

Written Testimony of

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in the

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Expanding representation will not only improve access to the courts and the quality of justice obtained by these individuals, but will allow court calendars that currently include many self-represented litigants to be handled more effectively and efficiently . . . Equal access to justice without regard to income is a fundamental right in a democratic society. It is essential to the enforcement of all other rights and responsibilities in any society governed by the rule of law. It also is essential to the public's confidence in the legal system and its ability to reach just decisions.

- California AB 590

¹ This testimony was prepared with the help of Emily Savner, Research Associate in the Brennan Center's Justice Program.

Introduction

Senator Hassell-Thompson, Senator Sampson, and hearing co-chairs, thank you for holding this hearing on New York's IOLA program and civil legal services. I am delighted to provide testimony in support of legal representation of the poor.

I am the director of the Justice Program at the Brennan Center for Justice at New York University School of Law. The Brennan Center was founded in 1995 as a living tribute to the late Supreme Court Associate Justice, William J. Brennan, Jr. The Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice.

Within the Justice Program, I lead the Access to Justice Project, one of the few national initiatives dedicated to helping ensure that individuals, families and communities can obtain access to the courts and other public institutions. Through public education, research, counseling and litigation, the Brennan Center works to expand access to civil legal services on the national and state levels and to promote policies that better enable people to resolve their problems in reliance on the rule of law.

Our perspective on the current crisis is perhaps distinct from that of some of the other witnesses. The Brennan Center is not a legal services provider organization. Additionally, the Brennan Center does not receive New York State funds or IOLA funds. Rather, the Brennan Center is a free-standing, public interest law organization, funded by foundation grants and by other private charitable contributions. In addition to offering our policy expertise in the area of legal services, my testimony is informed by my past experience as a legal services lawyer in New York City, first at MFY Legal Services and later at Legal Services for the Elderly. For the past several years, I have served as a member of the Justice Advisory Committee of the New York County Lawyers' Association. I have also served on the Pro Bono and Legal Services Committee of the Association of the Bar of the City of New York.

Testimony

I. Economic Hardship is Causing More Families to Turn to the Justice System, Despite Diminished Opportunity to Obtain Legal Help

a. Recessionary trends compound already-unmet legal needs of the poor

As we know all too well, conditions are bad and worsening for families of modest means, both nationwide and in New York. The recession has affected the lives and livelihoods of all our families, but it is the more vulnerable among us who are being hit the hardest. Poverty brings people closer to the law in numerous ways and triggers reliance on, and inevitable problems accessing, the safety nets we have formed:

- Unemployment – As of December 2009, the national unemployment rate was 10 percent; 15.4 million Americans are unemployed today.² This does not include the 2.3 million people only “marginally attached to the labor force” and not included in official unemployment statistics because they have given up looking for work. As a result, the need for unemployment insurance benefits has skyrocketed. In October 2009, there were over 217,000 initial claims for unemployment filed nationally, up from approximately 133,500 in the same month in 2007.³
- Nutrition Assistance – As of August 2009, almost 36.5 million individuals participated in the Supplemental Nutrition Assistance Program, an increase of 23.9 percent from one year earlier. Of those people, 2.5 million were New Yorkers.⁴
- Foreclosure – An underlying lending crisis is the root of the current recession, and the foreclosure blight continues. Foreclosure filings were reported on nearly 938,000 properties nationally in the third quarter of 2009, up nearly 23 percent from the same period in 2008. In New York, foreclosures filings beset 15,242 properties in the third quarter of 2009, up 5.28 percent from last year.⁵
- Domestic Violence – Economic difficulties increase tensions at home, and are known to be associated with an increase in the incidence of domestic violence. The Legal Project, an organization that provides free legal services to low-income victims of domestic violence in Schenectady County, New York, reported that in 2007, the organization assisted about 700 victims. In 2008, the organization predicted it would likely serve more than 800 victims.⁶

In harsh economic times, civil legal conflicts increase in number and intensity, as do the adverse consequences of leaving them unresolved or resolving them unfavorably.

- More employees lose jobs, and more are denied unemployment insurance benefits.
- More tenants face eviction, and more turn to shelters.
- More homeowners face foreclosure, and more turn to shelters.

² U.S. Dept. of Labor, Bureau of Labor Statistics, Employment Situation Summary, *available at* <http://www.bls.gov/news.release/empstat.nr0.htm> (last visited Dec. 4, 2009).

³ U.S. Dept. of Labor, Bureau of Labor Statistics, Table 1. Mass layoff events and initial claimants for unemployment insurance, November 2004 to October 2009, seasonally adjusted (last visited Dec. 1, 2009), *available at* <http://www.bls.gov/news.release/mmls.t01.htm>.

⁴ U.S. Dept. of Agriculture, Supplemental Nutrition Assistance Program: Number of Persons Participating (last visited Dec. 1, 2009), *available at* <http://www.fns.usda.gov/pd/29SNAPcurrPP.htm>.

⁵ RealtyTrac, Foreclosure Activity Hits Record High in Third Quarter (Oct. 15, 2009), *available at* <http://www.realtytrac.com/foreclosure/foreclosure-rates.html> (“foreclosure filings” include default notices, scheduled auctions and bank repossessions).

⁶ Michael Goot, *Officials Fear Rise in Domestic Violence Cases*, Daily Gazette, Nov. 16, 2008.

- More families lose government benefits, and more face hunger and illness without additional safety net.
- More people experience domestic violence, and more people are harmed.

People need legal help and civil legal services programs can be a life-saver – the link that, literally, makes a life or death difference. But, regrettably, this link is broken. Even before the recession hit, more than 80 percent of the annual legal needs of low-income people went unmet, according to the Legal Services Corporation (LSC).⁷ In its 2009 Justice Gap study, LSC found that for every client served by an LSC-funded program, another eligible person seeking help is turned away due to insufficient staffing.⁸

The “justice gap” in America is not a new phenomenon, but the recession has widened it and brought to light its consequences.

b. Civil legal services programs report being overwhelmed by prospective clients

More people are financially eligible for federally funded legal services than ever before.⁹ The U.S. Census Bureau reports that the number of people eligible for LSC-funded services (people living at or below 125 percent of the federal poverty level) grew to 53.8 million in 2008, up from 50.8 million just one year before.¹⁰ And this number captures just the recession's start.

Signs of this unmet need are visible in virtually every legal services program across the country. Stories from New York providers reveal the extent of the problem:

- In December 2008, a week-long survey revealed that programs outside New York City were turning away around 55 people every hour they were open, amounting to 114,400 people per year.¹¹
- From 2007 to 2008, Legal Services NYC saw a 37 percent increase in the overall number of new foreclosure cases in Brooklyn alone.¹²

⁷ LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 2 (Sept. 2005).

⁸ LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 1 (Sept. 2009).

⁹ LSC Updates, Legal Services Corporation, U.S. Census: More Americans Eligible for Civil Legal Aid (Sept. 17, 2009).

¹⁰ Press Release, U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2008 (Sept. 10, 2009), available at http://www.census.gov/Press-Release/www/releases/archives/income_wealth/014227.html.

¹¹ Cara Matthews, *Money is Short but Demand By Poor for Legal Services Increases*, The Ithaca Journal, Feb. 25, 2009.

¹² Press Release, Legal Services NYC, Legal Services NYC-Brooklyn Branch Helps Midwood Families Avoid Foreclosure, Predatory Lenders (Apr. 2009), available at <http://www.legalservicesnyc.org/index.php?option=content&task=view&id=298>.

- The Legal Aid Society is forced to turn away eight of every nine clients who seek the program's help. Since the recession began, the Legal Aid Society also reports experiencing a 16 percent rise in the number of clients seeking domestic violence help, a 20 percent increase in housing cases, a 30 percent increase in employment-related cases and a 40 percent increase in health-related cases.¹³

c. Funding for civil legal services in New York falls despairingly short

While the legal needs of the poor and newly poor are growing, access to legal services for these families is disappearing due to legal services programs' funding shortfalls. Civil legal services in New York has been funded jointly by federal, state, local and private sources, but revenue from all these sources has been far from sufficient in recent years.

As this hearing's sponsors recognize, the crash of New York's IOLA fund constitutes a disastrous loss of revenue. The IOLA fund has been the largest source of government support for most of the civil legal services programs serving New Yorkers, yet current, near-zero interest rates have caused IOLA revenue to plummet precisely when it is most needed.¹⁴ In 2008 and 2009, IOLA awarded around \$25 million in grants to civil legal services providers across the state, but the IOLA fund is expected to produce only \$6.5 million for distribution in the 2010-2011 fiscal year.¹⁵

The instability of general state funding for civil legal services has also undercut programs' capacities to aid the growing numbers of people in need of help. From a high of \$15.8 million in the 2007-2008 fiscal year, the first time the Governor put funding for legal services in his Executive Budget, funding was cut by more than half the next fiscal year, reaching only around \$6.6 million in the 2008-2009 fiscal year. This fiscal year, after completely eliminating funding for civil legal services, Governor Patterson restored just \$1 million of the funding following a community outcry.¹⁶ Another \$6.6 million has been restored in Assembly funding, and the Senate has dedicated \$4.4 million for legal services, but only a portion of the Senate's

¹³ Lily Jamali, *Legal Aid Funding Dwindles As Recession Factors Mount*, NY1.com, Jul. 21, 2009.

¹⁴ At the start of 2008, the federal funds rate was 3.50 but today it hovers between 0 and 0.25%. Federal Reserve Bank of New York, *Historical Changes of the Target Federal Funds and Discount Rates*, available at <http://www.newyorkfed.org/markets/statistics/dlyrates/fedrate.html> (for 2008 figure); Federal Reserve Bank of New York, *Federal Funds Data*, available at <http://www.newyorkfed.org/markets/omo/dmm/fedfundsdata.cfm> (for current, 2009 figure).

¹⁵ Joel Stashenko, *'Staggering' Gap in Civil Legal Assistance Looms as IOLA Fund is Squeezed by Interest Rate Plunge*, N.Y. Law Journal, Aug. 18, 2009; Allison Roselle, *Fund that Pays for Low-Income Legal Services Spirals Downward*, Legislative Gazette, Dec. 7, 2009.

¹⁶ See Press Release, Legal Services Funding Alliance, *Civil Legal Services in Crisis* (Mar. 3, 2009), available at <http://www.empirejustice.org/issue-areas/civil-legal-services/lfsa/legal-services-crisis.html>.

funding is expected to go to civil legal services and none of that sum has been appropriated yet.¹⁷

Separately, for the current fiscal year, the state legislature provided over \$30 million for counseling assistance for individuals facing foreclosure, yet no similar pot of funding for legal representation in foreclosure cases has been appropriated by the state.¹⁸

The total amount of state-level funding for civil legal services continues to swing. Just last week, the Legislature passed the Governor's Deficit Reduction Plan, cutting 12.5 percent, or \$246,000 out of the already-strained civil legal services budget.¹⁹ However, in a much welcomed development, the Office of Court Administration has designated \$15 million in its budget for Fiscal Year 2010-2011 for civil legal services.²⁰ Delivery of this funding is an absolutely essential response to the IOLA revenue hole, and a key to keeping the doors of legal services programs open.

While an IOLA stopgap from the Office of Court Administration along with targeted foreclosure counseling money are critical interventions that should be applauded, the need for a more stable solution remains high. New York State must develop steady, year-to-year general funding for civil legal services as a part of the state's budget.

Last, the other main source of financing for civil legal services in New York is federal funding distributed through the nation's Legal Services Corporation. While federal funding has been on the rise in the last several years, LSC funds do not begin to fill the gaping funding holes. Federal funding for LSC in Fiscal Year 2009, totaled \$390 million. Even that amount is only around half of what LSC funding was, in real dollars, at its 1981 high water mark, the last time LSC funding allowed programs to reach a "minimum level of access."²¹

¹⁷ Around \$2.7 million of the Senate's funding is expected to go to civil legal services, the rest will likely go to criminal defense services. The Assembly has yet to pass the resolution outlining the expenditure of the Senate's funding, and thus none of it has been granted out to programs. See Joel Stashenko, *supra* note 15.

¹⁸ See 2009-10 Appropriations Bill (S51A A151A): Legislature and Judiciary, N.Y. Assem. (N.Y. 2009).

¹⁹ See Press Release, N.Y. State, Division of the Budget, Estimated Senate and Assembly DRP Local Assistance (Dec. 2, 2009).

²⁰ See N.Y. State Unified Court System Budget: Fiscal Year April 1, 2010 – March 31, 2011 (Dec. 1, 2009) at vii.

²¹ LEGAL SERVICES CORPORATION (2005), *supra* note 7, at 2 (dollar amounts adjusted for inflation using CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl>).

d. The result: people have no choice but to go it alone

Without access to civil legal services, people are going to court without representation, if they are getting to court at all. A 2005 survey of court managers in New York City Housing and Family Court showed that in cases ranging from eviction to child custody, from paternity to domestic violence, the majority of people are appearing *pro se*: 75 percent appear *pro se* in Family Court, 90 percent in Housing Court.²²

The foreclosure crisis has created unprecedented legal need among families attempting to remain in their homes and handle bankruptcy; however, the overwhelming majority of these families address these issues without representation. Judge Fern Fisher, Deputy Chief Administrative Judge for New York City Courts, reported that in 2008, there were 600,000 filings in consumer credit and housing cases and as many as 90 to 95 percent of litigants in housing cases and 99 percent of litigants in consumer cases were unrepresented.²³

From November 2008 to May 2009, in foreclosure proceeding involving “subprime,” “high cost” and or “non-traditional” mortgages, proceedings in which homeowners are likely to have a valid defense, 84 percent of defendants proceeded without full representation in Queens County. In Richmond County (Staten Island), 91 percent of such defendants were unrepresented, and 92 percent were unrepresented in Nassau County.²⁴

Facing a new and complicated set of legal problems alone is not something most would do by choice, but for too many vulnerable families, legal help is too often financially out of reach.

II. Lawyers Provides Unique Services and the Best Chances for Success

In the wake of civil unrest in the early 1970s, the federal government recognized the need to expand access to lawyers for low-income people: Richard Nixon signed into law legislation creating LSC, with the goal of making access to the justice system more universal. Providing legal representation to those otherwise unable to afford it has proven to be a success, to the benefit of the individuals and families that receive the services, and to the benefit of society, as evidenced by a more properly functioning judicial system.

²² OFFICE OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES 1 (Dec. 2005).

²³ Noeleen G. Walder, *City Launches Program to Boost the Ranks of Pro Bono Attorneys*, N.Y. Law Journal, Apr. 28, 2009.

²⁴ MELANCA CLARK WITH MAGGIE BARRON, BRENNAN CENTER FOR JUSTICE, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 14 (2009). Copy Appended as Exhibit A.

Legal services lawyers provide a range of services that would otherwise be unavailable to their clients. In foreclosure cases, lawyers can help families stay in their homes or find livable, alternative solutions. They can advance a variety of claims and defenses, including:

- 1) Raising defenses that protect homeowners from lenders and servicers who broke the law;
- 2) Helping homeowners renegotiate their loans;
- 3) Helping ensure that lenders follow the foreclosure process properly;
- 4) Helping homeowners achieve bankruptcy protection; and
- 5) Helping tenants when a landlord's property is foreclosed.²⁵

In the area of family law, legal services lawyers help victims of domestic violence obtain protective and restraining orders and assist parents and other family members fighting for custody of a child.

In consumer cases, lawyers protect the elderly and other vulnerable groups from unscrupulous or predatory lenders, help people manage and renegotiate their debt and assist those filing for bankruptcy.

Where families are hungry or homeless, legal services lawyers can help people to appeal wrongful denials of government benefits, allowing for access to the crucial safety net they need.

Having a lawyer makes a measurable difference in a person's case. Research reveals that a person with legal representation is more than five-times likelier to prevail in court than a self-represented person.²⁶ Conducting a meta-analysis of existent studies considering the effects of legal representation on adjudicated civil case outcomes, this study finds that, across case types, lawyers produce more favorable case outcomes than do self-represented litigants or non-lawyer advocates. Cases in which represented litigants are found to have the largest advantage over unrepresented litigants include landlord-tenant cases, asylum cases, and social security disability reconsideration cases.²⁷

In a 2001 study examining New York City's Housing Court, researchers found that while 51 percent of unrepresented tenants had final judgments ordered against them, only 22 percent of represented tenants did. Tenants with legal

²⁵ *See id.*

²⁶ Rebecca L. Sandefur, *Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes* 3 (Mar. 26, 2008) (unpublished manuscript, on file with the Brennan Center).

²⁷ *Id.* at 30.

representation were found to have similar advantages in cases involving eviction orders and stipulations requiring landlords to provide repairs.²⁸

III. Civil Legal Services is a Public Good

Of course, it is not only the value to individual clients that the State should consider in weighing the worth of legal services for the poor. Meaningful access to the courts benefits the larger society as well. In the 1974 LSC Act, Congress recognized that “providing legal assistance to those who face an economic barrier to adequate counsel will serve best the ends of justice” and that “for many of our citizens, the availability of legal services has reaffirmed faith in our government and laws.”²⁹

But, we would urge lawmakers not only to consider the value added by legal services lawyers to our democracy, but also the financial savings they generate. Civil legal services produces real cost-savings by states and localities.³⁰ For example, when families obtain the government benefits they need, such as Food Stamps, Medicaid, Medicare, SSI and federal tax credits, the state gains federal dollars, the value of which are multiplied when reinvested in the local economy by the low-income beneficiaries.

Legal services programs also serve a critical preventive function, fending off many of the harms that communities experience when representation is unavailable. Thus, by tackling clients’ mental health issues, education needs, and family disputes, they contribute to reducing re-arrests of clients with past criminal records. By fighting evictions and foreclosures, they help enable states and localities to reduce the costs associated with maintaining shelters, foster care, and a variety of other services for the homeless. And by helping clients to correct unsafe living and workplace conditions, they help to reduce government expenditures on health care.³¹

IV. Continued and Expanded Access to Legal Services is Possible

While the troubled economy has dramatically increased the need for civil legal services, it has also made it more difficult for communities to finance legal services. A variety of ideas for increasing funding for civil legal services, including creating or raising certain fees, were developed in a report to Chief Judge Kaye by the

²⁸ Carroll Seron *et al.*, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 *Law & Society Review* 419, 428 (2001).

²⁹ Legal Services Corporation Act. 42 U.S.C. 2996 §1001.

³⁰ See Laura Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid* (Nov. 6, 2009) (currently unpublished), available at <http://ssrn.com/abstract=1503009>.

³¹ See *id.*

New York Legal Services Project in 1998.³² These ideas (including distribution of revenue from the state's abandoned property fund) should be considered anew by the Legislature in light of the extraordinary level of need in the society. The Brennan Center recommends investigating:

a. Increased annual state appropriation

Several states have recently increased their legislative appropriations for civil legal services. These include New Hampshire, Oregon, West Virginia, Texas and Wisconsin.³³ A regular, and increased, state appropriation for civil legal services is the most direct way to ensure access to legal representation in the face of economic fluctuations.

Swings in New York's state funding for civil legal services characterize the state's approach to funding. The money earmarked in the Office of Court Administration's budget for civil legal services next fiscal year may be enough to continue access at the current level in the short term; however, longer-term funding solutions are necessary. A predictable, general civil legal services appropriation should be included annually in the Governor's Executive Budget and approved by the Legislature, both when the IOLA fund is flush and when, as now, the fund is depleted.

b. Increased civil court filing fees

A number of additional states, including Arkansas, Colorado, Pennsylvania and Texas, have increased or created new civil court filing fees, either temporarily or permanently, to fund civil legal services.³⁴ Revenue-generating fees on a range of court services can raise substantial amounts in civil legal services funding each year.

Connecticut is on its way to restoring an 85 percent drop in IOLTA revenue and permanently expanding the state's civil legal services funding, as the state passed legislation that increases several civil court fees.³⁵ Revenue collected through these newly raised fees is transferred to the Connecticut Bar Foundation, which disburses the revenue to legal services programs.

Targeted fee increases may have dual objectives as well. For example, a foreclosure filing fee, charged each time a lender wishes to foreclose on a property,

³² NEW YORK LEGAL SERVICES PROJECT, FUNDING FOR CIVIL LEGAL SERVICES FOR THE POOR (May 1998), available at <http://www.courts.state.ny.us/reports/misc/legalservpoor.pdf>.

³³ Information provided by the American Bar Association, Standing Committee on Legal Aid, Access to Justice Resource Center, <http://www.abanet.org/legalservices/sclaid/atjresourcecenter/commdevresources.html>.

³⁴ *Id.*

³⁵ Newly increased fees in Connecticut include jury fees and the fees for bringing a case in the Superior Court, designating a case as a complex litigation case, applying for a prejudgment remedy, filing a motion to open or reargue a judgment, among others. 2009 Conn. Pub. Acts 09-152.

could generate revenue for legal services while also providing a disincentive for lenders to foreclose on properties, particularly in cases where the defendant has actionable claims or when loan modification might be a mutually beneficial option.³⁶

Of course, not all fees are appropriate. It is essential to include safeguards that assure that court fees are implemented only if waivers are available for people who cannot afford to pay. Fees should not be interposed as barriers that prevent vulnerable individuals from gaining access to the courts or from fully vindicating their rights once in court. However, it is important to explore whether New York possesses significant opportunities to increase some civil court fees at little or no cost to the state, given the administrative and collection structures already in place.

c. Graduated court fees, or other “heavy user” fees

An additional option that warrants investigation and consideration is a progressive or “graduated” fee system. A variety of models might be available to impose fees in certain categories of cases, or on certain categories of litigants, where extensive litigation is known to place a disproportionate demand on the resources of the court system. A related approach would be to charge an annual filing fee, as contrasted with the conventional, one-time initial filing fee, in order to take into account the burden placed on the courts by litigations of long duration. With respect to all of these approaches, safeguards would be necessary to assure that the criteria chosen do not interfere with access to the courts for those who are vulnerable.

d. A fee on lawyers’ net billings

Another approach that warrants investigation would be to impose a charge on lawyers’ net billings, to be paid by counsel for both plaintiffs and defendants, and to be paid without regard to which side wins or loses particular cases. Attorneys who collect greater fees would be required to pay more than others who collect less. Here, as above, safeguards would be necessary to assure that increased fees, charged to attorneys, do not play out in a way that discourages individual litigants in their efforts to protect their rights.

e. A new infrastructure

Improvements should be made to the current state infrastructure for civil legal services. Legal services clients need a clearer voice in policy-making and need an advocate for increased funding for legal services programs. Nearly 30 states other than New York have created Access to Justice Commissions or Coalitions to coordinate the access to justice community. Such an entity is one form New York

³⁶ Several states have specific fees in place for filing a foreclosure complaint. See National Center for State Courts, Total Foreclosure Filings, Rates and Filing Fees for U.S. States (Oct. 2008), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/financial&CISOPTR=116>.

should consider to improve its own accountability in this context, and to assure increased and sustained attention to the issue.³⁷

V. Creating a Civil Right to Counsel

The Brennan Center, as a leader in national, state and local civil right to counsel initiatives, urges adoption of the right to counsel, an important mechanism for protecting the most vulnerable people in our society and helping to stabilize the delivery of legal services in New York. Substantial work has been done in New York to recognize an expanded civil right to counsel, and the Legislature should act expeditiously to embrace this model.

a. *Support for a civil right to counsel*

The basic concept of a civil right to counsel is not new.³⁸ Legislatures have long identified certain areas of civil law in which representation by counsel is guaranteed, for example, where individuals face involuntary psychiatric hospitalization or medical quarantine.³⁹ In fact, New York already guarantees civil legal representation when a parent is at risk of losing custody of a child to the government and is the only state that currently provides counsel to a parent facing the loss of custody of a child to another parent (or other private actor).⁴⁰

In recent years, significant national momentum has built to recognize a civil right to counsel in certain critical categories of cases in state settings. Thus, in a significant development, the American Bar Association in 2006 issued its resolution supporting a civil right to counsel in adversarial proceedings where basic human needs are at stake:

The American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those

³⁷ See American Bar Association, Standing Committee on Legal Aid, Guidance on State Access to Justice Commissions and Structures, available at <http://www.abanet.org/legalservices/sclaid/atjresourcecenter/atjmainpage.html>.

³⁸ See National Coalition for a Civil Right to Counsel, Historical Perspective, http://www.civilrighttocounsel.org/about_the_issue/historical_perspective/.

³⁹ Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, Clearinghouse Review (Jul.-Aug. 2006), available at http://brennan.3cdn.net/2f2ca53878e9299012_67m6ib9tv.pdf.

⁴⁰ See Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State: A Report of the New York State Bar Association*, 25 *Touro L. Rev.* 31, 50 (2009), http://www.tourolaw.edu/lawreview/pdfs/_5_WWW_State%20Bar%20Report%2011-4-08_SM_Final_12.23.08_.pdf.

involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.⁴¹

b. Right to counsel efforts in New York

The New York State Bar Association, and the New York County Lawyers' Association (alongside many other bar associations), co-sponsored the ABA's resolution⁴² and convened a broad range of stakeholders to identify areas of the law in which a civil right to counsel was most needed. Following a lengthy deliberative process that included a state-wide conference and the release of a formal paper gathering the stakeholders' views, the New York State Bar Association issued a resolution of its own, urging recognition of a civil right to counsel for: i) renters facing eviction and homeowners facing foreclosure, and ii) people defending appeals from determinations awarding them unemployment insurance benefits.⁴³ The Brennan Center authored a report, adopted by the State Bar, describing why a right to Counsel in these cases is necessary.⁴⁴

Several initiatives to enact a civil right to counsel have been advanced in recent years in New York. In January 2009, New York State Assembly Member Hakeem Jeffries introduced legislation to establish a right to counsel for homeowners facing foreclosure who would otherwise be unable to afford counsel.⁴⁵ The bill also would require notice to be sent to homeowners in foreclosure proceedings, informing them of the availability of state-provided counsel. Assembly Member Jeffries' bill should be taken up in the Senate, as its passage could eliminate one pressing area where too many homeowners are now appearing in court *pro se*.

In New York City, Councilwoman Rosie Mendez introduced legislation in 2007 – and intends to reintroduce it in the Council's next session – to establish a right to counsel for low-income, older New Yorkers facing eviction or foreclosure; an effort supported by the New York County Lawyers' Association.⁴⁶ The Mendez bill constitutes a model also appropriate for enactment as state legislation.

c. The California example

In these difficult times, it is notable that the State of California, facing severe financial pressures,⁴⁷ enacted a law to establish a civil right to counsel. Although

⁴¹ Resolution 112A, American Bar Association House of Delegates (Aug. 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

⁴² See Abel, *supra* note 40.

⁴³ Resolution Adopted by New York State Bar Association (Nov. 1, 2008).

⁴⁴ Abel, *supra* note 40; *Id.*

⁴⁵ A. 464, 2009-2010 Leg. Sess. (N.Y. 2009).

⁴⁶ Councilwoman Medez first introduced this legislation in 2007, Int. No. 648; N.Y. COUNTY LAWYERS' ASSOCIATION, REPORT ON RIGHT TO COUNSEL IN HOUSING COURT (Dec. 2006), available at http://www.nycla.org/siteFiles/Publications/Publications1124_3.pdf.

⁴⁷ Shane Goldmacher, *California Faces a Projected Deficit of \$21 Billion*, L.A. Times, Nov. 18, 2009.

New York should draw inspiration from this development, it should not be bound by the particulars of the California model, most specifically, its "pilot project" structure. The California law has the following features:

- It creates fully self-supported, three-year pilot projects (one or more, to be determined).
- It will provide lawyers to individuals in selected courts, anticipated to include domestic violence claims, child custody cases, and housing matters.
- The projects, slated to start in 2011, will be funded by a \$10 set-aside of revenue collected from several existing fees on court services (including fees for issuing a writ for the enforcement of an order or judgment, issuing an abstract of judgment, recording or registering any license or certificate, issuing an order of sale, and filing and entering an award under the state's workers' compensation law).
- It will require data collection to expand knowledge concerning the extent to which legal services provides individual and societal benefits in California (each pilot project will collect data on case outcomes for individuals served, individuals not served, and the effects on equal access to justice, on court administration and efficiency).⁴⁸

Especially noteworthy about the California example is that Chief Justice Ronald M. George supported the legislation based in part on the courts' need to respond to the problem presented by the growing number of unrepresented litigants in California. When the bill was signed into law, he cited this burden on the courts and the importance of improving public confidence in the justice system, stating:

The growing number of unrepresented parties in lawsuits imposes significant costs on the courts and erodes the public's confidence in our system of justice . . . This legislation provides an important step in improving access to justice for those most in need.⁴⁹

New York has long recognized the due process need for counsel in civil matters, the additional institutional and societal imperatives that were important in enactment of the California law, and the critical difference that legal representation makes in individuals' lives. The New York legislature is well positioned to continue in its role as a national leader by enacting a civil right to counsel law that is more definite and permanent than the California law.

⁴⁸ Cal. AB 590.

⁴⁹ Press Release, Assembly Member Mike Feuer, Governor Signs Feuer "Right To Counsel" Legislation (Oct. 12, 2009), *available at* <http://democrats.assembly.ca.gov/members/a42/newsroom/20091012AD42PR01.htm>.

Conclusion

What should New York do to meet the legal needs of its vulnerable residents? It should create an annual appropriation for civil legal services that is sufficient to respond to the need and stabilize the delivery of services now and in the future. It should employ a broad range of models to generate revenue sufficient to finance the appropriation, including the possibility of a graduated court fee that would place an increased responsibility on parties that draw heavily on resources of the court. It should create a funded infrastructure to coordinate the delivery of legal services. And, it should embrace the right to counsel model as a more stable structure for assuring access to justice. The New York Legislature knows that civil legal services saves families and communities. The time to act is now.