

State of the Judiciary
Chief Judge Jonathan Lippman, New York Court of Appeals
Message to judges and lawmakers
February 17, 2015, at Court of Appeals Hall, Albany, NY

INTRODUCTION

Access to justice is the defining principle of our court system. It manifests itself in so many diverse ways in over four million civil, criminal, and family proceedings in court houses across New York State. Access to justice means ensuring that litigants have meaningful representation when their liberty or the very necessities of life are at stake. Access to justice is the issue when citizens struggle to understand our justice system and the judicial process is hidden from view. Access to justice is also front and center when rich and poor, the privileged and the disadvantaged alike seek a level playing field before the courts, and it is what victims want when they enter the halls of our courts desperately seeking assistance. And access to justice is the driving force behind the court system's determination to secure the resources necessary to meet our constitutional mission of fostering equal justice.

Access to justice means that everybody — regardless of race, ethnicity or orientation, irrespective of wealth or poverty, whether we are mighty or weak — each and every one of us gets his or her day in court. Equal justice, that defining principle of our country, requires that every human being has access to the courts and a judicial system where the scales of justice are exquisitely balanced.

GRAND JURY REFORM

In that context, I start today with a subject that has transfixed our justice system and the public over the last months in New York and nationwide — the crisis emanating from deadly police-civilian encounters and the grave dangers faced by those who protect us on a daily basis on our street corners and in our communities.

As Chief Judge, it is not my role to defend or decry a particular grand jury decision. But the grand jury is a vital component of our judicial system — under the law, it is a part of the court and an institution for which the Judiciary is ultimately responsible. Of immediate concern are the perceptions of some that prosecutors' offices, which work so closely with the police as they must and should, are unable to objectively present to the grand jury cases arising out of police-civilian encounters. Such perceptions, while broad brush, clearly can undermine public trust and confidence in the justice system. Let's face it. Able and dedicated prosecutors and the grand jury process cannot win in these inherently incendiary situations. Damned if you do and damned if you don't, no matter how strict the adherence to fairness and the rule of law.

To me, it is obvious that we need significant change in grand jury practices and protocols in the world we live in today. Governor Cuomo and Attorney General Schneiderman have generated extensive debate by proposing that these cases might be handled by a special prosecutor, albeit under different circumstances and at different stages of the process. But what I propose today are solutions to this problem that directly follow from the fact that, under the law, it is the court that

oversees the grand jury and its protocols. First, I am submitting legislation that will require that grand jury proceedings, in cases involving allegations of homicide or felony assault arising out of police-civilian encounters, be presided over by a judge. While judges currently provide very general “supervision” of grand jury proceedings, that role now merely entails providing only preliminary legal instructions to the grand jury and occasionally ruling on contested legal issues that arise. In this category of cases, I am proposing that a judge be physically present in the grand jury room to preside over the matter. The judge would be present to provide legal rulings, ask questions of witnesses, decide along with the grand jurors whether additional witnesses should be called to testify, preclude inadmissible evidence or improper questions, and provide final legal instructions before the grand jury deliberates. This puts the ultimate responsibility for the grand jury where it belongs — with the court, and it largely removes any negative perceptions about the grand jury process in these cases of great public interest.

We must also address another highly debated issue, the secrecy of grand jury proceedings — and the legislation I submit will do just that. The strict secrecy of grand jury proceedings — originating in medieval England and mandated in New York by statute — can be detrimental to access to justice and public debate over issues of compelling public interest. Grand jury secrecy is based on several grounds: to prevent tampering with the grand jury’s investigation; to prevent the subject of the investigation from fleeing to avoid prosecution; to encourage reluctant witnesses to cooperate; and to protect those who are not indicted. While these are all laudable reasons for secrecy, they do not justify the breadth of the current law that bans virtually all disclosure, and although nominally allowing a court to grant disclosure, provides no guidance as to when to do so.

When a grand jury indicts, the normal rules granting public access to court records are generally adequate to ensure an informed public debate about the handling of the case. Moreover, discovery rules in criminal matters precisely regulate the disclosure of evidence during the pendency of a case. But in cases where a grand jury votes not to bring charges — where no true bill emerges — the public is left to speculate about the process, the evidence, the legal instructions, and the conclusions drawn by the grand jury. In cases of significant public interest, secrecy does not further the principles it is designed to protect but, in fact, significantly impedes fair comment and understanding of the court process.

I am therefore proposing that we lift the veil of secrecy of these proceedings, without compromising the historical justification for secrecy. The legislation I propose today would create a crystal clear statutory presumption in favor of the court disclosing the records of a grand jury proceeding that has resulted in no charges, in cases where the court finds that the public is generally aware that the matter is the subject of grand jury proceedings; the identity of the subject of the investigation has already been disclosed or the subject consents to disclosure; and disclosure of the proceedings advances a significant public interest. Upon such a finding, the court will be authorized to disclose the record of the proceedings, including the charges submitted to the grand jury, the legal instructions provided in support of those charges and, critically, the testimony of all public servants and experts. The prosecutor would have the opportunity to redact testimony that would identify a civilian witness and to move for a protective order upon a showing that disclosure would jeopardize an ongoing investigation or the safety of any witness.

These two legislative steps I have outlined — requiring an active, physical judicial presence in grand jury proceedings investigating potential homicide or serious assault arising out of a police-citizen encounter, and ending grand jury secrecy as we know it — will enhance public access to, and confidence in, the justice system. This in turn will help preserve the integrity of the judicial branch, law enforcement, and the institution of the grand jury — in many ways, a relic of another time that must be modernized and updated to meet the complex challenges of today’s justice system.

BROWNSVILLE COMMUNITY CENTER

As important as it is, grand jury reform is not enough. At the end of the day, public trust is the fuel that drives our justice system. Without it, it is impossible to solve crimes, to adjudicate cases, and to convene juries. In short, without trust there can be no justice.

Healing the rift that exists between the justice system and many of our communities will not happen overnight, and it will not happen without the effort of multiple agencies — not just police but prosecutors, probation and, yes, the courts. But change is possible, and we have seen it in community courts in Midtown Manhattan, Harlem, and Red Hook, Brooklyn — where we have re-engineered the response to low-level crime, emphasized alternatives like drug treatment, job training, and community service, and promoted great public confidence in the courts and the justice system.

We must look for other places that would benefit from the community justice model. One such place is Brownsville, Brooklyn, which is one of the most violent neighborhoods not just in New York City but in the entire state, and where a recent article about the neighborhood was headlined “Where Optimism Feels Out of Reach.”

Working with a range of partners — including the Mayor’s Office, the New York City Council, the Brooklyn Borough President’s Office, and the Brooklyn DA’s Office — we are developing a Community Justice Center for Brownsville that will provide off-ramps for local residents who come into contact with the justice system, linking low-level defendants to the kinds of services and supports they need to become law-abiding members of society.

The Center will be a state-of-the-art facility in the heart of the neighborhood. The money is in place to proceed, and with the necessary approvals, I look forward to the justice system playing a lead role in bringing trust and optimism back to Brownsville, and with further efforts, to other communities around our state.

A STATEMENT OF POLICY ON CIVIL GIDEON

While scrutiny of our criminal justice system is the issue of the day, we continue to face a crisis that involves the very legitimacy of the civil justice system. Over the past five years, the Task Force to Expand Access to Civil Legal Services, chaired by Helaine Barnett, has documented the desperate and unmet need for civil legal services in our state.

In criminal cases, defendants have the guarantee enshrined in *Gideon v Wainwright*, that “any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” In civil matters involving the essentials of life — the roof over

one's head, family safety and security, subsistence income — there is no such right to counsel. Therefore, I call on the Legislature today to pass a joint resolution that makes it unmistakably clear as a matter of policy and principle that low-income New Yorkers facing legal matters concerning the necessities of life are entitled to effective legal assistance in civil proceedings. This would be the first statement of its kind by a legislative body in our country — it would be the ultimate manifestation of what is commonly known as Civil Gideon, the civil counterpart to the right to legal representation in criminal cases.

This proposed joint resolution that I am submitting to the Legislature would announce — loudly and clearly — New York's commitment to what we all believe is a given in the year 2015: that New Yorkers living in poverty or with limited or modest means must have effective legal assistance in crucial civil matters relating to their wellbeing, their livelihoods, and their families. Our society will and should be judged by how we treat the most vulnerable among us. We ask the Legislature to make a bold statement to show our conviction and resolve in insisting on equal justice for all New Yorkers.

CLOSING THE JUSTICE GAP

The legislative resolution will make abundantly clear the policy of our state. But what can we do now to meet our responsibilities to the most disadvantaged in society?

Over the past few years, we have been wrestling with this question and trying to develop creative solutions. For example, last year, I announced the creation of the Pro Bono Scholars Program, which allows law students to sit for the bar exam in February of their third year in exchange for devoting their last semester of law school to full-time pro bono work. Over a hundred New York law students in this program will very shortly take the bar exam and begin their pro bono placements, collectively donating over 48,000 hours to poor persons unable to afford counsel.

I have little doubt that for many participants, this experience will spark a life-long interest in public service. Once this flame is lit, we shouldn't extinguish it — we should be actively looking for ways to encourage our best and brightest to become full-time advocates for those in need.

That's why today I am so pleased to announce the launch of Poverty Justice Solutions, a new program that will extend the reach of the Pro Bono Scholars program. Each year, Poverty Justice Solutions will take 20 exceptional Pro Bono Scholars and place them after graduation and admission in two-year fellowships with civil legal service providers in New York. These attorneys will work at different agencies but they will all be dedicated to the same goal: helping low-income New Yorkers preserve their housing and preventing homelessness.

We know from hard-earned experience that the presence of a lawyer can be the difference between a human being staying in her home or being evicted. Unfortunately, we also know that the vast majority of tenants who come to Housing Court on an eviction case do so without representation.

It is estimated that Poverty Justice Solutions will enable civil legal service providers to handle 4,000 additional matters each year — a significant contribution to closing the justice gap. The first Poverty Justice Solutions attorneys will be selected this spring and will begin work

following their graduation in June — none too soon given the dire legal needs of thousands of low-income New Yorkers.

We have been fortunate to have the help of a number of partners in conceiving Poverty Justice Solutions. The program is a public-private partnership involving the Robin Hood Foundation, the Center for Court Innovation, the New York City Human Resources Administration, and civil legal service providers in New York City. I thank Mayor Bill de Blasio and Commissioner Steve Banks for expanding legal representation funding across the board to address poverty and homelessness in the city. And I particularly want to thank Michael Weinstein of the Robin Hood Foundation for his commitment to finding creative ways to reduce poverty in New York.

NON-LAWYER ADVOCATES

In our fight to close the justice gap in New York state, non-lawyers have been an increasingly powerful force. Two years ago, I asked Roger Maldonado and Fern Schair to chair a Committee on Non-Lawyers and the Justice Gap and to explore ways that people without law degrees could make meaningful contributions to helping low-income people with legal problems. Since then, we have established programs in Housing Court in Brooklyn and in consumer debt cases in Civil Court in the Bronx. These programs use “navigators” — trained non-lawyers — who provide an array of services, including information, guidance within the court house, and moral support. They assist litigants in completing do-it-yourself forms, assembling documents, identifying possible sources of assistance funding, and in certain cases, accompany litigants and answer factual questions in the courtroom. The Navigators help litigants understand the process and reinforce the timetables and responsibilities as set out by the court. The Committee recently completed a report that demonstrates a marked difference in the behavior of litigants accompanied by Navigators — a greater ability to more clearly set out the relevant facts and circumstances and a significant increase in use of relevant defenses for those litigants. We have shared the progress of this program with the New York State Bar Association, which also sees the great promise of this exciting new concept.

I am pleased to announce today that I intend to introduce legislation this year that calls for a further level of involvement by non-lawyers in assisting litigants. This proposal would codify a more substantial role for non-lawyers by establishing a category of service providers called “Court Advocates” in Housing Court and in consumer credit cases to assist low-income litigants.

While there is no substitute for a lawyer, the help of a well-trained non-lawyer standing by a litigant’s side is far preferable to no help at all. We have already seen what a difference it can make.

INDIGENT CRIMINAL DEFENSE

Providing quality legal representation for indigent persons accused of a crime remains both a legal obligation and a moral priority for our justice system. Recent developments strongly suggest that our state is now on a fast track to fulfilling the promise and mandate of *Gideon v. Wainwright*. The historic settlement last fall of the *Hurrell-Harring* lawsuit means that, for the first time, the State has acknowledged that it bears responsibility to set standards and provide funds necessary to ensure the high and uniform quality of representation for low-income people

in criminal cases. Moreover, the settlement vests responsibility for implementation of its stringent provisions with the Office of Indigent Legal Services. Thus, the settlement honors two foundational and fundamental principles: that the quality of representation in cases legally mandated by *Gideon* is truly the responsibility of the State; and that the task of securing needed improvement in the quality of representation must be vested in an independent and professionally staffed office.

Despite this welcome achievement, our efforts are far from over. The settlement terms — which, most importantly, require implementation of caseload limits and provision of counsel at first court appearance — apply only to five of the state’s 62 counties. And although the average institutional defender caseloads in those counties are currently too high — nearly 500 per attorney, well in excess of the nationally recognized limits — none of the five counties are among the 23 counties most in need, where average attorney caseloads exceed 700.

We simply do not have the luxury of waiting indefinitely to make progress in the rest of the state. We must take full advantage of the momentum of the settlement and the effective blueprint it provides. That is why the Office of Indigent Legal Services is seeking \$28 million from the Legislature for the upcoming fiscal year for what would be the first phase of a five-year upstate caseload reduction and provision of counsel at first appearance program. We can no longer tolerate the unacceptable circumstance in this state in which the quality of justice one receives is dependent on the happenstance of where one is charged and prosecuted.

NATIONAL SUMMIT ON HUMAN TRAFFICKING AND THE STATE COURTS

A quality indigent defense system is fundamental to access to justice, and fighting the evil of human trafficking is also a vital component of ensuring justice for all. The Judiciary has the ability to be a catalyst for change in addressing this problem, and New York leads the way in this regard, at the forefront in developing responses to sex trafficking. In 2013, I announced New York’s launch of the nation’s first statewide system of dedicated courts designed to intervene in the lives of trafficked human beings.

I am pleased to announce today that on October 7-9, 2015, New York will host a National Summit on Human Trafficking and the State Courts. The Summit will be financed by a nearly half million dollar grant from the federally funded State Justice Institute, which has done such great work in this area through the State Courts Collaborative — of which New York’s Center for Court Innovation is an integral player. Building upon New York’s experience and expertise in Human Trafficking Intervention Courts, the Summit will provide a national platform for discussion among state court leaders and will further the goal of building national, state, and local partnerships to address the full scope of human trafficking. This groundbreaking Summit will be conducted in partnership with the National Center for State Courts, the National Conference of Chief Justices, and the National Conference of State Court Administrators.

Individuals charged with prostitution-related offenses are overwhelmingly victims of trafficking, recruited or forced into the commercial sex industry. Jurisdictions and courts around the country are just beginning to recognize this phenomenon. The New York Summit will be a significant catalyst to raise consciousness about the nature, scale and scope of human trafficking, and the

role of the state courts in combating this modern day form of slavery, where victims, at the youngest of ages, are exploited by a vast and evil industry.

TRANSFORMING ATTORNEY DISCIPLINE IN NEW YORK

Turning to the legal profession, an area in need of change in our own state involves discipline for professional misconduct by lawyers. While an attorney's disciplinary history may not be the sole determinant in a potential client choosing an attorney, there is no doubt that it is pertinent information that should be easily accessible, in the same way and for the same reasons that complaints against physicians are public information when they result in a statement of charges or a final disciplinary action.

With this in mind, I am announcing today that we have centralized this information and made attorneys' history of public discipline readily accessible on the Unified Court System's website. A simple click on the "Attorney Directory" link³ on the court system's home page allows a user to search for an attorney. In addition to displaying information such as the attorney's year of admission and current registration status, this search will now also provide the attorney's "Disciplinary History." The database includes public discipline dating back decades and links readers to disciplinary orders issued since 2003. However uncomfortable or inconvenient the facts may be, the public has a right to know.

From a more systemic perspective, an efficient and effective attorney disciplinary system is fundamental to the sound administration of justice. In assessing our current system, commentators have raised important and challenging questions including whether our departmental-based system leads to regional disparities in the implementation of discipline, whether conversion to a statewide system is desirable, and how we can achieve speedier dispositions that give much-needed closure to both clients and attorneys.

With this in mind, I am extremely pleased to announce today the creation of the Commission on Statewide Attorney Discipline. This new Commission, chaired by Chief Administrative Judge A. Gail Prudenti, and made up of leaders from both the bench and the bar whom I will announce in the near future, will conduct a top-to-bottom review of the system throughout the state to assess what is working well and what can work better, and to offer recommendations on fundamentally reshaping attorney discipline in New York.

RESTORING INTEGRITY TO THE FIDUCIARY APPOINTMENT PROCESS

Members of the legal profession and others are routinely appointed by judges as fiduciaries to serve the courts and litigants — as a receiver managing property during foreclosure proceedings, legal counsel for estates lacking designated beneficiaries, or a guardian representing the interests of children or incapacitated adults, to name just a few.

Over the years and in spite of the adoption 13 years ago of the current Part 36, an administrative rule regulating the fiduciary appointment process, public trust and confidence have sometimes been compromised by allegations that the process is tainted by favoritism, nepotism, or politics and that appointments result from factors other than merit.

I am therefore announcing today the appointment of Deputy Chief Administrative Judge Michael V. Coccoma as the Statewide Administrative Judge for Fiduciary Matters. In addition to his other judicial and administrative responsibilities, Judge Coccoma will be charged with monitoring and enforcing compliance with fiduciary appointment rules throughout the state. Should a particular problem be identified requiring further investigation, the complaint will be immediately referred to the Special Inspector General for Fiduciary Appointments, with whom he will work closely.

Through this proactive approach to monitoring compliance, we will streamline and improve the fiduciary appointment process, eliminate loopholes, promote effective appointments, and, most importantly, earn the confidence of the public that is the bedrock of our system of justice.

MOVING TOWARDS A DIGITAL FUTURE: MANDATORY E-FILING

We also must ensure that our court procedures are consonant with the digital age and fully accessible to those who practice here. The New York Court System's experiment with electronic-filing began in 1999 with a limited pilot program and has since expanded significantly.

Today, there are more than 57,000 active registered users of our e-filing system; more than 800,000 cases have been e-filed, and over six million documents have been e-filed. Universal e-filing will save New Yorkers more than \$300 million annually, according to reliable estimates. This year, I will introduce legislation to empower the Chief Administrative Judge to implement mandatory e-filing in the Supreme Court in all counties and in all classes of cases. It is time to end the "experiment," fully embrace modern technology, and by statute make e-filing a permanent part of New York practice.

CONTINUED LEGISLATIVE PRIORITIES

We also must continue the fight for our other legislative priorities that remain unresolved.

JUVENILE JUSTICE

For the past several years, we in the Judiciary have repeatedly recommended legislation to end New York's dubious distinction in being one of the only states in the nation to prosecute 16 and 17-year-old offenders as adult criminals. What a travesty! Governor Cuomo, to his great credit, has now introduced legislation that adopts in full the excellent proposals of the commission he created last year — a proposal that builds on the thoughtful work of the court system's own Sentencing Commission.

Although the Governor's legislation differs in some respects from the Judiciary's bill, our principal concern is ensuring legislative action on this issue now — the long and the short of it is, raise the age of criminal responsibility in New York to 18, period! Let's get a bill done this year and capitalize on the momentum that the Governor has brought to the table — and end our shame in treating children as adult criminals.

BAIL REFORM

As a matter of common sense and of fundamental fairness, we again submit legislation to reform the way we make decisions affecting the pre-trial liberty of those accused of crimes in our state.

Bail decisions should without question be informed by public safety considerations and the need to protect New Yorkers on our streets and in our communities; it denies reality to suggest otherwise. And a system that presumes an individual is innocent should also presume that a non-violent individual should not be incarcerated pending trial without good reason. We must ensure that pre-trial detention is reserved only for those defendants who cannot safely be released or who cannot be trusted to return to court.

It is estimated that taxpayers spend a staggering \$9 billion per year on pretrial detention across the country, and that 61% of jail inmates are in an unconvicted status awaiting trial. So let's make the safety of the public a statutory factor in New York bail decisions and change the presumption of incarceration for defendants who are not a threat to public safety. This is critically important to the public purse and will save New Yorkers tens of millions of dollars every year. What a boon for New York from a fiscal perspective, and what a giant step for fairness in our state!

WRONGFUL CONVICTIONS

Another vital area for legislative action is wrongful convictions. There is no greater failure in the criminal justice system than to unjustly deprive an innocent person of her or his liberty.

One of my first tasks upon taking office as Chief Judge in 2009 was to form the New York State Justice Task Force, now co-chaired by former Senior Associate Judge of the Court of Appeals, the Honorable Carmen Beauchamp Ciparick and Westchester County District Attorney Janet DiFiore. I am very pleased that two of the Task Force's most significant recommendations — the expansion of the State's DNA Databank and providing criminal defendants with greater access to post-conviction DNA testing — have already been enacted. Three others await immediate legislative attention: requiring video-recording of custodial interrogations by law enforcement throughout our state; adopting procedural safeguards when the police conduct lineups and photo identifications; and reforming discovery laws to accelerate and broaden pre-trial disclosure of evidence in criminal cases. Passage of these three reforms is critical. When the innocent are wrongfully accused, we all suffer.

ENSURING FAIRNESS FOR JUDGES: THE SALARY COMMISSION

And let's talk about our judiciary, the life-blood of the court system. A talented and thriving Judiciary is absolutely essential to an effective system of justice and to every aspect of civilized society. If New York is to preserve the excellence of its Judiciary, it must continue to attract high-quality candidates to the bench by ensuring fair and competitive pay for its judges. After more than a decade of struggle and debate over the vexing issue of judicial salaries, in 2010 New York took a historic step forward by establishing a Special Quadrennial Commission on Judicial Compensation. This April, the Commission will sit again with new members and will determine judicial salaries for the next four years. I will be announcing the Judiciary's two appointments to the commission in the very near future, and we look forward to another very positive chapter in

our efforts to make the pay of New York's judges reflect the critical work that they do and their status as the absolute best state judiciary in the country.

CONTINUING ON THE ROAD TO RECOVERY: THE JUDICIARY'S 2015-2016 BUDGET

Judicial salaries, of course, are incorporated in a judicial budget that is carrying out our responsibilities under the Constitution and ensuring equal justice in our courts. After years of no-growth attrition budgets, our current budget, meticulously crafted by Chief Administrative Judge Prudenti, is allowing us to continue on the road to recovery and ensure that we can deliver justice to the people of New York.

But years of austerity have taken a considerable toll on our court system and the delivery of services the public expects. Since 2009, the Judiciary has shouldered nearly \$400 million in increased costs and has lost more than 2,000 employees, significantly impairing court operations. In order to prevent backsliding and maintain our ability to serve the public, we again seek an increase in our budget. The proposed 2015-2016 budget carefully balances the Judiciary's obligation to be a faithful steward of public funds with our branch's fundamental and independent duty to provide fair and timely justice to every person who comes to our courthouses.

The budget also continues our commitment to helping the millions of litigants who appear each year in cases without representation by providing significant additional funding for civil legal services. We know that for every dollar invested in civil legal services, the State receives more than six dollars in economic benefit — through 2013 a total economic benefit to New York of \$769 million according to the most recent economic analysis. What a bargain for the well-being of our state and its fiscal strength!

CONCLUSION

As we look ahead, I know I speak for my spectacular colleagues, all seven of us — a full house, on the best high court in the nation, Susan Read, Eugene Pigott, Jenny Rivera, Sheila Abdus-Salaam, Leslie Stein, and Eugene Fahey — in saying that the New York State Judiciary is strong, committed, and prepared for the challenges of the year to come and beyond. I want to salute our fabulous Chief Administrative Judge Prudenti for her leadership, her wisdom, and her singular dedication to the pursuit of justice in our courts. I could not be more grateful to her and to our stellar and wonderfully supportive Presiding Justices Luis Gonzalez, Randall Eng, Karen Peters, and Henry Scudder, and to our preeminent judges and terrific court staff who together are the heart and soul of our institution.

It is through all of their efforts and their steadfast commitment that the public is served with such distinction and care, and that we are able to ensure that all New Yorkers have access to our courts, each and every day. Access to justice is the overriding objective behind each of the accomplishments, initiatives, and proposals that I present in this year's State of the Judiciary and those that have come before. Access to justice and equal justice for all is the very reason we have courts, and it is the legacy that this Judiciary and this Chief Judge aspire to leave for our great institution. Thank you.