

# New York State Bar Association

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Testimony  
of  
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Joint Legislative Public Hearing  
on the  
Proposed 2020-21 Public Protection Budget

February 12, 2020

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

Access to justice will be the primary focus of my remarks, and it is the centerpiece of the Association's legislative priorities. We submit that legitimate budgetary concerns should not reduce access to justice for the poor, the weak and the vulnerable. The ability of an impoverished or unpopular individual to invoke the power of the world's most prestigious legal system to protect his or her rights is – and should continue to be – a source of great pride and great strength for all New Yorkers. We urge you to remain committed to protecting access to justice and to ensuring the public's trust and confidence in our justice system.

### **Judiciary Budget Request**

The State Judiciary's budget requests **\$2.36 billion, an increase of \$45.9 million (2.0%)** over current year funds.

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

The New York State Bar Association supports the Judiciary's budget request for 2020-21.

### **Funding Civil Legal Services**

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

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

In an era when some federal policymakers continue efforts to defund the Legal Services Corporation, the need for responsible action in New York State is critically important. New York must provide a steady source of funding targeted to ensuring legal representation to protect the “essentials of life” – housing, preventing or escaping from domestic violence, access to health care.

The New York State Bar Association strongly supports the inclusion of \$85 million for civil legal services within the Judiciary’s Budget request, the same level requested last year and included in the current Public Protection Budget.

### **Support for IOLA**

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

For the past several years the Judiciary Budget has included a \$15-million allocation for the IOLA Fund to help supplement revenues, which have been low due to fluctuating interest rates. We support the inclusion of this item in this year’s budget and appreciate the Legislature’s recognition of the importance of this funding in previous years. We strongly urge you to continue your support for this appropriation.

Accordingly, we recommend that the Legislature:

- Approve the Judiciary Budget, to ensure access to justice and proper operation of the courts;
- Approve the Judiciary’s request of \$85 million for civil legal services; and,
- Approve the Judiciary’s request for \$15 million to support the IOLA Fund.

## **PROPOSED EXECUTIVE BUDGET**

### **Support for Court Reorganization/Restructuring**

We are pleased that the Governor has submitted to the Legislature legislation to amend the Constitution for the purpose of court reorganization or restructuring. This legislation is substantially the same as the proposal recommended by the Judiciary.

New York's court system has been called "the most archaic and bizarrely convoluted" in the United States. It is confusing for litigants and lawyers alike. New York has 11 different trial courts, making this costly for taxpayers and making case management difficult. Each of the 11 trial courts — more than any other state — has its own filing system and administrative staff.

The New York State Bar Association wholeheartedly supports Chief Judge Janet DiFiore's plan to eliminate this complex maze of overlapping trial courts and replacing it with a simplified structure, along with other needed reforms.

For decades, the State Bar, along with leaders of the Judiciary, other bar associations, and good government groups, has pressed for the need to reorganize and modernize New York's court system.

Unfortunately, the previous calls for court reorganization have not gained traction.

Now, however, Chief Judge DiFiore is breaking the logjam with a court modernization plan that will streamline and simplify the system. It will also:

- Enable faster and more efficient resolution of cases and fewer court appearances, saving money for litigants;
- Allow OCA to make best use of limited resources; and,
- Diversify the courts, especially outside of New York City.

With respect to diversity, currently in the third and fourth departments, which serve most of upstate, the Supreme Court bench is overwhelmingly white and male.

Former Chief Judge Judith Kaye observed that a diverse bench gives the public a belief that they are included in the justice system. And, indeed, there is value in symbolic representation — seeing someone who looks like you on the bench.

New York's demographics are changing. If the judiciary doesn't change apace, we risk undermining the public's confidence in our justice system and respect for the rule of law. By combining County, Family, Court of Claims, Housing and Surrogate's courts within Supreme Court, the Chief Judge's plan holds the potential of increasing the diversity of the Supreme Court bench outside New York City.

For example, my home county, Albany County, under the proposed plan and following the last election, as of January 1, we would have had 10 new diverse Supreme Court Justices — four Family Court Judges (three women and one Hispanic male), two County Court Judges (an African-American male and a woman), three Court of Claims Judges (all women), and the Surrogate's Court Judge (a woman).

Litigants will see the most benefit from the Chief Judge’s plan, because cases will be resolved faster and require fewer court appearances. That translates into a host of savings — on everything from child-care to time off from work to travel costs — all of which arise when one must be in court.

Moreover, reorganization of the courts would have a significant impact on everyday New Yorkers. Consider, for example, a domestic-abuse survivor who decides to leave her relationship. Today, she might find herself in three different courts to secure justice:

- Family Court for custody and protection of her children;
- Supreme Court to initiate divorce proceedings; and,
- Criminal Court if she wants her abuser to be prosecuted on charges.

The burdens placed on real people by our current system are intolerable. Having countless confusing hearings and proceedings is not only expensive, it also causes anxiety, pain, and despair for vulnerable persons. This is no way for a humane, modern justice system to operate.

The current system is particularly problematic in the high-volume courts — Family Court, Criminal Court, and the Housing Court of Civil Court — which primarily serve low-income litigants of color and are often overcrowded and underfunded.

In her 2019 State of our Judiciary Address, Chief Judge DiFiore’s noted how the State Bar’s historic court reform position parallels her own proposals.

We believe that:

- The Chief Judge and OCA should be able to establish divisions within those courts as necessary and direct court resources where they are needed;
- All judges impacted by court reorganization should continue to be elected or appointed as they are under existing law;
- The population cap that limits the number of Supreme Court Justices per judicial district to one per 50,000 should be abolished; and,
- The Office of Court Administration should have the ability to create a Fifth Judicial Department, which is currently barred by the state constitution.
  - In 2018, the Second Department in Brooklyn handled 8305 appeals, compared with the 5949 in the other three departments combined.
  - A Fifth Department would help relieve this caseload and remove yet another barrier to New Yorkers’ access to justice.

NYSBA strongly supports reorganizing and consolidating trial courts into the Supreme Court. Accordingly, we urge the Legislature to support this bold and much-needed reorganization plan and pass the proposed constitutional amendment this year.

## **Legal Representation for Immigrants**

In June 2019, NYSBA's House of Delegates called on New York to become the first state in the nation to enact a right to counsel for immigrants facing deportation. This topic is another of a long list of issues on which the Association exhibits its tradition of advocating for fair treatment and access to justice for all.

The June 2019 report, developed by NYSBA's Committee on Immigration Representation ("Committee") and approved by the House of Delegates, found that:

- The backlog in New York's immigration courts have more than doubled in recent years, from 47,000 to 110,000 in the first quarter of 2019. This is due to increasingly aggressive enforcement policies by the federal government that specifically targeted New Yorkers, especially downstate. (Note: More recent information from TRAC Immigration, which is based at Syracuse University, found approximately 123,000 cases pending in Immigration courts in 2019.)
- Increases in arrest numbers of immigrants in the lower 14 counties of New York have far outpaced national averages, with a 35 percent jump in arrests from 2017 to 2018, compared to 11 percent nationally, and a 29 percent increase in deportations, more than double the 13 percent national increase.
- Having a lawyer significantly increases the chances that individuals will be released from immigration custody, appear for their court hearings, and obtain relief against deportation. In fact, the New York Immigrant Family Unity Project, which provides public defender-type services to immigrants appearing in New York City's detained court, has led to an increase from four percent to 48 percent in case success rates.

Experience has shown that people in immigration removal proceedings are much more likely to be successful in asserting their rights when represented by a lawyer. The success rate for such litigants is significant. Thus, in the face of increased and indiscriminate immigration enforcement by the federal government, and given the complexities of our current immigration system, guaranteeing access to counsel is the only way to ensure that all New Yorkers have access to justice, equal protection, and due process under the law.

We strongly recommend that the Legislature should act on this important current issue by providing funding for legal representation for those who find themselves in the Immigration Court.

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

The State Bar Association has long been involved in addressing issues affecting families, children and the law. The Committees and Sections of the Association have prepared numerous reports and proposals on these important issues, which have been adopted as policy of the Association. Two key reports recently approved by the Association relate to i) parental representation, and ii) increasing assigned counsel rates including representation by attorneys for the child. These are important issues on which we ask your consideration.

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

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

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

This topic is critically important to ensuring that the indigent and vulnerable have adequate access to justice. Accordingly, the Association respectfully requests that an increase in funding for assigned counsel and attorneys for the child be included in the 2020-21 budget.

## Reform of the Parole System

Despite New York's recent reforms in the area of criminal justice, serious deficiencies persist at the "back end" of the system -- the parole process. Accordingly, NYSBA recommends reforms that will result in better decision-making as to whom should be granted parole and when parole should be revoked, reduce the costs associated with the parole process by reducing the number of parolees who are needlessly re-incarcerated, and increase public safety by improving the quality of decision-making and enabling parole officers to devote more resources and focus to the parolees most in need of supervision.

### Technical Violations of Parole

A person released from a New York State prison to parole supervision is required to comply with a number of conditions during the period of that supervision. The conditions typically include attending all required office reports, paying all required fees and surcharges, refraining from using or possessing illegal drugs, complying with the instructions of the parole officer, and refraining from any new criminal conduct.

The failure to comply with *any* condition of parole can lead to the issuance of a warrant for the alleged violator's arrest and, upon execution of the warrant, the immediate re-incarceration pending a parole violation hearing.

There is little or no evidence that the current revocation process for technical parole violators enhances public safety or reduces recidivism. The practice of arresting and holding large numbers of alleged "technical violators" negatively impacts county jails. It is estimated that in 2018, an average of 1,740 people were incarcerated each day in local jails in New York State on technical parole violations. The financial cost to the State of incarcerating all these technical parole violators has been estimated to be approximately \$359 million annually. Further, localities spend nearly \$300 million incarcerating these individuals awaiting disposition of charges.

The human cost is also enormous. Even a brief period of incarceration on a technical violation can result in a person losing his or her job or housing and can interrupt ongoing community-based treatment services and educational opportunities.

In November 2019, NYSBA's House of Delegates approved a report by our Task Force on the Parole System, which made the following recommendation:

- Eliminate mandatory pre-adjudication detention for technical parole violators;
- Re-incarceration should not be imposed until reasonable alternatives to a prison sanction have been exhausted;
- Limit re-incarceration for technical violations to 30 days;
- Credit "time served" to any post-adjudication re-incarceration imposed;
- Reinvest savings in community-based health assessments, treatment and housing;
- Establish a System of "Earned Time Credits" as incentive to good behavior while on parole; and,
- Increase the number of Parole Commissioners.



A copy of the report may be viewed at the following link: <https://www.nysba.org/parole/>

We recommend that the 2020-21 budget include provisions following the recommendations of our report, in order to reduce unnecessary costs for New York State and local governments, and to enhance parolees' reintegration into society.

### **Adult-use Recreational Marijuana**

At its January 31, 2020 meeting, our House of Delegates approved a report by our Committee on Cannabis Law, supporting the legalization of adult recreational marijuana use in New York State.

The report - which may be viewed at the following link <http://www.nysba.org/CannabisandtheLaw> - recommends that legislation on this topic cover the following issues:

- USDA- mandated cannabis testing;
- A comprehensive state Office of Cannabis Management;
- Provisions for local municipality "opt-out";
- Social equity provisions;
- Taxes;
- Advertising and marketing guidelines; and,
- State environmental protections.

There are several critical issues that New York State must consider on this topic. For the purposes of this hearing, I highlight the report's provisions on social equity and the analysis of taxes in states that have legalized adult-use recreational marijuana.

#### Social Equity

Although the report recommends extensive study on provisions to enhance social equity for communities that have previously been disproportionately harmed by marijuana prohibition, specific provisions that we recommend for consideration in New York include:

- Develop incubator programs to provide direct support to small-scale operators who are marijuana license holders in the form of legal counseling services, education, small business coaching and funding in the form of grants;
- Require licensees to use good-faith efforts in hiring employees who meet the equity eligibility criteria, and certify annually that 25% of their employees meet the criteria or that they have use a good faith effort to achieve that 25% threshold;
- Dedicate a percentage of local cannabis tax and non-licensing fee revenue to support a Community Reinvestment Fund to, at a minimum, provide reentry services, job

training, and criminal-record-change assistance to residents of disproportionately impacted areas;

- Ban local or state government from discriminating against licensing applicants on the basis of their substance-use treatment history, or convictions unrelated to honesty, and background checks can only be used to check for those convictions;
- Create a basic framework for permitting cannabis-consumption lounges, while leaving zoning to local governments. Local governments are authorized to regulate consumption lounges where cannabis may be used on site;
- Authorizing local government to facilitate resentencing and expungement to restore the civil rights of prior cannabis arrestees and to fund these efforts through cannabis taxes. This can include automation, fee waivers, and funding legal fairs and lawyers to publicize and execute.

### Taxes

The report covers the probable correlation between tax rate and revenue. It appears a pattern has emerged, with the report indicating that “a lower rate of tax returns higher per capita tax revenues and fosters a robust and thriving market while simultaneously discouraging growth of the gray and illicit market.”

In examining the experience in California, the report stated:

Cumulatively, the tax rate in California can be as high as 45% which has caused significant numbers of consumers to turn to the illicit market in order to avoid substantially-increased prices associated with legal purchases. The marijuana tax revenue shortfall of \$101 million in California has prompted the legislature to reduce the retail excise tax from 15% to 11% and suspend all cultivation taxes until 2022. The legislature’s rationale is that states with lower tax rates have seen continued tax revenue growth (e.g., Colorado over 7% tax revenue growth from 2017 to 2018). Democratic Assemblyman Rob Bonta, sponsor of California’s bill to reduce cannabis taxes, stated, “Lowering a tax rate to bring in more money might sound counterintuitive, but as they found in Washington state, if you drop the tax, more people will buy more legally so revenue will go up.”

As the Legislature considers this topic during the budget debate, we hope that this report will serve as a resource on several important issues.

## **Indigent Criminal Defense**

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

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

The Commission's 2006 report concluded that there is "a crisis in the delivery of defense services to the indigent throughout New York State and that the right to the effective assistance of counsel, guaranteed by both the federal and state constitutions, is not being provided to a large portion of those who are entitled to it." This finding was both alarming and disheartening. Since then, there have been developments in New York State to address this issue. In 2010, state leaders created the Office of Indigent Legal Services, an important step that the State Bar Association strongly supported. In 2014, the state entered into a settlement in the case of *Hurrell-Harring v. State of New York*, agreeing to provide sufficient additional funds to assure adequate legal representation for indigent criminal defendants in five of New York's counties outside of the City of New York.

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

This is a critical step to improve indigent criminal defense services in New York State.

The Association continues to support a statewide, state-funded system with an independent entity to oversee quality and delivery of public defense services, as part of the 2020-21 budget, to ensure that indigent defendants receive effective representation in New York State's criminal justice system.

## **Adequate Funding for the Commission on Judicial Conduct**

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

As a result, the Commission's current staffing level is at 42 staff members, down from 50 staff members in recent years.

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

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

The Commission has requested an additional for \$330,000 for additional staff. The total budget request is for \$6,356,000. The New York State Bar Association supports that request.

### **Conclusion**

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

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

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

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