

Chief Judge Jonathan Lippman (ret., New York)
Shifting the Landscape on Access to Justice
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Thank you Dean Soifer, Bob LeClair, Justice Acoba and, of course, Chief Justice Mark Recktenwald. Mark, I would be remiss if I did not say what a truly wonderful leader you are in the Access to Justice movement taking place in Hawaii and beyond, a fact that every Chief Justice in the country would attest to. And you are a truly worthy successor to your distinguished predecessors, including Bill Richardson, for whom this great law school was named, and my good friend, Ron Moon.

It is a delight to be at the Richardson Law School, and I want to thank the Access to Justice Commission for inviting me to be your keynote speaker at this 2016 Access To Justice Conference.

In speaking to you this morning about access to justice, I would start by making clear that I have been very much an advocate of judicial leaders playing a strong proactive role on access issues and reform of the justice system. A few years ago, the New York Times credited me with the national quote of the day, when I said that state courts are the emergency room for society's ailments. All of the societal issues of the day ultimately find their way into the courts and, as an institution, the Judiciary must be engaged in removing the barriers that confront those who seek access to our courts to resolve their most pressing problems.

For too long, access was limited to those with the financial resources to afford quality legal representation, while those without money in their pockets were left to fend for themselves. From the perspective not of an activist judge -- you know, that has certain connotations -- but as a judge who is, I hope and believe, proactive in the pursuit of justice, it has been my focus to shift the landscape on access to justice to better serve the disadvantaged, the vulnerable, and those who just need a helping hand.

Shifting that landscape is about ensuring that the scales of lady justice are exquisitely balanced regardless of one's wealth or station in life. The pursuit of justice for all should and must be our mission, and we are the essential players in this endeavor.

To me, the greatest threat to the pursuit of justice today -- and to the very legitimacy of the justice system -- is the desperate need for legal services by the poor and people of modest means. Whether it be the homeless and downtrodden in Honolulu, or those evicted or foreclosed on in their homes in New York, people who are fighting for the necessities of life -- the roof over their heads, their physical safety, their livelihoods, and the wellbeing of their families -- literally are falling off the proverbial cliff because they cannot get, they cannot afford, legal representation.

There is a huge justice gap that exists between the desperate need for legal services by the poor and people of modest means, and the finite legal resources that are available. We have made

great strides over the last years, and how proud you should be that Hawaii now ranks 3rd in the country in the new Access To Justice Index. Yet the justice gap still manifests itself in so many different ways, as witnessed by the fact that in New York there are 1.8 million people who came into the courts last year who were unrepresented by a lawyer, and that 96% of defendants in landlord tenant cases here in Hawaii are unrepresented, with 80% not having a lawyer in foreclosure proceedings.

In the heart of the fiscal crisis, the Legal Aid Society, in New York City, the oldest legal services entity in the country, turned away eight of nine people who came to them seeking legal assistance. Today, legal services organizations around the country still turn away more people than they can help.

The poverty rate hovers at around 20 percent in so much of the country, almost that high here in Hawaii when you factor in your high cost of living. The Legal Services Corporation in Washington DC is under attack, and very lucky to keep the limited funding that it has. IOLTA, or IOLA, as we call it in New York, which gives money to legal services based on lawyers' fiduciary accounts has seen its revenues drop dramatically because of low interest rates -- New York, for instance, went from about \$36 million to \$6 million in one year in terms of the monies from interest bearing accounts that go to legal services.

What is required to meet this kind of crisis and the issues that we face today is leadership, partnerships and innovation, on the part of the Judiciary, on the part of the Bar, from the biggest firms to the smallest practitioners, from the academy and the law school community, and of course from the workers in the vineyards -- our legal service providers.

When I first became Chief Judge in 2009, I went to testify at a hearing before a joint legislative committee on the long range plan for civil legal services in New York. What became clear to me in the course of that testimony was that there not only was no long range plan for legal services in our state, but no short range plan and, in reality, no plan at all.

In my role as the steward of the justice system in New York, I decided to attack this issue head on as the centerpiece and focus of my years as Chief Judge. I want to talk to you today about the lessons we learned in New York in seeking to close the justice gap, to the extent that is instructive, and also talk about what is going on here and around the country and what we all have to do to make the ideal of equal justice a reality each and every day in Hawaii, in New York and across the nation.

The first thing that we did in New York to try to change the equation on access to justice, was to put together a task force to enhance civil legal services that we now call the New York State Permanent Commission on Access to Justice, very much the counterpart to the Hawaii Access to Justice Commission which brings us all together today. The one rule that I set out to the task force and to our chair, Helaine Barnett, the former president of the Legal Services Corporation in Washington -- was that this was not going to be an arm's length relationship, but a partnership where we had a basic understanding. We would collaborate from day 1 before any reports or suggestions were issued, and based on our discussions, I would do absolutely

everything that the Commission recommended. It was incestuous to say the least, and to the end I followed through on every single thing on the Commission's to do list.

In my mind, access to justice commissions around the country cannot be divorced from, or operate apart from, the Judiciary and the leadership of the profession, if they are to be effective and avoid putting out recommendations that sit on the library shelf, with nothing getting done.

We also decided that we would focus on two pillars in our efforts to support civil legal services in our state. The first of the two pillars was public funding for legal services, which when I started as the Chief Judge in 2009, was essentially zero. We had a few dollars in what we call member items from the legislature, but really, no systemic public funding. So, we committed to focus on public monies to support legal services, and determined that the other pillar of our program would be, and remains, increasing pro bono work by the Bar.

At the outset, we decided to reach out to the public and to our constituencies to get their support, through public hearings that the leadership of the Judiciary and the profession would preside over. Each year, I personally presided over four hearings throughout the state to promote legal services, to make a record, and to get the facts.

We also, at the very beginning, obtained a joint resolution from the legislature -- and we always want them to think that these things are their ideas -- saying, "Chief Judge, go hold these hearings and tell us what resources you need to support civil legal services for the poor in our state -- and put those needs in the Judiciary budget." And we said, "Great idea, legislature. That's exactly what we're going to do."

My belief was that the Judiciary should be at the center of this effort, because that is our Constitutional mission -- to foster equal justice. That's what the Judiciary does, above everything else. Everybody gets equal justice, everybody gets their day in court.

In addition to that, I believe that the Judiciary is uniquely positioned to play a leadership role in access to justice because of the leverage that we have and the resources that we have. But to succeed, the Bar had to be our partners, and they without hesitation joined us, recognizing that helping our fellow human beings goes to the very core of our great profession.

Another centerpiece was the realization that because of the gridlock in Washington, we could not depend on Washington for further funding, or to provide the ultimate solutions to our access to justice issues.

We decided to look to state and local government as a means to fund legal services for the poor, and supplement the LSC grants New York was getting for legal services. To me, funding at the state level is the new horizon for public funding for legal services. That is where the average citizen comes in contact with the justice system and legal services should, in significant measure, be funded locally, rather than always looking to Washington.

Remember, the Legal Services Corporation has \$375 million -- for the entire country -- to provide grants to legal services providers. Fair to say, a small amount in the big scheme of things -- and Hawaii has one statewide grantee -- the Legal Aid Society of Hawaii.

In asking for state and local funding, we had to answer why the state should fund civil legal services for the poor. The approach in one respect was obvious -- because it's the right thing to do. And from time immemorial, as long as there have been judges and lawyers -- we talk about the moral imperative for equal justice. Remember the Bible, Deuteronomy? "Justice, justice, shall you pursue, for rich and poor, high and low alike."

Well, we know, it is the right thing, the moral thing to do. But the answer we get from our partners in government, if that is our only rationale, is that there are lots of right and moral things that are important. Shouldn't we help poor people? Sure, we must help poor people, but what we get if that is our exclusive argument is that this is a tough budgetary year, and we just don't have the money -- get in line!

So, we took a little different approach. And that approach was -- and is -- that it is good for the economic bottom line of our state and our communities to support legal services for the poor. And that, if you invest money in civil legal services, more money is returned to the state with reduced social services cost, reduced incarceration costs, and more federal dollars flowing to the state.

We delivered highly sophisticated economic studies done pro bono by major accounting firms and fiscal experts that showed that for every dollar invested in civil legal services, five to six dollars are returned to the state. Our newest studies show that, in fact, ten dollars are returned to the state for every dollar invested.

So, we tell our partners in government, don't just do it because you want to help the vulnerable -- which you should do -- but do it because it helps the well-being of our economy and our society. Everyone loses if people fall off the cliff, go on public welfare, and don't have money to put into local banks and local stores. We help all of us by funding civil legal services.

This is an unconventional approach, a counterintuitive approach, and you also need unconventional messengers to deliver it. So, who did we have testify at these hearings? We had the heads of the largest banks, the heads of the landlord associations, the business associations, the Comptroller of the State of New York, the City Council Speaker, and even Cardinal Dolan. And let me tell you, it was quite a scene when Cardinal Dolan came in with his red hat and red robe, and said that the message of the church was the same as the message that the Chief Judge was giving. The word from on high!

We must continue to think of new ways to get our message across. If we don't do it, no one will. Whether in New York City or Honolulu, you don't have people protesting in the street with placards saying, "More money for legal services for the poor." It's not that kind of an issue. We have to stand for something, and advocating for legal representation for the most vulnerable in society is our most fundamental obligation. We are not here just to feather our own nest.

And lesson in point. At the beginning of my tenure as the Chief Judge, the Governor and the legislature cut \$170 million from the Judiciary budget – a hell of a lot of money, by any standard, even in a state as large as New York. A budget cut of that size necessarily required layoffs of court personnel.

At the same time, I had pledged to give millions of dollars to legal services for the poor in the Judiciary budget. The other two branches of government asked how can you lay people off and possibly close the doors of the courthouses, at the same time that you're giving money to legal service organizations that are representing poor people?

The answer I gave was that if we keep the courthouse doors open and don't have equal justice inside, then we might as well close the doors. In those circumstances, justice does not mean anything!

So we gave the monies to legal service providers and we did what we had to do and laid off court personnel, most of whom I am pleased to say were able to return to the court system within a reasonable period of time. But we agonized about this choice, and in the end I believe made our point – that the Judiciary and the profession believed that access to justice for all was the very foundation of our court system.

From that moment on, we didn't have a day's trouble in funding legal services for the poor in the Judiciary budget. We went from \$12.5 million, to \$27.5 million, to \$40 million, to \$55 million, to \$75 million, to \$85 million. And then with this year's budget, to \$100 million – which was the goal we originally set, and we believe that we have now institutionalized that kind of funding at the state level, beyond what New York legal service providers get from Federal or other sources.

In New York today, between state and local funding – including funds that New York City provides -- we have \$160 million, almost half the funding the Legal Corporation has for the entire country to support legal services for the poor.

And public funding for legal services is essential, so that our legal service providers know that they are not alone. Providers are doing God's work, and we need to show them that we are right there to support them.

So, it is great to have public funding, but make no mistake, it is the tip of the iceberg. As I said before, we still turn away more people than we can help. There's not enough public money in the world to meet the need. More has to be done, and it has to come from the voluntary, pro bono efforts of the Bar to fill that gap.

We have to appeal to the nobility of the Bar. We need to get more soldiers in the field to help the legal service providers by doing pro bono work. In New York, we first looked to parts of the Bar that were relatively untapped when it came to pro bono work.

First, we had the Baby Boomers -- who were slowing down their practices. We told them if they do a certain amount of pro bono work for the poor, we'll put a gold star on their chest, and

we'll call them Lawyers Emeritus. We have 2,000 of these Baby Boomer lawyers who are now doing pro bono work in the Emeritus Program.

We also talked to corporate counsel -- those corporate counsel that come from other states, working for big corporations in New York. We told them that we would change our rules and allow them to do pro bono work here even if they were not admitted to the Bar. The bottom line -- if you are representing someone for no fee, you can practice in the courts of the state of New York, whether admitted or not.

And then we went to aspiring lawyers and said: We're going to impose a 50-hour pro bono requirement on all law students who want to become admitted lawyers in New York. The theory is that if you're not going to embrace the core values of our profession, which are about helping others, serving others, then you're not going to be a lawyer in New York.

You would have thought that the world was coming to an end when we announced this. While some law schools, like here in Hawaii, required 50 hours of community service or a certain number of clinic hours, this was a licensing requirement.

The main opposition came from the organized Bar that said that this was the nose under the tent for mandatory pro bono for all lawyers. While this was not the case, as Seinfeld would say: "Not that there's anything wrong with it." If every lawyer in the State of New York, Hawaii or the country gave 50 or 100 hours of pro bono work, wouldn't that be terrible? Wouldn't that be horrible? The world would surely collapse.

The bottom line is that the people who really got it, who really understood what we were doing, were the students. The students embraced it immediately, and they did not stop at 50 hours, either. When they start getting into pro bono work, they love it, and they do much more than they're required to do.

My view is that if we require law students to learn about torts, and contracts, and property, we should also require them to learn about values, and that it's not enough to teach the different disciplines that you learn about in law school. Interwoven with that has to be learning what being a lawyer is all about, helping others. You can't live in a vacuum, whether you become a corporate lawyer, or a torts lawyer, or a legal services lawyer. All admitted lawyers, no matter what they do, should know that lawyering in a real way is a public service.

So, we survived all of that, and then there came another crisis in shifting the landscape on access to justice in New York. Another crisis with the organized Bar. We asked lawyers to report on their attorney registration how many hours of pro bono work they did and how much they contribute to legal services providers. We did this to help us chart our future course on access to justice. We cannot know what to do, unless we know how we are doing. Again, in return, we got the nose under the tent argument.

But, our rationale was the same as for the 50-hour rule. We're the gatekeepers. The Judiciary, the Chief Judge, in my case, is the gatekeeper for Bar admission. We're also the legal regulator of the profession. And our job as legal regulator is not to make sure that all lawyers make a lot of money and have 2 cars in the garage.

No. Our job is to make sure that the public has trust and confidence in this profession, and that the profession is what it's supposed to be, and operates at a level that is beyond reproach. It's not to see to it that lawyers are financially successful.

I did not take a vote and ask lawyers if they thought it was a good idea that we require them to tell us how many hours of pro bono work that they do. Rather, I believed that this was a critical, ethical issue for our profession that required leadership by the Judiciary as the legal regulator. The end result of that was that we were able to get the best system of pro bono reporting in the country. After we exercised moral leadership on this issue, we talked with the Bar and came to an understanding to develop a much more expansive, but somewhat less intrusive, pro bono reporting system. We now have the information we need by geographic area, big firm, little firm and specialties. We are going to know where we need to do more, and where lawyers are doing their part.

So, what other things should we be thinking about to change the landscape on access to justice? One thing is to identify in the everyday practices and protocols of the courts and the profession what needs to be done to even the playing field. What we did in the Judiciary in this regard, as the rule-maker, was to put out new rules for foreclosure and consumer credit cases. What was happening in foreclosure cases? Remember the robo-signings, where lawyers were getting robo-signed foreclosures while representing the banks, but often really had no idea what the case was about.

We made the lawyers put in affidavits saying that they were personally familiar with the case. And surprise of surprise, foreclosures dropped over 50 percent in New York. Why? Because lawyers didn't want to attest falsely that they knew the facts of the case.

We did the same thing with consumer credit cases, addressing where the consumer credit entities buy up the credit card bills – for pennies on the dollar -- and then put in some broad-brush affidavit that says that an unsuspecting defendant owes \$5,000 or \$20,000 or more.

What we did is say that they needed to give us the trail of the debt. Who has owned it, who owns it now, what is the history, what is the exact amount. Give us this information before we give you a default judgment over some poor person who may or may not get notice and, if it is received, has no idea what to do with it. Let's make sure that there is notice, and that the courts and the defendant get all the particulars about the debt.

Making these new court rules did help our access to justice efforts, but we were determined to continue to think out of the box and be innovative in finding new ways to deliver legal services to disadvantaged New Yorkers. And we had a seemingly insoluble problem in New York. We concluded that there were just not enough lawyers doing pro bono work to make sure that people get legal representation. What to do?

We looked around and found that civil legal services in Great Britain are done, for the most part, by nonlawyers. This was intriguing to us. Obviously, the best solution is to have a lawyer to promote access. We concluded, however, that the next best solution is to have a non-

lawyer trained in a particular niche who might even be more effective than a generalist lawyer who doesn't know about the particular area.

So, we started the Navigator program, where nonlawyers go into the courtroom with the litigant, particularly in housing and consumer credit cases -- they can answer questions from the judge, and provide moral support to the litigant. Then we took it a step further to the street level. We opened storefronts of non-lawyers, called Legal Hand, supervised by legal service attorneys. These storefronts are in communities that are changing and non-lawyers provide legal assistance and information.

The Bar looked at what we were doing, and thought it was a good idea -- because we were not taking the bread out of any lawyer's mouth. In these kinds of cases, over 90 percent of the people are unrepresented, just like here in Hawaii.

So, up to now, I've tried to give you an overview of some of the things we've done to change the paradigm on access to justice -- the funding, increasing pro bono, stressing values and the nobility of what we do, new rules, new ideas, and the use of non-lawyers. And there's so many other things to be done with technology, unbundling of legal services, lawyers for a day programs, court help websites and do-it-yourself forms.

And look at all you've done here in Hawaii -- self-help centers, access to justice rooms, clinics, model pro-bono policies, foreclosure mediation programs, the Indigent Legal Assistance Fund, court forms, training libraries, the use of non-lawyers, language access, the Domestic Violence Center, the Disability Rights and Mediation Centers, and on and on.

And none of us have a monopoly on innovative ideas on Access to Justice. California has a pilot Civil Gideon program. Connecticut has a Lawyer Corps program where the big corporations fund fellows to provide civil legal services. The State of Washington has a new lowbono legal technician program. New Jersey has done so much with foreclosures. Texas has line items in the executive budget supporting legal services for the poor. And so much more.

There are lots of interesting, innovative things happening here in Hawaii, in New York and around the United States. But, how do they fit together? To me, in one fashion or another, we are going toward some kind of a right to counsel, or a Civil Gideon -- meaning, in my mind, legal representation, or at the very least, effective legal assistance for every person in need. But, how do you actually get there? There are three obvious ways -- by policy, by statute, or by Constitution.

If you look at the most recent US Supreme Court cases on a constitutional right to counsel in civil matters -- Turner versus Rogers, for example -- I would not count on it as a constitutional right in the near future. We need more time. What about by statute? It's possible. There are right of counsel bills in cities around the country, particularly in housing matters, that are gaining support. But, to me the real new frontier, for the time being is on the policy side. In New York, our legislature passed a joint resolution declaring that it is the public policy of our state to provide legal representation or effective legal assistance to everybody in need, fighting for the necessities of life.

And the initiatives that you've undertaken in the Hawaii Judiciary and the Access to Justice Commission are mostly on the policy side. The things I talked to you about going on in New York and all the different and interesting things happening in other states are policy based. I believe that a thousand flowers are blooming and that we are literally changing the dialogue on Access to Justice and civil legal services.

That's what happened on the criminal side. Look at the seminal case of Gideon versus Wainwright, that says that everyone whose liberty is at stake is entitled to a lawyer. It's not perfect, believe me. Criminal indigent defense representation is very uneven in the country, but at least there is a Constitutional floor. If your liberty is at stake, you get a lawyer.

Gideon was fifty plus years ago. Twenty years before that, in Betts versus Brady, the U.S. Supreme Court (just like in Turner versus Rogers in civil cases) said that even if you're going to go to jail, you have no right to a lawyer.

What happened in the 20 years between Betts and Gideon? What happened was that the dialogue changed, and lots of interesting things were done in different states around the country to promote criminal indigent defense representation. Things were changing. Innovation was about in the country. That's why by the time of Gideon, 25 attorney generals in different states in the United States put in amicus briefs to the U.S. Supreme saying that you should have a constitutional right to a lawyer when your liberty is at stake.

The discussion had changed. That's what happens when people are proactive in the pursuit of justice. That's what is happening in the civil side today – that's what you are all doing. I really believe that we are changing the priorities, that people are starting to understand that civil legal services for the poor are as important as schools, hospitals, and housing, and all the things that we hold dear in our society.

We're at the tipping point. I believe there's a revolution today in access to justice. The public is getting it. The person on the street has known for many years, since Gideon, that if your liberty is at stake, you get a lawyer. They watch television, they know about Miranda rights. They know that everyone gets a lawyer, if you may go to jail.

But what about if you asked, a few years ago, what would happen if your home was being foreclosed on, or you were being evicted -- should you get a lawyer? Until recently, a very tiny percentage would have said yes. Go out in the street today, after the foreclosure crisis and the economic crisis in the country, and all of our efforts on access to justice in civil matters, and ask people if they think someone who is getting the roof over their head taken away from them should get a lawyer. Today you are going to have 80 to 90 percent say, absolutely! All the things that you are doing in Hawaii is making that happen, and the same goes for the rest of the country.

So, the dialogue is changing. We really are getting to the point where we can have a right to counsel. We are building the foundation. We are shifting the landscape.

Can we really close the justice gap? We can and we will. It requires innovation, it requires leadership, it requires partnerships, and it requires being proactive in the pursuit of justice.

The Judiciary, again, is uniquely suited to make this happen, as the gatekeeper for Bar admission, as the legal regulator, as the rule-maker. It's our Constitutional role, it is what we're supposed to do.

The profession? We are not a parochial profession, we can't be. We have to always remember the nobility, the values, and look at the example of the legal service providers, our heroes. Whatever we do, we must support them with pro bono work to help people.

And our legal educators must be value-driven. Being at law school is more than learning about the subjects we talked about -- contracts, and all of the others. It's about learning what it means to be a lawyer, so that with the next generation of lawyers we are not going to worry about mandatory pro bono and the nose under the tent. They are going to meet their obligations as lawyers because it is in their DNA, it's what lawyers do.

Together, if we continue to think out of the box, if we are proactive in pursuing justice, if we truly are leaders in the Judiciary and the profession, if law schools teach new lawyers about values, and if you and other Access to Justice Commissions continue your ground breaking work, we can and we will, one day in the not so distant future, make the ideal of equal justice a reality here in Hawaii, in New York and around this great country. Thank you.