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Advocating for a Civil Right to Counsel in New York State

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ADVOCATING FOR A CIVIL RIGHT TO COUNSEL IN NEW YORK STATE

*Kathryn Grant Madigan**

INTRODUCTION

I want to welcome you on behalf of our now over 76,000 members of the New York State Bar Association (“NYSBA”) to this very historic conference. Access to justice is not just for those who can afford it, but is fundamental to the mission of NYSBA. It is a long-term legislative priority of our Association, and it informs everything we do as a bar association.

As President, I have had an opportunity to shape the Association’s priorities. This year I made a personal commitment towards access to justice initiatives, which consisted of two forms. The first piece of it was *Cy pres*, building on the important work of a committee we have at the state bar that has been chaired by Barbara Finkelstein.¹ It is an extraordinary piece of work. Our current co-chairs of

* J.D. Albany Law School; B.A., *cum laude*, University of Colorado at Boulder. Kathryn Grant Madigan served as the 110th President of the New York State Bar Association, becoming only the fourth woman to hold the position. She is a partner at the law firm of Levene Gouldin & Thompson LLP located in Binghamton, New York where she specializes in trusts and estates and elder law. This Article is based on remarks given at An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State, held at Touro Law Center, Central Islip, New York, in March 2008.

¹ C. Bruce Lawrence & Barbara Finkelstein, *Cy Pres for Civil Legal Services: A Report and Recommendations to the New York State Bar Association House of Delegates From the Special Committee on Funding for Civil Legal Services* (2006), available at http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2745.

the President's Committee on Access to Justice are President-Elect, Bernice Leber, and United States Magistrate Judge George Lowe from Syracuse, who have been on the road, working with the bench, the bar, and federal courts to educate them about *Cy pres* and the ways in which we can target mass tort and class action funds for civil legal services for the poor. We already have a couple in the hopper, and we are working very hard to spread the word.

The other piece of our access to justice commitment is Civil Gideon, which is a passion of mine. Not only has it been the focus of most of my outreach, whether in my President's Messages in our *Bar Journal*, on my blog, or contacts with the media, but we have also taken it to the airwaves because we have a unique relationship with the New York State Broadcaster's Association. We make a contribution to their charitable fund each year and in return we are able to play two sixty-second and two thirty-second—they used to be called public service announcements—non-commercial sustaining announcements (“NCSA”). They are aired throughout the state. We did a series of these back in October; we picked up about \$600,000 worth of airtime. We are going to run these again in another series in April. I wanted to share with you the one I am most proud of:

This is Kate Madigan, President of the New York State Bar Association. If you are accused of a crime, you have the right to a court appointed lawyer if you cannot afford one. But if you are in danger of being evicted from your home, face the loss of healthcare or public benefits, there is no guaranteed right to counsel. It can mean the difference between losing a home or keeping it, suffering from domestic abuse or finding refuge, gaining or losing custody of a child. Despite

the thousands of hours of free legal services provided by New York Lawyers each year, we can only meet 20 percent of the civil legal needs of the poor. We can and must do better. The promise of equal justice for all must extend to every citizen. When basic human needs are at stake, everyone deserves the right to counsel.

*Brought to you by the New York State Bar Association in cooperation with the New York State Broadcaster's Association.*²

This piece has gotten more air-time than any other piece we have run, so it is obviously striking a chord across the state. When we roll out our new NCSAs, I will obviously keep that one.

As President of the Bar Association, I also have an opportunity to present themes that you may want to consider promoting during the year. My theme for 2008 was "Leadership Through Service."³ Lawyer service is what drives so many in the legal profession, and there is no better example of leadership through service than our planning committee for this conference, led by the extraordinary Andrew Scherer. This is a dream of his. Andy has made extraordinary efforts and done a terrific job. I also want to thank each and every member of the planning committee, including our able folks from the State Bar Association, Gloria Herron Arthur, Kathy Baxter, Kia Franklin, Don Friedman, Tom Maligno, and Dave Robinson. You have assembled a veritable Who's Who of civil jus-

² *New York State Bar Association Launches Radio Campaign*, <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=17644> (last visited Sept. 15, 2008).

³ *Kathryn Grant Madigan Sworn in as 110th President of the New York Bar Association*, <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=16503> (last visited Sept. 15, 2008).

tice advocates, attorneys in public service, in government service, in non-profits, in private practice, in-house, and in academics. I am very confident that we will look back at this historic conference as the catalyst for meaningful reform here in New York State.

We are the bellwether state, and we need to own that.⁴ It is inspiring to think how we now have this opportunity to lead the way. As I look over this extraordinary group of judges, academics, politicians, bar leaders, and civil justice advocates, coming together for the purpose of developing long-term solutions to close our justice gap, I feel the incredible energy, commitment, and dedication of this group assembled here today. While I have always been proud to be a lawyer and very proud of our tradition of service on behalf of our most vulnerable citizens, I am overwhelmed today by your commitment, by your passion, and by your vision of where we need to be and where we must be.

When our State Bar Association joined with the American Bar Association and other state bars in support of Civil Gideon,⁵ there were those who said that creating a civil right to counsel in New York would be impossible, impractical—a fantasy. To those naysayers, I say we are not just a group of dreamers. To paraphrase Andrew Scherer, we are paradigm shifters.⁶ I know that I can say on behalf of

⁴ See NEW YORK STATE BAR ASS'N, LEADERSHIP THROUGH SERVICE: 2007-2008 REPORT TO THE MEMBERSHIP, available at http://www.nysba.org/Content/NavigationMenu/AboutNYSBA/AnnualReport/nysba_annual_report_07-08_final.pdf.

⁵ Kathryn Grant Madigan, 'Gideon' Right in Civil Cases is Needed, 237 N.Y.L.J. 13 (2007).

⁶ Andrew Scherer, *Panel Discussion: International, National and Local Perspectives on Civil Right to Counsel*, 25 TOURO L. REV. 81 (2009).

all of you that we are ready to roll up our sleeves this afternoon, and open up our minds to the collaborative process to develop those practical strategies through an effective blueprint to make the right to counsel a reality here in New York. It is not easy. This is not a linear process, and I know so many of us lawyers are very linearly oriented. But then again, effecting social change is never easy.

I. *GIDEON V. WAINWRIGHT* AND THE NEED FOR A CIVIL RIGHT TO COUNSEL IN NEW YORK STATE

This is the forty-fifth anniversary of *Gideon v. Wainwright*.⁷ In writing for the majority in *Gideon*, Justice Black recognized that criminal defendant's need "the guiding hand of counsel" because they are "unfamiliar with the rules of evidence," and therefore they lack "both the skill and knowledge [to] adequately . . . prepare his defense, even though he have a perfect one."⁸ In the Court's own words, it was "an obvious truth," that the right to due process and liberty under the law could be guaranteed only by ensuring that all persons who were "haled into court" were represented by a lawyer even if they could not afford one.⁹ It was obvious, and all agreed that by forcing people to confront their accusers without a lawyer was a "denial of fundamental fairness, [and] shocking to the universal sense of justice."¹⁰

Forty-five years later, no one questions that truth; now, such

⁷ 372 U.S. 335 (1963).

⁸ *Id.* at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

⁹ *Id.* at 344.

¹⁰ *Id.* at 339.

“an obvious truth,” and yes, “an inconvenient truth.”¹¹ It is still “shocking” to our sense of justice that we would incarcerate a criminal who was tried and convicted without an attorney.¹² But is there not yet another truth that must be acknowledged and addressed? Is it not just as shocking that we leave our poor and our most vulnerable to represent themselves in their battles for basic human needs: shelter, sustenance, safety, and health? Whether forced out of the home, terrified by an abuser, or denied government benefits without adequate representation, the poor are confined. The poor are denied due process. The poor do, indeed, suffer a loss of liberty. And in some cases, indeed in many cases, their loss is just as great if not greater had they been convicted of a crime and imprisoned.

Is not the loss of shelter, food, safety, and healthcare fundamental to justice? Consider the construction worker, who at the age of fifty-one suffers a stroke. He is no longer able to work and is nonetheless denied disability benefits leaving him unable to afford his rent and his medicine. Consider the struggling college student, whose boyfriend repeatedly abuses her, and is unable to afford an attorney to get a restraining order that might save her life. Consider the mother whose daughter is mentally disabled with ADHD and bipolar disorder. The child is labeled a behavior problem struggling with learning. The mother just wants to ensure she receives an education and the mental health assistance that she needs, so her daughter can have the future she deserves. Consider the veteran who is among the

¹¹ See Wade Henderson, *Keynote Address: The Evolution and Importance of Creating a Civil Right to Counsel*, 25 TOURO L. REV. 71 (2009).

¹² *Gideon*, 372 U.S. at 337.

600,000 soldiers who have returned from Iraq and due to the logjam in Veterans' Affairs he has not received benefits and is facing foreclosure on his home.¹³ We all know of these stories because there are millions of them.

We know that on average, as Wade Henderson and others have observed, low income households experience at least one civil legal need every year.¹⁴ We know that we cannot meet this ever-growing demand for civil legal services with our current resources. With the declining economy, housing crisis, and rising healthcare costs, we know that the demand is only going to increase.¹⁵ The statistics are grim. Take a look at housing. In 2006, the Legal Aid Society of New York was able to represent 15,000 low income tenants facing eviction, but was forced to turn away 90,000 people seeking legal services.¹⁶ Legal Services for New York and Legal Services for New York City represent and advise over 10,000 households, but can only assist twenty-one percent of eligible tenants seeking their help.¹⁷

In New York City Housing Court, eighty-five to ninety percent of the landlords are represented by counsel in proceedings where

¹³ See Carl Hulse, *Bush and House G.O.P. Team Up to Present Shown of Strength*, N.Y. TIMES, May 10, 2008, at A14 (stating that President Bush rejected a bill which included unemployment assistance for veterans). See also David M. Herszenhorn, *Congress Votes For a Stimulus of \$168 Billion*, N.Y. TIMES, Feb. 8, 2008, at A1 (stating that the Democrats plan to initiate a bill to help "homeowners at risk of foreclosure").

¹⁴ Henderson, *supra* note 11, at 71. See also Evelyn Nieves, *80% of Poor Lack Civil Legal Aid, Study Says*, WASH. POST, Oct. 15, 2005, at A09.

¹⁵ See, e.g., Michael R. Meacham, *What's the One Thing Big Business and the Left Have In Common?*, N.Y. TIMES, Apr. 15, 2007, at 68; Gail Collins, *George Speaks, Badly*, N.Y. TIMES, Mar. 15, 2008, at A19; *Give Strapped Homeowners a Break in Bankruptcy Court*, USA TODAY, Mar. 4, 2008, at 10A; Steny H. Hoyer, Op-Ed., *Fighting for Families in an Uncertain Economy*, US FED. NEWS, Jan. 10, 2008.

¹⁶ Manny Fernandez, *Free Legal Aid Sought for Elderly Tenants*, N.Y. TIMES, Nov. 16, 2007, at B3.

¹⁷ *Id.*

ninety percent of the tenants are not.¹⁸ We know when that tenant is a senior, especially in New York City, they are at a much greater risk of homelessness.¹⁹ An eviction can also send a senior person spiraling down to hospitalization and institutionalization in a nursing facility, all at the public's expense. We applaud Councilwoman Rosie Mendez, and the efforts from the part of the counsel and housing advocates to provide free legal services to those low-income elderly residents trying to navigate the New York City Housing Court.²⁰ This is a historic effort, and if it passes, it will be the first in the nation.

II. THREE CRITICAL AREAS FOR ADVOCATING A CIVIL RIGHT TO COUNSEL IN NEW YORK STATE

Our bar is committed to doing its share, but even with two million hours of pro bono services each year at the state and local level, we are simply not able to close this justice gap.²¹ We are advocating for a genuine commitment from our governor and our legislators in a number of critical areas. The first is stable, permanent funding for civil legal services.²² The second is an independent

¹⁸ Vesselin Mitev, *State Bar Conference Promotes Right to Counsel in Civil Cases*, 239 N.Y.L.J. 1 (2008); See *The Results of Two Surveys: Self-Represented Litigants in the New York City Family Court and New York City Housing Court* (2005), available at http://www.courts.state.ny.us/reports/AJJI_SelfRep06.pdf.

¹⁹ See generally Haya El Nasser, *Foreclosure Crisis Has Ripple Effect: Local Officials See More Crime, Blight, Less Tax Revenue*, USA TODAY, Mar. 11, 2008, at 3A (stating that seniors "are disproportionately affected by the housing crisis").

²⁰ Councilwoman Rosie Mendez sponsored a bill that "would allocate approximately \$10 million annually to provide free legal counsel to low-income senior citizens facing eviction or foreclosures." Mitev, *supra* note 18, at 1; See also Fernandez, *supra* note 16 (explaining that Ms. Mendez's bill will provide counsel to tenants with low incomes).

²¹ Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. TIMES, Aug. 17, 2000, at A1; Kathryn Grant Madigan, *Justice for All*, 79 N.Y. ST. B.J. 5 (2007).

²² See Helaine M. Barnett, *An Innovative Approach to Permanent State Funding of Civil*

IOLA board.²³ And the third is the civil right to counsel.²⁴

Over the past weeks and months we have been taking the concerns to our state leaders. In fact, just last week President-Elect Bernice Leber and I met personally with members of the State Assembly and Senate, including Assembly Speaker Sheldon Silver and counsel for the governor, in order to advocate for those principles. We are making the case to the state legislature for why New York must step up in each of these vital areas, which we view as a legal and moral imperative.

We need a commitment from the state for a stable funding mechanism for civil legal services. New York is only one of seven states in the nation that does not provide stable funding for civil legal services.²⁵ We are joined by the Dakotas and Arkansas in that very dubious group.²⁶ New York often trails well behind our sister state of Massachusetts—and we have representatives here from the Boston, New Jersey, and Vermont bars, who provide two to four times the five dollars we now spend per person in our state.²⁷

“We support the Report of the New York Equal Justice Commission which calls upon the state to create” stable funding to

Legal Services: One State's Experience—So Far, 17 YALE L. & POL'Y REV. 469 (proposing the use of “abandoned property” as an alternative source of funds for legal services).

²³ See Elizabeth Stull, *Former Interest on Lawyers Account Fund Chairmen Object to Gov. Spitzer Proposal*, THE DAILY RECORD OF ROCHESTER, Feb. 26, 2008.

²⁴ See Edwina F. Martin, *Access to Justice in New York City*, 47 NO. 3 JUDGES' J. 14, 15 (2008).

²⁵ Madigan, *supra* note 21, at 5.

²⁶ See ArkansasJustice.org, Arkansas Access to Justice Commission, Fact Sheet - Civil Legal Aid in Arkansas, <http://www.arkansasjustice.org/materials> (last visited Sept. 1, 2008); LegalAssist.org, About Legal Services of North Dakota, http://www.legalassist.org/tree/about_lsnd.html (last visited Sept. 22, 2008); DPLS.org, Dakota Plains Legal Services, <http://www.dpls.org/> (last visited Sept. 22, 2008).

²⁷ Madigan, *supra* note 21, at 5.

facilitate an access to justice fund by 2010 at a level of fifty million dollars annually from the state budget.²⁸ Last year's commitment in all sources from the governor's judiciary budget was eighteen million dollars.²⁹ That was a start. We applauded the governor and the legislature for that commitment. But those gains are already threatened. Indeed, they may be lost. I know that most of you share our disappointment in the meager one million dollar allocation that has currently been proposed by the governor in his current budget, substantially less than what was committed in the governor's budget appropriation last year of eight million dollars.³⁰ One million dollars is simply a symbolic gesture of support. However, you and I know that we do not need symbolism. We need, and our poor need, real resources. That is the only way we are going to close the justice gap.

We applauded the governor for his leadership in building on the important work of the IOLA board in securing more favorable interest rates on the IOLA funds.³¹ However, this year's Executive Budget proposal and its reliance on the predicted increase in IOLA funds is cause for great concern, especially given the economic realities and falling interest rates.³²

If this proposed Executive Budget passes, New York will

²⁸ *Id.*

²⁹ Joel Stashenko, *Budget Cuts, Lower Interest Rates Harm Civil Legal Services Funding*, 239 N.Y.L.J. 4 (2008) (stating that a record \$15.3 million was spent by New York State in the 2007-08 fiscal year).

³⁰ *Id.*

³¹ Martin, *supra* note 24, at 16; Position Memorandum from the N.Y. State Bar Ass'n on the Executive Budget (Mar. 6, 2008), available at <http://www.nysba.org/Content/ContentFolders/Legislation/LegislativeMemoranda20072008/NYSBAMemorandum19.pdf>.

³² *Id.*

have yet another dubious distinction. We will be the first, among eighteen states in this nation, who have promulgated comparability regulations for IOLA, and then essentially eliminated state funding.³³ All other states that have passed comparability regulations have either maintained state funding or have actually increased the level of state support.³⁴ Rest assured we have communicated these concerns to the governor.³⁵ We will continue to advocate for budget increases to bring state funding up to twenty-five million dollars this year, so we remain on track to fully fund the fifty million dollar level by 2010.

Our second commitment is maintaining the independence of the IOLA board. Our state bar's executive committee recently voted to oppose the part of the budget bill that would allow the governor to appoint an IOLA executive director.³⁶ This proposal will open the door for political interference with the operation of the IOLA fund, and could compromise the ability of the board members to act independently, which could create the appearance of partisanship.³⁷ No other state gives this appointing authority to any entity other than the board.³⁸ While all of us are looking for better ways to serve the legal service needs of the poor, that is not it, and we have communicated those concerns to the governor.

Finally, which is why we are all here today, we need to have a

³³ *Id.*

³⁴ *Id.*

³⁵ *See Id.*

³⁶ Position Memorandum, *supra* note 31.

³⁷ *Id.*

³⁸ *Id.*

commitment to implementing the right to counsel, the blueprints of which we are going to work on at this conference. So, now that we have defined the scope of this immense problem, it is time to get to work. We need your minds, we need your hearts, we need your guts; we need an all out effort to develop an action plan, and implement practical strategies for a civil right to counsel here in New York. We want to take that plan to our political leaders and convince them that this is the time. This is the right thing to do. It really is up to each and every one of us. It is our responsibility. You are all on the front lines; you see where it goes. We know that preventive legal services are absolutely pivotal. We know the cost-benefits; if we do not make that essential investment now, if we do not provide and pay for preventive legal services, we pay a lot more later on.

We know, for example, that Legal Aid addresses family and school instability and abuse, as well as deprivation of benefits.³⁹ These are all identified as risk factors in producing violent crime.⁴⁰ If we can prevent just five people from committing violent crimes, we would save New York more than 1.3 million dollars in prison costs,⁴¹ not even counting the dollars we spend to support the parole process, the court system, and the police departments.⁴² Would not our dollars

³⁹ Adriene Holder, *Panel Discussion: International, National and Local Perspectives on Civil Right to Counsel*, 25 TOURO L. REV. 113 (2009).

⁴⁰ Rolf Loeber & Wim Slot, *Serious and Violent Juvenile Delinquency: An Update*, 35 CRIME & JUST. 503, 547 (2007).

⁴¹ Report of the Fiscal Committees on the Executive Budget, Public Protection & General Government, <http://assembly.state.ny.us/Reports/WAM/2008Green/pubprot.pdf> (last visited Oct. 9, 2008).

⁴² New York State Division of the Budget, 2008-09 Executive Budget: Agency Appropriations, <http://publications.budget.state.ny.us/eBudget0809/agencyPresentations/appropData/index.html> (last visited Sept. 3, 2008).

be better spent keeping our citizens out of prison and helping them to lead productive lives? Does that not seem obvious? But as we have seen over and over again with the poor, one civil legal problem can lead to that downward spiral of despair, homelessness, lack of medical care, lack of education, and then prison. That despair is then passed on to future generations. We have the power to make the difference here in New York, to become a state that truly owns its commitment to our most vulnerable.

III. CONCLUSION

It is essential that we speak out with one very powerful voice. I am honored today not only to add my own voice, but that of our 76,000 members of NYSBA, in support of this historic civil right to counsel movement. In conclusion, I want to reassure you that the Association is more committed than ever before to the fight for access to justice. It is and will remain a priority for our Association, for our leadership. We hear you. We understand the problem, and we know that it is time for real solutions. So, today let us harness your gifts. Let us create the ultimate gift for our poor New Yorkers—a workable action plan establishing a civil right to counsel. So let us roll up our sleeves and get to work. Thank you.

