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April 7, 2016

Hon. Janet DiFiore  
Chief Judge of the State of New York  
New York State Unified Court System  
Office of Court Administration, Rm. 852  
25 Beaver Street  
New York, NY 10004

Dear Chief Judge DiFiore:

On behalf of the New York City Bar Association (“City Bar”), I am pleased to congratulate you on your appointment as Chief Judge of the Courts of the State of New York. We look forward to a long and productive relationship with you, and to working with you toward the continued betterment of the New York State Courts and Judicial System.

Founded in 1870 in response to growing public concern over corruption in the justice system in New York City, the City Bar continues to do what it can to help ensure the quality and integrity of the New York courts. Our Judiciary Committee reviews and rates candidates for judicial office or for any other office connected with the administration of justice in the New York state courts in the City of New York. Our Executive Committee reviews and rates nominees to the New York State Court of Appeals. And through its annual program, “How to Become a Judge,” our Special Committee to Encourage Judicial Service seeks to expand the number of qualified candidates for judicial office by encouraging applications from persons who previously have not applied, including those from groups historically unrepresented or underrepresented in the judiciary as a whole, or in specific judicial offices, such as appellate courts. In addition, we recognize court personnel and practitioners in the state court system who have provided extraordinary service through two annual awards—the McDonald Awards and the Botein Medal.

Over many years, the City Bar has enjoyed a positive working relationship with the Judiciary. State Court judges sit on our committees, including our Executive Committee, attend and speak on our panels, volunteer to judge at Moot Court, and serve as keynote speakers at our events, both large and small. We are pleased to support the Judiciary as an independent and crucial third branch of government, as a means to resolving complicated commercial disputes and as a way to provide individuals with redress that can be obtained only through our court

system. We have long spoken out in favor of policy initiatives that improve access to justice, fairness and the overall administration of justice.

In addition to reviewing and providing testimony on the Judiciary's annual budget request, the City Bar (i) responds to the Chief Administrative Judge's requests for public comment on proposed rules, (ii) works collaboratively with the Advisory Committees across all practice areas, (iii) proposes solutions to the problems we experience as court practitioners, (iv) provides testimony regarding the need for civil legal services funding, and (v) comments on OCA-sponsored legislation. Even in those instances where we may take a different point of view, we try to provide our reasoning in a way that is helpful. Since January 2015, the Council on Judicial Administration, State Courts of Superior Jurisdiction Committee and Civil Court of the City of New York Committee have written a combined nearly 20 reports, comment letters or letters to individual judges covering such topics as preliminary conference and settlement conference procedures, judicial compensation, the redaction of confidential personal information from court filings, proposed changes to the Rules of the Commercial Division and the New York Civil Practice Law and Rules, and the problems faced by unrepresented litigants, particularly in Housing, Family and Civil Court.<sup>1</sup>

At the start of Your Honor's tenure, I asked several City Bar committees<sup>2</sup> to provide comments as to how we can continue to work with the Judiciary in order to keep improving the state courts and our judicial system. Since our committees include practitioners of every stripe<sup>3</sup> and since I asked each committee to submit consensus positions only, please take these suggestions in the spirit with which they were written – as top priorities for a broad spectrum of lawyers practicing across multiple practice areas in the five boroughs of New York City, all of whom want a court system that lives up to its mandate and meets its full potential.

## **2016-17 Judiciary Budget**

The court system, litigants and practitioners all have felt the negative impacts of the draconian budget cuts implemented in 2011. These cuts still affect the judicial system to this day. In written testimony submitted in support of the 2016-17 Judiciary Budget,<sup>4</sup> we provided

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<sup>1</sup> See New York City Bar Association, Policy Issues and Advocacy webpage, <http://www.nycbar.org/issues-and-policy/policy-issues-aamp-advocacy> (topics: Justice System; Litigation). In addition to its committee work, the City Bar sometimes convenes a Task Force or working group to study a particular issue. These groups may make recommendations that involve court practice or structure. See, e.g., *Task Force on Mass Incarceration*, <http://www.nycbar.org/task-force-on-mass-incarceration>, and *Task Force on the NYS Constitutional Convention*, <http://www.nycbar.org/task-force-on-the-new-york-state-constitutional-convention>.

<sup>2</sup> Contributing committees are: Alternative Dispute Resolution (Nancy Kramer, Chair); Civil Court of the City of New York (Gina M. Calabrese, Chair); Criminal Courts (Kathryn S. Paek, Chair); Council on Judicial Administration (Steven M. Kayman, Chair; Fran Hoffinger, Transition Letter Subcommittee Chair); Disabilities Law (Katharine H. Parker, Chair); Housing Court (Anna Florek-Scarfutti, Chair); Matrimonial Law (Jenifer J. Foley, Chair); Minorities in the Courts (Natacha Carbajal, Chair); Pro Bono and Legal Services (Alison McKinnell King, Chair); State Courts of Superior Jurisdiction (Adrienne B. Koch, Chair); and Trusts, Estates and Surrogate's Courts (John M. Olivieri, Chair).

<sup>3</sup> E.g., our Criminal Courts Committee includes prosecutors and defense attorneys; our State Courts Committee includes attorneys representing both plaintiffs and defendants.

<sup>4</sup> Available at <http://www2.nycbar.org/pdf/report/uploads/20073039-2016BudgetJudiciaryJudicialAdminReportFINAL1.29.16.pdf> and annexed hereto.

detailed information about the effects of those cuts over many practice areas. We now recommend as a critical first step toward ameliorating the impact of those cuts that the current 4:00 p.m. or 4:30 p.m. closing time for courtrooms, clerk's offices and court buildings be returned to the original 5:00 p.m. closing time. We believe that the return to the 5:00 p.m. closing time is essential for the proper functioning of the courts. The City Bar also believes that returning court staffing (court attorneys, clerks, court officers and interpreters) to previous levels, prior to the budget cuts, would have a positive impact on court efficiency.

We offer one particular suggestion with respect to staff shortages in Housing Court. One way to help finance staffing increases in that court is to redirect filing fees to the Housing Court's operational budget rather than to the general fund. As the filing fee in Housing Court has not been increased over the past thirteen years, it would seem reasonable for a moderate increase above the current \$45.00. Due to the high volume of cases in that Court, even a small increase in the filing fee would, over a period of time, result in a meaningful net budgetary benefit, at least some of which could be used to augment the operational budget. We are particularly concerned about this issue because the current budget indicates that the funding shortfalls will not be improving in the near future.

We also would like to highlight one particularly egregious effect of inadequate funding of the court system - lengthy delays in the entry of orders of all kinds. These delays necessarily result in delays in noticing and filing appeals, and other forms of prejudice. As just one example, we have heard reports of significant delays in the entry of judgments, often weeks and sometimes as long as three months after judgments have been signed. Similarly, we have heard reports, on occasion, of the court being unable to open a trial part or proceed to trial for lack of a part clerk or court officers.

### **Access to Lawyers and Legal Services by Indigent Parties in Housing, Family, Consumer Debt and Criminal Appeal Cases**

As Your Honor well knows, there is a significant justice gap impacting low-income New Yorkers in certain civil matters that affect essential life needs. There is a pressing need for additional access to lawyers by indigent parties in housing, family and consumer debt cases, whether through *pro bono* programs, assigned counsel or law school clinics. These matters, for which parties have no constitutional right to attorneys, nonetheless implicate fundamental rights pertaining to parental and property rights, protection from garnishment and loss of essential income from unfounded financial claims.

It is so important that the annual Judiciary Budget continue to include adequate funding for civil legal services programs. We discuss the particular needs of each court below.

#### **Housing Court**

Housing Court is the busiest court in the city. Judges hear on the order of 75 to 140 cases per day. In addition to the volume of cases heard by the Court each day, Housing Court suffers a severe shortage of court staff such as interpreters and court clerks. Further complicating matters is the fact that an overwhelming majority of tenants appearing before the Court are unrepresented and, as such, are ill-prepared to litigate in an emotionally charged environment. Consequently,

Housing Court judges rely on their court attorneys, who help these *pro se* litigants understand stipulations, along with their rights and options. Court attorneys also help facilitate agreements, help Housing Court judges appoint guardians ad litem and prepare appropriate referrals.

Unfortunately, in recent years the number of court attorneys in Housing Court has been plummeting. In order to buttress the Court's effectiveness and ensure due process for unrepresented litigants, it is crucial that every "Resolution" Part be assigned two court attorneys and that every trial part have at least one court attorney. The need for additional legal counsel to assist low income litigants in Housing Court is self-evident as losing one's rent-regulated or subsidized housing can have devastating consequences for litigants and their families, including young children.<sup>5</sup>

### Family Court

Matters involving parental rights and the potential loss of those rights, the rights of parties to orders of protection (when those matters do not rise to the level of criminal charges), and the rights of parties to seek support (child and spousal) are all areas which require legal counsel. While there are a few legal service assistance programs in some Family Courts (such as LIFT – "Legal Information for Families Today" – which provides legal information and help with court forms in Family Court cases in several counties in New York City), these programs are staffed primarily with non-lawyers, which does not ensure that litigants are sufficiently protected. As set forth below, those programs involving non-lawyers are meant to supplement, but not substitute for, the additional lawyers who should be assigned to help low-income litigants navigate through the court system.

### Civil Court

As with housing and family matters, consumer debt judgments have a pervasive impact on an individual's life. They result in garnishments that impact low-income people, but also impede access to future credit, rental housing, insurance, and employment. About 76,000 consumer debt collection cases were filed in New York City Civil Court in 2014. The vast majority of these cases are brought by debt buyers, who often do not have evidence sufficient to establish their prima facie case. Nevertheless, the default rate in these cases is high, ranging from 75% several years ago to 41% in 2014. In 99% of the cases, the unrepresented consumer faces opposition by expert collection counsel, who appear in court on a daily basis. Consumers are unaware of defenses available to them or how to articulate those defenses, and often enter into unwise stipulations. The few consumers lucky enough to obtain counsel get better and swifter outcomes in court than those who do not - better settlement terms, return of wrongfully garnished funds, and discontinuances of old cases involving sewer service and mistaken identity.

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<sup>5</sup> The City Bar currently supports a City Council bill that would provide a right to counsel for tenants facing eviction or foreclosure in Housing Court, Int. 214-A. See <http://www2.nycbar.org/pdf/report/uploads/RighttoCounselinHousingNYCProBonoHousingCourtReportFINAL2.27.15.pdf>.

## Criminal Court

There is a need for additional legal counsel for criminal appeals. New York is one of two states that does not automatically assign counsel to indigent defendants convicted after trial. Thus, when an indigent defendant fails to fill out the *In Forma Pauperis* for assignment of counsel, there is a risk that he or she will be deemed to have abandoned the appeal. The automatic assignment of counsel for appeal would remedy the unfair loss of the right to appeal for indigent defendants.

## **Additional Resources to Process Uncontested Matrimonial Cases**

One of the Judiciary's foremost priorities in the matrimonial field should be to allocate more resources to the prompt processing of uncontested matrimonial cases. Even an uncontested matrimonial case requires a judge to review the papers to confirm that the statutory criteria for a divorce have been met, that parents have provided adequate support for their children and that spousal support obligations have been properly allocated. We recognize that the Judiciary receives limited resources and that other types of cases demand attention; however, the shortage of matrimonial resources in these cases uniquely burdens the most vulnerable populations—from domestic violence survivors who are trying to make a break from their past and establish new homes to small children who do not know where or with whom they will live.

We offer one recent, real-world example of what is happening all too often in matrimonial cases: a couple signed a settlement and submitted uncontested papers on June 8, 2015. By mid-November, the court system appeared not to have processed the uncontested divorce papers so the lawyer phoned the referee assigned to the case. The referee stated that he had so many cases on his desk he could not even offer an estimate of when he would review the uncontested papers, but the referee added that these parties were lucky to live in Manhattan; in the other boroughs, it might take a year for a judgment of divorce to be processed, even if the divorce was based on the parties' settlement agreement.

Perhaps due to the lawyer's inquiries, a judgment of divorce was signed November 25 2015, but E-Courts did not reflect it because of the need for privacy in matrimonial matters—and so the couple had no way of knowing they were divorced until December 10. By then the ex-wife was hoping to remarry, but to do so she needed a certified copy of the judgment. The Clerk's Office said they were about two months behind in scanning signed judgments, and no certified copy would be available until the original had been scanned. The Clerk projected that scanning would occur two months after signing and eight months after the uncontested submission. The Clerk's Office entered the judgment and produced certified copies on January 22, 2016, but only in response to an in-person visit and a handwritten affirmation from a lawyer. If the couple had not been able to afford counsel, they and their children would have remained in limbo for even more months. We can and should do better.

## **Non-Lawyer Advocate Programs**

The City Bar supports the use of non-lawyer advocates to assist unrepresented litigants in certain matters, although this is not without controversy among our members. Moreover, any

policy must be scrutinized in order to ensure that a non-lawyer advocate is supervised by an attorney and that a client's legal rights are fully protected. Following reports by the City Bar's Committee on Professional Responsibility in 1995<sup>6</sup> and 2013<sup>7</sup>, in 2015, we supported OCA-drafted legislation, then identified as OCA 2015-21.<sup>8</sup> If enacted, this bill would authorize non-lawyers, under an attorney's supervision, to provide free legal assistance as housing court and/or consumer court advocates. The program is designed to supplement, not substitute for, services by lawyers in these cases.

The OCA proposal is intended to create a structure for the delivery of legal services by non-lawyers while addressing some of the problems that may arise by having non-lawyers provide such services to litigants. The proposal includes court approval of certification requirements for advocates and of plans by nonprofits to employ them, and narrowly defines advocates' roles. It structures the advocates program as a pilot program with an advisory committee to oversee implementation and a mandated assessment after several years of operation. This structure will allow study to determine whether such programs are indeed beneficial and whether the non-lawyers are supervised properly by admitted attorneys. Finally, the proposal anticipates implementing rules, which we believe must address such issues as the relationship between the client and the supervising attorney; whether a notice of appearance must be filed; and how to handle the client's legal needs beyond the services that can be performed by the non-lawyer advocate.<sup>9</sup>

## **Access to Justice by People with Disabilities**

Ensuring access to our court system must be a priority and is indeed a constitutional mandate.<sup>10</sup> In the *Lane* case, the U.S. Supreme Court held that "ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts," and cited a litany of persistent barriers to justice for litigants, jurors, and lawyers with disabilities. Unfortunately, deep and systemic barriers continue to exist. Though there are Americans with Disability Act ("ADA") liaisons in each major New York State courthouse, advocates and litigants still encounter problems due to misinformation on court websites, lack of training of those designated to respond to requests for accommodation, and a process that may be too decentralized to be uniformly effective across our court system.

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<sup>6</sup> "Prohibitions on Nonlawyer Practice: An Overview and Preliminary Assessment", Jan. 4, 1995, *available at* <http://www2.nycbar.org/pdf/report/uploads/95033-ProhibitionsonNon-LawyerPractice.pdf>.

<sup>7</sup> "Narrowing the 'Justice Gap': Roles for Nonlawyer Practitioners," June 2013, *available at* <http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf>.

<sup>8</sup> See November 2015 report to the Chief Judge from the Permanent Commission on Access to Justice, *available at*: [https://www.nycourts.gov/accesstojusticecommission/PDF/2015\\_Access\\_to\\_Justice-Report-V5.pdf](https://www.nycourts.gov/accesstojusticecommission/PDF/2015_Access_to_Justice-Report-V5.pdf) at p. 36 ("The Committee also should seek to amend the Judiciary Law to authorize specially trained nonlawyers, supervised by lawyers in nonprofit legal services organizations, to assist unrepresented litigants in certain types of cases.")

<sup>9</sup> To the extent OCA's legislative proposal gets introduced in the Legislature this session, we further recommend one drafting change. The protection afforded non-lawyer advocates from the rules prohibiting unauthorized practice of law should parallel the existing statutory protection afforded law students.

<sup>10</sup> See, e.g., *Tennessee v. Lane*, 541 U.S. 509 (2004).

Moreover, state court judges lack sufficient training and resources to respond adequately to requests for accommodation. Attorneys with disabilities, many of whom are in solo or small law firm practices, face steep barriers in their practice, ranging from the most basic deprivation of access, to lack of a support network, to ignorance or prejudice by adversaries and court staff (including judges) about how best to accommodate them and to ensure that they are able to practice and properly represent their clients. Resources for basic accommodations are scarce: by way of example, there are fewer than ten sign language interpreters employed by the court system and they are all located in New York City.

Furthermore, the guardian ad litem program, while laudable, is severely underfunded and limited to Housing Court. Guardians ad litem are paid only \$600 per case (by the Human Resources Administration). They are eligible for this payment only in cases where Adult Protective Services is involved; otherwise, their work is on a volunteer basis. There are numerous instances where guardians ad litem are appointed to preserve due process but Adult Protective Services is not involved (e.g. institutionalized or incarcerated litigants or those who did not otherwise meet the Adult Protective Services criteria). As mentioned, guardians ad litem work on these cases *pro bono* and are expected to donate the vast majority of their time, which results in many individuals deciding not to apply or serve as guardians ad litem.

We propose that a task force be formed comprised of relevant stakeholders including advocates for individuals with disabilities, lawyers with disabilities, court staff including judges, and representatives from bar associations to assess the current support system, and develop recommendations for a strategic plan of action. The task force would also be charged with developing a realistic timetable for addressing the many obstacles that prevent lawyers and litigants with disabilities from accessing the state judicial system. New York should be a leader in this area and set an example for other states.

## **Article 81 Guardians in Housing Court**

Cases involving mentally ill tenants can run exceptionally long, and property owners face unjustifiable hardship as rental arrears accrue while city agencies and courts attempt to address the situation of an incapacitated tenant. Many of these cases require the appointment of an Article 81 guardian. At present, the Court relies on Adult Protective Services for a psychological examination and, depending on the results, the Office of Legal Affairs may commence an Article 81 guardianship proceeding. This process, handled in the Supreme Court, can be lengthy and cumbersome. End to end, this delay can be exacerbated in situations where Adult Protective Services is unable to assist or has improperly closed the case.

While this process is clearly important to protect the alleged incapacitated person's rights as well as those of his or her adversary, it can be expedited. In Manhattan, a hybrid Part where a judge sits as both a Housing Court and Supreme Court Justice has been successful in appointing Article 81 guardians for tenants. We recommend that this Part be replicated in all five boroughs. Additionally, in cases where Adult Protective Services does not file for guardianship and no family members are available to interface with the various courts, there should exist some other mechanism to initiate an Article 81 proceeding directly (perhaps by guardians ad litem or legal services) with sufficient resources to initiate Article 81 actions, appoint evaluators as required by Article 81 and make community guardians available for assignment in such cases.



## **Need for More Court Interpreters**

There is a critical need for more interpreters in the courts. Many of the litigants in the Criminal, Civil, Family, and Housing Courts have limited English proficiency (hereinafter, “LEP Litigants”). As a simple matter of due process, LEP Litigants need to understand what is happening to them in court. In an effort to ensure due process, OCA provides court interpreters to LEP Litigants at taxpayer expense. While OCA has done pioneering and heroic work in this area, the needs of the LEP Litigant community are growing faster than the budget. OCA currently budgets approximately \$30 million annually for these services. The budget for court interpreters has remained essentially the same for the past nine years, even though the Great Recession hit the LEP Litigant community particularly hard and caseloads have increased. The need for more interpreters is felt most acutely in Family and Housing Court, because, as is understandable, Criminal Courts often have first priority with respect to interpreters.

The result is that resources have become over-taxed, creating frustrations and inefficiencies that undermine the courts’ ability to dispose of cases expeditiously and fairly. Feedback from attorneys who practice in this area and other bar associations regarding the quality of services provided to the LEP Litigants includes the following:

1. If an interpreter is not available, no judicial business gets done. There are not nearly enough interpreters, even for the most recurring languages. This causes (i) hearings to be postponed, (ii) unnecessary repeated trips to court, (iii) stresses on the judges and court staff, and (iv) great inefficiencies.
2. With the exception of Family Court protection orders, court orders are issued only in English. [There is a pilot project to provide Spanish language protection orders.] Interpreters are not provided for the orders, just for the court hearings. This leaves it to the LEP Litigants to find someone outside of the court system to interpret court orders for them. This problem creates obvious dangers, unfairly burdens the LEP Litigants, and undermines compliance with the court orders.
3. Housing Court disputes are typically settled. However, in many cases, parties are not able to commence settlement discussions because of a dearth of interpreters, and even when one is available, often the interpreter’s time is cut short because he or she is needed in another courtroom. This can undermine efforts of the court attorneys to settle cases. Also, since courtrooms take priority in terms of staffing interpreters, LEP litigants who need interpreters are frequently unable to use the Help Centers which are so critical in terms of access to justice for the vast majority of unrepresented litigants.
4. The court staff sometimes does not communicate with the LEP Litigants regarding the availability of interpreters and the proper role of the interpreters. This problem is a product of a lack of training. Over the past five years, the training budget has been squeezed. It is the LEP Litigants who suffer the consequences.

The LEP Litigant community includes many of the neediest and most powerless people. When they are treated this way in our courts, it sends the message that they are unimportant. We



need to do more. OCA is currently doing all it can with the resources it is provided. OCA can improve services and promote efficiency with increased funding for additional interpreters.

## **E-Filing Issues**

The use of e-filing has been a tremendous boon to the court system, judges and attorneys in facilitating communication, and, of course, in easing the filing of papers. Unfortunately, there have been numerous glitches along the way, particularly when e-filing is first initiated in a new county or expanded into an area of law for which e-filing was not previously available. Attorneys need to be trained in the use of the system. Some counties (notably Kings County Supreme Court) have deployed a dedicated clerk for e-filing who is available, within the court system, to judges and other court personnel, as well as to attorneys and *pro se* litigants. We urge the creation of the position of E-Filing Clerk in every county in which e-filing is available, at least simultaneously with the implementation of e-filing (if it is not possible to do it in advance) to assist judges, court staff and the public in learning how to use the system.<sup>11</sup> We also recommend extending e-filing to Civil Court, perhaps beginning in the no-fault parts, where there are mostly institutional litigants; and, our Surrogate's Courts practitioners suggest that e-filing be available throughout the state, along with a corresponding set of published and uniform rules regarding e-filing procedures in those courts.<sup>12</sup>

A second area related to e-filing that requires immediate attention is the creation of software capable of simultaneously inputting the county clerks' records, the court's records and other entries into the e-filing system. The current procedures require duplication, often by hand, of the entries related to various filings, including motions and responses to motions and the calendaring of court appearances. This has resulted in inordinate delays and has generated confusion among attorneys and court personnel, including judges, as to what has been timely filed, what papers are properly before the court and even what date the case is scheduled to be heard. The cost of the time expended by all parties and court staff in correcting misunderstandings and responding to inquiries from counsel is significant. We urge the immediate investment required to remedy these problems, which has been repeatedly raised and discussed in recent years.<sup>13</sup>

While e-filing in most civil cases has been a positive innovation, the same cannot be said in criminal, matrimonial and family court cases, where issues of privacy may outweigh convenience. In these types of cases, highly sensitive personal information must be protected from the general public. Among other things, we are concerned that in the areas of matrimonial and family law, parties in the midst of personal family crises may try to use e-filing as a sword,

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<sup>11</sup> Anecdotally, there have been instances where lawyers attempted improperly to file legal papers by sending them directly to the assigned judge using the judge's email address.

<sup>12</sup> Indeed, Surrogate's Courts practitioners further suggest that there should be publication of all local Surrogate's Court rules and procedures, including any established by specific Surrogates. Online publication would suffice. Such transparency would enhance the attorney-client relationship by allowing practitioners to give better advice, result in greater efficiency, and improve the flow of information.

<sup>13</sup> The Chairs of the Advisory Council of the Commercial Division have been apprised of these issues and we understand that they may soon be making a recommendation, including private funding for an outside tech company.

threatening to embarrass the other party by e-filing private and personal information. Children's personal and private information may be made public as well. In criminal cases, where information about arrests and complaints is sealed when the cases end in dismissal or acquittal, damage from having such information made public pending resolution may be irreparable. If e-filing in criminal, family and matrimonial cases is contemplated, we urge the appointment of task forces of judges, defense lawyers, family law practitioners and prosecutors to assess whether e-filing should be implemented in such cases and, if so, to establish appropriate protocols to safeguard the information and address other related issues.<sup>14</sup>

## **Data Management Issues and Statistics**

The "E-Courts" feature on the OCA website is an effective way for attorneys, and members of the public, to track case progress. However, we have learned that not all judges and Justices notify E-Courts when they have rendered decisions in a matter. In the Bronx, for example, one must go to the separate County Clerk website to learn if a decision has been made and an order entered. Ideally, the system for reporting judicial decisions should be uniform. Either judges should be instructed to report decisions to E-Courts, or OCA and the County Clerks should work together to link their respective websites, or there should at least be an Advisory on the E-Courts page of the OCA website stating which courts' decisions are and are not reported on E-Courts, and what alternative source(s) of information are available.

In addition, obtaining information from OCA in an efficient and useful way can be a challenge. For example, requests for information such as statistics on appeals, the proportion of appeals which are interlocutory as opposed to appeals after trial, the time to disposition when an appeal was filed and when one was not, and the time from notice of appeal to decision on appeal was not readily available. Information about disposition rates of particular judges has also been difficult to come by. Other information sought included general case statistics, such as the number of cases filed in a particular year, the breakdown by type of case (e.g., criminal, civil, housing or family), the time from filing to disposition, the number of appeals, the percentage of cases resolved through trial or dispositive motion, the number of trials for different types of cases, and the number of motions for different types of cases. We urge OCA to post such statistics online so that the public can easily access the information.

In some instances, OCA has been unable to produce information that we have requested in the course of our study of an issue. Two examples relate to conditional sealing applications under CPL § 160.58, and applications for modification of sex offender risk levels under Correction Law § 168-o. The State Division of Criminal Justice Services has data on applications or modifications granted, but only OCA would be able to compile county-by-county data on applications made or modifications sought. Access to this information would help advocates determine the extent of unmet need for attorneys to litigate these specialized matters, and would permit the courts, the Legislature, and Bar Associations to take the most appropriate steps to meet any unmet need.

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<sup>14</sup> The City Bar's most recent comment letter on e-filing is available at: <http://www2.nycbar.org/pdf/report/uploads/20073067-CommentsToTheSupremeCourtCivilAdvisoryCommitteeonElectronicFilingonthestatesexperiencewiththeelectronicfilingSTACOUR3.25.16.pdf>

## **Proposed Reform of Preliminary Conferences in State Court**

In recent years, there has been a significant effort by the Commercial Division to move closer to the practice in federal court, especially with respect to discovery. Indeed, federal court practice is more efficient than state court practice in several respects. Although we certainly applaud the Commercial Division's efforts to increase efficiency, we believe that the entire state court system (commercial and non-commercial divisions alike) would be well served to overhaul some time-honored, but nevertheless highly inefficient, practices. One such area in desperate need of reform is the preliminary conference procedure. We should adopt a procedure more akin to the one set forth in Fed.R.Civ.P. 26(f), or adopt the Model Preliminary Conference form requiring attorneys to meet and confer in advance of the initial conference for both commercial and non-commercial cases. This would lead to more thoughtful discovery planning from counsel and also lessen the burden on court personnel to deal with unnecessary discovery issues.

In state court, except in the Commercial Divisions, seldom do the attorneys meet and confer before the preliminary conference to: (i) identify and resolve discovery issues; (ii) draw up an agreed-upon discovery plan; (iii) discuss resolution of the case; or (iv) consider the utility of alternative dispute resolution to resolve all or some of the issues in the litigation. Therefore, preliminary conferences in state court are highly inefficient and often ineffective, with lawyers usually meeting and conferring for the first time and, thereafter, waiting for an hour or more for the court to sign off on a document that could have been negotiated and submitted in advance.

Currently, under 22 NYCRR § 202.12(b), the parties may elect to prepare a discovery plan in advance of the preliminary conference, but they are not required to do so (unlike federal court practice). Rule 8 of the Commercial Division Rules requires the parties to make a "good faith effort" to discuss and resolve various issues in advance of a preliminary conference, but in practice this rarely occurs. Moreover, Rule 8 certainly does not require the parties to submit a proposed order by a date certain.

Indeed, many of the new Rules adopted for Commercial Division cases could easily be adopted throughout the State Court system. This would require the attorneys handling a case to have a better grasp of the key facts, discovery issues, applicable legal doctrines and the strength of the parties' respective positions earlier in the case. Also, the early consideration of referral to mediation might "nip the dispute in the bud." Further, as a result of a Rule 26(f)-type procedure, the initial court conference would be more productive and meaningful for everyone - court personnel, clients and practitioners.

The preliminary conference system in state court is not the only procedure that needs to be re-examined and made more efficient. However, its reform would be a significant first step in the right direction.<sup>15</sup>

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<sup>15</sup> The City Bar's most recent comment letter on preliminary conference orders is available at: <http://www2.nycbar.org/pdf/report/uploads/20073056-CommercialDivisionRulesChangesJudicialAdmin.StateCourts.Litigation3.7.16.pdf>

## **Vacancies in the Appellate Division, First and Second Departments**

The City Bar is delighted that Governor Cuomo recently filled some of the vacancies in the First and Second Department, but believes that it is important to encourage the Governor to fill the remaining vacancies as soon as possible. According to a recent New York Law Journal article, the six vacancies on the 21-judge First Department were the highest number of unfilled vacancies in nearly two decades.<sup>16</sup> Those vacancies necessitated the First Department to operate with only four-judge panels on many appeals. In cases where there was a tie, a fifth judge needed to be vouched in order to break the tie, resulting in delay. While the filling of three of those vacancies in the First Department will help alleviate some of the delay, filling the remaining three vacancies sooner rather than later remains a necessity. The appointment of a new Presiding Justice in the First Department is also critical. According to another recent New York Law Journal article, there are 80 new appeals filed each week in the First Department.<sup>17</sup>

The situation in the Second Department is even worse. Until last month, there were three vacancies in the 22 judge court, making the Department critically short-handed. The impact of shortage was compounded by the Second Department's vast territorial reach. The vacancies have resulted in extreme delays; according to our judicial members, delays of *more than one year* from the completion of briefing to oral argument are common. As a result, cases grind to a halt while trial judges and litigants await the outcome of interlocutory appeals, particularly those which dismiss all or some of the plaintiff's claims. While the recent appointment of two judges to the Second Department court will help alleviate some of the delay, we hope the Governor is urged to fill the remaining vacancy as soon as possible to reduce the backlog.

## **Filling Court Vacancies in Criminal Courts**

There is also a need to fill vacancies in the Criminal Courts. For example, the New York County Criminal Court is short ten judges which has resulted in lengthy trial delays. Delays in getting matters to trial are most acute in misdemeanor cases, although felony cases in the Criminal Term, Supreme Court are also experiencing trial delays. Of course, these delays are particularly harmful to defendants who have not made bail and are in jail awaiting trial. Even for those defendants who are out on bail, a trial delay has severe consequences: criminal defendants awaiting trial are often fired or suspended from their jobs, and risk losing their homes if they live in public housing. The damage from delays may be hard to reverse, even if the defendants are ultimately acquitted or exonerated. And finally, the limited legal staffing in Criminal Courts (court clerks, court officers, interpreters) adds to the delays and impacts negatively on a defendant's constitutional speedy trial rights. Accordingly, we hope you can encourage the Mayor and Governor to help remedy this shortage in judges and in ancillary personnel in the New York City Criminal Courts.

## **Extending Term of Housing Court Judges**

We recommend that Civil Court Act § 110 be amended to extend the reappointment term of Housing Court Judges from five to ten years after the initial five year appointment. We

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<sup>16</sup> See "Judges, Public Feel Effect of 1<sup>st</sup> Department Vacancies," NYLJ, 1/26/16.

<sup>17</sup> See "Appellate Division Appointments Bring Relief to Courts," NYLJ, 2/22/16.

believe this will promote judicial independence while providing sufficient review of judicial performance.

### **Problems Specific to Unrepresented Consumer Debtors and Access to Files in Civil Court**

In a recent letter<sup>18</sup> to the Chief Administrative Judges of the Civil Courts in each borough, we recommended a series of changes to improve the process by which unrepresented defendants can seek to vacate a default judgment for lack of personal jurisdiction, including, having clerks use only the new, updated Order to Show Cause form, marking the form with “file unavailable” when necessary, and having judges order the plaintiff to produce the affidavit of service on the motion return date.

As a more long-term solution, we recommend that the Civil Court implement scanning and electronic record keeping for both backlogged and newly filed consumer debt cases. Several court systems around the country have implemented electronic record keeping for both old and newly filed cases. Obtaining a scanner for each clerk’s office and setting up a dedicated file destination would allow for easy access by the clerks to backlogged files at a minimal cost. Additionally, once the scanning system is set up, plaintiffs bringing new cases could be required to scan their Affidavits of Service at the clerk’s office, ensuring that defendants vacating default judgments or making motions to dismiss will have access to complete paper files. Mandating e-filing in Civil Court for no-fault insurance cases is one possible way to shift clerical resources towards consumer debt cases and attendant file maintenance. No-fault cases comprised 36% of Civil Court cases in 2014, and all parties in those cases are always represented by counsel, with the ability and resources to satisfy e-filing requirements.

### **Proposed Amendments to New York’s Class Action Procedures**

The City Bar has developed a proposal to amend Article 9 of the CPLR, to modernize New York’s class action procedures.<sup>19</sup> This proposal has been endorsed by OCA’s Civil Practice Advisory Committee and has been presented, with certain limited modifications, in the Legislature. Article 9 has not been substantively addressed in 40 years and modernization is long overdue. To summarize:

1. The current CPLR § 901(b) prevents class actions demanding statutory penalties. The provision is not binding on federal court, and the amendment would eliminate forum shopping and provide for greater certainty in administration of the law.
2. A common law doctrine pre-dating the enactment of Article 9 disfavors class actions against governmental entities. This judicially-developed rule has been slowly eroded over the past fifteen years. Section 1 of the Bill recommends a new CPLR 901(b) to formally rescind the rule (and in lieu of the current CPLR 901(b)).

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<sup>18</sup> Available at <http://www2.nycbar.org/pdf/report/uploads/20073063-CaseFileAccessVacatingDefaultJudgementsImplementationCivilCourtFINAL3.18.16.pdf>.

<sup>19</sup> The City Bar supports the bill introduced as A.9573/2016 (Weinstein). Our report in support of the original proposal is available at: <http://www2.nycbar.org/pdf/report/uploads/20072985-ClassActionsProposedAmendsArt9CPLRJudicialAdminLitigationStateCourtsReportFINAL11515.pdf>.

3. CPLR § 902's present requirement that class certification motions be made within 60 days fails to consider the complexity of contemporary litigation. The proposal recommends following the federal approach of having motions made "at an early practicable time . . . ."
4. The proposal goes beyond present law in providing the courts with explicit guidance for the selection of class representatives and class counsel.
5. CLPR § 908 states that actions pleaded as class actions cannot be settled without judicial approval and class notice. The proposal suggests retaining New York's longstanding rule requiring judicial approval, but eliminating the notice requirement unless necessary to protect class members.

We respectfully submit that an endorsement by New York's new Chief Judge would provide a strong impetus to the Legislature to enact these amendments.

### **Ongoing Support for and Encouragement of Mediation**

In recent years, court-annexed mediation programs have been implemented throughout the State and Federal court systems with enormous success. New York should be a leader in this field. One of the most important initiatives should be an expansion of court annexed mediation programs throughout the state.

Over the last 30 years, the use of mediation as an alternative dispute resolution process has grown enormously throughout the country. Today, mediation is used regularly to resolve civil disputes in a wide variety of substantive areas, including commercial, tort, insurance, family, matrimonial, bankruptcy, and employment matters. Indeed almost every substantive legal area that is litigated today can also be mediated. Where there has been support from the bench, mediation has become less an "alternative" to, and more a key component of, the litigation process.

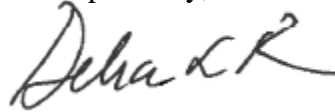
Mediation has grown because it works. Where robust court mediation programs have been implemented, empirical evidence shows they succeed. Court-annexed mediation reduces caseloads. It can provide speedy resolutions to disputes and reduce litigant and court expenses.

New York State is a proven laboratory of innovative ideas for legal reform. Chief Judge Lippman increased access to justice for low-income parties and changed *pro bono* bar admission requirements. The late Chief Judge Kaye developed problem-solving courts and radically altered jury service. Those initiatives were later followed by other states. It is time for New York to take the lead in promoting options for mediation, specifically by increasing court-annexed mediation programs.

\* \* \*

We would be delighted to answer and respond to any questions you may have concerning the issues set forth in this letter. We look forward to working with you toward our mutual goal of ensuring that the New York Court System and Judiciary meet the highest standards of quality, efficiency and justice for all.

Respectfully,

A handwritten signature in dark ink, appearing to read "Debra L. Raskin", with a stylized flourish at the end.

Debra L. Raskin

Cc: *Via Email*  
Hon. Lawrence K. Marks  
Hon. Fern A. Fisher  
Ronald Younkings, Esq.  
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212.382.4788 | [ekocienda@nycbar.org](mailto:ekocienda@nycbar.org)**REPORT IN SUPPORT OF THE  
JUDICIARY'S 2016-2017 BUDGET REQUEST**

The New York City Bar Association<sup>1</sup> urges the Legislature to accept the Judiciary's 2016-2017 Budget Request in its entirety.

The Budget Request seeks a 2.4% increase of \$48.25 million in the "All Funds Budget." This amount is necessary to fund mandatory salary increases for represented nonjudicial employees, annualization of the cost of five Family Court judgeships created effective January 1, 2016, and increases in nonemployee contractual obligations. The increase is also required to address staff shortages in the courts and to fund civil legal services for the most vulnerable New Yorkers.

The increase in the Judiciary Budget Request is necessary to maintain staffing levels required for the courts to function efficiently and effectively. For years, the Judiciary faced significant non-discretionary cost escalation without corresponding funding increases. In Fiscal Year 2009-2010, the General Fund State Operating portion of the Judiciary Budget was \$1.786 billion. Six years later, that amount is \$1.85 billion, an increase of only \$64 million. This constitutes an increase of about 0.6% on an annual basis, which is far below the rate of inflation. The courts are still recovering from \$170 million in cuts imposed on the Judiciary in 2011. There are now 2,000 fewer court personnel than there were in 2009. Though greater efficiency has ameliorated the impact of staff reductions to some extent, the harsh effect of the cuts still burden the entire court system.

The Judiciary Budget Request includes an increase of \$15 million for civil legal services to help ensure equal access to justice for low income New Yorkers facing housing, consumer debt and other legal problems pertaining to the essentials of life. Adequately funded legal services helps domestic violence victims, senior citizens, and the formerly incarcerated seeking reentry into society as well as other vulnerable individuals and families. For every dollar invested in civil legal services, the State of New York receives more than ten dollars in economic benefits as a result of reduced social services and other public expenditures, as well as an inflow of federal benefits.<sup>2</sup>

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<sup>1</sup> This report was authored by the New York City Bar's Council on Judicial Administration. The Council is chaired by Steven M. Kayman. The report was prepared by the Council's Judiciary Budget Subcommittee, Janet Ray Kalson (Chair).

<sup>2</sup> Testimony of Neil Steinkampt, Managing Director, Stout Risius Ross, at the Chief Judge's Hearing on Civil Legal Services, Appellate Division, First Dep't, Sept. 29, 2015.

Since the \$170 million cut in the Judiciary Budget in 2011, staff shortages have seriously disrupted the smooth functioning of the courts. There are delays in opening courtrooms and in literally getting through the courthouse doors due to inadequate numbers of court officers. Even on rainy and extremely cold days, litigants endure unduly long waits outside of courthouses before they can be screened. Shortages of personnel lead to endless lines in clerks' offices, lengthy delays in filing essential court documents, and extensive backlogs in entering judgments and other legal filings essential for smooth court functioning. Shortages of interpreters delay proceedings on a daily basis.

In Supreme Court, the elimination of court clerks has caused extensive difficulties. In Brooklyn, the motion support office, which was previously staffed by 18 clerks, is now staffed by 3. Stacks of papers wait to be entered or processed, including judgments. Many judges do not have fulltime clerks, and the courts are often staffed by clerks "de jour" who are unfamiliar with procedures in the parts to which they are assigned. In Manhattan, there is a six week delay in entering judgments. In many counties, it takes several months to get a divorce judgment signed after the papers have been submitted. In Queens Supreme Court, litigants cannot obtain orders and other critical case documents because there are not enough clerks to file and scan the papers. In one case, a settlement was "so ordered" on December 2, 2015, and as of January 22, 2016, the defendant's counsel was unable to obtain a copy of the order. As the defendant is 96 years old, time is obviously of the essence.

In the Supreme and Family Courts, cutbacks in judicial resources have had profound effects on litigants and attorneys. Trials for routine cases in Supreme Court often take twice as long as they did previously because the lack of resources, staff and in some cases, early closing times, makes it impossible for judges to devote concentrated periods of time to one matter. In juvenile delinquency cases in Family Court, while improvements have been made in spite of cutbacks, there are frequent and lengthy adjournments, caused, in part, by the 4:30 p.m. court closure time. In some counties, in sex crime/special victim cases, which frequently have young victims, the victims are forced to take the stand on two or more dates to complete their testimony -- leading to difficult and traumatizing rehashing of their prior testimony and experiences.

Prolonged trials also cause delays in providing rehabilitative services for juvenile delinquents/troubled youths. Cases are not given large enough blocks of time and are not tried day-to-day. The often lengthy adjournments lead to hardship, discontent and frustration as well as the loss of witnesses with critical evidence who are unwilling or unable to return to court. Where borough offices are located within Family Court buildings, the court's early closing time also hinders the ability of the Presentment Agency to interview victims and witnesses.

The wait for an initial court date for interstate child support cases in some counties can be 12-15 weeks. Lengthy adjournments -- in some counties of up to 18 or 20 weeks -- delay the issuance of final orders of support, a situation detrimental both to the custodial parents and children who are not receiving child support, and to the noncustodial parents, who often feel overwhelmed by arrears in support that accrue because of the final orders' retroactive effect. The 4:30 p.m. closing time for Family Court often prevents child support cases from being completed on the same day, reduces time slots for hearings, and unduly limits the amount of time

a judge may give to hear a case. Adjournments are frequently granted on voluntary returns on warrants, allowing some respondents to abscond from court and necessitating the issuance of multiple warrants on the same dockets.

The appellate courts experience similar problems. Appeals in the Second Department are backlogged, with cases held up for a year or more awaiting oral argument.

In New York City, Criminal Court is short ten judges. Because of the shortage of judges and court staff, there are lengthy trial delays in criminal cases. The delay in getting a case to trial is most acute in misdemeanor cases in Criminal Court, although felony cases in New York City Supreme Court are also experiencing trial delays. This situation is damaging to both defendants who are jailed, who face longer periods of incarceration, and those who are not, but live with the uncertainty of multiple postponements. Criminal defendants awaiting trial are often fired or suspended from their jobs, and risk losing their homes if they live in public housing -- damage that may be hard to reverse, even if the defendants are ultimately acquitted or exonerated.

Six judges in New York City Criminal Court had no court attorneys for the first half of 2015, and though four court attorneys were eventually hired, two judges remained without court attorneys for an entire year. New York City Criminal Court is 200 court officers below its staffing guidelines and about 100 court officers short of what is needed for the court to adequately staff its parts. As a result, many parts are unable to open or must close prematurely. The New York City Criminal Courts need an additional 15 senior court clerks and three associate court clerks to be fully staffed. Parts that should have two or three clerks assigned regularly open with one. The staff shortage results in increased overtime and inadequate help in the courtroom.

The shortage of court reporters in New York City Criminal Court in 2015 was so severe that the court was forced to use digital electronic recording devices in some parts. Currently, the New York City Criminal Court has 10 reporters fewer than the required number.

There have been so few interpreters that the New York City Criminal Court has been forced to rely on per diem interpreters, which increases costs, decreases the quality of translation services, and leads to extensive delays in proceedings, hearings, and trials. Defendants literally languish in jail due to a shortage of court interpreters. Recently the Staten Island trial of an 84 year old Urdu-speaking defendant was delayed for two days because there was no Urdu interpreter. While the defendant was ultimately released, he was unnecessarily jailed for two days. In another case on Staten Island, the defendant's proceeding was delayed for two days because there was no Sinhalese interpreter. In Queens, an interpreter crisis was recently averted only because the judge drafted his mother-in-law to provide French translation services. In the Bronx, a Legal Aid Lawyer was unable to speak to his client for many days because there was no Fulani interpreter. In Queens, a Legal Aid supervisor reports that many criminal hearings and trials were postponed from October/November 2015 to January/February/ March 2016 (and in some cases April 2016) in hope that parts would be open and staffed. Many defendants in these proceedings are languishing in jail in the interim because they are unable to post bail.

Data entry staffing levels are at an all-time low in New York City Criminal Court which has resulted in delays in case initiation in summons parts and in entering information into

databases. These shortages prevent crucial information -- such as orders of protection -- from getting to the Department of Criminal Justice, the police department, district attorneys' offices and defender organizations.

At Housing Court, there are frequently long lines outside the courthouses in the morning, even in inclement weather. Delays for interpreter services are the norm. A shortage of clerks leads to lengthy delays in filing papers, particularly in Brooklyn, where it is not uncommon for attorneys to wait in line for over an hour. Unrepresented tenants wait for hours in Brooklyn, the Bronx and Queens in the clerks' offices to file answers, HPs (Housing Part cases) or orders to show cause. Clerks do not have the time to thoroughly explain answers or other forms. Parts can have 90 or more cases on their calendars, making it extraordinarily difficult for judges to take the time necessary to address the concerns of *pro se* litigants and get through the day's calendar. Judges in Resolution Parts should have a minimum of two court attorneys but often only have one or are forced to share a court attorney with another judge. The help centers are understaffed, and people wait hours for assistance. The clerks' offices close at 4:30 p.m. except for emergency applications, causing hardships for both attorneys and unrepresented respondents, who may take time off from work in the afternoon to file answers or other papers, only to be turned away.

In Bronx Housing Court, litigants are told that they cannot adjourn their cases because the dockets are too full. Court staff cannot find files. A sign was posted in the clerk's office stating that due to short staffing, files not found on the shelf may not have been filed away; the sign states that people can check back at a later date to see if a file was re-shelved. *Pro se* litigants and attorneys endure long lines at the clerk's office. Orders to show cause are often put before judges without the files, depriving the judges of crucial information to assess the requests for relief.

In New York City Civil Court, judicial and staff shortages are problematic as well. Currently, No Fault cases are being assigned trial dates in February 2017. Litigants must wait a year to get a pretrial conference. The shortages of judges and staff are especially harmful to consumer debtors. More than a third of the cases in Civil Court are filed by debt buyers who purchase debt for pennies on the dollar and then sue without necessary supporting documents. There is widespread sewer service in consumer debt proceedings and 40% of the cases result in default judgments. Consumers often find out about judgments when their wages are garnished or bank accounts seized. Unfortunately, due to staff shortages, the courts are ill equipped to deal with consumers' attempts to vacate these default judgments. Old files containing the affidavits of service required to contest sewer service are off site and take months to retrieve which prevents litigants from proving defective service defenses. In newer cases, many defendants cannot successfully assert improper service defenses within the 60 day deadline imposed by the CPLR because the affidavits of service have not been placed in the court file. *Pro se* defendants and attorneys representing consumer debtors are often pressured to settle without presenting their legal claims to a judge.

In Manhattan, there are presently no trials scheduled in the Commercial Landlord Tenant Part due to a lack of judges. This creates an unfair and commercially untenable situation. The clerks are currently seven months behind in issuing judgments. There are extensive delays in

docketing and filing; for low priority cases, docketing and filing can take over a year. Clerks' assignments are literally double what they used to be. While previously there was an appeals clerk and a judgment clerk, the appeals clerk is now also the judgment clerk. Boxes of transcripts and other documents are not filed due to staff shortages. The calendar clerk is also the floating part clerk. The supervisor used to supervise six staff and now supervises 21. The small claims office may need to be merged into the general clerk's office due to staff shortages, and when a clerk is out sick, staff must be taken from other departments to maintain essential services. New York County Civil Court has recently lost two more clerks, who we understand are not being replaced. Recently, an attorney with the New York City Bar Association waited for months to get a default judgment entered, and when he went back to the clerk's office to correct a problem with the caption, no clerk was available to help. Disabled litigants encounter delays in being served because ADA trained clerks are sent to other courts without trained replacements.

As this far from complete listing of the problems resulting from funding shortages demonstrates, the Judiciary Budget Request should be approved in full.<sup>3</sup> The funds requested are required for the courts to adequately perform their constitutional and statutory obligations. Funding for adequate staffing and services is necessary for the timely and fair administration of justice.

January 2016

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<sup>3</sup> The Judiciary Budget Request does not include funds for the judicial pay increase recommended on December 24, 2015 by the Commission on Legislative, Judicial and Executive Compensation. These funds will be requested in a supplemental appropriation, because the Judiciary submitted its Budget Request to the Governor on December 1, 2015, as required by the New York State Constitution. Salaries that appropriately compensate the courts' judges are essential to attract and retain a highly qualified and experienced state judiciary. This need is especially pressing in New York, where judges handle a multitude of complex cases involving business and financial institutions as well as an ever lengthening docket of Family Court, Housing Court, consumer debt, guardianship and other cases affecting the daily lives of our state's residents.