

Until Civil Gideon: Expanding Access to Justice
Lunchtime Keynote by Chief Judge Jonathan Lippman
Introduction by Fern Schair
November 1, 2013, 1:00 p.m.
Fordham University, 113 West 60th Street, 12th Floor Lounge

I want to start by thanking Fern Schair for her wonderful introduction and for inviting me to speak with you today. Fern, you do so much to improve our legal system and our courts. I so admire and greatly appreciate your wonderful work. Fordham Law School's Urban Law Center, the Urban Law Journal, and the Feerick Center for Social Justice have put together a truly first-rate program, spearheaded by Dora Galacatos and Nestor Davidson. Expanding access to justice is a topic of the very greatest importance to New York's judiciary and something that has been the highest priority for me as Chief Judge. The terrific speakers you've assembled for today's Conference remind us of all the work that is going on in New York and around the country to ensure equal access to justice for all who come before our courts.

My focus today is on the work that New York's judiciary has done to address head-on the acute need for civil legal assistance in our state. The lack of effective legal assistance can unbalance the scales of justice and devastate the lives of real human beings and their families. As a society, we must be responsible for the fair and equal administration of justice, and it is imperative that we ensure that the playing field is leveled for all those who come through our courthouse doors.

This year, we mark the 50th anniversary of the landmark case of *Gideon v. Wainwright*. In *Gideon*, the United States Supreme Court recognized an indigent defendant's right to appointed counsel for the first time. The Court ushered in a dramatic change to our legal system when it announced 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. This seems to us to be an obvious truth.”

The words of the Supreme Court in *Gideon* are a reminder and a challenge to all of us in the judiciary, the legal profession, law schools, and public service that today, there is still no right to counsel in civil cases where litigants are fighting for the most basic necessities of life. Undoubtedly, the criminal indigent defense system faces problems related to overwork and understaffing, but at the very least, there is a constitutional mandate that trials where the accused are denied access to representation have no legitimacy. What is at stake in civil cases -- the custody of a child, the roof over a person’s head, access to food stamps or disability benefits -- is no less critical to a person's well-being and existence than the very loss of liberty itself. Fifty years after the Supreme Court ruled that a poor defendant is entitled by the Constitution to representation in criminal court, millions of Americans continue to lack representation as they navigate our housing, family, and other civil courts.

But, what is not secured yet as a Constitutional right can, to a significant degree, be provided by other means. A diverse and growing coalition of bar associations, judicial leaders, service providers, academics, and others are experimenting on the ground with creative ideas and approaches to expand legal representation through new funding streams, greater lawyer volunteerism, and other programs and initiatives.

In New York we have worked toward a comprehensive, systemic approach to meeting the challenge of the desperate need for civil legal services. A central component of New York’s response has been the Task Force to Expand Access to Civil Legal Services in New York. In 2010, I established the Task Force, chaired since its

inception by Helaine Barnett, former President of the federal Legal Services Corporation, who has devoted her entire professional career to providing legal services to the poor. The Task Force is composed of judges, lawyers, business executives, representatives from law schools and nonprofit organizations, legal service providers, and labor leaders from all over our state. Its mission is to systematically document, measure, and address the impact of this enormous problem and – most importantly -- make recommendations for action. In addition, each year, I personally preside, with the leadership of the Judiciary and the President of the State Bar, over a series of four public hearings, one in each of the state’s judicial departments, in order to assess the extent and nature of unmet civil legal needs and identify emerging ideas and solutions.

The most important outcome has been the inclusion of substantial funding for civil legal services in the Judiciary’s budget. Based on the research, testimony, surveys, and data included in the Task Force's first report in November 2010, we were able to show the Legislature that additional funding for civil legal service providers was badly needed. The Governor and the Legislature approved the Judiciary budget allocating \$27.5 million in state funding for civil legal services. The next year, we received \$40 million. And this year, a total of \$55 million was devoted to funding for civil legal services in the Judiciary's budget -- by far, the highest level of state funding for civil legal services in the country, and yet the tip of the iceberg in terms of the dire need.

The impact of this funding is being felt by people around the state. Judge Fern Fisher, the Deputy Chief Administrative Judge for New York City Courts and the Director of the New York State Courts Access to Justice Program, testified at the latest hearings to the hundreds of thousands of “lives that were assisted and changed by the

legal service providers and volunteers who were able to be helping hands due to” Civil Legal Services funding obtained by the Judiciary.

In allocating funding, as with every aspect of our strategy, the judicial branch in New York has focused on those with the most profound needs. To provide every person with a legal problem of any kind with a lawyer at public expense is just not feasible. What we are doing in New York is prioritizing our resources, particularly in light of today's fiscal realities, and focusing, first and foremost, on providing counsel for those people who come to our courthouses seeking the “essentials of life” --a roof over their heads, family stability, personal safety free from domestic violence, access to health care and education, or subsistence income and benefits. That is the best way to make immediate and meaningful progress in addressing the access to justice crisis.

The allocations in the judiciary budget for civil legal services are without a doubt a bright spot. They set a tremendously important precedent for a steady, permanent funding stream from the public fisc. Giving poor litigants a fair shake by providing them with representation goes to the very heart of our constitutional mission to provide equal justice. Keeping the doors of our courthouses open is not meaningful if what goes on inside these doors does not foster equal justice. Without equal justice, we might as well close the courthouse doors.

Expanding public funding for civil legal services is the central and indispensable component of New York's approach. We must get our partners in government to understand that funding legal services for the poor is every bit as important as the other critical priorities of our society. We don't say that, because of the economy, we are not going to have schools this year to educate our children or hospitals to heal our sick, and

we can't say that the poor and people of limited means will be allowed to fall off a cliff because we don't have enough money to provide them with legal services. We can't, and we won't. The moral imperatives could not be more clear!

But changing our public priorities is not the whole picture. We are engaged in so many other endeavors beyond funding. Each year, the Task Force has presented recommendations designed to come at the problem from all angles, and we have undertaken a wide range of reforms aimed at securing legal representation for the poor and people of limited means.

One of the most significant pieces of the puzzle is encouraging pro bono efforts by the private bar. Lawyers in New York and in so many other states deserve great credit for helping those in need. Volunteerism is a strain that runs strongly through the profession. Without the outstanding work of New York's attorneys, the crisis of the unrepresented here would be far worse. We have a long history of facilitating and promoting pro bono work through partnerships with legal services providers, placement services, award and recognition programs, training, guidelines, and events. We saw that especially this year with Superstorm Sandy. When the storm receded, it left in its wake not only physical destruction, but complicated legal problems involving insurance, access to benefits, lost or damaged property, housing, domestic violence, and employment. The members of the legal profession in New York came out in force to give help to people in crisis after the storm. Our civil legal services funding also played an important role in supporting legal service providers in their disaster response.

The court system has also created a range of programs that facilitate placements of volunteer attorneys in order to assist and encourage members of the bar in

undertaking pro bono work. Through the Volunteer Attorney Program, lawyers are trained by the courts to provide legal advice and assistance to litigants who represent themselves in court. Working under the supervision of court staff, these volunteers answer questions, assist with petitions and other court forms, help to interpret court orders, and provide guidance in preparation for court hearings.

We have looked to both our most senior attorneys and our very newest to encourage and support this spirit of volunteerism. Our Attorney Emeritus Program seeks to promote the active participation of senior attorneys in pro bono work. The program is open to attorneys in New York who are at least 55 years of age and have a minimum of 10 years' experience practicing law. They commit to performing 60 hours of pro bono service over a two-year period, some of which counts toward CLE requirements. Each Attorney Emeritus works with qualified legal services programs that provide malpractice coverage and access to offices, staff, and any necessary training. With about fifty organizations already participating, this program provides a range of opportunities for senior lawyers who want to use their experience in productive ways to promote the public good. And it offers an added benefit to young lawyers at legal service organizations who can learn from working with their more experienced colleagues through this program. Under the superb leadership of Fern Schair and John Feerick, the Attorney Emeritus Program has grown since 2010 to include about 750 lawyers --- mostly baby-boomers starting a new wonderful, meaningful phase of their careers. How great!

We have also focused on lawyers just embarking on their legal careers. In New York, we became the first state in the country to mandate that applicants to the bar

contribute 50 hours of pro bono work before they are admitted to practice. And let me be frank, I didn't take a poll of the bar or law schools, or a vote as to whether requiring law students to do 50 hours of pro bono work during their three years of law school was a good idea. This was too fundamental! Some say, "What a terrible burden on law students in these difficult economic times." To the contrary -- we're talking essentially about a little more than a week's worth of work --- and what a crime to let them go through law school without learning what it means to be a lawyer. This initiative was designed to increase the level of pro bono service among law students, but as importantly, to cultivate a culture of service among future lawyers. We need the new generation of lawyers to embrace the core values of our profession. And in my view, they should demonstrate before they are admitted to the Bar that they understand what it means to be a part of our noble profession, which first and foremost, is about service to others. If we require law students to take Torts and Contracts, we should also be requiring them to learn about the values of our profession. Pro bono must become a part of their DNA that continues with them throughout their careers.

Beyond the 50-hour rule, law schools and law students are pivotal and an integral part of the equation in access to justice, as law schools are the incubators and instillers of the basic values of the legal profession and law students comprise the future leaders of the bar. With this in mind, the Task Force convened a national conference in May 2012 at Cardozo Law School and again in May 2013 at New York Law School on the role of law schools in helping to meet the essential civil legal needs of low-income New Yorkers. These conferences drew together law school professors and administrators, pro bono coordinators, judges, bar leaders, attorneys in private practice,

legal service providers, and students who have identified and articulated ways for law schools to be helpful through pro bono work by students, clinics, externships, changes in curriculum, post-graduate programs and other initiatives.

In addition to the most and the least experienced lawyers, in-house counsel is another category of lawyers whose interest in pro bono we hope to encourage. Even if they are not admitted to the New York bar, in-house counsel who are licensed to practice law in another state may work full time for a corporation here. There are approximately 9,000 in-house counsel working in New York, some of whom – but not all -- are admitted to practice law in New York. Many of them are employed by legal departments where providing pro bono legal assistance to the underserved is a core value. Under ordinary circumstances, however, in-house counsel who are not admitted here cannot represent clients in court here. But what if they want to take a case pro bono? When we have so many unrepresented litigants facing the most dire circumstances, why shouldn't they be able to do it?

Last spring, I asked Judge Victoria Graffeo to chair an Advisory Committee on Pro Bono Service by In-House Counsel to look at ways to encourage pro bono by in-house counsel. That group has developed proposed changes to the rules of the Court of Appeals governing registration of in-house counsel to allow them flexibility to represent people in our state who are unable to afford a lawyer. This idea has widespread support, including by the New York State Bar Association, and I look forward to its implementation in the coming months.

For all the good work that so many lawyers in our state do -- and we estimate that it amounts to about two million hours a year -- we have never been able to measure

more precisely just how many hours of pro bono work are actually performed in New York. For the first time, as of this past summer, attorneys are now required to report on their biennial attorney registration form how many hours of pro bono work they have done over the registration period and how much money they have donated to service providers. Pro bono reporting promises not only to give us reliable data, but also to raise the profile of pro bono work by focusing attorneys on giving their time, talents, and resources to helping those less fortunate.

Another of our most recent efforts is to look at the ways that non-lawyers can have a role in assisting low-income pro se litigants with their legal problems. A little over a year ago, Professor Gillian Hadfield, who is here with us today, testified at our civil legal services hearings about the high cost of legal representation and the kinds of work non-lawyers might do to mitigate the deep, unmet need for legal help. Elsewhere in the world, non-lawyers are freely permitted to provide certain kinds of help. I asked Fern Schair and Roger Maldonado to chair a committee to look at ways -- short of changing our laws on attorney practice -- that non-lawyers can relieve some of the pressure on our legal system in New York. They have been working on developing pilot programs and I expect to move forward on their recommendations in the coming months.

The reality is that, even with all these efforts, we still see many, many self-represented litigants come into our courts. And we have not ignored that reality: we've increased dramatically the resources and information available on the courts' website and in our courthouses, including a large number of online forms that are interactive and designed for litigants to use by themselves. We also heard from judges that they were

unsure just how far they could go to accommodate unrepresented litigants. In response, we have proposed a new Rule 100.3(B)(12) of the New York Code of Judicial Conduct. That rule will provide guidance and support to judges in dealing with pro se litigants. It states that “It is not a violation [of the judicial ethics rules] for a judge to make reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard.” I will be sending the rule to the Court of Appeals shortly for its approval.

None of the work I have talked about today, by itself, can solve the problem. But together, these efforts can begin to fill the enormous gap between the need for civil legal assistance and the resources available. New York’s multi-faceted approach is showing results. The decision to convene the Task Force and to hold annual hearings catalyzed the interest and attention to this issue in our state. It established a vital precedent and template, by implementing an annual process to fund civil legal services through state monies that are an integral part of the Judiciary’s overall budget. And pro bono efforts by the bar and the courts and programs that facilitate representation of the poor in civil cases have galvanized and changed public attitudes toward reinforcing the “obvious truth” that legal representation in civil cases involving the basic necessities of life is fundamental to the delivery of justice.

In New York and around the country, we must all be diligent in doing the necessary work and laying the foundation to make sure that our nation makes good on the promise of *Gideon*. On this 50th anniversary year, we are still a far way from the ideal of a civil Gideon, the constitutional right to indigent civil representation. But, we have made more progress than ever before in establishing stable streams of funding for

our legal service providers, spurring more participation from the bar and educating our communities about the importance of access to justice. Across the nation, a thousand flowers are blooming, with innovative programs to foster equal justice through civil legal services for the poor and people of limited means. We are all thinking out of the box, with new ideas laying the groundwork for civil Gideon. Twenty-one years before *Gideon*, in *Betts v Brady*, the U.S. Supreme Court denied a constitutional right to free counsel for indigent criminal defendants. But in the 21 years before *Gideon*, the dialogue changed, and the country's view of the need for criminal legal representation evolved based on experimentation with new ideas and programs. We are now together changing the dialogue in this country when it comes to civil legal representation for the poor and its importance to the well-being of our society.

On Clarence Gideon's gravestone is a eloquent epitaph from one of the letters that this poor, uneducated man wrote to his court-appointed lawyer, Abe Fortas, who went on to become the renowned Supreme Court Justice. The epitaph reads, "Each era finds an improvement in law for the benefit of mankind." Let the improvement in our era be a new commitment to providing civil legal services for the poor. Every society is judged by how it treats its most vulnerable citizens. We in the profession can and should be held accountable by this standard. Whether we are in public service or in private practice, we all must join together to ensure that everyone, rich or poor, high or low alike, has access to legal representation when the basic essentials of human life are at stake. The pursuit of justice is what our noble profession is all about, and pursuing justice is what we must all do in order to maintain the ethical core and legitimacy of our justice system. Thank you.