and clients of state-funded civil legal services providers, confirmed that the availability of civil legal assistance stabilizes lives, preserves homes and assures educational opportunities for children.[9] The circumstances described at the hearing, and at each of the prior years' hearings, established that accessible, publicly funded civil legal assistance averted dire consequences for individuals and families, restoring the hope, promise and opportunity that sustains New York's communities and the vitality of our state.[10]

At the hearing, Chief Judge DiFiore praised the work of the Permanent Commission and said that there has been "a change in perceptions and attitudes in New York and around the country[;] policymakers at all levels of government have come to recognize that legal services for the poor is not just the right thing to do, which, of course, it is, but is the wise thing to do as well."[11] The Chief Judge's statement reaffirms our Judiciary's commitment to working with the Permanent Commission to achieve access to effective legal assistance for all New Yorkers

confronting matters involving the essentials of life, and New York's place as one of hope, promise and opportunity for all of its citizens. The Commission thanks Chief Judge DiFiore for her steadfast support of its efforts to bridge the justice gap.

When the Task Force's hearings began in 2010, pursuant to a joint legislative resolution,[12] New York's courts were overwhelmed with unrepresented individuals who were facing challenges impacting the essentials of life—their housing, their medical care and their relationships with their families. Recognizing that the unmet needs in the state for civil legal services remain substantial, and that New York's efforts to close the justice gap should remain resolute, the Permanent Commission recommends that the current funding level be continued in the upcoming fiscal year.

To further narrow the justice gap, the Permanent Commission will engage in a major strategic planning process, with the ultimate goal of ensuring that every New Yorker in need has effective legal assistance when faced with a legal matter threatening the critical necessities of life.[13] With the support of a grant from the Public Welfare Foundation, and with input from many stakeholders from around the state, the Permanent Commission will craft a strategic action plan for a coordinated, civil legal services delivery system that will fulfill the objectives of the state's 2010 and 2015 joint legislative resolutions.[14]

In addition, the Permanent Commission is proposing a new initiative to expand access to justice. In recognition of the barriers faced by families when having to litigate their family-related matters in multiple courts, the Commission recommends that (1) the Chief Judge's Task Force on the New York State Constitutional Convention consider court simplification that consolidates family-related matters within a single court, overseen by one judge; and (2) the court system establish two court simplification pilot programs—one in New York City and one upstate—to assess the efficacy of consolidation.[15]

Equally significant, as this report details, are numerous impactful non-monetary innovations the Permanent Commission spearheaded, and continues to support, that effectively expand access to justice for all. These non-monetary initiatives include:

Court Processes: Rules and Simplified Court Forms

- Securing adoption by the Administrative Board of the Courts of a resolution declaring that it should be the court system's policy to support and encourage the practice of limited scope representation in appropriate cases to help bridge the access to justice gap;[16]
- Promoting development and implementation of an Online Dispute Resolution (ODR) pilot by the court system for consumer debt matters in order to evaluate the effectiveness of ODR in bridging the justice gap;[17]

Law School Involvement

- Encouraging law school and law student involvement in pro bono efforts at all 15 New York law schools, the work of the Statewide Law School Access-to-Justice Council and continuation of the annual Law School Conference;[18]

Technology Initiatives to Expand Access to Justice

- Supporting the integration of technology into client delivery systems, including through two pilot online intake portals;[19]
- Convening the now annual Statewide Technology Conference to promote collaboration and innovation to improve the delivery and efficiency of civil legal services;[20]

Role of Non-Lawyers

- Establishing the Legal Hand storefront initiative, which introduced the concept of neighborhood storefronts staffed by trained community volunteers who provide free legal information, assistance and referrals in areas including housing, family and benefits matters, to help resolve issues and prevent them from escalating into legal actions;[21]
- Exploring expansion of the Navigator Program that enables trained Navigators to provide assistance to litigants in courthouses, helping them navigate and understand their proceedings and court process;[22]
- Recommending that legislation be introduced to create a Court Advocate Program allowing specially trained non-lawyers to work, under the supervision of attorneys in non-profit organizations, and provide legal assistance to unrepresented low-income individuals in court proceedings;[23]

Public Education Efforts

- Expanding outreach to and training of public librarians statewide—including through the development of a webinar training program—to provide librarians in public libraries around the state with information to assist library visitors with questions about legal problems and to refer such visitors to legal services providers;[24]

Pro Bono Efforts to Increase Access to Justice

- Promoting adoption of the New York State Bar Association Model Pro Bono Policy by state and federal government agencies;[25]
- Encouraging local and municipal governments to consider adoption of an appropriate pro bono policy;[26] and
- Supporting consideration by the New York court system of appropriate steps to take to further promote and support pro bono by its attorneys.[27]

Even though our state has achieved the Task Force's initial goal set for state funding and adopted many impactful non-monetary initiatives, there remains a substantial need for civil legal services. We have come far, but much work still remains to be done. To that end, in 2017, the Permanent Commission will focus on the development of a long-range, strategic action plan designed to ensure effective legal assistance for every New Yorker confronting legal challenges to the essentials of life.[28] We are committed to working with Chief Judge DiFiore to achieve this objective.

PART A

The Chief Judge's Civil Legal Services Initiative For New York State

The New York State civil legal services initiative was launched on Law Day in 2010 by then Chief Judge Jonathan Lippman with the hope that it would be "an obvious truth to all that those litigants faced with losing the roof over their heads, suffering the breakup of their families, or having their very livelihood threatened cannot meaningfully pursue their rights in the courts of New York without legal counsel."[29] Under this initiative, the Permanent Commission on Access to Justice was established to address the unmet civil legal needs of low-income New Yorkers and serves as a model for expanding access to justice. Since its inception, the Permanent Commission has been led by Helaine M. Barnett, former President of the federal Legal Services Corporation, and has been composed of representatives from the Judiciary, the business community, government, private law firms, bar associations, civil legal services and pro bono legal assistance providers, law schools and funders.

Each year, New York's Chief Judge holds civil legal services hearings on the unmet civil legal needs of low-income New Yorkers. The Permanent Commission reports to the Chief Judge on findings based on the hearings and its ongoing work, and proposes recommendations for monetary and non-monetary initiatives to close the access-to-justice gap. The Chief Judge submits these annual reports to the Governor and Legislature. The result of this process is the implementation of multi-faceted initiatives to bridge the justice gap.

Since 2010, the civil legal services initiative has made significant inroads, most importantly by attaining the funding goal of $100 million of dedicated state funding for civil legal services. Today, greater numbers of low-income individuals have access to a spectrum of services to resolve their civil legal matters, from legal information assistance at Legal Hand neighborhood centers, to in-court support and guidance through the Court Navigator Program, to increased pro bono assistance from law students and attorneys, to full representation by legal services providers. The overall impact is that a substantially higher percentage of the legal needs of low-income New Yorkers are being met, resulting in better outcomes and averting dire consequences for these individuals as they seek to address matters involving the essentials of life.

I. Judiciary Civil Legal Services Funding Is Having an Impact

For fiscal year 2016-2017, Judiciary Civil Legal Services (JCLS) funding totaled an unprecedented $100 million, which included a $15 million allocation to the New York State Interest on Lawyer Account Fund (IOLA).[30] The remaining $85 million will be allocated to 82 civil legal services providers serving low-income New Yorkers in every county of the state.[31] In response to the 2016–2017 RFP,[32] the JCLS Oversight Board received and considered 90 total applications from 87 applicants for funding, including three applicants that also applied for funding related to joint projects.[33] The Oversight Board awarded 83 grants (with one provider receiving two separate grants), including six to applicants that had not previously sought funding.[34] The $85 million in total grants ranged in size from $20,000 to $9,786,789, and contracts will be awarded for a five-year term, from January 2, 2017 to December 31, 2021.[35]

The Oversight Board informed the Permanent Commission that, in accordance with the priorities articulated by the Chief Judge and recommended in our previous reports, this year's awards targeted matters involving the essentials of life—legal problems in the areas of housing (including evictions, foreclosures and homelessness), family matters (including domestic violence, children and family stability), access to health care and education, and subsistence income (including wages, disability and other benefits and consumer debts).[36] The Oversight Board further informed us that it continued to emphasize the provision of direct legal services, while also encouraging collaboration among civil legal services providers, preventive and early-intervention legal assistance, as well as innovation through the use of technology.[37] As recommended by the Permanent Commission, the Oversight Board allocated the new funding by county, based upon the proportion of the population living at or below 200% of the federal poverty level.[38]

Data collected by the Office of Court Administration (OCA) shows that civil legal services funding allocated by the Chief Judge in the Judiciary budget has increased the number of low-income New Yorkers being served with those funds.[39] The number of direct legal assistance cases handled by JCLS grantees increased from 421,113 in 2014–2015 to 453,908 in 2015–2016, as indicated in the following table:[40]

JUDICIARY CIVIL LEGAL SERVICES GRANTEES

Direct Legal Assistance

	2013-2014 CASES HANDLED	2014-2015 CASES HANDLED	2015-2016 CASES HANDLED
First Department	108,350	128,095	133,743
Second Department	172,284	183,742	213,819
Third Department	40,482	42,907	36,660[41]
Fourth Department	63,858	66,369	69,686
STATEWIDE TOTAL	**384,974**	**421,113**[42]	**453,908**

The increased number of cases handled has contributed to a decline in the numbers of litigants seeking to navigate the civil justice system without counsel, dropping from 2.3 million in 2009 to 1.8 million in 2014.[43] Statewide, for example, the impact can be seen by the increase in representation in foreclosure settlement conferences.[44] Since 2011, the number of litigants unrepresented in foreclosure settlement conferences has decreased from 67% to 38%.[45]

Even more significant are the findings of a recent study conducted in 2016 by the New York City Human Resources Administration Office of Civil Justice, in partnership with OCA.[46] This study sought to assess the impact of both JCLS and New York City legal assistance funding on the level of tenant representation in eviction cases in New York City Housing Court.[47] The study, based on data from OCA and the judges and staff of the New York City Housing Court, found that more than one in four tenants, or 27%, who are facing eviction matters in the New York City Housing Court are now represented by counsel.[48] This is a striking increase

from prior court system findings that only 1% of tenants in New York City Housing Court were represented by attorneys.[49] In contrast, only 1% of landlords in eviction proceedings appeared in court without counsel.[50]

Further, the increased funding has had a significant impact on the percentage of legal needs being met. In 2010, expert consultants commissioned by the Permanent Commission found that only 20% of the legal needs of low-income New Yorkers were being met.[51] Building on that finding, in 2015, we sought to update our analysis and determine the degree to which the need for civil legal services for low-income New Yorkers was being fulfilled.[52] At our request, the Chief Administrative Judge formed a committee to bring this analysis up-to-date.[53] After thorough review and analysis of data, the committee estimated that 31% of legal needs were being met in 2015.[54]

For 2016, we again sought to ascertain the percentage of civil legal needs being met. This year, OCA's Office of Court Research conducted the analysis. It first reviewed the Census Bureau's latest poverty statistics, which found that approximately 6.12 million New Yorkers, or nearly one third of the population, are currently living below 200% of the poverty level.[55] Using this figure, it was estimated that 1.2 million low-income New Yorkers now have three or more civil legal problems.[56] Additionally, the number of cases handled by JCLS providers in 2015–2016 was considered. Based on the totality of the data, it is estimated that 37% of the civil legal needs of low-income New Yorkers are now being met.[57]

II. Judiciary Civil Legal Services Funding Provides Substantial Economic Benefits to New York State and a Return of $10 for Every $1 of Funding

For the past six years, the Permanent Commission has obtained pro bono assistance from four nationally recognized experts to analyze the cost savings and economic benefits resulting from funding civil legal services programs in New York State. This year, that assistance once again came from Neil Steinkamp of Stout Risius Ross (SRR), a global financial advisory firm, who assisted the Permanent Commission in 2015. This year, Mr. Steinkamp updated his previous analysis of the economic impact on New York State of federal benefits obtained through civil legal assistance.[58] In addition, he analyzed data on the benefits received by low-income New Yorkers as a result of the provision of civil legal services by IOLA grantee organizations from 2005 to 2015.[59] Based on the foregoing, Mr. Steinkamp, among other things, concluded:

- **Additional Economic Benefit from Child and Spousal Support Payments to Recipients of Those Benefits and Their Families Was Estimated to Be $26.2 Million:** For 2015, IOLA data indicates retroactive awards of child and spousal support at approximately $1.38 million and monthly payment awards at nearly $356,000.[60] The net present value of the monthly payments, based on a payment stream of nine years, is approximately $38.4 million.[61] Thus, the total value of the child and spousal support awards for 2015 is approximately $39.8 million.[62] After deducting the estimated value of support payments not actually received, the estimated value of actual child and spousal support payments is approximately $26.2 million.[63]

- **Total Estimated Cost Savings from the Avoidance of Emergency Shelter Increased to $345.2 Million:** In 2013, using state and local data from 2012 on the cost of providing shelter in New York State as well as IOLA data on eviction prevention cases, Cornerstone Consulting concluded that anti-eviction legal services programs that receive IOLA funding saved the government approximately $116 million annually in averted shelter costs.[64] In 2014, IOLA analyzed updated data and estimated such annual savings had increased to more than $220 million.[65] In 2015, based on increased cost savings from brief representation cases (an estimated $63.2 million) and extended representation cases (an estimated $282 million), Mr. Steinkamp estimated cost savings to the government increased in aggregate to $345.2 million, corresponding to shelter avoidance for approximately 32,038 individuals.[66]

- **Present Value of Wage Impact of Work Authorization Assistance for Immigrant Victims of Domestic Violence, Trafficking and Other Crimes Was Estimated to Be $52.6 Million:** With the assistance of civil legal services providers, approximately 6,513 immigrant clients, applying for "Green Cards," U Visas, T Visas, Violence Against Women Act self-petitions or other long-term status, successfully achieved work authorization in 2015.[67] Work authorization provides a significant wage increase to immigrants, amounting to an average increase of approximately $1,278 per annum for women and $1,435 per annum for men.[68] Of the individuals who received work authorization in 2015, 51% were estimated to be women.[69] These work authorization results were estimated in aggregate to increase annual wages of immigrants by $4.24 million for women and $4.3 million for men.[70] The total net present value of wage impacts because of work authorization, assuming work authorization will continue for two-, four- and ten-year terms dependent upon the type of legal assistance provided to obtain work authorization, was estimated to be $52.6 million.[71]

- **Present Value of Wage Impacts of Citizenship for Immigrants Was Estimated to Be $49.5 Million:** Approximately 3,831 clients of civil legal services providers attained citizenship in 2015.[72] Citizenship provides a wage increase for former immigrants, amounting to an average increase of approximately $735 per annum for women and $823 per annum for men.[73] Of the individuals who received citizenship in 2015, 51% again were estimated to be women.[74] As a result of attaining citizenship, annual wages of former immigrants were estimated in aggregate to increase by $0.85 million for women and $1.3 million for men.[75] The total net present value of such wage impacts owing to citizenship was estimated to be $49.5 million.[76]

- **Civil Legal Services Provided a Positive Economic Impact on the New York State Economy Owing to the Long-Term Financial Impact from Federal Benefits Obtained:** Civil legal services in 2015 for low-income New Yorkers provided substantial economic value to families in need, as well as to state and local economies and governments.[77] As a result of legal representation in 2015, the economic value to clients and their families of federal benefits secured, including Supplemental Security Income and Social Security Disability (SSI/SSD) awards, Medicare and Medicaid benefits and other federal benefits, was estimated to be approximately $953.9 million.[78] These federal benefits also provide a significant overall stimulus to the New York State economy and create thousands of jobs.[79] The overall impact when also considering the "multiplier effect"—that savings generate further economic activity by, for example, allowing clients to use such savings in their community—amounted to $1.29 billion and the creation of approximately 9,020 jobs.[80]

- **Civil Legal Services Providers Obtained Nearly $100 Million in Benefits for Their Clients and Families, Resulting in an Estimated Total Economic Impact of Over $2.7 Billion when Coupled with Continuing Cost Savings from Prior Years:** After expanding the 2016 cost-benefit analysis to include consideration of immigration and citizenship work, Mr. Steinkamp "calculated benefits this year associated with cases for which there was legal assistance in 2015 to be nearly $100 million."[81] Combining that $100 million with monies received into New York as a result of both extended and limited representation cases for SSI, SSD, Medicaid, Earned Income Tax Credit, other federal benefits and state unemployment benefits bring that figure to $1.1 billion for 2015, which, owing to the "multiplier effect," generates an additional $1.29 billion (as well as over 9,000 jobs).[82] When added together with the total estimated cost savings of $345.2 million from shelter avoidance, the total economic impact is estimated to be over $2.7 billion.[83] Thus, the $348 million total civil legal services funding in 2015 resulted in a return of $2.7 billion, or roughly a return of $7.88 for every $1 of funding in 2015.[84] However, total program funding of $348 million includes funding to support legal assistance for, among other things, credit card debt and other consumer rights matters, advanced care planning and pro bono legal services for low-income entrepreneurs, which results in understating the total return per $1 of funding.[85] Owing to these additions, Mr. Steinkamp ultimately concluded that a more reasonable estimate of such return was $10 for every $1 of funding in 2015.[86]

III. Non-Monetary Initiatives Have Been Implemented to Help Bridge the Justice Gap

In previous reports, we proposed a series of non-monetary recommendations aimed at expanding access to justice for low-income New Yorkers that have been implemented as part of the Chief Judge's civil legal services initiative.[87] Many of these could not have been accomplished without partnerships among the Judiciary, legal services providers, the private bar and New York's law schools. The key non-monetary recommendations that have been implemented since our first report in 2010 include:

Legislative Policy

- Adoption by the Legislature of our proposed concurrent resolution proclaiming it to be the state's policy that low-income New Yorkers facing legal matters concerning the essentials of life have effective legal assistance;[88]

Court Processes: Rules and Simplified Court Forms

- Development of a continuing process to assess current court forms and create uniform simplified forms for use in landlord-tenant, consumer debt, foreclosure and child support matters, which has already resulted in the approval of a number of new, uniform statewide forms;[89]

- Amendment to the Code of Judicial Conduct clarifying that judges may make reasonable accommodations for unrepresented litigants to have their matters fairly heard;[90]

- Commencement of an ODR pilot program for consumer credit matters that is now under development by the court system to evaluate the efficacy of ODR to help bridge the access-to-justice gap;[91]

- Development of a pilot program that will provide additional notice in landlord-tenant proceedings to ensure that unrepresented litigants are aware, at the start of proceedings against them, of available defenses, resources and consequences of the proceedings;[92]

- Approval by the Administrative Board of the Courts for public comment a proposed rule to require early disclosure in landlord-tenant proceedings of the regulatory status and housing code violations at the subject premises;[93]

- Adoption by the Administrative Board of the Courts of a resolution declaring that it should be the court system's policy to support and encourage the practice of limited scope representation in appropriate cases to help bridge the access-to-justice gap;[94]

Law School Involvement

- Commencement of an annual Law School Conference and establishment of the Statewide Law School Access-to-Justice Council, to enhance access-to-justice involvement by New York's 15 law schools and their students and to promote collaboration with civil legal services providers, the bar and courts;[95]

Technology Initiatives to Expand Access to Justice

- Commencement of an annual Statewide Technology Conference that promotes effective use of technology by legal services providers and enables dissemination of information to improve technology and service delivery systems that directly increase access to civil legal assistance for low-income people;[96]

- Implementation of the Pro Bono Law Firm IT Initiative, which provides law firm IT staff to assess the technology needs of individual civil legal services providers and make recommendations for enhancing and improving technology;[97]

- Establishment of two pilot projects, currently under development, to create online intake portals to facilitate the dissemination of information and access to legal assistance for consumer debt matters;[98]

Role of Non-Lawyers

- Formation of an advisory committee to consider the contributions that non-lawyers can make to bridge the justice gap that led to the issuance of an administrative order authorizing creation of Court Navigator pilots in which community volunteers are trained to assist unrepresented litigants in certain matters;[99]

- Opening of three Legal Hand storefront centers that are staffed with trained community non-lawyer volunteers who provide free legal information, assistance and referrals to visitors;[100]

- Proposal of legislation by OCA that would establish a new program for Court Advocates to assist litigants in housing and consumer cases;[101]

Provider Collaboration

- Promotion of models of collaboration among civil legal services providers, including the one-roof model of provider co-location and cost sharing, exemplified by the George H. Lowe Center for Justice in Syracuse;[102]

Pro Bono Efforts to Increase Access to Justice

- Amendment of Section 6.1 of the New York Rules of Professional Conduct that increases the recommended annual pro bono service for New York lawyers from 20 to 50 hours;[103]
- Establishment of mandatory reporting of pro bono activities and financial support for civil legal services providers as part of biennial attorney registration;[104] and
- Revision of a court rule to permit in-house counsel to register in New York for purposes of performing pro bono work to encourage pro bono work by in-house counsel licensed out-of-state.[105]

We also provided support for three additional major non-monetary, access-to-justice initiatives announced by then-Chief Judge Jonathan Lippman to support pro bono legal services:

- Issuance of the 50-hour pro bono service requirement for law graduates seeking admission to the New York bar;[106]
- Formation of the Pro Bono Scholars Program, which enables law students to spend their final semester performing pro bono service and permits them to take the bar examination in February, prior to graduation;[107] and
- Establishment of the Attorney Emeritus program, to encourage transitioning and retired attorneys to provide legal assistance to low-income New Yorkers.[108]

IV. The 2016 Civil Legal Services Hearing Demonstrated the Impact of Judiciary Civil Legal Services Funding and Continuing Unmet Need

Following the posting of public notice on the court system's website, Chief Judge Janet DiFiore conducted the 2016 hearing on civil legal services at the Court of Appeals on September 27, 2016.[109] Joining the Chief Judge at the hearing were: the Presiding Justices of all four Judicial Departments, First Department Acting Presiding Justice Peter Tom, Second Department Presiding Justice Randall T. Eng, Third Department Presiding Justice Karen K. Peters, and Fourth Department Presiding Justice Gerald J. Whalen; Chief Administrative Judge Lawrence K. Marks; and New York State Bar Association President Claire Gutekunst.[110]

A total of 15 witnesses presented testimony at the 2016 hearing,[111] and written submissions were received from 12 additional interested individuals or on behalf of organizations with which they were affiliated.[112] The 2016 hearing testimony—both oral and written—adds to the extensive evidence from hearings in previous years held throughout the state. At this hearing and in prior hearings, business leaders, state and local government officials, district attorneys, labor leaders, medical providers, educators, religious leaders, judges and clients all testified to the need for JCLS funding to bridge the access-to-justice gap for low-income families and individuals in every part of New York State.

At the 2016 hearing, leading New Yorkers from throughout the state and clients of JCLS grantees provided new evidence of the urgent need for additional resources to bridge the justice gap.

Former Chief Judge Jonathan Lippman Testified about Accomplishments Increasing Access to Justice and a Vision for the Future: Judge Lippman led off the hearing by congratulating Chief Judge Janet DiFiore for continuing to support the Judiciary's funding for civil legal services:

> I congratulate you on your stewardship of the Judiciary budget this last year through the Legislature with the help of your terrific, spectacular Chief Administrative Judge, Judge Marks, a budget that included not only so many important things for the Judiciary, but really a milestone, $100 million, for legal services for the poor in this state.… What a terrific accomplishment that is, and this amount of money I think does signal what the priorities of our state really are.… So thank you … for your dedication and commitment to the vulnerable and people who really can't do it on their own, the disadvantaged people who really need just a helping hand.[113]

Judge Lippman continued his testimony, however, by noting that, even with substantial state funding, there is still a large unmet need for civil legal services statewide:

> Legal service[s] providers turn away, even today, more people than they can help. That means more than 50 percent of the people [who] come to our wonderful providers are turned away because of lack of resources.[114]

After describing numerous ways—beyond additional funding—that New York State has risen to meet the need for civil legal services, Judge Lippman concluded by expressing both his vision and his confidence in Chief Judge DiFiore:

> And I am absolutely confident, with you, Chief Judge, at the helm, with your spectacular leadership in this state, that we have all of those things: leadership, innovation, partnerships, many times over.… I am truly confident that the day is not very far … where the ideal of equal justice is a reality for each and every person in each and every courtroom in this state.[115]

Business Leaders Testified to the Significance of Legal Services in Providing Efficient and Fair Ways to Resolve Conflicts: Stephen Cutler, Vice Chairman of JPMorgan Chase, testified about the importance of legal services for the timely and fair resolution of legal problems. He also noted that legal representation is good for the courts:

> In short, if those with whom we [JPMorgan Chase] have disputes are represented by able counsel, we think that could help us get fair and quicker settlements. That in turn will mean a court system that won't be overwhelmed with matters that should be resolved without much if any court intervention, and it will also mean a court system that will be able to devote more resources to matters that do need court intervention. But maybe most important of all it's what any of us would want for ourselves or our parents if we or they were involved in a dispute over a life-essential financial matter and couldn't afford counsel; it's just the right thing.[116]

Mr. Cutler also stated that JPMorgan Chase is a strong supporter of increased access to civil legal services because its people "feel an acute sense of responsibility to the communities in which they live and work."[117] He concluded:

> It's that same sense of responsibility that extends to our legal department, where it can be seen most clearly in our pro bono program. We provide assistance to … low-income families securing welfare benefits, to refugees in seeking asylum, and victims of domestic violence in seeking court protection. The program is one of the

> ways in which we recognize the importance of legal counsel in securing a fair and just society. And it is that principle that brings me here today to support greater access to civil legal services in the State of New York.[118]

Edward P. Swyer, President, The Swyer Companies & Stuyvesant Plaza, Inc., spoke movingly about why it was so critical for businesses to support the delivery of legal services to low-income New Yorkers:

> I believe it is extremely important for businesses who can afford to, to step up to make a difference. We all have a responsibility to do what we can to make our community a better place to live. Without an ability for an individual to escape the tyranny of domestic violence, an unscrupulous employer or landlord, immigration violations and other situations, legal representation is essential. Otherwise, our unemployment increases creating a draining on our social services and our community suffers.[119]

Mr. Swyer concluded:

> Our family foundation and our commercial enterprise support many philanthropic causes, but none is more important than access to those less fortunate. It is in our DNA; civil legal help for victims has the most lasting impact on the quality of their lives. Civil legal help for those at risk of homelessness, facing bankruptcy, in need of economic support, assists families and provides overall stability in our community. Civil legal help is also good for business. [William] James once said: "A community is only as strong as its weakest link." The efforts of the Permanent Commission and the Office of Court Administration have made the chain in our state much stronger with the support of civil legal services. This has improved the lives of thousands and made our state a better place to live and work.[120]

Law Schools Are Playing a Critical Role in Expanding Legal Services for Low-Income New Yorkers: Suzanne Goldberg, the Herbert and Doris Wechsler Clinical Law Professor of Law at Columbia Law School, testified about her observations about the role played by law schools and their students:

> [I]n the last ten years, my students have put in thousands of hours addressing domestic violence, family recognition for same sex couples, laws that discriminate and policies that discriminate against transgender individuals, asylum for individuals fleeing persecution based on gender identity, sexual orientation, among a broad range of issues. And … those are just my students.… If you take those and you add to them all of the students just at Columbia's many other clinics, focused on mass incarceration, immigration, prisoner's rights, the needs of youth, adolescent young people aging out of foster care, access to environmental issues, public benefits, mediation, human rights and more, and then you add to those all of the students in clinics at New York's 14 [other] law schools … it's really an extraordinary number of hours that students are dedicating directly to expand the access to justice.[121]

Professor Goldberg also spoke about her hope that law schools can become even more vibrant partners in access-to-justice efforts around the state:

> I think the silver lining finally for our times is that a growing number of law students understand in a deeply personal and passionate way how important it is for them to get involved in ensuring access to justice. As a result, while the need for more lawyers in the field is pressing in all of the ways that we have already heard … there are many in law school who are really ready and willing to work, and just need the mentoring, the guidance, and the recognition to find the best paths forward to make their contributions.[122]

Technology Has the Potential to Improve the Efficiency and Effectiveness of Legal Services Providers: David A. Heiner, Vice-President of Regulatory Affairs for Microsoft Corporation, and board chair of ProBono.Net, testified about the need for the legal community to continue to explore how technology can advance the mission of delivering effective legal information and services to low-income New Yorkers. Mr. Heiner described his reactions when he was introduced to technology's potential for impacting the delivery of legal services:

> [W]hen I started to look into it, I was really struck by the incredible fragmentation in the system, just the broad range of people who need help, the broad range of legal issues which you all know so well, that need to get addressed, and the very broad range of legal aid providers and other organizations that need the help. It's terrific that there are so many. But, … it feels like a confusing landscape, and it can be kind of hard to navigate. So it felt like something where technology … could help. Computers are very good at keeping track of things. They are very good at connecting, at networking and connecting people. They are very good at getting things done more efficiently.[123]

After describing numerous ways in which technology could have an impact on the delivery of legal services, Mr. Heiner concluded by describing a technology project that may make getting access to legal information and appropriate, effective legal help a reality:

> Finally, I would just mention … this LSC portal project; this is a joint project of Microsoft, LSC and Pro Bono Net … and the goal is to build a prototype of basically the front end to the whole legal aid system in a given state. So it would connect to the court system, it would connect to available resources, it would have a nice interface. Over time, people should be able to speak to the system, get useful information, be directed to lawyers where there are lawyers, and be directed to how to help themselves, where there is a need to help themselves.[124]

Increased Investment in Legal Services for Low-Income Tenants Has Drastically Expanded Capacity and Improved Outcomes: Steven Banks, Commissioner of the New York City Human Resources Administration/Department of Social Services, provided written testimony. Mr. Banks' colleague, Jordan Dressler, Civil Justice Coordinator of the New York City Human Resources Administration's Office of Civil Justice, provided oral testimony on the progress resulting from the city's significant investment in civil legal services, particularly in housing matters:

> [T]he justice gap for New York City tenants facing eviction in our Housing Courts is narrowing, given in large part to the extraordinary investments in access to civil legal services and other tenant supports by the Administration, the New York City Council, and the State Judiciary.[125]

Mr. Dressler stated that provision of quality legal representation for thousands of low-income tenants facing eviction and displacement has been a key component of his agency's civil legal service initiatives,[126] and described the human impact of these efforts:

> Protecting these affordable units throughout New York City for families and seniors, and protecting tenants in small buildings is critical. And the financial and human costs that we avert when tenants avoid eviction and preserve their tenancies are substantial. More importantly, many families are spared the trauma of homelessness, including disruption of education, employment and medical care. Our legal services programs are interested in keeping these New Yorkers in their homes, preventing displacement, and preserving and protecting the city's affordable housing stock.
>
> And we are already seeing results from our programs to protect tenants.… We partnered with OCA to undertake a new analysis to assess the current prevalence of legal representation among tenants in court for eviction cases and the need for counsel that remains. We found that a substantially higher proportion of tenants in court for eviction had legal representation than ever before.… Even before [the city's] housing legal assistance programs are implemented fully this year, more than one in four tenants in court, facing an eviction case in New York City, 27%, [are] now represented by a lawyer.… These results suggest that we are on the right track with this investment. Furthermore, we see very encouraging signs that by making access to legal representation more available, we are realizing concrete improvement in the courts, and in the lives of New Yorkers. The two key findings to bear that out: Residential evictions by city marshals declined 24% in 2015 compared to 2013 … [and] Orders to Show Cause in the city's Housing Courts … also declined by 14%, while residential evictions filed remained largely stable[.][127]

Creative Solutions Can Remedy the Resource Gap and Expand Access to Civil Legal Services: John S. Kiernan, President of the New York City Bar Association, provided testimony about the success of the City Bar Justice Center and the value of limited-scope legal services to assist low-income New Yorkers, proving that creative solutions can remedy the resource gap and expand access to civil legal services:

> [P]rovision of so-called limited or unbundled legal services, is ultimately at the heart of legal services provider's pragmatic determinations of how best to serve clients who need legal representation in circumstances where, as just a matter of reality, there simply aren't enough available resources to meet the demand of all the people who can't afford a lawyer. The City Bar considers itself a leader in providing several forms of such unbundled legal services through many of our Justice Center's existing projects. We believe these representations reflect a highly valuable form of legal service that enables the Justice Center and other providers … to increase substantially the number of people that [they] are able to assist and to place clients in far better positions than if they had no legal assistance at all.[128]

The Judiciary Is Working to Ensure a Meaningful Opportunity to Be Heard for Litigants with Family Matters: Hon. Douglas E. Hoffman, Presiding Judge of the Integrated Custody and Domestic Relations (ICDR) Part of the New York County Supreme Court and New York County Family Court, testified as to the benefits of this pilot ICDR Part, which creates efficiencies for families navigating Family and Supreme Courts by having one judge hear their related

family matters, ensuring judicial familiarity with all of the issues presented and preventing what Judge Hoffman describes as costly, divisive and time-consuming litigation.[129] In the pilot ICDR Part:

> Attorneys for the children and the parents are in Family Court on site daily through their contracts with New York City or New York State, and social workers are paired with the attorneys to form a team to represent the litigation interests of the children or adults. An attorney for the children can be appointed when appropriate in the ICDR the first day a case is filed.[130]

Prior to the pilot ICDR Part program, attorneys would often be assigned a case in Family Court but would not be authorized to appear in Supreme Court, resulting in new attorneys being assigned after a case spent months in Family Court. Under this program, "the judge addresses all the family's cases from day one, through the conclusion of the Supreme Court matrimonial action,"[131] which avoids referral of the case back to Family Court for further action and provides numerous benefits to the litigants:

> [F]or example, if through the contract, the attorneys for the children and the social worker cannot appear in Supreme Court, I may keep the custody case or the domestic violence case in Family Court, and what I do is then calibrate the Family Court and Supreme Court matters so they are heard on the same day. And in that way, all the cases are heard and people have access to their attorneys from day one, the very same attorneys. In addition, there are a number of issues that frequently overlay both the Family Court and the Supreme Court matters; particularly substance abuse and mental health issues. Supreme Court has essentially no in-house access to substance abuse and mental health testing and treatment services. The ICDR utilizes services available to Family Court to address the wide range of issues confronting the families who appear before it. With respect to substance abuse issues, the ICDR can utilize in a consolidated matrimonial action the on-site testing, counseling, referral and monitoring services of Family Treatment Court.[132]

In his written testimony, Judge Hoffman noted that the pilot ICDR Part's provision of representation not only increases the fairness of the process for individual litigants, but also benefits the system as a whole:

> Cases that include counsel for both sides result in more informed, and therefore more just, decision making by the court. The process moves more expeditiously and eliminates the filing of unnecessary supplemental petitions.… A litigant in a child support proceeding represented by an attorney with experience in child support matters may receive a more reasonable child support order, consistent with actual income, which would decrease the need to file future petitions for downward modification, as well as violation petitions. Increase in the availability of counsel for these cases would promote judicial economy and would provide jurists with more time to spend on each case, while also decreasing the amount of time each jurist spends explaining Family Court procedures to unrepresented litigants.[133]

Judge Hoffman concluded his written testimony with an appeal for further support and for other changes that would improve the system:

> In addition to the overall need for funding for counsel for child support, agencies that have a contract with New York City and/or New York State to provide legal services should be permitted pursuant to their contract to appear in both Family and Supreme Courts, to address all issues relevant to the family, including child support, and to be paid for their services. There needs to be a formal expansion of mental health testing and evaluative services for cases that are transferred to Supreme Court, as well as drug testing, assessment, referral and monitoring services.[134]

The Testimony of Legal Services Clients Demonstrates the Profound Impact of the Legal Assistance that They Received: Clients who testified at this year's hearing highlighted the life-changing impact of civil legal assistance.

Jorge ("Billy") Torres[135] is a former director of the Eastside Family YMCA in the suburbs of Rochester, New York, where he worked with at-risk youth and connected them with tutors and programs. When his wife became ill with Hodgkin's lymphoma, he left his job to spend more time with her and their children, ultimately transitioning to a lower-paid position that was more flexible and closer to his home. Due to this loss of income and increased medical expenses, Mr. Torres found himself unable to afford his family's monthly expenses, began to fall behind on his mortgage payments and was facing foreclosure. A predatory lender reached out to Mr. Torres, and he paid $2,700 before realizing the program was a scam.

When Mr. Torres came to the Supreme Court, he was referred to a legal services provider where he received free legal assistance with his foreclosure action. He filed for Chapter 13 bankruptcy, which included an automatic stay that forestalled foreclosure, and applied for the Mortgage Assistance Program (MAP). While Chapter 13 was ultimately not an option for Mr. Torres, his MAP application was approved. Mr. Torres's attorney negotiated with the mortgage lender, and the lender accepted the MAP loan, satisfying Mr. Torres's mortgage in full. Now financially stable, the Torres' family is able to stay in their home.

Mr. Torres testified about the dire consequences he would have faced had he not received free legal assistance:

> My particular case required the investment of over 100 hours of attorney time. There is no way that I could have been able to afford to pay a private attorney for the time required to achieve the positive result ultimately reached in my case. If not for the assistance of a strong legal services program … it is likely that I would have lost my home, destabilizing myself and my family, and also jeopardizing my ability to continue to do the work I do within my community.[136]

Glenn Rice[137] is a veteran of the United States Armed Forces who suffered from post-traumatic stress disorder (PTSD) which has seriously impaired him for more than 30 years. Unable to obtain assistance through the Department of Veterans Affairs (VA), Mr. Rice conducted an Internet search and found a legal services provider that helped him in his VA appeal. The appeal was successful, and Mr. Rice now has 100% permanent and total disability benefits from the VA, which includes covering education costs for children. Mr. Rice is proud to be able to extend this benefit to his daughter when she goes to college next year.

In addition to accessing full VA benefits, Mr. Rice received assistance with his Social Security Disability hearing, contesting the denial of benefits. The Administrative Law Judge commended the legal services lawyer's brief as one of the best he had ever read—a testament to the caliber of work coming from free civil legal services organizations—and awarded Mr. Rice

full Social Security Disability benefits. Mr. Rice now has the financial security he needs and deserves and is immensely grateful for the availability of civil legal services that helped him overcome the shame surrounding his disability, seek care and find a resource that gave him the help he needed.

After describing the comprehensive services provided to him and his family, Mr. Rice testified to the obstacles encountered by other veterans:

> I do know veterans returning home from combat zones and overseas deployments have a difficult time admitting they may have a problem and the Veterans Administration is overwhelmed with cases. It can take years before your case is even looked at and it is hard to navigate the VA and the Social Security Administration on your own. Having an option like Legal Services … gives veterans another avenue to travel and can make the difference between a denial and a favorable, life-changing outcome.[138]

Donna Spinner,[139] a resident of Plattsburgh, received legal services assistance for help with her divorce case, brought after long-term domestic violence and abandonment, which left her destitute. Ms. Spinner married her husband in 1978 and raised two sons. During this time, her husband was mentally, emotionally and financially abusive, blocking her from obtaining a job or pursuing an accounting degree. When he started his own business, Ms. Spinner acted as the bookkeeper, but her husband grew increasingly agitated and refused to keep her informed of income or expenses. In 2008, they filed for bankruptcy, and Ms. Spinner's husband took payments from a client—without the knowledge of or permission from the bankruptcy trustee—and disappeared.

From that point forward, Ms. Spinner did not have a known address for her husband. She attempted to file for divorce and seek spousal support, but Ms. Spinner's husband had quit his last place of employment, so there was no address at which to serve him. Destitute, Ms. Spinner could not sustain herself: her home went into foreclosure, she moved in with her mother, and—unable to find full-time employment—she applied for public assistance and Medicaid coverage.

In 2014, assuming she could not afford an attorney, Ms. Spinner's husband filed for divorce. However, a friend referred Ms. Spinner to legal services, and an attorney worked with her to gather evidence, including copies of licenses and certifications, prior resumes and old tax returns to support a case for spousal support. In court, Ms. Spinner's attorney informed the judge and her husband's attorney of the evidence of her husband's earnings, leading to an agreement on a monthly maintenance sum. Thanks to this support, Ms. Spinner is now divorced from her abusive ex-partner, lives independently, is no longer receiving public assistance and is enrolling in college in the next semester.

Ms. Spinner spoke passionately about the emotional and financial abuse she experienced and the life-changing legal assistance she received to achieve independence:

> I wake up in the morning free of the anxiety, stress and depression that I endured for so many years of my marriage. I am no longer controlled emotionally or financially, I do not live in fear of my husband's behavior and my children are no longer used as weapons against me.

> I no longer have to reside with family members, nor do I receive public assistance anymore. My health has improved and my blood pressure is no longer out of control. I am now in the position mentally and financially to go back to college and intend on enrolling in the next semester.
>
> Before going to Legal Aid, I had no idea what my rights were. Legal Aid provided me with that information and assisted me in obtaining what I was legally entitled to. With their knowledge and assistance, my spouse was no longer able to manipulate me and control my life.[141]

Susan McParland-Leisen,[141] a resident of Nassau County, testified that in 2009, when she was 48 years old, she was terminated from her position as an executive assistant after more than 16 years of steady employment. For nearly two years, she looked for work unsuccessfully. When her unemployment benefits ran out, she had no choice but to apply for public assistance; she received cash assistance of only $119 per month and food benefits. Subsequently, she was diagnosed with breast cancer and applied for Social Security Disability, but was denied coverage. She was physically and emotionally ravaged by chemotherapy treatments and multiple surgeries. Finally, with the help of legal services, she reapplied and was approved for Social Security Disability. She now has a steady income, is getting healthier and serves on the board of the local legal services provider that stabilized her life:

> I was finally approved for Social Security Disability. I broke down in tears when I read the letter. It was so important to have my own source of income, which gave me dignity and security. My first phone call was to [my legal services attorney] to thank her for all of her hard work and to express my elation and relief that I was finally approved. The second phone call was to Nassau County Social Services to tell them that I no longer needed public benefits.[142]

Harry Michel,[143] a resident of Queens, testified about how a legal services program successfully fought four consecutive eviction proceedings so that he and his son could keep the co-op apartment they lived in with Mr. Michel's brother, avoiding homelessness. After Mr. Michel's brother was tragically injured in an accident, he was unable to satisfy all the financial obligations associated with the co-op. As a result, Mr. Michel fell behind and was sued for nonpayment. With legal help, he was able to obtain an emergency grant to pay his arrears and the case was dismissed. The co-op then pursued three more eviction proceedings: accusing Mr. Michel of an illegal sublet, of violating the co-op bylaws and, once again, of nonpayment. All of these cases were successfully resolved, and Mr. Michel and his son have been able to remain in their home:

> Recently, I fell behind in my share of the rent because I had to use my limited resources to apply for a [taxi] license so I could become self-sufficient. The co-op served me with an eviction notice. For the fourth time, Legal Aid helped me by obtaining rental assistance to satisfy my rental arrears. I continue to maintain the apartment with the hope that [my brother] will someday be able to return home and we will occupy the apartment together again.[144]

Ady Escobar,[145] a resident of the Bronx, has a five-year-old son with a rare, degenerative condition; Jose suffers from frequent kidney stones, needs a gastric tube to give him water, makes unexpected movements he cannot control and can walk only with help. For two and a half years, he successfully attended a state-approved school that specializes in working with fragile children with multiple disabilities. When he was turning five, he needed to apply for an official school placement for elementary school. The Department of Education (DOE)

repeatedly recommended various public schools for children with disabilities, but when Ms. Escobar visited those schools she immediately saw they could not accommodate her son's needs. With help from a legal services provider, Ms. Escobar was able to gather and present the medical evidence she needed to convince the DOE to allow her son to stay at the school that had already proved would help him succeed:

> Legal Services helped me get what I need for my son. My lawyer fought hard for Jose and for me. She talked to me regularly to keep me posted about everything that was being done. When the case wasn't going well, she helped to give me the strength to keep working and get past the disappointment and never give up. My lawyer spoke very powerfully and clearly about my son's needs at the meetings [with the DOE] she attended for my son. She helped make sure that the law would work for my son's benefit. I felt that I was not alone in fighting for Jose's rights.[146]

Holding up a picture of Jose, Ms. Escobar told the hearing panel:

> Without legal services, my son would not have the opportunity to be in a school that recognizes his needs, as well as [his] wonderful potential.[147]

PART B

Recommendations for 2017

Based on the Chief Judge's hearing in September 2016, and our work over the past year, the Permanent Commission makes these recommendations for action:

Funding

- State funding for civil legal services, having reached the original goal set in 2010 of $100 million per annum, should continue to be provided at its present level to address the ongoing access-to-justice gap for low-income New Yorkers;

New Non-Monetary Initiatives

- The Permanent Commission will engage in a major strategic planning effort, with interested stakeholders, to create a coordinated civil legal services delivery system with the goal of providing effective assistance to 100% of those in need;
- Court simplification should be implemented to consolidate jurisdiction for family-related matters within a single court, overseen by one judge; the Chief Judge should forward this recommendation to her Task Force on the New York State Constitutional Convention for its consideration;
- Two court simplification pilot programs should be established—one in New York City and one upstate—to improve access to justice for families, with the goal of bringing together, before a single judge, in one court, family-related matters that at present are often bifurcated between Supreme Court and Family Court;

Continuing Non-Monetary Initiatives

- Law school and law student involvement in pro bono efforts at the 15 New York law schools should continue, as should the work of the Statewide Law School Access-to-Justice Council and the annual Law School Conference;
- Support for the integration of technology into client-delivery systems should be continued and expanded, including the two pilot online intake portals;
- A Statewide Technology Conference to promote collaboration and innovation to improve the delivery and efficiency of civil legal services should continue to be held on an annual basis;
- The court system should continue to develop and then implement an ODR pilot for consumer debt matters in order to evaluate the effectiveness of ODR in bridging the justice gap;
- The Permanent Commission should continue to work with the court system to encourage the use of limited-scope representation to help bridge the access-to-justice gap;
- The Judiciary should institutionalize and expand the Legal Hand storefront initiative, which introduced the concept of neighborhood storefronts staffed by trained community volunteers who provide free legal information, assistance and referrals in areas including housing, family and benefits, to help resolve issues and prevent them from escalating into legal actions;

- Expansion of the Court Navigator Program should be explored;
- Legislation should be introduced to create a new program for Court Advocates allowing specially trained non-lawyers to work, under the supervision of attorneys in non-profit organizations, providing legal assistance to unrepresented low-income individuals in court proceedings;
- Support should continue for the expansion of outreach and education to public librarians statewide, including the development of a webinar training program, to provide librarians in public libraries around the state with the information needed to assist library users with questions about legal problems and referrals to legal services providers; and
- Support should continue for the expansion of pro bono service by government attorneys by (1) promoting adoption of the New York State Bar Association Model Pro Bono Policy by state and federal agencies; (2) encouraging local and municipal governments to consider adoption of an appropriate pro bono policy; and (3) suggesting the New York court system consider appropriate steps to further promote and support the provision of pro bono services by its attorneys.

As described below, the combination of continued funding at the present level to bridge the access-to-justice gap and the implementation of the Permanent Commission's recommended non-monetary initiatives will enable New York State to continue its progress on working to meet the unprecedented need for civil legal assistance in matters affecting the essentials of life for low-income families and individuals living at or below 200% of the federal poverty level.

I. Continuing Civil Legal Services Funding in the Judiciary Budget Is Essential to Maintain the Progress on Bridging the Access-to-Justice Gap

Evidence before the Permanent Commission documents a vast, continuing need for civil legal services for low-income New Yorkers.[148] In our previous reports, and again here, we have demonstrated that the access-to-justice gap hurts low-income New Yorkers, adversely impacts the functioning of the courts and increases litigation and other costs for represented parties such as private businesses and local governments. We have presented independent analyses showing that funding civil legal services is a sound investment that brings federal benefits into the state, stimulates the state and local economies when low-income families and individuals spend these additional federal benefits on goods and services in their communities, and saves government expenditures on state and local public assistance and emergency shelter.[149]

This year, New York reached the funding goal set by the Permanent Commission in 2010 to secure $100 million in dedicated funding for the provision of free civil legal services for low-income New Yorkers confronting challenges involving the essentials of life. Additionally, the Permanent Commission's numerous non-monetary recommendations to help close the justice gap have been adopted, with new recommendations to be implemented in the coming year.

Although JCLS grantees handled 453,908 cases last year,[150] helping substantially more New Yorkers than the previous year, evidence before the Permanent Commission, including the testimony from hearing witnesses, substantiated the existence of a continuing unmet need and confirmed that although significant progress has been made, more must be done to close

the access-to-justice gap. Existing data suggests that the number of unrepresented litigants statewide still remains unacceptably high, with the percentages in particular case types, such as child support and consumer debt, near or above 90%.[151]

In order to meet these needs, the Permanent Commission recommends that state funding be continued and sustained at the level of $100 million for the 2017–2018 fiscal year, during which time the Permanent Commission will engage in a strategic planning process, as described in the next section of this report, to develop an action plan with the goal of designing a system with a well-integrated and coordinated supporting infrastructure that will permit all persons to have effective assistance to solve their civil legal problems. To assist in this effort, the Permanent Commission recommends that OCA continue to work with the New York City Human Resources Administration's Office of Civil Justice, IOLA and the courts to develop additional procedures and methodologies to enhance data collection and verification of the numbers of unrepresented litigants in all case types throughout the state.

II. New Initiatives for 2017

A. Strategic Planning

In the upcoming year, the Permanent Commission will spearhead a major strategic planning process to design a statewide civil legal services delivery system. This strategic planning process is intended to develop a plan to fulfill our state's policy that every New Yorker confronting a challenge involving the essentials of life (housing, family matters, health care, education and subsistence income) is entitled to effective legal assistance.[152]

Background
In July 2015, the Task Force to Expand Access to Civil Legal Services in New York became the New York State Permanent Commission on Access to Justice in recognition of its significant work over its six-year history advancing both monetary and non-monetary initiatives to help close the justice gap, and to ensure continued pursuit of its mandate to address the unmet need for civil legal services. Since her 2016 swearing-in as Chief Judge, Hon. Janet DiFiore has repeatedly expressed her support for the Permanent Commission's ongoing efforts to increase meaningful access to justice.

This year, New York State allocated $100 million to fund civil legal services, reaching the initial goal set in 2010, when the Task Force issued its first report. As the current report documents, the need for civil legal services remains urgent and the Permanent Commission believes that a strategic planning process will result in a blueprint for a coordinated and integrated civil legal services delivery system to aid all New Yorkers. Notably, New York State was recently awarded a $100,000 "Justice for All" grant—one of only seven states nationally to receive this funding—to support the Permanent Commission's statewide endeavor to achieve effective legal assistance for 100% of New Yorkers in need.[153]

Process and Objectives
The overarching goal of the strategic planning process will be the development of an integrated and coordinated infrastructure for a statewide civil legal services delivery system that affords effective assistance to all individuals in need. We will begin this process by convening our

partners in the civil justice community and other critical stakeholders, as detailed below, to assess all components of the current delivery system and inform development of an action plan for the integrated system. It is projected that this legal services delivery system will include:

- Enhanced coordination and cultural competence among the existing network of civil legal service providers, pro bono assistance, social services and non-lawyer programs;
- Access to information through technology, including online forms and informational websites;
- Services such as Self-Help Centers and Court Navigators;
- A clear path to allow litigants to access appropriate legal services and subsequent referrals to other social services as necessary;
- Simplified court and administrative rules and processes; and
- Alternative dispute resolution services.

To assist in developing the action plan, the Permanent Commission will look not only to its accomplishments to date, but also to the framework established in its 2014 report to ensure that all individuals living with incomes at or below 200% of the federal poverty level have access to effective legal assistance in matters involving the essentials of life. This framework identifies essential factors for assessing priorities and the appropriate level of assistance required to address an individual's specific legal needs. These factors include identifying relevant client characteristics, targeting "essentials of life" legal areas, assessing the type of legal matter involved and determining the range of legal assistance that could be effective and appropriate in that individual's specific circumstances.

The planning process will include a complete inventory of existing civil legal services in order to evaluate all essential components and select factors to guide their prioritization and implementation; an analysis of barriers to accessing services; and an outline of concrete, achievable steps that can be taken to enhance access to meaningful legal assistance. The planning process will identify both geographic and substantive areas in greatest need and prioritize the areas of focus.

Stakeholders

While the Permanent Commission will specify the goals of the strategic planning process, that process will also involve a wide range of stakeholders. The Permanent Commission will expand the stakeholder base to include a diverse group of individuals and entities from throughout the state with an interest in the civil legal services delivery system. This group will include civil legal services providers, bar associations, law school leadership, public and private funders, local government officials, community-based and business organizations, consumers of legal services from low-income communities, pro bono volunteers, language-access advocates, public librarians, and legal technologists.

The Permanent Commission has already made significant inroads in bringing together key stakeholders, developing and implementing targeted components of what could be the basis of a fully integrated delivery system and laying the groundwork for the creation of a self-sustaining system to provide meaningful access to appropriate levels of legal assistance. The grant will enable the Permanent Commission to advance this process with the goal of achieving legal assistance for 100% of those in need.

B. Access to Justice for Families Should Be Expanded Through Court Simplification[154]

The current court structure, comprising eleven separate trial courts, each with its own jurisdictional limitations, imposes significant barriers to access to justice, particularly for low-income and unrepresented litigants. Nowhere is this more evident than with family matters. Families already in distress and confronting the most difficult and emotional life challenges, face the added burden of having to litigate their related matters in multiple courts—most typically, Supreme Court for matrimonial matters and Family Court for child custody and visitation. The consequences for families are numerous—including the added inconvenience and expense, as well as the potential for conflicting determinations by judges who may be unfamiliar with aspects of the related cases handled by other judges.[155]

Multiple appearances at multiple courts can be extremely difficult for litigants. Litigants are forced to miss work, pay for travel expenses and engage in a judicial process that is inherently confusing—all the more so because there are two courts, each with different personnel, procedures, and judicial predilections, addressing what to the litigants is one problem: resolving their family crisis. Litigants with disabilities face virtually insurmountable challenges related to travel and access; some have been reported to abandon their litigation because of the challenges in pursuing their cases.

A simplified court structure in which family-related matters are heard in one court, with one judge overseeing all related family matters, would address these barriers and provide a more just and accessible alternative for families. At this year's hearing, Judge Douglas Hoffman, who presides over a new pilot, the ICDR Part, testified extensively about the benefits of combining Supreme Court and Family Court matters into one court:

> So what are the truly major benefits to litigants of this integrated part and how does it further the goals of access to justice? … [A]ll cases for this entire family are heard by one judge who is familiar with and equipped to address all the issues presented by the family.[156]

Court simplification would allow for assignment of counsel at the earliest possible stage, ensuring continuity of representation throughout the proceedings. In addition, court simplification would provide all families with access to the numerous services and resources that are currently only available in Family Court—including social work services, mental health and substance abuse counseling and treatment, DNA testing and mediation.

Various reform efforts to simplify the court structure have been proposed in the past—from sweeping structural change to initiatives for targeted reform. A report outlining these prior efforts is included as Appendix 12.[157] The negative impact of the complexity of the court structure on the resolution of family matters has been repeatedly identified in the court restructuring proposals. As the 1997 Task Force on the New York State Constitutional Convention observed, domestic matters provided the "most extreme example … of fragmentation" of all the trial courts.[158] Reform advocates have argued that the shuffling required between numerous courts has a negative impact on litigants and recommended that Family Court should be merged into the Supreme Court to provide "one forum for intra-family disputes."[159] This recommendation was echoed in 2007 by the Special Commission on the Future of the New York State Courts.[160]

Based on the foregoing, the Permanent Commission recommends that court simplification be implemented to consolidate jurisdiction for all family-related matters in one court. These matters, at a minimum, would include matrimonial proceedings and matters now adjudicated in Family Court, including custody, visitation, guardianship, paternity, child support, and neglect and abuse matters. Recognizing that such consolidation would likely require a constitutional amendment,[161] we recommend that the Chief Judge forward this report to her Task Force on the New York State Constitutional Convention for its consideration.

In the interim, we further recommend that two court parts be established on a pilot basis in order to test court simplification for family matters. These parts would have jurisdiction to hear matrimonial proceedings, as well as custody, visitation and support matters. One pilot should be established in a court outside New York City, with an Integrated Domestic Violence (IDV) Judge presiding over this separate pilot part. The second should be established in New York City, presided over by an Acting Supreme Court Justice. This recommendation has the support of the respective Deputy Chief Administrative Judges for the courts inside and outside New York City, as well as the Statewide Coordinating Judge for Family Violence Cases. Further, the Chief Administrative Judge has been consulted and his initial response has been positive.

III. Continuing Non-Monetary Initiatives

A. The 15 New York Law Schools and Their Students Should Continue Their Significant Work Contributing to the Effort to Expand Access to Justice for Low- and Moderate-Income New Yorkers

Since the first law school access-to-justice conference in 2012, initiatives to increase involvement by New York's law schools and their students in efforts to expand access to justice have had a profound impact. Progress has been made to integrate access-to-justice issues and cultural competency principles into curricular and clinical offerings to ensure law students are equipped to sensitively and effectively counsel clients from diverse communities. The pro bono requirement that all candidates for bar admission in New York perform 50 hours of pro bono legal work offers every student an experiential skills and professional values learning opportunity,[162] inspiring some students to become Pro Bono Scholars and dedicate their final law school semester to public service legal work. Over the years, ideas generated from the conferences' opening plenary panels and work group sessions have produced recommendations adopted by the Permanent Commission, in addition to sparking pro bono projects and collaborations with legal and non-legal community partners, with the net result of improving access to justice for our most vulnerable citizens.[163]

On May 17, 2016, the Permanent Commission convened the Fifth Annual Law School Conference at the New York University School of Law. This year's 170 attendees included deans, administrators, professors, law students and Pro Bono Scholars from all 15 New York law schools; legal services providers; and members of the bench, bar and Board of Law Examiners who were welcomed by Helaine M. Barnett, Chair of the Permanent Commission. Ms. Barnett introduced Chief Judge DiFiore and New York University School of Law Dean Trevor W. Morrison, both of whom applauded the significant role of New York's law schools and their students in narrowing the justice gap.

Fordham Law School Dean Matthew Diller, Chair of the Permanent Commission's Law School Involvement Working Group, presented the conference theme "Race, Poverty, Identity: Diversity Issues and Access to Civil Justice." He indicated that the high cost of a legal education, declining enrollments and a contracting market for legal jobs have generated increased urgency about what more New York's law schools can do to improve access to justice for New Yorkers who face a myriad of barriers due to race, poverty, gender identity and lack of diversity. With this charge, the plenary and work group panelists led the conference attendees in a series of discussions that produced recommendations for consideration by the Permanent Commission.

Drawing from the conference work groups' recommendations, the Permanent Commission adopted these key recommendations:

Law Schools Should Take a Three-Pronged Approach to Broadening Access to Legal Education by:

- Establishing more flexible admissions processes that consider and weigh a broader range of qualifying criteria beyond grade point averages and standardized admission test scores;
- Building relationships with their communities to foster pipelines to the legal profession for students who might not otherwise consider law school; and
- Taking greater steps to foster success of a diverse law student body.

Law Schools Should Develop at Least One Institutional Learning Outcome for Students Related to Access to Justice in Furtherance of ABA Standard 302[164] and Court of Appeals Rule 520.18:[165]

- To ensure students have the opportunity to meet that learning outcome, law schools should identify courses in the required curriculum where this learning outcome is or should be addressed;
- Once the courses have been identified, course-level learning outcomes related to access to justice should be specifically set out in the faculty member's syllabus; and
- Assessment tools should be developed and implemented that will evaluate whether students have achieved the outcome in furtherance of access to justice.

Law Schools Should Recognize the Value of Non-Lawyer Assistance in the Legal Services Delivery System, Given the Salutary Impact Non-Lawyers Can Have in Enabling Access to Justice, by Encouraging:

- Law schools to identify ways for law students to partner with non-attorneys—for example, social workers, financial counselors, housing advocates—and to foster partnerships between student-run projects and non-lawyer programs;
- Law schools to recruit students who have demonstrated an interest in law by working with community programs like Legal Hand; and
- Law schools to consider creating training programs for non-lawyers, such as a language access project similar to Project Totem at Albany Law School.[166]

The Law School Conference Should Continue to Be Convened Annually and Be Supported by the Statewide Law School Access-to-Justice Council as:

- The annual conference provides a unique opportunity for New York's law schools and the legal profession to explore collaborative efforts to expand access to justice;
- Feedback from surveys conducted subsequent to this year's conference indicated strong support for continuing the annual conference and its collegial work group format; and
- The Statewide Law School Access-to-Justice Council continues to serve as an incubator for developing salient conference themes, identifying impactful speakers and supporting ongoing projects generated from the conference work groups.

B. Effective Technology Initiatives that Can Increase Access to Justice and Further Leverage Resources for Civil Legal Assistance for Low-Income New Yorkers Should Be Supported

Since 2013, the Permanent Commission has focused on the potential role of technology in transforming the delivery of civil legal services to low-income New Yorkers.[167] The research established that civil legal service providers benefit greatly from the effective incorporation of technology into both their day-to-day internal operations and their client service delivery. We also determined that while providers were eager to embrace the latest technology, most of them lacked the knowledge, expertise and funding to do so.

As a result of those findings, we have sought to provide access to the expertise and resources necessary to educate providers as to the benefits and efficiencies of technology and help support the integration of technology into client service delivery. The Permanent Commission is pleased to report that the efforts undertaken so far—in only two years—already are having a significant effect.[168] The Pro Bono Law Firm IT Initiative[169] that we launched has harnessed the expertise of law firm IT staff to assess the technology needs of individual civil legal services providers and make recommendations for enhancing and improving technology. Five legal service providers participated in and have benefitted from the initial pilot. Discussions have been underway to determine how best to maximize lessons learned in order to effectively impact the wider legal services community.

We also encouraged the development of two pilot projects, one in New York City and one in western New York, which are now engaged in creating online portals for the screening and intake of low-income New Yorkers seeking legal assistance in consumer debt matters. This year, the development of both pilots, which will result in easy online access to legal assistance for the user and reduced intake time for providers, is well underway. Where technically feasible, the pilots should be made compatible with each other. The pilot in western New York is being led by Legal Assistance of Western New York, along with the Legal Aid Society of Mid-NY and Neighborhood Legal Services. The New York City pilot is being led by the City Bar Justice Center and includes providers CAMBA, MFY, Urban Justice Center and the Feerick Center. Stakeholders from both pilots met at the New York City Bar Association in June 2016 to exchange information, provide updates and share the results of individual studies. The New York City pilot is expected to launch by the end of the year and the western New York pilot in 2017.

On June 23, 2016, the Permanent Commission convened our second, day-long Statewide Technology Conference, sponsored in conjunction with NYSTech[170] at New York Law School.[171] The conference brought together over 160 executive directors and technology staff from civil legal services providers, law firms, law schools, legal funders, technology service providers and court administrators, to share innovative ideas that can improve the delivery of civil legal services and the efficiency of provider operations.[172]

While showcasing innovative technology and delving into a variety of topics—from developing technology programs, to training, to the best ways to gather and use data—there was particular emphasis on security, identified by attendees at the previous conference as being of particular importance. The keynote was delivered by Seth Andrew, then Senior Advisor, Executive Office of the President, Office of Science and Technology Policy. Mr. Andrew spoke about a variety of government portals developed to assist the public. In an effort to provide best practices for building portals, he advised attendees that online tools are most effective when they are simple and intuitive.

Based upon these initiatives, the Permanent Commission makes these key recommendations:

The Pro Bono Law Firm IT Initiative Should Be Continued and Expanded:

- The Pro Bono IT Initiative, having proven successful in assisting five legal services providers, should be continued and expanded to reach civil legal aid providers throughout the state by engaging law firm IT coordinators, recruiting pro bono IT professionals from additional law firms and engaging law school communities. A list of discrete projects, growing out of the assessments and other technology projects, should be developed for assignment to IT volunteers and overseen by an IT coordinator.

The Developers of the Two Pilot Online Intake Portals Should Continue to Consult with Each Other in Planning and Implementation, with the Goal of Making Their Systems, where Technically Feasible, Compatible with Each Other:

- The developers of the two pilots should continue to consult as they move forward so that, where technically feasible, the pilots can be compatible with each other. In addition, the pilots should be capable of expansion in order to address the full range of civil legal problems relating to the essentials of life that low-income people can face.

The Statewide Technology Conference Should Continue to Be Convened Annually:

- The two technology conferences organized by the Permanent Commission have proven extremely successful in bringing together civil legal services providers from across the state to meet with their colleagues and technology professionals to learn about the latest technological initiatives in order to maximize efficiency and increase the number of individuals served. The conference should continue to be convened on an annual basis to continue to foster collaboration and critical analysis of the uses and benefits of technology in the delivery of civil legal services.

Supporting Efforts to Identify Funding Streams for the Development and Expansion of Technology:

- The Permanent Commission should continue to support civil legal services providers in their efforts to identify additional funding sources and dedicated funding streams that will support technology expansion and innovation to improve the delivery of civil legal services.

C. Initiatives to Increase the Contributions that Non-Lawyers Can Make to Bridge the Access-to-Justice Gap Should Be Further Developed[173]

Recognizing the depth and breadth of the justice gap, the Permanent Commission has consistently explored new avenues for expanding the level and types of services available to meet the need for legal assistance. One such avenue is the role non-lawyers can play within the legal services delivery system. As a result, the Permanent Commission has helped develop two significant models of non-lawyer assistance, the Court Navigator Program and Legal Hand neighborhood storefront centers. The value of these models was recognized by the ABA Commission on the Future of Legal Services in its 2016 report, specifically citing the two as programs that exemplify how courts are experimenting with innovative methods to assist the public and meet the needs for civil legal services.[174]

These models and pilot projects begin to create a continuum of legal assistance, ranging from information and community-based assistance that aims to prevent legal issues from becoming more serious to court-based programs that assist low-income litigants in navigating the legal system should they find themselves in court without representation. For each of these models, the Permanent Commission offers recommendations for how non-lawyers can contribute to our efforts to close the justice gap in the upcoming year.

Legal Hand

As noted in our 2015 report, for people in need of assistance, a visible, accessible, walk-in neighborhood office where basic information and assistance can be obtained offers a tremendous benefit. Accordingly, the Permanent Commission supported the creation of Legal Hand, a neighborhood-based storefront center, staffed with trained community non-lawyer volunteers who provide free legal information, assistance and referrals to help low-income individuals with issues that affect their lives in areas such as housing, family, immigration, divorce and benefits and try to prevent problems from turning into legal actions.

The first three Legal Hand storefront centers were launched in New York City—in Crown Heights, Brownsville and South Jamaica—and were supported by a $1 million grant from an anonymous donor. The Legal Hand centers, which are visible from the street and welcoming, are open during regular business hours, with weekend and evening hours as well. Since their opening, there have been approximately 4,000 visitors who have received assistance for problems primarily involving housing, family and benefit issues.

There is an enormous prevention benefit to this initiative. Legal Hand neighborhood storefront centers provide a location where people can stop in to ask questions and get information and assistance, which could make the difference in resolving problems before they erupt into much more serious issues that ultimately may result in full-scale legal proceedings. To assist with a range of legal problems, Legal Hand volunteers receive training from legal service providers in areas involving the necessities of life and, in particular, areas where emergencies commonly arise. The overarching principle behind Legal Hand is the recognition that problems with legal components begin percolating long before any case is filed and individuals are required to go into court. By providing support and legal information early in the process, Legal Hand can help people resolve their disputes before they escalate and require court intervention.

This program unites the concepts of using non-lawyers to deliver assistance and legal information to those in need and making such assistance available at accessible walk-in neighborhood storefront offices. Providing a reliable, consistent and accurate source of

assistance and information on legal issues that affect the essentials of life will lead to more just outcomes, more crises averted and less litigation, as well as monetary savings for our state and local governments. Most importantly, these centers are contributing to the goal of equal access to justice.

The Permanent Commission recommends that the Legal Hand program be institutionalized and integrated into the court system's overall efforts to provide assistance in order to reduce the number of unrepresented litigants in the courts by preventing matters from turning into court actions.

The Court Navigator Program

The Court Navigator Program operates in courthouses to help unrepresented individuals with their civil legal proceedings.[175] Navigators do not provide substantive legal advice; rather, they assist litigants in understanding the proceedings and navigating the process. The Court Navigator Program builds on the successful model, developed by the NYS Courts Access to Justice Program, in which community volunteers are trained to assist unrepresented litigants who appear in New York City Housing Court for non-payment cases and in New York Civil Court for debt collection matters.

In 2015–2016, an evaluation of the Navigator Program operating in designated New York City housing and consumer credit court parts was conducted as part of a national study supported by the Public Welfare Foundation.[176] This evaluation was designed to assess the impact that trained and supervised non-lawyers had in helping people who came into court without representation, and issue findings regarding replication and sustainability of the Navigator model statewide and nationally. Based on data already collected by OCA, it is anticipated that the evaluation will show that the informational and emotional support provided by a non-lawyer, who is appropriately trained and supervised, results in better outcomes for otherwise unrepresented people and promotes the fair administration of justice.

Over the course of the past year, the Permanent Commission explored expansion of the Court Navigator Program into courts in other parts of the state. The Permanent Commission has had preliminary conversations with the Presiding Justice of the Third Department to explore possible expansion of the Court Navigator Program. The Presiding Justice has expressed interest if the program can be appropriately funded and staffed. The Permanent Commission recommends that discussions continue with the Presiding Justice of the Third Department and the Chief Administrative Judge to explore possible ways of expanding the Court Navigator Program. The Permanent Commission also continues to support the Court Navigator and NYS Courts Access to Justice Program in New York City.

Court Advocates

Building on the success and importance of the Navigator Program model, OCA drafted proposed legislation that would establish a new Court Advocate Program to assist litigants in housing and consumer cases. The proposed measure would encourage development of non-lawyer models of assistance in furtherance of the recommendations of the former Advisory Committee on Non-Lawyers and the Justice Gap.

Court Advocates would be specially trained non-lawyers who would work under the supervision of lawyers in non-profit organizations. These non-lawyer Court Advocates would be authorized to provide free limited legal assistance to individuals living at or below 200% of the poverty

level in specified matters. The program would be overseen by the Chief Administrative Judge with the advice and assistance of an advisory board which would be established as part of this initiative.

The Permanent Commission recommends that OCA continue its efforts to seek the enactment of legislation creating the proposed Court Advocate Program.

Language Access

The Permanent Commission recognizes that language barriers impair access to justice. When interpretation and translation services are provided to non-English speaking individuals facing legal challenges, access to justice is meaningful and outcomes improve.

A language access initiative underway at Albany Law School, profiled during a work group session at this year's Law School Conference, offers a model for interpretation and translation services provided by non-lawyers at a law school clinic. Project Totem, conceived and directed by an Albany Law student, recruits and trains multilingual undergraduate students to assist law student interns and supervising attorneys to facilitate communication with non-English speaking clients. Based on the positive experiences of the clients and salutary impact at the Albany Law School clinics, other New York law school clinics are working on tailoring this project for use in their clinical programs.

Since interpretation and translation services are essential to providing meaningful access to justice, the Permanent Commission plans to create its own working group on language access that would undertake a detailed review of language-access needs, study the efforts currently underway to meet those needs and consult with OCA's Advisory Committee on Language Access. In addition, the working group will also explore ways to replicate successful models like Project Totem.

D. Education and Outreach to Public Libraries Should Be Expanded

In 2015, the Permanent Commission conducted a survey of public librarians throughout the state to determine the extent of library services being offered to the public in need of legal information and assistance. The survey results demonstrated the invaluable role that libraries play in assisting the public to find answers to their legal questions and the overwhelming interest of librarians to expand their knowledge to better serve their patrons. The Permanent Commission also gathered information on outreach initiatives involving public libraries. Across the state, civil legal services providers and other service organizations are engaged, in varying degrees, with their local libraries, in order to connect the public with available services and resources. Based on these findings, the Permanent Commission has been working with the NYS Courts Access to Justice Program, led by the Hon. Fern Fisher, to expand efforts to educate public librarians about the courts, the legal process and the legal resources and services that are available to the public.

Given the large number of public libraries statewide and the limited resources for education and outreach, initial focus has been on developing partnerships and collaborations with librarians' associations and civic organizations, in order to enlist their support and seek their assistance in organizing a cadre of volunteers to implement a training program. To this end, outreach has been made to the New York Library Association, the League of Women Voters

and the court system's Public Access Law Librarians. The Public Access Law Librarians have been surveyed to assess the current level of interaction with public librarians and how relationships might be further developed.

In addition, the NYS Courts Access to Justice Program has updated the materials for its statewide public librarians' program, "Opening Courthouse Doors," to create "Librarian Portfolios" that will be the basis of the training program. Librarian Portfolios are available for every Judicial District outside New York City. The Permanent Commission, with the assistance of William H. Taft V, a partner in the law firm Debevoise & Plimpton, LLP, will engage law firm librarians in the project to assist with development of supplemental training materials as well as a train-the-trainer curriculum. To kick off the training, a webinar will be developed for public librarians to provide an overview of access-to-justice issues in New York and highlight the role of public librarians in assisting to bridge the justice gap. Further, a proposal will be submitted to the New York Library Association to present a workshop at its 2017 conference.

Based upon these efforts, the Permanent Commission recommends that:

- The Permanent Commission and the NYS Courts Access to Justice Program continue their collaboration to expand outreach and education to public librarians throughout the state, with the goal of creating a train-the-trainer program that will employ volunteers to connect with public librarians and educate them about the courts, the legal system and available resources;
- Partnerships should continue to be developed to engage public and private law librarians and civic organizations to participate in the initiative, as these partners will assist in developing a train-the-trainer program, publishing access-to-justice materials and creating supplemental materials that enhance the initiative; and
- Additional partnerships should be developed between legal services providers and the public libraries to explore collaborations that would further expand access to legal assistance and information.

E. Pro Bono Policies Should Be Adopted by Government Agencies to Promote Pro Bono Service by Public Sector Attorneys

The Permanent Commission recognizes the importance of pro bono service to help narrow the justice gap and has recommended a number of initiatives which have positively impacted the provision of pro bono service. These initiatives include the amendment of Rule 6.1 to increase the recommended annual number of pro bono hours from 20 to 50, and the mandatory reporting of pro bono hours as part of biennial attorney registration.

The Permanent Commission has examined the New York State Bar Association's Model Pro Bono Policy for state and federal government attorneys.[177] Adopted in June 2016, the model policy seeks to encourage and support participation by government attorneys in the provision of pro bono services by addressing the impediments faced by these attorneys when seeking to perform pro bono service. The model policy includes: a statement of need and declaration that every state and federal agency, under appropriate terms and conditions, should encourage and support pro bono service; a definition of pro bono service, consistent with the New York Rules of Professional Conduct; procedures that are compliant with state statutory provisions that govern the business and professional activities of state employees; and policies and procedures for, among other things, developing a referral process and use of

agency resources. The Permanent Commission has endorsed the State Bar's model policy, as it provides an exemplary model that can be adapted as appropriate by government agencies to encourage and support participation by their attorneys in pro bono service, and supports adoption of the model policy by state and federal agencies.

In addition, the Permanent Commission recommends that counties and municipalities throughout the state consider adopting the model pro bono policy, with necessary variations to address particular needs of local governments, or developing their own individual policies, specifically tailored to local circumstances. To this end, we encourage local governments to consider New York City Corporation Counsel's well-established Volunteer Legal Activities Program as a model.[178] This program was developed with the approval of New York City's Conflicts of Interest Board to ensure that Corporation Counsel attorneys would be in compliance with the applicable ethical rules and policies when undertaking pro bono service. It requires attorneys to choose from an approved list of pro bono activities that comply with the program's limitations, most specifically that attorneys cannot appear in any court or administrative proceeding or be involved in any work in which the city has an interest (when the work of city agencies or officials has some relationship to the subject matter).

Further, given the large numbers of attorneys employed by the New York State courts, we encourage the court system to take steps to further encourage and support those attorneys in the performance of pro bono service, consistent with the rules of the court system.

■■■

For the foregoing reasons, the Permanent Commission respectfully requests that the Chief Judge adopt the funding and non-monetary recommendations for action set forth in this report to continue to bridge the access-to-justice gap for low-income families and individuals in New York State.

ENDNOTES

1. Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York 16–17 (2010) [hereinafter 2010 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-TaskForceREPORT.pdf. *See also* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York: Appendices 5–8 (2010).
2. *See* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York: Appendix 1 (2010) [hereinafter 2010 Annual Report: Appendix 1], available at http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-Appendices.pdf (text of former Chief Judge Lippman's Law Day announcement of the creation of the Permanent Commission).
3. *See infra* Part A.III.
4. *See infra* Part A.I; *see also infra* Part B.I.
5. *See infra* Part A.II.
6. *See infra* Part A.I.
7. *See NYC Office of Civil Justice 2016 Annual Report,* NYC Human Resources Administration: Department of Social Services (June 2016) [hereinafter *Office of Civil Justice 2016 Report*], *available at* https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ%202016%20Annual%20Report%20FINAL_08_29_2016.pdf; *see also City Report Reveals Major Increase in the Number of Tenants in Housing Court Who Have Legal Representation,* City of N.Y. (Aug. 30, 2016), http://www1.nyc.gov/office-of-the-mayor/news/698-16/city-report-reveals-major-increase-the-number-tenants-housing-court-who-have-legal#/0.
8. N.Y. Assemb. Res. K1621, 2009–2010 Sess. (2009), *available at* https://www.nysenate.gov/legislation/resolutions/2009/k1621; N.Y. S. Res. J6368, 2009–2010 Sess. (2009), *available at* https://www.nysenate.gov/legislation/resolutions/2009/j6368 [hereinafter Joint Resolution]. The Joint Resolution was adopted by the State Senate on June 29, 2010 and the State Assembly on July 1, 2010.
9. *See* Appendix 7; *see also* Appendices 8 & 9.
10. The 2010, 2011, 2012, 2013, 2014 and 2015 Reports of the Chief Judge's Permanent Commission, the Appendices to each Report, the transcripts for each of the Chief Judge's hearings and other information are available from the Permanent Commission's website, http://www.nycourts.gov/accesstojusticecommission.
11. *The Chief Judge's Hearing on Civil Legal Services, Sept. 27, 2016 (opening remarks of Hon. Janet DiFiore, Chief Judge of the State of New York, at 5:23–6:3).*
12. Joint Resolution, *supra* note 8.
13. *See infra* Part B.II.A.
14. *See* Joel Stashenko, *State Courts Get Grant to Expand Access to Justice,* N.Y.L.J. (Nov. 18, 2016), http://www.newyorklawjournal.com/id=1202772708694/State-Courts-Get-Grant-To-Expand-Access-to-Justice?slreturn=20161027154751; Joint Resolution, *supra* note 8; N.Y. Assemb. Res. B2995, 2015–2016 Sess. (2015), *available at* http://legislation.nysenate.gov/pdf/bills/2015/B2995; N.Y. S. Res. C776, 2015–2016 Sess. (2015), *available at* http://legislation.nysenate.gov/pdf/bills/2015/C776 [hereinafter Concurrent Resolution]. The Concurrent Resolution was adopted by the State Senate and State Assembly on June 18, 2015. The full text of the Resolution reads:

    WHEREAS, This Legislative Body, by resolution adopted in 2010 (J.6368 and K.1621), recognized that the fair administration of justice requires that every person who must use the courts have access to adequate legal representation and, accordingly, invited the chief judge of the state to annually report to the governor and the legislature concerning the findings of his statewide hearings to assess the extent and nature of unmet civil legal service's needs, and the work of the Task Force to Expand Access to Civil Legal Services in New York; and

WHEREAS, These annual reports have consistently demonstrated that, for a significant percentage of those New Yorkers in need, effective legal assistance can have profound impact upon one's ability to realize or protect the essentials of life, which may include remaining in one's home, escaping from domestic violence, stabilizing a family, maintaining or obtaining subsistence income or other vital government services, securing adequate health care or pursuing an education; and

WHEREAS, These annual reports also have shown that, when impoverished New Yorkers must appear in the state's civil courts without legal representation, there is a greater public cost because these courts must divert more of their limited resources to assist them, and because their cases are much less likely to be settled early or otherwise disposed of and therefore they add to court calendar congestion; and

WHEREAS, Although, in the wake of this Legislative Body's 2010 resolution, the state has committed greater fiscal resources to the provision of civil legal services for the poor and the Task Force to Expand Access to Civil Legal Services in New York has secured greater service contributions by law schools, bar associations and the private bar, it remains the case today that a vast number of New Yorkers who live in poverty actually do not have access to effective legal assistance when necessary to realize or protect the essentials of life; and

WHEREAS, To change this dynamic, it should be the policy of the state of New York, that every New Yorker in need have effective legal assistance in matters involving the essentials of life (housing, family matters, access to healthcare, education and subsistence income); now, therefore, be it

RESOLVED (if the … concur), That it is the sense of this Legislative Body that the state must continue its efforts to achieve the ideal of equal access to civil justice for all.

15. *See infra* Part B.II.B.
16. It is anticipated that the Chief Administrative Judge will issue an administrative order formalizing the Administrative Board's resolution.
17. Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York 31 (2015) [hereinafter 2015 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Report-V5.pdf.
18. *See* Appendix 10; *see also infra* Part B.III.A.
19. *See* Appendix 11. See also Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York: Appendix 16, at 4–5 (2015) [hereinafter 2015 Annual Report: Appendix 16], *available at*} http://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Appendices.pdf
20. *See* Appendix 11; *see also* 2015 2015 Annual Report: Appendix 16, *supra note* 19, at 5–6.
21. *See infra* Part B.III.C.
22. *See infra* Part B.III.C.
23. *See infra* Part B.III.C.
24. *See infra* Part B.III.D.
25. *See* NYSBA President's Comm. on Access to Justice, Golden Gavel Model Pro Bono Policy (June 18, 2016) [hereinafter Model Pro Bono Policy]; *see also* Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York: Appendix 17 (2015), *available at* https://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Appendices.pdf (statement from the New York State Bar Association in Support of Pro Bono Service by Government Attorneys, dated Nov. 5, 2015).
26. *See* 2015 Annual Report, *supra* note 17, at 36.
27. *See infra* Part B.III.E.
28. *See infra* Part B.II.A.
29. *See* 2010 Annual Report: Appendix 2, *supra* note 2, at 3.
30. *See* Appendix 4.
31. *See id.*

32. *See* Appendix 2.

33. Based on information made available to the Permanent Commission by the Oversight Board to Distribute Judiciary Civil Legal Services Funds in New York. *See* Appendix 4 for a list of grantees and awards.

34. *See id.*; *see also* Appendix 4.

35. *See* Appendix 4; *see also* Appendix 2, at 6.

36. *See* Appendix 2, at 1.

37. *See id.* at 4.

38. *See id.* at 1.

The federal poverty level and 200% of that level for the 48 contiguous states and the District of Columbia are calculated as follows:

FAMILY SIZE	100%	200%
1	$11,880	$23,760
2	$16,020	$32,040
3	$20,160	$40,320
4	$24,300	$48,600

U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs, Dep't of Health & Hum. Serv. (Jan. 1, 2016), *available at* https://aspe.hhs.gov/poverty-guidelines.

39. Based on information made available to the Permanent Commission by OCA, Division of Professional and Court Services, Grants and Contracts Office [hereinafter OCA Information].

40. *See* OCA Information, *supra* note 39.

41. This slight decrease in the number of cases handled in the Third Department is attributable to a shift of resources to address an increased foreclosure caseload which requires significantly more attorney resources to resolve. *Id.*

42. The 2014–2015 statistics have been updated from last year's report based upon revised data submitted by civil legal services providers to OCA, Division of Professional and Court Services, Grants and Contracts Office.

43. *See* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York 2, 7 & 20 (2014) [hereinafter 2014 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/CLS%20TaskForce%20Report%202014.pdf. *See also* Appendix 9 (statement of Beth Goldman, President & Attorney-in-Charge, New York Legal Assistance Group).

44. See Hon. Lawrence K. Marks, 2016 Report of the Chief Administrator of the Courts Pursuant to Chapter 507 of the Laws of 2009 (2016).

45. *Id.*

46. *See Office of Civil Justice 2016 Report*, *supra* note 7.

47. *Id.*

48. *Id.* at 1.

49. *Id.*

50. *Id.*

51. *Id.* at 9.

52. *See* 2015 Annual Report, *supra* note 17.

53. The committee consisted of members of OCA's Office of Court Research and the Division of Professional and Court Services, which administers the JCLS contracts and collects annual data from JCLS grantees.

54. *See* 2015 Annual Report, *supra* note 17, at 9–10. *See also The Chief Judge's Hearing on Civil Legal Services, Fourth Dep't, Sept. 30, 2015 (statement of Ronald Younkins, Executive Director, New York State Office of Court Administration, at 3).*

55. *Poverty Status in the Past 12 Months: 2015 American Community Survey 1-Year Estimates*, United States Census Bureau: American FactFinder, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S1701&prodType=table (last visited Nov. 27, 2016) (U.S. Census Bureau's American Community Survey data by year from 2010 to 2015 on total population living below 50%, 125%, 150%, 185% and 200% of poverty level in New York State).

56. *See The Chief Judge's Hearing on Civil Legal Services, Fourth Dep't, Sept. 30, 2015 (statement of Ronald Younkins, Executive Director, New York State Office of Court Administration, at 1–3).*

57. Based on information made available to the Permanent Commission by OCA, Office of Court Research.

58. *The Chief Judge's Hearing on Civil Legal Services, Sept. 27, 2016 (statement of Neil Steinkamp, Managing Director, Dispute Advisory & Forensic Services, Stout Risius Ross, Inc.).*

59. *Id.* at 6–7.

60. *Id.* at 7.

61. *Id.*

62. *Id.*

63. The U.S. Department of Health and Human Services, Administration for Children & Families, Office of Child Support Enforcement reports that only 66% of Child Support payments are actually received. *Id.* at 8.

64. *See* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York 23 (2013) [hereinafter 2013 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-TaskForceReport_2013.pdf.

65. *See* 2014 Annual Report, *supra* note 43, at 21.

66. *The Chief Judge's Hearing on Civil Legal Services, Sept. 27, 2016 (statement of Neil Steinkamp, Managing Director, Dispute Advisory & Forensic Services, Stout Risius Ross, Inc., at 19–20).*

67. *Id.* at 13–16.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at Exhibit 5A.

72. *Id.* at Exhibit 5B.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 20.

78. *Id.* at 16–17.

79. *Id.* at 20.

80. *Id.*

81. *The Chief Judge's Hearing on Civil Legal Services, Sept. 27, 2016 (testimony of Neil Steinkamp, Managing Director, Dispute Advisory & Forensic Services, Stout Risius Ross, Inc., at 91:7–9).*

82. *The Chief Judge's Hearing on Civil Legal Services, Sept. 27, 2016 (statement of Neil Steinkamp, Managing Director, Dispute Advisory & Forensic Services, Stout Risius Ross, Inc., at 1–7).*

83. *Id.* at 20–23.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See supra* note 10.

88. *See* Concurrent Resolution, *supra* note 14.

89. *The Chief Judge's Hearing on Civil Legal Services, Fourth Dep't, Oct. 3, 2013 (testimony of Hon. Michael V. Coccoma, Deputy Chief Administrative Judge for Courts Outside New York City and Supreme Court Justice, Sixth Judicial District, at 87:10–98:11).*

90. In 2012, the Permanent Commission recommended a revision to Section 100.3 of the New York Code of Judicial Conduct to the Chief Judge, regarding a judge's duty of impartiality and diligence, to provide that a judge does not violate Section 100.3 by making reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard. Section 100.3 was subsequently amended in 2015. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 100.3(B)(12) (2015). *See also* 2013 Annual Report, *supra* note 64, at 8 n.19.

91. *See* 2013 Annual Report, *supra* note 64, at 36–37.

92. *See* 2015 Annual Report, *supra* note 16, at 32.

93. *Id.* at 33. It is anticipated that the Chief Administrative Judge will issue an administrative order formalizing the Administrative Board's resolution.

94. *See* 2015 Annual Report, *supra* note 17, at 5.

95. *Id. See also* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York 34–35 (2011) [hereinafter 2011 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-2011TaskForceREPORT_web.pdf; 2013 Annual Report, *supra* note 64, at 28.

96. *See* Appendix 11. *See also* 2014 Annual Report, *supra* note 43, at 23–28.

97. *See* 2014 Annual Report, *supra* note 43, at 23–28.

98. *Id.* at 27–28.

99. Administrative Order of the Chief Administrative Judge of the Courts AO/42/14 (Feb. 10, 2014) [hereinafter Administrative Order 42/14], *available at* https://www.nycourts.gov/courts/nyc/SSI/pdfs/AO-42-14.pdf (launching the Court Navigator Program).

100. *See infra* Part B.III.C.

101. *Id.*

102. *See* Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York 43–44 (2012) [hereinafter 2012 Annual Report], *available at* http://www.nycourts.gov/accesstojusticecommission/PDF/CLS-TaskForceREPORT_Nov-2012.pdf. The George H. Lowe Center for Justice was dedicated October 29, 2015. *See* Douglass Dowty, *Poor and need a civil lawyer? New center in downtown Syracuse is one-stop destination*, syracuse.com (Oct. 29, 2015), http://www.syracuse.com/news/index.ssf/2015/10/poor_and_need_a_lawyer_new_center_in_downtown_syracuse_is_one-stop_destination.html.

103. Joint Order of the Supreme Court, Appellate Division (Apr. 23, 2013), *available at* https://www.nycourts.gov/attorneys/probono/1200-6.1.pdf (amending Rule 6.1 of the New York Rules of Professional Conduct to provide that each lawyer should aspire to provide at least 50 hours of pro bono legal services each year to low-income persons).

104. Administrative Order of the Chief Administrative Judge of the Courts AO/135a/13 (Apr. 22, 2013), *available at* www.nycourts.gov/ATTORNEYS/probono/AO-135a-13.pdf (amending Section 118.1(e) of the Rules of the Chief Administrator to require reporting of pro bono services and financial contributions to organizations providing legal services to the poor and underserved). *See* 2014 Annual Report, *supra* note 43, at 1.

105. *See* Advisory Committee on Pro Bono Service by In-House Counsel in New York State, Report to the Chief Judge of the State of New York and the Presiding Justices of the Four Appellate Division Departments (2013), *available at* http://www.nycourts.gov/rules/comments/PDF/PC-Packet-IHC-ProBono.pdf. The amended rule is N.Y. Comp. Codes R. & Regs. tit. 22, § 522.8 (2015).

106. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 520.16 (2015).

107. The Pro Bono Scholars Program was announced by then-Chief Judge Jonathan Lippman in his 2014 State of the Judiciary address. *See Pro Bono Scholars Program—A Legal Education Initiative*, N.Y. State Unified Court Sys., http://www.courts.state.ny.us/attorneys/probonoscholars/index.shtml (last visited Nov. 21, 2016).

108. *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 118.1(g) (2015) (allowing an attorney meeting certain requirements to participate in an approved pro bono legal services program as an "attorney emeritus"). *See also Attorney Emeritus Program*, N.Y. State Unified Court Sys., https://www.nycourts.gov/attorneys/volunteer/emeritus (last visited Nov. 21, 2016).

109. A witness list for the Chief Judge's hearing is annexed as Appendix 6. A transcript of the oral testimony at the hearing is annexed as Appendix 7. Written statements from testifying witnesses at the Chief Judge's hearing are annexed as Appendix 8. Written statements submitted for the Chief Judge's hearing are annexed at Appendix 9.

110. *Id.* at 1.

111. *See* Appendix 6.

112. *See* Appendix 9.

113. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Hon. Jonathan Lippman, former Chief Judge of New York; Of Counsel, Latham & Watkins, LLP at 10:1–22).*

114. *Id.* at 14:9–12.

115. *Id.* at 23:25–24:8.

116. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Stephen M. Cutler, Esq., Vice Chairman, JP Morgan Chase & Co. at 33:16–34:3).*

117. *Id.* at 34:4–5.

118. *Id.* at 34:11–21.

119. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Edward P. Swyer, President, The Swyer Companies & Stuyvesant Plaza, Inc. at 66:10–19).*

120. *Id.* at 67:1–17.

121. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Suzanne B. Goldberg, Esq., Herbert and Doris Wechsler Clinical Professor of Law and Director, Center for Gender & Sexuality Law and Sexuality & Gender Law Clinic, Columbia Law School; Executive Vice President for University Life, Columbia University at 40:2–19).*

122. *Id.* at 45:8–17.

123. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of David A. Heiner, Esq., Vice President, Regulatory Affairs, Microsoft Corporation at 50:22–51:10).*

124. *Id.* at 55:16–56:1.

125. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Jordan Dressler, Coordinator, New York City Human Resources Administration, Office of Civil Justice at 98:16–21).*

126. *Id.* at 100:13–16.

127. *Id.* at 103:25–106:4.

128. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of John S. Kiernan, Esq., President, New York City Bar Association; Partner, Debevoise & Plimpton LLP at 110:1–17).*

129. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Hon. Douglas E. Hoffman, Presiding Judge, Integrated Custody and Domestic Relations Part, New York County Supreme Court, New York County Family Court at 124:13–126:6).*

130. *Id.* at 127:4–11.

131. *Id.* at 126:24–127:1.

132. *Id.* at 128:4–129:1.

133. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Hon. Douglas E. Hoffman, Presiding Judge, Integrated Custody and Domestic Relations Part, New York County Supreme Court, New York County Family Court at 7)*.

134. *Id.* at 7–8.

135. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Jorge ("Billy") Torres, client of Legal Assistance of Western New York, Inc.).*

136. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Jorge ("Billy") Torres, client of Legal Assistance of Western New York, Inc. at 5*).

137. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Glenn Rice, client of Legal Services of the Hudson Valley*).

138. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*testimony of Glenn Rice, client of Legal Services of the Hudson Valley at* 78:19–79:4).

139. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Donna Spinner, client of Legal Aid Society of Northeastern New York*).

140. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*testimony of Donna Spinner, client of Legal Aid Society of Northeastern New York at 86:21–87:13*).

141. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Susan McParland-Leisen, client of Nassau Suffolk Law Services Committee, Inc.*).

142. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*testimony of Susan McParland-Leisen, client of Nassau Suffolk Law Services Committee, Inc. at 139:24–140:7*).

143. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Harry Michel, client of The Nassau Suffolk Law Services Committee, Inc.*).

144. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Harry Michel, client of The Nassau Suffolk Law Services Committee, Inc. at 144:21–145:4).*

145. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016* (*statement of Ady Escobar, client of Legal Services NYC [Bronx Legal Services]*).

146. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, Sept. 27, 2016 (testimony of Ady Escobar, client of Legal Services NYC [Bronx Legal Services] at 149:5–15).*

147. *Id.* at 149:16–20.

148. *See supra* Parts A.I. & IV.

In addition, despite modest economic recovery over the last five years, poverty has increased Statewide. According to the American Census Bureau, an estimated 6.12 million New Yorkers were living below 200% of the poverty level in 2015 compared to 6.0 million New Yorkers in 2010. *Poverty Status in the Past 12 Months: 2010 American Community Survey 1-Year Estimates*, United States Census Bureau: American FactFinder, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_S1701&prodType=table (last visited Nov. 28, 2016).

Other poverty indicators show the high percentage of poverty in New York. Lack of food security is a significant indicator of poverty, and the U.S. Department of Agriculture reports that as of 2015, the three-year average percentage of New York residents living in "food insecure" households stands at 14.1%. *See State Fact Sheets: New York*, U.S. Dep't of Agric., http://data.ers.usda.gov/reports.aspx?StateFIPS=36&StateName=New%20York&ID=10633#P7b285e748d914a68b13669c455f9874a_2_39iT0 (last updated Nov. 4, 2016) [hereinafter *USDA New York Fact Sheets*]. In New York City, an estimated 16.5% of the population is "food insecure" or lacks "consistent access . . . to enough nutritionally adequate food for an active, healthy life for all members of a household." Office of the Director of Food Policy, New York City Food Policy: 2014 Food Metrics Report 7 (n.d.), *available at* http://www1.nyc.gov/assets/foodpolicy/downloads/pdf/2015-food-metrics-report.pdf. Throughout the State, the percentage of people living in "very low food secure" households—defined to include households with disrupted eating patterns and reduced food intake owing to lack of monetary and other resources for food—is now 4.9%. *See USDA New York Fact Sheets*; s*ee also Measurement*, U.S. Dep't of Agric., http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/measurement.aspx (last updated Oct. 4, 2016).

Another poverty indicator is the size and continued growth of the homeless population in New York City, which currently stands at nearly 60,000 people in the shelter system, including approximately 23,600 children, more than the population of 58,600 observed in early 2015. *See Official New York City Homeless Shelter Count Nears 60,000*, Wall St. J. (Sept. 26, 2016), http://www.wsj.com/articles/official-new-york-city-homeless-shelter-count-hits-60-000-1475167512; *see also* J. David Goodman & Nikita Stewart, *Despite Vow, Mayor de Blasio Struggles to Curb Homelessness,* N.Y. Times (Oct. 26, 2015), http://www.nytimes.com/2015/10/27/nyregion/despite-vow-mayor-de-blasio-struggles-to-stop-surge-in-homelessness.html.

149. *See* 2015 Annual Report, *supra* note 17, at 25–26; 2014 Annual Report, *supra* note 43, at 21–23; 2013 Annual Report, *supra* note 64, at 23–27; 2012 Annual Report, *supra* note 102, at 18–25; 2011 Annual Report, *supra* note 101, at 23–29; 2010 Annual Report, *supra* note 1, at 20–26.

150. *See* OCA Information, *supra* note 39.

151. *See* 2015 Annual Report, *supra* note 17, at 24.

152. *See* Concurrent Resolution, *supra* note 14; Joint Resolution, *supra* note 8.

153. *Justice for All: Grants Announcement*, Pub. Welfare Found. & Nat'l Ctr. for State Courts (Nov. 2016), *available at* http://www.publicwelfare.org/wp-content/uploads/2016/11/JFA-Announcement-Awards.pdf.

154. The recommendations presented here were developed by the Working Group on Court Simplification for Families which included, in addition to Permanent Commission members and counsel: Hon. Michael Coccoma, Deputy Chief Administrative Judge for the Courts Outside New York City; Hon. Jeanette Ruiz, Administrative Judge, New York City Family Court; Amy Schwartz, Empire Justice Center; Nancy Goldhill, Legal Services NYC; Laura Russell, The Legal Aid Society; and Rudolph Estrada, The Legal Aid Society.

155. For a detailed discussion of the burdens imposed by the current court structure on families, *see A Court System for the Future: The Promise of Court Restructuring in New York State*, Special Commission on the Future N.Y. State Courts 37–44 (2007), *available at* https://www.nycourts.gov/reports/courtsys-4future_2007.pdf.

156. *The Chief Judge's Hearing on Civil Legal Services, Court of Appeals, September 27, 2016 (testimony of Hon. Douglas Hoffman, Presiding Judge, Integrated Custody and Domestic Relations Part, New York County Supreme Court, New York County Family Court, at 126:18–23).*

157. See Appendix 12.

158. *See id.* at 2.

159. *Id.* at 2 & 2 nn.7–8.

160. *See id.* at 8.

161. *See id.* at 3.

162. In 2015, 8,868 individuals were admitted to the New York bar and either completed 50 hours or more of qualifying pro bono legal assistance or, in the case of the 107 pro bono scholars, a semester of field work. *See* Court of Appeals of the State of New York, 2015 Annual Report of the Clerk of the Court 11, app. 10 (2015), *available at* http://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2015.pdf.

163. Recommendations initially discussed and/or proposed by stakeholders at prior annual Law School Conferences that have since been successfully implemented, include, for example (a) development of a Handbook of Best Practices for Supervising Law Student Pro Bono Work; (b) adoption of New York Court of Appeals Rule 520.16 in 2013 mandating 50 hours of pro bono service before seeking admission to the New York bar; (c) formation of the Statewide Law School Access to Justice Council to create a forum for stakeholders to discuss and address access-to-justice activities; (d) pilot of a Statewide Consortium Website for Student Pro Bono Opportunities; (e) launch of the Pro Bono Scholars Program allowing law students to sit for the bar exam early and spend the last semester of law school in a supervised, full-time pro bono placement; (f) modification of law school curricula to increase awareness of access-to-justice issues and to better prepare law students for public service; and (g) establishment of the Committee on Non-Lawyers and the Justice Gap to find opportunities for non-lawyers to expand access to justice in specific areas. *See generally* Permanent Commission on Access to Justice, Report to the Chief Judge of the State of New York: Appendix 15 (2015) [hereinafter 2015 Annual Report: Appendix 15], *available at* https://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Appendices.pdf; Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York: Appendix 15 (2014) [hereinafter 2014 Annual Report: Appendix 15], *available at* https://www.nycourts.gov/accesstojusticecommission/PDF/2014%20CLS%20Report_Appendices_Vol%202.pdf; Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York: Appendix 15 (2013) [hereinafter 2013 Annual Report: Appendix 15], *available at* https://www.nycourts.gov/accesstojusticecommission/PDF/2013CLS-Appendices.pdf; Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York: Appendix 15 (2012) [hereinafter 2012 Annual Report: Appendix 15], *available at* https://www.nycourts.gov/accesstojusticecommission/PDF/CLS2012-APPENDICES.pdf.

164. ABA Standard 302 provides, in relevant part, that:

> [a] law school shall establish learning outcomes that shall, at a minimum, include competency in the following:
>
> a. [k]nowledge and understanding of the substantive and procedural law;
>
> b. [l]egal analysis and reasoning, legal research, problem solving, and written and oral communication in the legal context;
>
> c. [e]xercise of proper professional and ethical responsibilities to clients and the legal system; and
>
> d. [o]ther professional skills needed for competent and ethical participation as a member of the legal profession.

ABA Standards and Rules of Procedure for Approval of Law Schools, Standard 302 (2016–2017), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf.

165. New York Court of Appeals Rule 520.18, governing the skills competency requirement for admission, states that "[e]very applicant for admission to practice . . . shall demonstrate that the applicant possesses the skills and values necessary to provide effective, ethical and responsible legal services in this State. An applicant may satisfy this requirement by submitting proof of compliance with one of [five pathways]." N.Y. Court of Appeals R. § 520.18, *available at* http://www.nycourts.gov/ctapps/520rules10.htm#B18.

166. *See UAlbany Students Help Immigrants Achieve Legal Status*, U. Albany (Apr. 20, 2016), http://www.albany.edu/news/69163.php.

167. *See* Appendix 11.

168. *Id.*

169. *See* 2015 Annual Report, *supra* note 16, at 29; 2014 Annual Report, *supra* note 43, at 27. This initiative was led by Michael Donnelly of Simpson Thacher & Bartlett LLP and included the involvement of Permanent Commission member Deborah Wright, along with Jeff Franchetti of Cravath, Swaine & Moore LLP; Peter Kaomea of Sullivan & Cromwell LLP; Peter Lesser of Skadden, Arps, Slate Meagher & Flom LLP; Curt Meltzer of Chadbourne & Parke LLP; Tara McGloin of Proskauer Rose LLP; John Roman of Nixon Peabody LLP; and Sean Sullivan of Wachtell, Lipton, Rosen & Katz. Others involved in the initiative included Ed Braunstein of The Legal Aid Society; John Greiner of Just-Tech; and Christine Fecko of IOLA.

170. NYSTech is a voluntary collaboration of legal services providers from across New York that convenes technology leaders regularly for information sharing and training.

171. *See* Appendix 11.

172. Detailed summaries and findings from the Conference sessions are set forth in full in the Technology Working Group's Conference Report, annexed hereto as Exhibit A to Appendix 11.

173. The recommendations presented here were developed by the Working Group on Non-Lawyer Involvement, which was chaired by Permanent Commission member, Anne Erickson, and included, in addition to Permanent Commission members and counsel: Fern Schair, Feerick Center for Social Justice, Fordham University School of Law; and Roger Maldonado, Balber Pickard Maldonado & Van Der Tuin, PC.

174. *See* American Bar Association Commission on the Future of Legal Services, Report on the Future of Legal Services in the United States 21 (2016), *available at* http://abafuturesreport.com/2016-fls-report-web.pdf.

175. In 2014, an Administrative Order of the Chief Administrative Judge of the Courts was issued establishing the Court Navigator Program "for the purpose of providing essential non-legal services, without cost, to unrepresented litigants by qualified non-lawyers." *See* Administrative Order 42/14, *supra* note 98. Under the Order, the Navigators "shall be assigned by, and act under the supervision of, not-for-profit services providers approved for this purpose by the Chief Administrator." *Id*.

176. The Public Welfare Foundation engaged researchers from the American Bar Foundation and National Center for State Courts to study national models that use non-lawyers, including the three pilots operating in the New York City Housing and Consumer Credit Courts, and is expected to release the findings later this year.

177. *See* Model Pro Bono Policy, *supra* note 25.

178. Memorandum from Michael A. Cardozo, Corporation Counsel, on Pro Bono Legal Services and Bar Associations Program to Corporation Counsel Attorneys (Sept. 25, 2002) (on file with the Permanent Commission); Memorandum from Michael A. Cardozo, Corporation Counsel, on Pro Bono Opportunities for the Law Department to Corporation Counsel Attorneys (Nov. 8, 2002) (on file with the Permanent Commission).

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