

April 2013

The Time for Civil Gideon is Now

Bernice K. Leber

Follow this and additional works at: <http://digitalcommons.tourolaw.edu/lawreview>



Part of the [Social Welfare Law Commons](#)

Recommended Citation

Leber, Bernice K. (2013) "The Time for Civil Gideon is Now," *Touro Law Review*: Vol. 25: No. 1, Article 10.

Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol25/iss1/10>

This Prefatory Matter is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact ASchwartz@tourolaw.edu.

The Time for Civil Gideon is Now

Cover Page Footnote

25-1

THE TIME FOR CIVIL GIDEON IS NOW

*Bernice K. Leber**

INTRODUCTION

In March 2008 we held a statewide conference on a civil right to counsel while the State of New York found itself in the midst of a budget crisis. With a then-projected five billion dollar budget deficit due to the Wall Street crisis, and the concurrent downturn in the economy, secondary mortgage market, and plummeting interest rates the state saw a combined loss of twenty percent in state revenues.¹ Legal services providers put every ounce of their collective efforts into restoring civil legal services funding to the level provided during the 2007 state budget negotiations—\$15.7 million.² The state bar was proud to help with this effort.

The situation was bleak. Former Governor Spitzer earmarked a meager one million dollars for civil legal services on the assumption that the most favored customer interest rate would boost Interest

* Bernice Leber is a litigator and partner at Arent Fox LLP, focusing on the prosecution and defense of complex civil business disputes. Recently, Ms. Leber was elected the 111th President of the New York State Bar Association. In addition to her fine work for the NYSBA, she serves on the Corporate Board Selection Committee of the Financial Women's Association.

¹ NEW YORK STATE, 2008-09 ENACTED BUDGET FINANCIAL PLAN 5 (2008), available at <http://www.budget.state.ny.us/budgetFP/2008-09EBReportFinal.pdf>; NEW YORK STATE, REVENUE REPORT 9 (2008), available at <http://assembly.state.ny.us/comm/WAM/2008RevRep/2008RevReport.pdf>.

² Sara Foss, *Budget Helps Defendants in Civil Cases Less*, THE DAILY GAZETTE, Apr. 13, 2008, available at http://www.dailygazette.com/news/2008/apr/13/0413_civilsuits/.

on Lawyer Account (“IOLA”) funds and yield enough money to make up for the shortfall.³ However, the declining interest rates forewarned the boost in IOLA funds. In addition, the plan was not likely to come to fruition any time soon, especially in a recession.⁴

Since March, our collective efforts have helped to restore some civil legal services funding—to \$7.3 million, a drop in the bucket—and it is clear that New York’s economic situation has only worsened. The deficit is now predicted to be \$6.4 billion.⁵ Governor Paterson called an emergency session of the legislature on August 19, 2008 and asked legislators and state agencies to cut their already slim budgets by another seven percent.⁶ In a live televised broadcast, Governor Paterson forewarned that New York was facing “increasingly harsh economic times,” and stated that now is the time for government to “learn to do more with less.”⁷

Some reading the articles within this Symposium might ask, is now the time to push for the implementation of Civil Gideon in New York? In these tough times, how will our taxpayers and government pay for it? The answer to this question is “an obvious truth”—Civil Gideon is the only thing to do, and we must do it now for two primary reasons. First, in these tough economic times, it is becoming

³ *Id.*

⁴ *See id.* (“Originally, the state assumed that the IOLA money would continue to grow But that figure has since been revised due to the slumping economy and the Federal Reserve’s decision to cut interest rates three times in recent months.”).

⁵ Press Release, Governor Paterson Calls Legislature Back to Albany for Special Economic Session on August 19 (July 29, 2008), http://www.state.ny.us/governor/press/press_0729081.html.

⁶ Press Release, Governor Paterson Reopens Budget Process, Ordering Current-Year Spending Cuts, Special Legislative Session and Hard Hiring Freeze to Address Plummeting State Revenues (July 30, 2008), http://www.state.ny.us/governor/press/press_0730081.html.

⁷ Press Release, Paterson Calls Legislature Back to Albany, *supra* note 5.

more difficult for our residents to afford legal representation, and they need help now more than ever. This past July, home foreclosure filings nationwide were up fifty-five percent, with New York among the top ten states for foreclosure filings.⁸ We know that those seeking help with a housing issue typically also need legal counsel on a host of other issues, not to mention the fact that the rising homeless population places an extreme burden on municipalities to provide alternative housing and sustenance.

Back in 2005, before we were facing the current crisis, the Office of Court Administration estimated that seventy-three percent of litigants in New York City Family Court and ninety-three percent in Housing Court appeared without an attorney in matters involving fundamental issues such as evictions, domestic violence, child custody, guardianship, visitation, support, and paternity.⁹ Sixty percent of pro se litigants surveyed, with annual incomes ranging from under \$15,000 to more than \$45,000, believed they could not afford an attorney.¹⁰

In 2008, it is not only the poor who are unable to afford an attorney. Middle class New Yorkers are also struggling to buy groceries, gasoline, and energy to heat their homes, let alone find the money for attorney's fees. Yet to qualify for help from Legal Aid, a family

⁸ Press Release, Foreclosure Activity Increases 8 Percent in July (Aug. 14, 2008), <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=5041&acct=64847>.

⁹ *The Results of Two Surveys: Self-Represented Litigants in the New York City Family Court and New York City Housing Court* (2004), available at http://www.courts.state.ny.us/reports/AJJI_SelfRep06.pdf.

¹⁰ *Id.* at 8.

of four must have an annual income that is less than \$26,000.¹¹ With the surge in housing foreclosures, it is evident that Civil Gideon is not just a needed remedy for the poor. We also need to rethink what it means to be poor today. The problem becomes more evident when not only the poor, but also now, the middle class are squeezed and cannot afford legal representation.

Second, the failure to fund these critical services now will have devastating consequences in the short term. Dollars spent on civil legal services saves us triple—even quadruple—the amount we would otherwise spend down the road. For example, according to the New York City Department of Social Services report entitled, *The Homelessness Prevention Program: Outcomes and Effectiveness*, every dollar spent on indigent representation in eviction proceedings saves four dollars in costs related to homelessness.¹² This is a particularly relevant example when you consider the ongoing mortgage foreclosure crisis. The loss of a home has brought the absence of fully funded civil legal services to the national stage. We see this in the programs and legislation offered to buy time for those facing foreclosure. But extending time to pay one's debt—without also providing legal counsel for those in need—is not truly affording a remedy at all.

¹¹ Legal Aid, Frequently Asked Questions About the Legal Aid Society, <http://www.legal-aid.org/en/aboutus/legalaidsocietyfaq.aspx> (last visited Sept. 24, 2008). The website also provides the eligibility requirements for both smaller and larger sized families.

¹² New York State Department of Social Services, *The Homelessness Prevention Program: Outcomes and Effectiveness* (1990), available at <http://www.nlada.org/DMS/Documents/1195250846.92/NYSDeptofSS%20-%20Homelessness%20Prevention%20Pram%20Outcomes%20&%20Effect.pdf>.

I. A NATIONWIDE ISSUE

At a recent presidential summit of all fifty state bar presidents and state delegates to the ABA that I chaired in New York City during the American Bar Association's annual meeting, access to justice topped the list of critical issues that we most want our United States presidential candidates to address meaningfully in the coming days. Jeffrey Bleich, president-elect of the State Bar of California, informed the group that in California there is just one legal services lawyer for every 8,000 people who need such services.¹³ H. Thomas Wells, president of the American Bar Association and representative for the Alabama Bar Association, noted that in 2007, \$7.5 million was spent to elect judges in Alabama, while just two million dollars was spent on access to justice.¹⁴ Barbara Bonar, president-elect of the Kentucky Bar Association, stated that in her state, the middle class was struggling to afford attorneys when facing foreclosure, divorce and child custody disputes.¹⁵ Clearly, New York is not alone in our quest for justice for the poor.

As a result of our meeting, the state bar presidents are drafting a letter that will highlight access to justice as a top priority for our nation's newly elected president in 2009. Not surprisingly, the discus-

¹³ Diane Curtis, *Governor Signs Bill to Help Increase IOLTA, Legal Services Funds*, CAL. B.J., Nov. 2007, http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/November2007&sCatHtmlPath=cbj/200711_TH_01_IOLTA.html&sCatHtmlTitle=Top%20Headlines.

¹⁴ Testimony Before The New York State Assembly Judiciary Committee 3 (2006) (statement by Luke Bierman, Fellow in Government Law and Policy at the Government Law Center of Albany Law School), available at http://www.albanylaw.edu/media/user/bierman_testimony.pdf.

¹⁵ See KYBar.org, Purpose—Kentucky Bar Association Civil Litigation Section, <http://www.kybar.org/Default.aspx?tabid=352> (last visited Sept. 25, 2008).

sion included advocacy for a federal Civil Gideon statute. All of the state bar presidents are prepared to sign the letter and forward it on to the campaigns of each presidential candidate. After the inauguration, we will ask for a meeting with the new president in order to request accountability and a response to the increased need for funding for civil legal services, for a federal Civil Gideon statute, and for a loosening of current restrictions placed on Legal Services Corporation funds.¹⁶ This unity of purpose, voice, and resources will enable us to accomplish much more than any one of us could individually. This unity of purpose gives us hope that things can change.

II. FUNDING CONCERNS

Over the next year, as we have in the past, the state bar will continue to join forces with the entire legal community in order to advocate for a permanent stream of funding. We are continually communicating our position with Governor Paterson and the legislative leaders. As recently as August 15, 2008, we wrote before the legislative session to request it. New York remains one of only seven states in our nation that does not provide permanent funding¹⁷—a grim statistic that is often repeated on these pages. This is no distinction. New York needs to surpass our sister states of Massachusetts, New Jersey, and Vermont, who provide two to four times the five dollars we spend for each poor person in our state.¹⁸ We have advo-

¹⁶ See Am. Bar Ass'n, ABA Mission and Association Goals—August 2008, <http://www.abanet.org/about/goals.html> (last visited Sept. 25, 2008).

¹⁷ Foss, *supra* note 2.

¹⁸ See Kathryn Grant Madigan, *Justice for All*, 79 N.Y. St. B.J. 5 (2007). See also Massachusetts Bar Association, <http://www.massbar.org/> (last visited Sept. 24, 2008); New Jersey

cated for funding to reach fifty million dollars by 2010.¹⁹

But we also are realists. Looking for dollars to fund necessary legal services for the poor, the state bar, and in collaboration with The New York Bar Foundation, has taken the doctrine of *Cy pres* on the road. We have been holding meetings with the bench and the bar in order to discuss ways in which to implement the use of *Cy pres* funds to support civil legal services. *Cy pres* is not a predictable source of funding and would not be a suitable substitute for permanent funding, but it is an untapped resource for civil legal services. We will continue to urge the bench and bar to find creative ways to secure legal services for the poor. Judge George Lowe and I have been working with the federal bench and state commercial divisions throughout the state to devise ways to ensure that residual funds make their way to needy civil legal services providers.

Among other things, I created a *Cy pres* committee with Judge Lowe as my co-chair, which consists of honored lawyers steeped in the process of applying to court for *Cy pres* funding from existing class actions. The committee also is engaged in developing protocols for the program both internally and through the bar foundation as well as in the courts. With over fifty years' experience making grants for civil legal services, the bar foundation and its board of directors are well-suited and experienced in assisting our state and federal courts and litigants with assessing worthy recipients of *Cy*

State Bar Association, <http://www.njsba.com> (last visited Sept. 24, 2009); Vermont Bar Association, <http://www.vtbar.org> (last visited Sept. 24, 2008).

¹⁹ Press Release, New York State Bar Association, New York State Bar Association Calls for an Increase in Funding For Legal Services for the Poor, http://www.nysba.org/AM/Template.cfm?Section=Current_Releases&CONTENTID=13477&TEMPLATE=/CM/ContentDisplay.cfm.

pres monies and finding the right nexus between the purpose for which the class action was brought and possible civil legal service providers to receive the award. The committee is also actively investigating court dockets and will actively work with litigants and their counsel in helping to devise settlement agreements that will provide for *Cy pres* funds to be administered, through the state bar and bar foundation. The committee is also making outreach to claims administrators to assist in this noble and worthy effort.

III. REPRESENTATION FOR ALL

If we truly believe in “justice for all,” as our Pledge of Allegiance states, then it is incumbent upon us to do all that we can, despite these difficult economic times, to ensure that all Americans have representation when fighting for fundamental needs, such as housing, sustenance, safety, and child custody. I applaud my forward-thinking and compassionate colleagues, and especially Andy Scherer and our immediate past president, Kate Madigan, for not only taking the time to contribute to the Civil Gideon conference at Touro Law Center and this Symposium, but also for continuing in the fight for access to justice. At the state bar, we are proud to partner with you in this vital endeavor.