FUNDING CIVIL LEGAL SERVICES FOR THE POOR

REPORT TO THE CHIEF JUDGE

LEGAL SERVICES PROJECT

May 1998

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EXECUTIVE SUMMARY

In recent times, only a fraction of the civil legal needs of the poor have been met, and the resources available to meet those needs have shrunk while the number of persons in need has grown. Since 1992, annual funding for civil legal services in New York has decreased by nearly $40 million, principally as a result of decreases in federal Legal Services Corporation funding and in proceeds of the state Interest on Lawyers' Accounts ("IOLA") program. Moreover, those funding sources are threatened with further decreases.

In September 1997, the New York State Assembly Judiciary Committee, in a report calling for enactment of a Judicial Reform, Integrity and Access to Justice Act, proposed that a permanent funding stream be identified to provide $40 million annually to legal services for the poor. The Assembly requested the Office of Court Administration to identify an appropriate funding source. Chief Judge Judith S. Kaye created the Legal Services Project and appointed as members business leaders and lawyers from a wide variety of backgrounds to "determine how society can best support legal services."

We are unanimous in the view that the provision of civil legal services for poor persons is a fundamental obligation of government which should, if necessary, be satisfied through allocation of general State revenues. Yet our charge was to look beyond that principle and to identify new revenue sources that would permit the State to augment civil representation of the poor without relying wholly on existing revenue streams.

After considering a variety of funding sources and receiving wide input, we propose that the State create an Access to Justice Fund and place it under the control of the IOLA Board of Trustees. The State should fund the Access to Justice Fund through a dedicated revenue stream of $40 million from the State Abandoned Property Fund. A modernization of the 55-year-old Abandoned Property Law undertaken now should result in substantial new revenues flowing to the Abandoned Property Fund. If for any reason the Abandoned Property Fund is inadequate to raise all of the money needed for civil

legal services, the General Fund should provide the balance — at least to the extent of surpluses in the Court Facilities Incentive Aid Fund that would otherwise be transferred to the General Fund. If all else fails, as a last resort additional revenue could be derived from discrete increases in certain law-related fees.

In providing funding for the civil legal representation of the poor, the State will reap many cost savings, including lower costs of judicial administration (fewer *pro se* litigants), financial savings (reduced homelessness and reduced need for income support and social services) and greater civil stability, especially in communities with large low-income populations.

Raising $40 million annually would do no more than restore legal services funding lost since 1992 (after adjusting for inflation). As Chief Judge Kaye stated when she appointed this Project, "A justice system that allows disparities in justice based on the ability to pay is inconsistent with a fundamental principle of our free democratic society — equal justice for all." Against the need and the principles at stake, $40 million is a small downpayment toward access to justice, and obtaining a substantial measure of justice is a bargain at this price.

I. The Unmet Need for Civil Legal Services.

The unmet need for critical civil legal services among poor New Yorkers has been thoroughly documented, is very great and is worsening.

Poor people in New York State encounter literally millions of problems each year without the assistance of a lawyer.[1] The problems are not trivial. Most often, they involve one of the basic necessities of life, such as shelter.[2] In New York City, nine out of ten tenants do not have counsel[3] to help them navigate the "impenetrable thicket" of summary eviction proceedings.[4] Low-income renters who are evicted become the City's homeless. A recent study found that 45 percent of the families surveyed became homeless by way of eviction. The Action Research Project on Hunger, Homelessness and Family Health, *Charles Dickens Meets Franz Kafka in 1997*, at 25 (Nov. 18, 1997).

The second most common legal problem of the poor involves another necessity of life: income maintenance, including food stamps, unemployment benefits, social security and SSI, and veterans benefits. Twenty-one percent of the statewide sample of poor persons reported unmet needs in this area. *Legal Needs Study* 21. Consumer problems, such as debt collection and wage garnishment, are the next most common unmet legal

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1 New York State Bar Association, *The New York Legal Needs Study 1990* , at 9-11, 17-18 (revised 1993) (the *"Legal Needs Study"*). The number of unmet civil legal needs is almost certainly greater today than it was in 1987 when the *Legal Needs Study* survey was undertaken. *See infra* p. 4 n.5.

2 Slightly more than 34% of the statewide sample of poor persons reported having at least one unmet legal need in the housing category. *Legal Needs Study* 17.

3 "[I]n almost 90% of the cases, unrepresented tenants attempt to defend their homes against landlords who are represented by attorneys." September Jarrett and Michael McKee, *Housing Court, Evictions and Homelessness: The Cost and Benefits of Establishing A Right to Counsel* 8 (1993).

4 *LaGuardia v. Cavanaugh,* 53 N.Y.2d 67, 70, 423 N.E.2d 9, 10, 440 N.Y.S.2d 586, 587 (1981) (quoting *Matter of 89 Christopher v. Joy,* 35 N.Y.2d 213, 220, 318 N.E.2d 776, 780, 360 N.Y.S.2d 612, 618 (1974)).

need, nearly tied in frequency with health problems at approximately 15%, statewide. *Id.* Legal problems involving family violence and disharmony are also common.

There is no reason to believe that the legal needs of the poor are becoming less pressing. The poor's numbers are increasing while their poverty deepens.[5] The laws governing all our lives continue to become more complex, and especially so for the poor;[6] and the resources available to help them continue to shrink. Since the beginning of this decade, the principal sources of funding for civil legal services for poor persons in New York State have been the federal Legal Services Corporation ("LSC") and the IOLA Fund.[7] In 1998, those two sources will generate almost $40 million *less* than they did in

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5 Between 1990 and 1995 the number of New Yorkers living below 125% of the poverty level — the benchmark for eligibility used by many legal services providers — increased from 3.4 million to 3.9 million. United Way of New York City, *Low Income Populations in New York City: Economic Trends and Social Welfare Programs 1997*, at 12 Table 3. As their numbers have increased, their income has declined. According to a report by the Center on Budget and Policy Priorities, *Pulling Apart: A State by State Analysis of Income Trends* (Dec. 16, 1997), the average income of the poorest 20% of families in New York decreased by $1,700 between the mid-1980s and the mid-1990s, from $8,480 to $6,790. *See also* Community Service Society of New York, *Poverty in New York City 1996,* at 7-9 (1997).

6 The laws affecting the lives of the poor have changed dramatically and have become increasingly complex and inaccessible to the lay person. For example, public benefits programs have been completely overhauled by federal, state and local changes in laws, regulations and policies, and New York's recent Rent Regulation Reform Act of 1997 has amended housing laws in ways likely to have profound impacts on low-income people, both individually and in the aggregate.

7 IOLA is a mechanism for generating funds for legal services by aggregating certain deposits that clients choose to leave with their lawyers (loosely referred to as "lawyer escrow deposits"). Specifically, IOLA applies to lawyer escrow deposits that are too small or will be held too briefly to generate income net of the costs of placing and maintaining them in an interest-bearing account and complying with laws regarding the reporting of income. Such deposits (currently estimated to total $1 billion in New York) are aggregated and the interest paid over to the IOLA Board, which distributes the interest to legal services providers. The attraction of IOLA is that it directs to legal services organizations funds that were previously absorbed by the banking system because deposits now subject to IOLA were previously placed in non-interest-bearing checking accounts. Thus, IOLA does not deprive any client of funds from which the client could have realistically expected to derive a benefit.

1992, on an inflation-adjusted basis.[8] In partial response to this crisis, in recent years the Assembly has used what are essentially discretionary funds under its control to reduce the funding gap. In 1997, the Assembly added $6.05 million to the budget for this purpose, reducing *pro tanto* the legal services funding gap. However, this year Governor Pataki vetoed approximately $7 million of budget "add-ons" for civil legal services for the poor. That veto graphically underscores the need to find a permanent and secure source of funding for legal services.

As a result of the LSC and IOLA reductions, legal services offices have closed or consolidated; the number of lawyers available to handle cases has been reduced; and certain types of cases can no longer be handled. Illustrative of the problem are the following facts reported by legal services providers in letters to the Project's Chair or staff:

- The Legal Aid Society of New York City's East Harlem Office must turn away three out of every four clients with meritorious cases, while at the Society's Bronx office there is a two-and-one-half-year waiting list to receive an appointment for a divorce.

- The Legal Aid Bureau of Buffalo lost its most experienced attorney and had to eliminate its clerical staff, transferring their duties to paralegals who were therefore unable to serve clients — clients served dropped from 5,434 in 1992 to 1,837 in 1997.

- Legal Services of Central New York's staff was reduced from 44 to 31.

- Niagara Falls Legal Aid Society lost almost half of its attorneys between 1992 and 1997, while its case openings decreased from 1,252 to 624.

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[8] In 1992, New York civil legal services providers received $25.5 million from the LSC and $29 million from IOLA, which totals $54.5 million, or $63.5 million in 1998 dollars (based on a 16.49% increase in the consumer price index for the Northeast Urban Region between January 1992 and January 1998). New York providers expect $27.5 million from these sources in fiscal 1997-98, making the shortfall since 1992 $36 million in January 1998 dollars.

- The Legal Aid Society in Rochester has lost seven staff positions and has had to limit family law representation to cases involving domestic violence and/or child support.

- Neighborhood Legal Services in Buffalo suffered a decline in new case openings from 9,930 in 1992 to 8,275 in 1996 and does less direct representation across the board, primarily because its legal staff has decreased from 22 attorneys in 1992 to 17 in 1997.

- The Legal Aid Society of Mid-New York, in the period from 1992 to 1997, closed one office and lost seven attorneys (from 20 to 13) resulting in a 36.6% decrease in the number of cases closed, from 6,638 to 4,206.

- Chemung County Neighborhood Legal Services lost 21% of its staff between 1992 and 1997; its caseload fell by 18.8%.

- Legal Services for New York offices in Brooklyn lost a third of their professional staff between 1992 and 1998, causing commensurate declines in case closings.

Statistics do not adequately convey the desperation of poor New Yorkers denied access to the protections of the law. One Project member described his first visit to The Legal Aid Society of Northeastern New York as "an eye opener":

> Each morning staff take calls from 9:00 a.m. to 10:00 a.m. until they have filled their caseload capabilities for the day. The maximum number of new cases which can be taken on is usually filled within the first half-hour. After that callers are told that they need to call back the next day, and have to hope they are the "lucky" callers for the day. The only exceptions for the rest of the day are emergency situations where the health or physical welfare of a family or individual is at stake.

So far as we can determine, there has been no recent, comprehensive, controlled statistical study that has estimated how much additional money would be required to address all the unmet needs of New York's poor for civil legal services. It seems certain, however, that the $40 million called for by the Assembly Judiciary Committee would address only a part — perhaps a small part — of the aggregate need, for even at the higher funding levels in 1992, only 15% of the poor's legal needs were receiving a

lawyer's attention, *see Legal Needs Study* xiv, and the number of poor persons is much larger today than it was in 1992, *see supra* p. 4 n.5.

II. The Cost-Effectiveness of Legal Services

It is wrong to focus only on the gross dollar cost of providing legal services. The fact is that the funding of legal services programs often is highly cost-effective and results in the saving of significant State funds. In many instances, the savings to the State outweigh the costs of providing counsel several times over. Moreover, additional funding for legal services will not cause a proportional increase in court caseloads, for two out of every three problems handled by legal services lawyers are resolved by advice or non-litigation services, such as drafting a letter or making a phone call.[9] Consider the following examples:

Eviction Prevention Programs. New York City's Homelessness Prevention Program currently provides $12 million annually to pay for lawyers to represent families in danger of eviction. The program has been funded in part on the basis of its cost savings. A 1990 report of the New York City Department of Social Services, *The Homelessness Prevention Program: Outcomes and Effectiveness*, evaluated a prototype eviction prevention program and concluded that the provision of lawyers to represent the indigent resulted in the saving of approximately $4 for every dollar of cost. *Id.* at 2. Savings resulted from the fact that represented poor tenants faced with an eviction proceeding are successful in avoiding eviction in more than 80% of all cases, compared to a much lower success rate for tenants who appear *pro se*. *Id.* at 4. Evictions lead in many cases to homelessness, which carries an enormous social cost. New York City Department of Homeless Services data suggest that it costs $30,000 to keep a family in the shelter system, where the average length of stay is 10 months. In 1993 it was

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[9] *IOLA Grant Activity Report 1996*, at 8.

estimated that providing counsel to all low-income tenants facing eviction in New York City would generate a net saving of $67 million.[10]

Disability Advocacy. Since 1984 New York State has funded the Disability Advocacy Program, which provides lawyers to represent applicants for federal social security disability benefits. A February 1997 report by the New York State Department of Social Services to the Legislature estimated that since 1984 the programs have saved the State $120 million (gross) in State welfare costs, by providing counsel to applicants for federal social security disability benefits and thereby increasing their likelihood of a favorable ruling from small to 88%. Estimated net savings in 1995-96 were $7.95 million (total savings in State welfare costs of $13.7 million, less the approximate $5.74 million cost of funding counsel).[11]

Domestic Relations. In the domestic relations area, cost savings can also be clearly shown in family preservation and child support. In 1996, New York City legal services providers handled 445 cases in which their representation helped to prevent the termination of parental rights. According to Child Welfare Watch, a joint project of the Center For An Urban Future and the New York Forum, the average cost of foster care per child in 1997 was $13,070 per year, and the average length of stay in the foster care system for each child in 1997 was 4.28 years. There is, therefore, a potential savings of $55,940 per child for cases in which an unwarranted placement is prevented.

Moreover, obtaining child support for clients is an important part of the work of legal services attorneys. Statewide, legal services providers reported obtaining child support for clients in 1,028 cases in 1996. While annual child support cost data are not

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[10] Community Training and Resource Center and City-Wide Task Force on Housing Court, *Housing Court, Evictions and Homelessness: The Costs and Benefits of Establishing A Right to Counsel* iv (June 1993).

[11] N.Y. State Dep't of Social Services, *Disability Advocacy Program 1984-1997*, at 6 (Feb. 1997).

available, the savings to the government are obviously substantial when the non-custodial parent is required to support the family.

III. Project Formation and Work.

The provision of adequate funding for civil legal services for poor persons has long been of concern to both the Bar and the Judiciary. In October 1997, Chief Judge Kaye created the Legal Services Project, appointed us as its members and charged us to "determine how society can best support legal services" and to seek means of "promot[ing] constancy in the flow of resources for professional legal services organizations so that they may continue their excellent work and serve greater numbers of litigants."[12] The creation of the Project followed issuance by the Assembly Judiciary Committee of a report in September 1997. Part III of that report is entitled "Providing Access to Justice" and contains two subsections, the first of which, headed "Dedicated Funds for Civil Legal Services," provides in pertinent part:

> To ensure access to justice for persons who could not afford to obtain counsel in critical civil legal matters, a new statute would be enacted which would require the provision of approximately $40 million per year by the state to fund civil legal services programs, beyond current allocations from the Interest on Lawyer Accounts program (IOLA).

Consistent with the principle that funding access to justice for the poor is a responsibility of society as a whole, Chief Judge Kaye appointed both lawyers and non-lawyers to the Project. The members of the Project include a number of individuals from industry and the financial services sector. The lawyer members include both private practitioners and senior corporate counsel. Only two of our 21 members are employed by a legal services program. Appendix A contains a list of the Project Members.

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12 The quotations are from an October 7, 1997 Unified Court System release.

As our first order of business, we undertook a thorough exploration of alternatives for funding legal services. We conducted an exhaustive review of existing programs and funding sources in New York and elsewhere. A selective bibliography of studies, surveys and other sources consulted can be found in Appendix B. Antonio Galvao and Barbara Mulé of the Office of Court Administration functioned as Project staff, coordinated our study and provided us with considerable statistical and other information. Their help was both indispensable and invaluable. Jeffrey Chapman, a third-year student at New York University School of Law, also assisted our research and inquiries.

We have drawn heavily on studies, surveys and reports by others, particularly the American Bar Association Standing Committee on Legal Aid and Indigent Defendants Project to Expand Resources for Legal Services (PERLS) and the State Planning Assistance Network (SPAN), a partnership of the ABA and the National Legal Aid & Defender Association. We were also greatly assisted by a briefing book prepared by the Legal Services Working Group, a legal services community coalition in New York State.

Our exploration of abandoned property as a source of funding included contacts with the reporter for the 1995 Uniform Unclaimed Property Law, the National Conference of Commissioners on Uniform State Laws, two members of the New York Commission on Uniform State Laws, the Office of Unclaimed Funds in the Office of the New York State Comptroller and representatives of the National Abandoned Property Processing Corporation.

We solicited information and views from all legal services providers and bar associations throughout the State whom we were able to identify. Twenty-seven legal services providers and 24 bar associations have responded to our inquiries; they are listed in Appendix C. Our chair conferred with both Chief Judge Kaye and Chief Administrative Judge Lippman, the latter of whom attended one of our four meetings.

IV. Evaluation of Alternatives.

Our objective in evaluating alternative sources of funding for civil legal services for the poor was to identify sources that are substantial, stable from year to year, and secure (that is, permanent). We also sought to identify potential funding sources that are the least controversial, or "fairest," in the sense that no segment of the public has a greater claim to the funds than any other group and no one group should legitimately feel unjustly saddled with an expense that should be borne more broadly.

Using these criteria, we considered several different ways of funding civil legal services, and permutations on some of those ways. Some possibilities, such as class action settlement remainders and sequestering a portion of punitive damages awards, were neither substantial nor secure. Other proposals, such as acceleration (without increase) of the payment of court filing fees with an allocation of the "float" to legal services, were judged too complex relative to the amount of revenue that they would probably generate. Appendix D is a compilation of the alternatives that we considered and a summary of the reasons each was rejected or deferred for future consideration.

V. Recommendations.

We have concluded that only one potential funding source meets the criteria of substantiality, permanence, constancy and fairness: abandoned (unclaimed) property.[13] We therefore recommend the annual transfer of $40 million, beginning next year, from the Abandoned Property Fund to a new "special revenue fund," as defined under New York State Finance Law § 2(17), to be called the Access to Justice Fund.[14] We

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[13] Maryland is the only state that currently dedicates a portion of its unclaimed property receipts to civil legal services for the poor. *See* Md. Code Ann. Com. Law § 17-317 (Supp. 1997).

[14] The case of *Phillips v. Washington Legal Foundation* (No. 96-1578), argued and awaiting decision by the United States Supreme Court, is a constitutional challenge to the Texas IOLTA program. Should the Supreme Court fail to reject that challenge, the

(continued...)

recommend amendment of the Abandoned Property Law to generate this additional annual revenue in the future. To the extent that these amendments fail to generate all the additional revenue needed to fund the Access to Justice Fund at a $40 million level (which in future years should be adjusted for inflation), the Abandoned Property Fund is sufficiently large to make up the difference. If for any reason the Abandoned Property Fund becomes inadequate for this purpose, we identify other sources that could be used, if necessary, to close the gap.

A. Abandoned Property. The key to our recommendation is amendment of the Abandoned Property Law, under which various categories of tangible and intangible personal property that remain unclaimed for specified periods of time (referred to as "dormancy" periods) escheat to the State of New York at the end of those periods. The owners of escheated property may lay claim thereto at any time because such claims are not subject to a statute of limitations. *See Application of New York University (State Comptroller),* 271 App. Div. 131, 134, 63 N.Y.S.2d 556, 558 (3d Dep't, 1946), *aff'd*, 296 N.Y. 913, 73 N.E.2d 36 (1947). However, experience teaches that only a relatively small portion is later claimed by the asserted owner.

Current Statistics and Current Law. Statistics issued by the Office of Unclaimed Funds, which is part of the Office of the State Comptroller, reveal that receipts from all abandoned property sources — including property turned over by reporting entities such as banks and brokerage firms, proceeds of sales of securities and audit collections of cash — are both substantial and stable from year to year. Amounts refunded or returned to owners are much smaller, but exhibit a similar stability. For the last three fiscal years, the reported amounts were as follows:

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[14](...continued)
decision could jeopardize the $10 million expected from New York's similar, but legally distinguishable, IOLA program. In that event, we would amend our recommendation to call for a transfer of $50 million, rather than $40 million, from the Abandoned Property Fund. Similarly, if New York legal services providers receive less from the Legal Services Corporation in future years than at present, the difference should be made up by an additional transfer from the Abandoned Property Fund.

	Abandoned Property Receipts	Abandoned Property Refunds
1996-97	$291 million	$65 million
1995-96	$299 million	$60 million
1994-95	$287 million	$58 million

Under the statutory regime, unclaimed property is initially held in a special fund. N.Y. State Fin. § 95(l). If at the end of any given month the monies in the Abandoned Property Fund exceed the greater of $6 million or an amount which in the Comptroller's sole discretion is necessary to satisfy claims against the Fund in the following month, the Comptroller is required to pay the excess into the State Treasury to the credit of the General Fund. The Comptroller and the Director of the Budget are required to review the balance in the Abandoned Property Fund quarterly and "may mutually agree" upon an amount to be paid from such Fund into the State Treasury to the credit of the General Fund, even though the balance in the Abandoned Property Fund may fall below $6 million. N.Y. State Fin. § 95(3). Finally, the statute provides that the monies in the Abandoned Property Fund at the end of the fiscal year shall "in no event" exceed $750,000. *Id.*

Proposed Amendments. New York's Abandoned Property Law was enacted in 1943. Although various sections have been amended from time to time, the statute has never undergone a comprehensive review, and its overall structure remains unchanged. In the intervening years, the National Conference of Commissioners on Uniform State Laws has approved and thrice amended a uniform law governing unclaimed property.[15]

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[15] The Uniform Disposition of Unclaimed Property Act, initially approved by the National Conference in 1954 and amended in 1966, was superseded by the Uniform Unclaimed Property Act of 1981, which in turn was revised in 1995. Eighteen states have adopted the 1981 statute; an additional five states have adopted the 1995 revised act. *See Am. Jur. Desk Book* Item 282 (1996).

If the New York Abandoned Property Law were amended in the following respects, which we recommend, substantial additional funds would escheat each year and would offset funds allocated to legal services:

1. The statute should be amended to reach the following categories of property interests not now covered that are covered by the Uniform Law: (i) unmatured debt instruments issued by a business or financial institution, *see* Uniform Law § 2(4); (ii) contract obligations, such as bonus payment obligations and royalties, that are not evidenced by a check; (iii) property held by state government agencies, *see id.* § 2(11); and (iv) unclaimed property distributable by a business organization in the course of dissolution (other than a bank or insurance company, which are presently covered by §§ 304 and 705, respectively, of the New York statute).

2. The New York Abandoned Property Law enumerates the categories of personal property subject to mandatory escheat. The holder of "miscellaneous" unclaimed property may, but is not required to, apply to the Supreme Court for an order declaring property abandoned and directing payment to the Comptroller. § 1310. The statute should be amended to define "miscellaneous property" all-inclusively[16] and to make the escheat of such property mandatory rather than permissive.

3. The dormancy periods in the New York statute should be shortened where they are longer than the periods under the 1995 Uniform Law for comparable property. Specifically, the following dormancy periods should be shortened:

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16 The commentary to Section 1 of the 1995 Uniform Law is explicit that the definition of "property" in that section is "intended to be all-inclusive."

Property	N.Y. Abandoned Property Law Time Period	1995 Uniform Unclaimed Property Act Time Period
Amounts held by the Superintendent of Banks after liquidation of a banking organization	Four years (§ 304(l))	One year (§ 2(a)(13))
Wages owed by a corporation to a New York resident	Four years (§ 304(l))	One year (§ 2(a)(12))
Monies paid into court that are in the hands of county treasurers or city finance commissioners, such as estate funds or veterans' benefits	Five years (§ 600(l))	One year (§ 2(a)(11))
Property held by the Superintendent of Insurance after insurance company liquidation proceedings	Five years (§ 705(l))	One year (§ 2(a)(9))
Unclaimed property paid into federal courts	Ten years (§ 1200)	One year (§ 2(a)(10); § 2(a)(11))
Gift certificates	Five years (§ 1315(1))	Three years (§ 2(a)(7))

4. The enforcement provisions of the Abandoned Property Law should be strengthened. At present, the only sanction for failing to report abandoned property is a penalty of $100 a day, which may be imposed only after a finding of willfulness. *See* § 1412(l). Under the 1995 Uniform Law, in contrast, the penalty is $200 a day (up to a maximum of $5,000) for non-willful failures to report; in the case of a willful failure to report, the penalty is $1,000 a day (up to a maximum of $25,000), plus 25% of the value of property that should have been reported. 1995 Uniform Law § 24(a),(b). An increase in penalties can be ameliorated by providing, as does the Uniform Law (§ 24(e)), that the Administrator shall waive penalties if the holder acted in good faith and non-negligently.

If the New York law were amended in the foregoing respects and if the statute were vigorously enforced, the Abandoned Property Fund should increase substantially, although it is very difficult to estimate, with any precision, just how much. However, even a 20% increase over the 1996-97 net of $226 million would more than cover our recommended $40 million allocation to the Access to Justice Fund. If the amendments generate more than $40 million over the 1996-97 benchmark, the entire excess should be transferred to the Access to Justice Fund, since $40 million will address only part of the legal needs of poor people. *See supra* pp. 6-7.

We additionally recommend that legislative hearings be held to determine the fairness, feasibility and effect of further shortening some of the dormancy periods provided in the New York statute. Are there persuasive reasons why, for example, an equity interest in a corporation should not escheat until five years after the last unclaimed dividend or other distribution? The answer to that question turns upon facts which we do not have but a legislative inquiry could gather.

B. Funding Contingencies.

In the event that the proposed amendments to the Abandoned Property Law do not, in the first year after they become effective, produce a net increase of $40 million in the Abandoned Property Fund over the 1996-97 benchmark, the difference should also be made up from the Abandoned Property Fund so long as the balance in that Fund is sufficient, in the Comptroller's discretion, to satisfy claims likely to be made against the Fund during the remainder of the current fiscal year.

We recognize that the latter aspect of our proposal may be viewed as an indirect draw upon the General Fund since transfers are made from the Abandoned Property Fund to the General Fund during the course of a year. But even so viewed, the proposal is appropriate, for the provision of civil legal services for poor people is widely — and

rightly — viewed as a societal, and therefore state, responsibility. Indeed, eighteen other states appropriate funds for civil legal services.[17]

Use of the General Fund to absorb any shortfall in abandoned property revenue is further supported by the fact that, during the last five years alone, as described below, the General Fund has absorbed nearly $120 million in funds derived from court operations and earmarked for the judicial system.

CFIA Fund Surplus. Generally, all court filing fees are paid to the State Commissioner of Taxation and Finance and placed in the State's General Fund. A portion of those fees is transferred by the State Comptroller to the Court Facilities Incentive Aid Fund (CFIA), a "special revenue" or "dedicated" fund, pursuant to a formula contained in New York State Finance Law § 94(4).[18]

Pursuant to New York State Finance Law § 94(6), the State Comptroller has authority to transfer funds from the CFIA Fund to the State's General Fund. Section 94(6) requires that the Comptroller certify, on or before April 30th of each fiscal year, the amount of monies transferred from the CFIA Fund to the General Fund. The transferred funds are guaranteed to be returned to the judiciary in the event that the CFIA Fund has an insufficient amount to meet its obligations. Since 1990, the State has taken annual CFIA surpluses and applied them to General Fund spending needs. The following table provides a breakdown of how money has been transferred in and out of the CFIA Fund over the five fiscal years from 1992-93 through 1996-97.

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[17] *A Chart of Significant Fundraising Activities for Legal Services* (PERLS Nov. 5, 1997).

[18] The amount transferred is one-half the difference between (i) the aggregate receipts paid to the State during the preceding fiscal year and (ii) the aggregate receipts paid to the State from the same fees during fiscal 1986-87.

Fiscal Year	Filing Fees Transferred to CFIA	CFIA Transfer to General Fund
92-93	$43,231,999	$29,183,557
93-94	$44,384,141	$28,051,479
94-95	$42,393,997	$21,105,772
95-96	$43,290,343	$18,170,000
96-97	$42,309,003	$21,928,556
TOTAL	$215,599,483.00	$118,439,364.00

Thus, not only is the General Fund already "indebted" to the judiciary by nearly $120 million, but there is a consistent pattern. Each year, the General Fund receives more than $20 million in surplus funds earmarked for the CFIA Fund. It would be appropriate, therefore, for the General Fund to absorb at least that much of the annual legal services funding shortfall.

Other Source–New Fees. Finally, and only as a last resort, consideration should be given to increasing fees paid by litigants and lawyers. Such increases should be considered only in the event that the Abandoned Property Fund does not produce enough net revenue and the Legislature is not persuaded that the shortfall should come from the General Fund, not even to the extent that the General Fund consistently "borrows" surplus CFIA funds.

Among all the suggestions for raising revenue to fund legal services, the most common ones involve, in one way or another, burdening participants in the legal system. Suggestions include various forms of increases in filing or court-use fees and attorney registration fees. Large segments of the bar and the legal services community oppose one or more of such increases. That opposition characterized many of the responses to our inquiries.

Some of the opposition is based on the principle that increasing the cost of litigation, especially increased filing fees to commence an action, may serve as a barrier to some who seek justice. The countervailing argument is that it is fair to ask litigants

who can afford to consume judicial resources to bear some special burdens in order to assure that those who cannot purchase such access nevertheless have it.

Attorney registration fee increases are criticized by bar associations and others as a discriminatory tax on lawyers, who would be singled out to bear a disproportionate burden of a societal cost. Critics also point out that lawyers in New York State already devote more than two million hours of pro bono service and $8 million in financial contributions annually toward legal services for the poor.[19] On the other hand, lawyers have a special ethical obligation to support the provision of legal services to those unable to pay, *see* Lawyer's Code of Professional Responsibility EC 2-25, and that obligation justifies placing some special burdens on lawyers.

Turning to economics, few of New York's fees have been raised in recent years. In general, court fees have not been raised since 1990, while the cost of living has increased by nearly 24% over the same period. The $300 biennial attorney registration fee has not increased either. One may argue that increases of less than 24% would simply restore the 1990 status quo.

After weighing the foregoing considerations, we have concluded that, if necessary, in the event the Abandoned Property Fund and CFIA surpluses have failed to generate $40 million and the Legislature is unwilling to appropriate general revenues to defray the balance, the Legislature should consider (i) a new $25 motion fee in Supreme Court; (ii) a $15 increase in Housing Court filing fees;[20] and (iii) an increase of $50 in the attorney registration fee.

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[19] *Final Report of the Pro Bono Review Committee* 14-17 (April 18, 1994).

[20] It is important to bear in mind that relief from both existing fees and any increased fees can be obtained by seeking permission to proceed as a poor person. CPLR §§ 1101-02. That relief is available to a litigant represented by a legal services organization (or a volunteer lawyer working under the auspices of such an organization) upon certification by the organization (or volunteer lawyer) that the litigant is unable to pay the fees. CPLR § 1101(e). Poor persons should obviously be exempted from payment of any increased fees that are imposed to fund civil legal services to the poor.

We do not lightly recommend consideration of fee increases, even on a contingent basis. Our members are not unanimous in recommending consideration of any fee increases, much less the increases described below. We would, on the whole, prefer an appropriation from general funds of the State. Nevertheless, recognizing that there may be political resistance to that solution, a clear majority of our members favor resort to the following fee increases if they prove necessary to the funding of civil legal services for the poor:

1. Motion Fee. There is currently no fee for filing a motion in Supreme Court. Yet motion practice consumes a very large portion of judicial resources. If we are faced with the unavoidable requirement of raising *some* fees, the State's imposition of a new $25 fee on the filing of any motion in a civil case in Supreme Court can be justified on the following grounds. First, it is arguably fair that those who consume more of the judicial system's resources should pay more. Second, a motion fee, unlike a filing fee, does not restrict access to the court in the first instance. Third, a $25 motion fee is *de minimis* from several perspectives: (i) in the context of the other fees applicable in Supreme Court cases (index number, RJI and jury demand), which have aggregated $320 since 1990, a $25 fee is a fraction of post-1990 inflation; (ii) the minimum jurisdictional amount in Supreme Court is $25,000, making the motion fee a tiny fraction (.1% at the greatest) of the amount at issue in any damages case; and (iii) counsel fees for any motion are likely to dwarf the $25 motion fee, rendering it a very modest incremental cost, not an insurmountable barrier. Assuming that the number of Supreme Court motions remains constant at the current level of approximately 240,000 annually, a $25 motion fee would raise approximately $6 million.

2. Housing Court Filing Fee. The filing fee to commence a special proceeding in Housing Court in New York City is only $35 and has not been raised since 1990. Because the fee is so low and the need for legal representation in such proceedings so great (*see supra* p. 3), we believe that a $15 increase would be justified. More than 95% of the Housing Court proceedings involving residential property are landlord-initiated nonpayment and holdover eviction proceedings. Since represented tenants are

much more likely to avoid eviction than unrepresented tenants (*see supra* p. 7), it is appropriate to "level the playing field" by providing counsel to tenants. Assuming that the number of filings remains constant at roughly 330,000, this proposal would raise approximately $5 million per year.

3. Attorney Registration Fee. Since 1990 attorney registration fees have remained constant at $300, payable biennially. Such fees are paid by or on behalf of approximately 140,000 lawyers registered in New York State. A $50 increase in the fee would be less than inflation and would generate approximately $3.5 million per year. If attorneys earning less than $50,000 per year were exempted from half or all of the increase, this measure would generate a smaller but still substantial sum.

Through these fee increases, the Legislature could provide that funding the Access to Justice Fund would be budget-neutral even if the proposed amendments to the Abandoned Property Law do not eventually generate $40 million in additional revenue annually (compared to 1996-97).

C. Other Issues.

Transition. It will necessarily take time for the amendments we propose (and any others made following the legislative hearings we recommend — *see supra* p. 16) to generate new funds. The Abandoned Property Law must be amended; the amendments must be widely publicized so that they are brought to the attention of holders of unclaimed property; and the enforcement provisions of the Law must be strengthened. All the while, hundreds of thousands of poor people will go unrepresented in addressing such critical legal needs as housing and disability. A civilized society cannot permit that state of affairs to continue.

We, therefore, call upon the Legislature to direct the Comptroller to transfer annually (beginning in 1999) from the Abandoned Property Fund to the new Access to Justice Fund (a) the net increase in the Abandoned Property Fund over its 1996-97 level and (b) additional monies from the Abandoned Property Fund necessary to bring the Access to Justice Fund to a level of $40 million in 1998 dollars (which should be adjusted

for inflation), so long as the balance remaining in the Abandoned Property Fund is sufficient, in the Comptroller's discretion, to pay claims likely to be made against the Fund during the remainder of the current fiscal year.[21] To the extent the Abandoned Property Fund is insufficient to maintain the Access to Justice Fund at the targeted level, the General Fund should make up the difference. In time, we hope that additional revenues resulting from amendments to the Abandoned Property Law will not only make it unnecessary to resort to the General Fund but will in fact raise more than $40 million that can be devoted to addressing the legal needs of the poor.

Distribution. As noted above (p. 11), we recommend that a new section be added to the New York State Finance Law creating an Access to Justice Fund and that the Access to Justice Fund be funded by automatic inflation-adjusted transfers from the Abandoned Property Fund. We agree with the proposal by the Assembly Judiciary Committee that these additional funds be distributed through the existing IOLA system. We are not persuaded, however, that the composition of the IOLA Board of Trustees should be modified. As the New York State Bar Association has rightly observed,[22] a requirement that one or more Board members be chosen from names submitted by legal services organizations or others would create a potential for conflict of interest, or at least the appearance of such a conflict. We also see no need for a new Office of Audit and Control within IOLA in the absence of a demonstration that IOLA has made grants inappropriately or has failed to monitor the grantees' use of IOLA funds. Finally, the IOLA Board should have flexibility to allocate funds to provide the most effective and most efficient delivery of legal services to the poor. At the same time we believe that the lion's share of new funding for legal services should be given to direct providers.

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[21] If IOLA revenues decrease from 1997 levels as a result of either or both a further decline in interest rates and the pending constitutional challenge *(see supra* p. 11 n.14), or if federal legal services grants to New York providers are reduced, additional monies should be transferred from the Abandoned Property Fund to the Access to Justice Fund to make up the difference.

[22] *Ensuring Access to Justice* 2-3 (approved by the NYSBA Executive Committee Jan. 29, 1998).

The foregoing recommendations will, as noted above (pp. 4-5 & n.8), only restore legal services funding to 1992 levels, which were themselves demonstrably inadequate. The need will remain much greater than these and other currently available resources. Without intending to be exhaustive, we suggest that a future agenda should include the following items:

- Identification of additional new funding sources at the State level.
- Preservation of and increases in federal funding through the Legal Services Corporation.
- Efforts to promote effectiveness and efficiency in the delivery of legal services to the poor.
- Increase in the *pro bono* contribution of private lawyers.
- Continuation of Chief Judge Kaye's efforts to make the courts more accessible to the public and to simplify judicial forms and procedures.

We do not suggest that the foregoing list is exhaustive. There is much more to be done before there will truly be equal access to justice for our poorest and most vulnerable citizens.

Respectfully Submitted,

The Legal Services Project

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Lorna Blake
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Martin D. Payson
Edward Reinfurt
M. Catherine Richardson
Penny Shane
Stanley S. Shuman
Kent T. Stauffer
Justin Vigdor

May 1998

APPENDIX A

The following is a list of the members of the New York Legal Services Project, their principal occupations and their principal affiliations relating to legal services:

Michael A. Cooper (Chair)	Mr. Cooper is a partner in the law firm of Sullivan & Cromwell, New York, NY, the President Nominee of The Association of the Bar of the City of New York and a former President of The Legal Aid Society
Stephanie W. Abramson	Ms. Abramson is Executive Vice President, General Counsel, and a Member of the Board of Directors of Young & Rubicam Inc., New York, NY
Helaine M. Barnett	Ms. Barnett is Attorney-in-Charge of the Civil Division of The Legal Aid Society, New York, NY, and former Chair of the New York State Bar Association Committee on Public Interest Law
Lorna Blake	Ms. Blake is the Executive Director of the New York State Interest on Lawyers' Account (IOLA) Fund, New York, NY, and is a member of the State Planning Assistance Network (SPAN)
Alexander D. Forger	Mr. Forger is special counsel in the law firm of Milbank, Tweed, Hadley & McCloy, New York, NY, and former President of the Legal Services Corporation, The Legal Aid Society and the New York State Bar Association
Joseph S. Genova	Mr. Genova is a partner in the law firm of Milbank, Tweed, Hadley & McCloy, New York, NY, a member of the ABA Commission on Interest on Lawyer Trust Accounts and has served on the Chief Judge's Pro Bono Review Committee
Allan L. Gropper	Mr. Gropper is a partner in the law firm of White & Case, New York, NY, and is a Director of New York Lawyers for the Public Interest and The Legal Aid Society

Lewis Golub	Mr. Golub is the Chairman and Chief Executive Officer of the Golub Corporation, Schenectady, NY, parent company of Price Chopper Supermarkets, and a present and past director of numerous charitable organizations
Stephen L. Hammerman	Mr. Hammerman is Vice Chairman of the Board of Merrill Lynch & Co., Inc., New York, NY, and a Director of the National Center for Disability Services
Darlene D. Kerr	Ms. Kerr is Senior Vice President of Niagara Mohawk Power Corp., Syracuse, NY, and former President of the Onondaga Citizens League
Harold O. Levy	Mr. Levy is Associate General Counsel of Travelers Group, New York, NY, and former Chairman of the University Settlement Board of Directors
Arthur Lindenauer	Mr. Lindenauer is Executive Vice President & Chief Financial Officer of Schlumberger Limited, New York, NY
Bernard H. Mendik	Mr. Mendik is Chairman of the Mendik Company, a division of Vornado Realty Trust, New York, NY
Archibald R. Murray	Mr. Murray is Chair of the Board and former Attorney-in-Chief of The Legal Aid Society, New York, NY, a former President of the New York State Bar Association and a former member of the IOLA Board
Martin D. Payson	Mr. Payson is Chairman of Latin Communications Group, Inc., New York, NY, and is a Director of the NAACP Legal Defense and Educational Fund
Edward Reinfurt	Mr. Reinfurt is Vice President of the Business Council of New York State, Albany, NY
M. Catherine Richardson	Ms. Richardson is a partner in the law firm of Bond, Schoeneck & King, LLP, Syracuse, NY, and former President of the Frank H. Hiscock Legal Aid Society and of the New York State Bar Association

Penny Shane	Ms. Shane is an associate in the law firm of Sullivan & Cromwell, New York, NY, coordinates the firm's pro bono activities and is a member of The Association of the Bar of the City of New York's Committee on Pro Bono and Legal Services
Stanley S. Shuman	Mr. Shuman is Managing Director and Member of the Executive Committee of Allen & Company Inc., New York, NY, and is Chairman of the Advisory Council of the Center for New York City Law, New York, NY
Kent T. Stauffer	Mr. Stauffer is a Senior Vice President of Chase Manhattan Bank, New York, NY, and a Director of New York Lawyers for the Public Interest
Justin Vigdor	Mr. Vigdor is a partner in the law firm of Boylan, Brown, Code, Fowler, Vigdor & Wilson, LLP, Rochester, NY, and has chaired pro bono committees of the New York State Bar Association, of which he is a former President

APPENDIX B

The following is a selective list of the sources reviewed by the New York Legal Services Project in preparing this report:

Association of the Bar of the City of New York, *Lawyers and the Poor in New York City* (1996)

Committee on Legal Aid, New York State Bar Association, *The New York Legal Needs Study* (1993)

Community Service Society of New York, *Poverty in New York City 1996* (1997)

Consortium on Legal Services and the Public Project to Expand Resources for Legal Services (PERLS), American Bar Association, *Innovative Fundraising Ideas for Legal Services* (1995)

Consortium on Legal Services and the Public Project to Expand Resources for Legal Services (PERLS), American Bar Association, *More Innovative Fundraising Ideas for Legal Services* (1996)

The IOLA Fund of the State of New York, *Programs Funded by the IOLA Fund of the State of New York* (1995)

IOLA Grant Activity Report 1996

Jarrett, September and McKee, Michael, *Housing Court, Evictions and Homelessness: The Costs and Benefits of Establishing Right to Counsel* (1993)

New York Abandoned Property Law §§ 1-1500 (Consol. 1994 & Supp. 1997)

New York State Assembly Judiciary Committee, *Judicial Reform, Integrity and Access to Justice Act: Responding to the Challenges of the 21st Century* (1997)

New York State Bar Association, *Ensuring Access to Justice* (1998)

New York State Bar Association, *The 1997 Desktop Reference on the Economics of Law Practice in New York* (1997)

New York State Department of Social Services, *Disability Advocacy Program, 1984-1996* (1997)

New York State Department of Social Services, *The Homelessness Prevention Program: Outcomes and Effectiveness* (1990)

New York State Finance Law (Consol. 1994)

Pro Bono Review Committee, *Final Report of the Pro Bono Review Committee* (1994)

Standing Committee on Legal Aid and Indigent Defendants Public Project to Expand Resources for Legal Services (PERLS), American Bar Association, *Overview of Significant Fundraising Activities* (1997)

State Planning Assistance Network (SPAN), *The SPAN Update: A Guide to Legal Services Planning* (July 1997 & January 1998)

Texas Lawyers Care, *State Filing Fee Add-ons for Legal Services for the Poor: A Compilation of Summaries, Statutes and Rules* (1997)

Thomas, Paul E., *Fiscal Benefits to New York State and Local Governments from Activities of Legal Services Project* (enclosure to a memorandum dated October 13, 1981 to Clarence Sundram (Executive Director, State Quality of Care Commission))

Unified Court System of the State of New York, *Court Facilities: A Partnership of Local and State Governments* (1995)

Uniform Unclaimed Property Act (1995)

United Way of New York City, *Low Income Populations in New York City: Economic Trends and Social Welfare Programs 1997*

The Washington State Access to Justice Network, Equal Justice Coalition, *Justice at Work* (1997)

APPENDIX C

The Legal Services Project thanks the following bar associations and legal services providers for supplying information and providing views, all of which were considered in preparing this report:

Bar Associations

Albany County Bar Association
The Association of the Bar of the City of New York
Bar Association of Erie County
Central New York Women's Bar Association
Cortland County Bar Association
The Defense Trial Lawyers Association
Essex County Bar Association
Federation of County Bar Associations
Lesbian and Gay Law Association of Greater New York, Inc.
Lewis County Bar Association
New York County Lawyers' Association
New York State Bar Association
Oneida County Bar Association
Oswego County Bar Association
Otsego County Bar Association
Protestant Lawyers Association of New York, Inc.
Saratoga County Bar Association
Schuyler County Bar Association
St. Lawrence County Bar Association
Sullivan County Bar Association
Westchester County Bar Association
Westchester Women's Bar Association
Western New York Trial Lawyers Association
Women's Bar Association of the State of New York

Legal Services Providers

American Immigration Lawyers Association
Bedford Stuyvesant Community Legal Services Corp.
Brooklyn Legal Services Corp. B "South Brooklyn Legal Services"
Central American Legal Assistance
Chemung County Neighborhood Legal Services, Inc.
Coalition of Youth & Family Services
Disability Advocates, Inc.
Gay Men's Health Crisis

Greater Upstate Law Project, Inc.
International Institute of Buffalo, NY
Legal Aid for Broome and Chenango, Inc.
Legal Aid Bureau of Buffalo, Inc.
Legal Aid Society of Mid-New York, Inc.
The Legal Aid Society of New York City
Legal Aid Society of Northeastern New York, Inc.
The Legal Aid Society of Rochester
Legal Services of Central New York, Inc.
Legal Services for the Elderly
Neighborhood Legal Services, Inc.
New York State Court Appointed Special Advocates Association, Inc.
Niagara County Legal Aid Society, Inc.
NOW Legal Defense and Education Fund
Public Utility Law Project
Queens Volunteer Lawyers Project
Samuel Sadin Institute on Law
Westchester/Putnam Legal Services, Inc.
The Workplace Project

APPENDIX D

POTENTIAL REVENUE SOURCES CONSIDERED BUT NOT RECOMMENDED

The members of the Legal Services Project gave substantial consideration to the following additional sources of potential revenue that might be dedicated to funding civil legal services for the poor but concluded that those alternatives should not be recommended at present for the reasons stated below. The sources are identified and described because the Legislature and the Executive branch may prefer one or more of them to the revenue sources recommended in this report.

Other Filing Fee Increases[1]

Consideration was given to an increase in the filing fee for all courts of general and limited jurisdiction, not just the Housing Court. A 10% increase in all such filing fees would yield approximately $14.1 million. Supporters of an across-the-board increase note that court filing fees have not been raised since 1990, even though the cost of living has risen nearly 24% during that period. They also note that fifteen other states, including neighboring New Jersey, have increased filing fees for this purpose. Texas, which did so last year, estimates that the increase will yield $4 million.

Project members were concerned that an across-the-board increase might unduly restrict the access of the poor and near poor to the courts. Although state-by-state comparisons are difficult to draw because more than one fee may be imposed during the litigation process in a given court, New York's filing fees are generally believed to be higher than those in most other states. In the absence of a more precise measure of the burden imposed by any individual litigant on the court system (in contrast, for example, to a fee that is imposed on the making of a motion, which inevitably utilizes judicial resources) and in the absence of an observable relationship between the imposition of a fee and the benefits to be realized therefrom (as in the case of Housing Court proceedings, where the fact of representation is likely to change the outcome), the members of the Project were not prepared to recommend an across-the-board increase in filing fees at this time.

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[1] The Association of the Bar of the City of New York and others have recommended that legal services be funded by allocation of a portion of the roughly $215 million in filing fees, attorney registration fees and other amounts collected annually by the Unified Court System. We have not pursued this alternative because we view our charge as being to identify *new* or *additional* sources of revenue.

Consideration was also given to an increase in the filing fee in Small Claims Court, which at present is only $10 for claims up to $1,000, $15 for claims from $1,000 to $3,000, and $23.09 for commercial claims. A $10 increase in those fees would raise an additional $700,000; an increase to $20 would raise $1.7 million. The revenues that would be raised by such an increase appear to Project members to be too insubstantial to justify the burden that the increase would impose upon claimants.

Accelerating Payment of Filing Fees

Under present law, civil litigants pay a combined fee of $170 for an index number when commencing an action in the Supreme Court. If a request for judicial intervention ("RJI") is thereafter made, a $75 fee is paid. At the note of issue stage a fee of $100 ($25 when the $75 RJI fee has already been paid) is imposed. Finally, a fee of $50 must be paid when a jury trial is demanded. If the aggregate of these fees — $320 — were paid at the commencement of an action subject to reimbursement of amounts that would otherwise have been payable but are not because the action terminates at an earlier stage, the State could capture and dedicate to legal services the income earned on the money for as long as it is held. This solution has the surface appeal of raising additional monies without increasing filing fees, but was rejected by Project members because (i) an upfront payment of $320 would nearly double the $170 index number fee and thus might reduce access to the courts significantly; (ii) litigants might forget that they are entitled to reimbursement of fees payable at stages of an action not reached; and (iii) issuing reminders of the entitlement to reimbursement and otherwise administering an accelerated fee payment scheme would be administratively very difficult and cumbersome.

Imposing a Fee on Entry of a Judgment

In Civil Court in New York City and City and District Courts elsewhere in the State, a fee of $35 is payable on entry of a judgment of confession. One may argue that there is no reason why a comparable fee should not be imposed on a judgment entered after a judicial determination or jury verdict in those same courts and on money judgments of all kinds entered in the Supreme Court. It is not unreasonable, the argument runs, to ask a plaintiff who has successfully invoked the judicial process to pay a modest charge for that success. A variant of this proposal would impose a percentage surcharge (presumably a downward sliding scale) on the face amount of money judgments. The revenue that would be generated by such a proposal cannot be reliably estimated because the Office of Court Administration does not maintain data on the number or amount of money judgments. Quite apart from that fact, this proposal did not appeal to Project members because judgments are frequently not collectible in whole or in part and may have to be enforced in a separate proceeding in New York or elsewhere for which separate fees would be payable. Moreover, it seems incongruous either to impose the same fee on a $100,000 judgment as on a $1,000 judgment or to have the fee measured by

the magnitude of a litigant's recovery (the more one has been damaged, the greater the fee one would be required to pay).

Allocation of a Portion of Punitive Damages Awards

Nine states[2] require that a portion of punitive damages awards be paid into the state treasury or a victims' compensation fund. In Colorado and Georgia, the statutes have been held unconstitutional. Their constitutionality has been upheld in Florida, Iowa and Oregon. A proposal that a portion of punitive damages awards be devoted to funding legal services has a theoretical appeal because, in contrast to compensatory damages, punitive damages are intended as a deterrent and the plaintiff who recovers such damages is only an incidental beneficiary. It is difficult to predict how much could be raised for civil legal services from an allocation of a portion of punitive damages awards, and the amount would in all likelihood vary considerably from year to year depending upon the quantum of such awards and their collectability. There is no reason to believe the amount would be substantial; to the contrary, New York's one experiment with such legislation yielded little.[3]

Interest on Broker Accounts

In Columbia, Greene, Delaware and Sullivan Counties and to the north and west, the real estate listing agent of the seller serves as the escrow agent, and down payment monies may be deposited in either interest- or non-interest-bearing accounts. In the past bills have been introduced in the Assembly to establish an IOBA (Interest on Broker Accounts) program based on the IOLA model. The sponsor's memorandum in 1991 estimated that IOBA would generate $1.6 million per year. However, there is no hard data of which we are aware that would support that estimate. Moreover, interest rates have declined since 1991, so that the potential revenue gain may be less than $1.6 million. For that reason and because implementing IOBA would present practical difficulties, Project members elected not to pursue this potential funding source.

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[2] Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Missouri, Oregon and Utah.

[3] In 1992, the Legislature enacted on an experimental basis a statute providing that 20% of punitive damage awards would be apportioned to the State, with the Attorney General's Civil Recoveries Bureau having responsibility for collection. CPLR § 8701; L. 1992, ch. 55. Pursuant to its sunset provision, the statute expired on April 1, 1994 upon the Legislature's failure to reenact it. Although the Governor's Budget Office had originally estimated that the statute would raise $10 million a year, in its first year only $74,000 was collected. *See* Andrew Blum, *Three More Join Trend: States Want Share of Punitives, Nat'l L.J.*, March 8, 1993, at 3, 35.

Acceleration of Attorney Registration Fees

As noted in the report (p. 21), the $300 attorney registration fee is payable every two years. If the fee were switched from a two-year to a four-year cycle (*i.e.*, $600 payable every four years), one-half of the fee could be deposited in a special revenue fund for two years, with the interest thereon being dedicated to funding civil legal services. As with the proposal discussed above of accelerating payment of filing fees, this proposal would generate funds because of acceleration of the timing of payment rather than an increase in the ultimate amount to be paid. Project members considered but rejected this proposal because it would be a substantial burden on many members of the Bar to have to write a check for $600, even if that check had to be written only once every four years.

Allocation of a Portion of Pre- and Post-Judgment Interest

In the federal judicial system, interest on judgments is set at a market rate, specifically, the rate determined by the most recent auction of 52-week Treasury bills. 28 U.S.C. § 1951. In contrast, interest in the New York judicial system — pre-verdict, between verdict and judgment, and after judgment is entered — is fixed at 9% unless otherwise provided by statute. CPLR § 5004. Since interest is intended to compensate a prevailing claimant for delay in payment, *see, e.g., Love v. State of New York,* 78 N.Y.2d 540, 544, 583 N.E.2d 1296, 1298, 577 N.Y.S.2d 359, 361 (1991), and since prevailing interest rates have been below (and for much of the time substantially below) 9% for several years, the New York statute, which has fixed interest at 9% since 1981 (*see* L. 1981, ch. 258), arguably confers a windfall, and it would not be unfair to divert the windfall component to supporting civil legal services for the poor.

Project members elected not to recommend this superficially attractive proposal for two reasons: (i) it is fundamentally illogical (that is, if the Legislature were persuaded that 9% interest is excessive in the current economic environment, it logically should reduce the interest rate rather than capture the difference between 9% and a realistic "market" rate of interest and allocate that difference to legal services); and (ii) the burden would fall unequally on prevailing claimants because pre-verdict interest is allowable in contract and property actions in New York, but not in personal injury actions. Moreover, there is no statistical information available to estimate how much revenue this proposal, if adopted, would raise.

Unclaimed Class Actions Proceeds

Frequently, members of a plaintiff class that has prevailed in an action after trial or that has secured a settlement cannot be located. It has been proposed that unclaimed class action proceeds (or "residuals") be devoted to civil legal services for the poor. In the State of Washington, a concerted effort has been made to inform judges and lawyers that legal services organizations may be appropriate recipients of unclaimed class action

proceeds through exercise by the courts of their *cy pres* power.[4] California, alone among the states, has gone one step further by enacting a statute that provides that any unpaid proceeds of a class action be distributed "in any manner the court determines is consistent with the objectives and purposes of the underlying cause of action, including to ... the California Legal Corps." Cal. Civ. Proc. Code § 384(b) (West Supp. 1997).

Project members believe that class action judgments or settlements offer great promise as a means of *voluntarily* raising funds for civil legal services for the poor, for there is considerable class action litigation in the federal and state courts of New York. We encourage efforts, such as those that have been undertaken in the State of Washington, to inform lawyers and judges of the societal benefit of dedicating unclaimed class action proceeds to legal services. However, as a statutorily mandated source of such funds, unclaimed class action residuals suffer from three defects. First, if traditional *cy pres* doctrine is invoked to justify such a statute, it will frequently be the case that legal services are not the "next best" or closest recipient to the plaintiff class. Second, because class action recoveries, after trial or settlement, are unpredictable, unclaimed class action proceeds cannot be relied upon as a constant, predictable source of legal services funding. Finally, and more fundamentally, most class action proceeds are realized by settlement, not a determination on the merits, and if the parties do not agree that unclaimed proceeds shall be devoted to legal services funding, they can easily negotiate a reverter of those proceeds to the defendants or some other disposition.

Income Earned on Tenant Security Deposits

Under Section 7-103 of the General Obligations Law, security deposits by tenants must be held by the landlord in trust and cannot be commingled with the landlord's personal assets. Landlords of dwellings containing six or more units must deposit the funds in an interest-bearing account. The tenant is entitled upon termination of the lease to the interest on the funds, less a sum equal to 1% per year on the deposit which the landlord can retain in lieu of administrative and custodial charges and less any amounts to which the landlord may be entitled under the terms of the lease, such as for repairs. Although the statute directs that deposits be placed in an account earning "the prevailing rate earned by other such deposits made with banking organizations in such area" (§ 7-103(2-a)), landlords have no incentive to maximize the interest on tenant deposits because they receive no benefit from a higher interest rate.

By analogy to IOLA, it should be possible to aggregate tenants' security deposits, obtain a higher interest rate on the aggregated funds, pay the landlords and

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[4] *Cy pres* (Norman French in origin and meaning "as near to") is "a rule of construction the purpose of which is to effectuate the general charitable intent when the particular or specific intention of the testator or donor cannot be carried out." 18 N.Y. Jur. 2d § 48 (1981).

tenants what they are currently earning (or more), and still generate a considerable surplus that could be devoted to funding legal services for the poor.

It would be imprudent to pursue a plan of aggregating tenant security deposits while the constitutionality of the Texas IOLTA program remains in question. But beyond this prudential consideration, the proposal is open to the objection that its implementation would require a considerable bureaucratic apparatus, the cost of which might consume a large part of any additional funds raised.

Interest on Justice Court Funds

The Justice Court Fund established pursuant to Section 99-a of the New York Finance Law is the repository for fines and penalties collected by the justice courts, which are paid to the Comptroller and then remitted to towns and villages for local criminal justice purposes. Under a bill introduced in the Assembly last May (A.7969), monies received and held by the Comptroller to the credit of the Justice Court Fund would be held for six months and the accumulated interest thereon would be paid to the IOLA Fund.

Project members doubt that this proposal would generate significant funds. Moreover, this proposal would unfairly impose the burden of legal services funding on towns and villages in proportion to fines and penalties collected, not to their populations of poor persons. In any event, Project members prefer a more direct approach to the legal services funding issue.