The Public Policy Forum

Court Reform in New York State

Presented by Jonathan Lippman

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In January 1996, Judge Jonathan Lippman became Chief Administrative Judge of all New York State Courts by appointment of Chief Judge Judith S. Kaye. In that capacity, he oversees the administration and operation of a court system with a $2.1 billion budget, 3,600 State and locally paid judges, and 16,000 nonjudicial employees in over 350 locations around the State. Judge Lippman serves as Chair of the New York State Court Facilities Capital Review Board, and is a member of the New York State Probation Commission. Judge Lippman is a Director of the New York University School of Law Alumni Association, a member of the Board of Directors and the President-Elect of the Conference of State Court Administrators. He graduated from New York University in 1965 with a B.A. in Government and International Relations. He received his J.D. from New York University School of Law in 1968. In 1989 he became Deputy Chief Administrator for Management Support, responsible for the day-to-day management of the New York State court system. In 1995, Governor George E. Pataki appointed him a judge of the New York Court of Claims.

Jonathan Lippman:

Good morning. I cannot begin today without thanking Dick Nathan for this wonderful opportunity to address such a truly distinguished audience. We really are very fortunate in New York to have a research and academic center like the Rockefeller

Institute that focuses specifically on the workings and problems of state government. I for one can attest that Dick Nathan and the Rockefeller Institute have offered us in the court system invaluable research and insight, particularly in our court reform efforts.

We are also very fortunate in New York to have a Chief Judge of unparalleled vision and stature. Few people in public life today have done more to advance court reform, the subject of my remarks today, than Judith S. Kaye. She has worked tirelessly to ensure that the New York courts keep pace with the demands of our rapidly changing society. Despite our massive caseloads, which keep growing year after year, she has never stopped believing that the courts can be responsive and relevant to the public.

What better illustration of the New York court system's national impact on court reform issues than *The New York Times* front-page article of April 26th? The article described nothing less than a revolution in how state court systems around the country are addressing nonviolent drug-related offenses and other types of criminal behavior, which in the past led to high rates of recidivism and a revolving door system of justice. The New York courts have been the driving force behind this national movement, changing the very persona of a tradition-bound judiciary to meet the challenges of the 21st century — and in the process redefining the words court reform to embrace a problem-solving approach to the way the courts conduct our business here in New York.

I have been very privileged indeed to be the Chief Administrative Judge for the last decade, working with Judith Kaye and so many others here in New York dedicated to reforming the courts. From the beginning, we have committed ourselves to taking the leadership role envisioned by the constitutional amendments of the mid-1970s, which created a centralized administrative structure for the State courts — particularly so on matters of court improvement and fostering court initiatives designed to reaffirm public trust and confidence in the courts. We have worked earnestly to create an environment in which the other branches of government and the public place a high value on the courts and our mission. We have openly and affirmatively accepted our obligation to be accountable to the public and the other branches of government, and we have been proactive in concretely demonstrating to all who will listen how we are meeting our

constitutional responsibilities heading the third branch of government — one that Alexander Hamilton called the least dangerous branch of government, a description I might add that not everyone necessarily agrees with based on the public debate going on in our nation's capital. But, least dangerous or most dangerous, everyone agrees on how important and vital the Judiciary is to our country and way of life.

The courts occupy a unique place within our system of government that demands independence — and I speak here not about our adjudicative role, which is so obviously fundamental, but of our prerogative to govern ourselves as a separate branch of government. In this context, we very much recognize that with the right of independence comes the corresponding right and interest of the other branches of government and the public to hold us accountable — accountable for our actions and performance, accountable for how we use the resources allocated to us, and accountable for the effective management of court business.

Let's face it. From time to time, every court system and judge — state and federal — faces outside criticism, often strident and harsh, and usually focused on unpopular court decisions. These situations must be taken seriously in and of themselves, but they can also transcend the individual judicial decisions to create an atmosphere, which impairs our very ability to govern ourselves. And, sometimes, to be frank, the criticism of unpopular court decisions can find fertile ground in promoting a negative view of the judiciary as an institution, especially if the judicial branch has failed to build up the store of credibility that comes from a reputation for good governance, or appears to fall short in managing its affairs effectively, or has been ineffectual or too passive in educating the public and its partner branches about its accomplishments, needs and challenges.

If there has been a hallmark of the New York courts over the last decade it has been our conscious striving to build that reputation for good governance, to build up that store of credibility, which is our strongest resource in preserving our institutional independence. I believe that we have to *earn* the privilege of independence accorded us by the Federal and State Constitutions, and the only way to do that is to be universally recognized for being committed to good governance, for being reform-minded and for

being nonpartisan. Our many court improvement initiatives certainly reflect this philosophy:

- overhauling our jury system;
- *major* reform programs in the family, civil and criminal justice areas, charting so different a course from the past, including the recent creation of a new experimental Criminal Division of the Supreme Court;
- matrimonial reform;
- revamping our fiduciary appointment and guardianship system;
- enhancing lawyer professionalism through Continuing Legal Education (CLE), attorney-client fee dispute arbitration and other such programs;
- court technology like e-filing and opening court records to the public on the web;
- opening our Family Court courthouses to the public;
- creating specialized commercial courts that are helping to attract and keep businesses in New York;
- addressing the civil legal needs of the poor;
- reengineering the State's indigent criminal defense system;
- creating a one-of-a-kind judicial education institute in this State; and
- building dignified courthouses that promote respect for the law, and on and on.

This morning, I would like to touch on a few areas, which continue to challenge our efforts to carry out the work of an independent judiciary, and call out for additional reform. I would like also to dwell for a bit on our problem-solving justice innovations, a signature part of our court reform efforts which I believe have been positively transformative – not only for the work of the New York courts, but also for court systems around the country and even internationally.

Obviously, our efforts at bettering the courts are intended most directly to provide the highest quality of service to our citizenry. That is our obligation and one that we have zealously embarked on. But we know that these efforts serve a broader goal as well — they are our very best guarantee of a strong, independent, and vibrant judiciary respected and valued by the public and the rest of State government, and capable of withstanding the inevitable highs and lows that all state and federal court systems must endure as a result of their central and sometimes controversial roles in our tripartite system of government.

Judicial Elections

Let me begin with a topic that has an enormous effect on public attitudes towards the judiciary — how we go about choosing our judges. The issue in this State has always been: Should judges be appointed or popularly elected? No issue related to judicial independence receives more attention from the popular press, bar associations, good government organizations, politicians, and legal scholars. And it doesn't take much to spark this debate. Seemingly every time an elected judge faces ethical or other difficulties, there are automatic calls for adopting an appointive system. A Judge is accused of criminal wrongdoing (as took place last week in New York City) and the knee-jerk reaction is that the political system that nominated the judge is at fault — a leap in reasoning that not all of us make — but certainly one that fosters point and counter-point from opponents and defenders of an elected judiciary.

Each system — elected and appointed — has its advantages and disadvantages, and each has its staunch supporters and critics. In New York, one could argue that we have the best of both worlds. About three-quarters of our judges are elected, with New York being one of eight states that select trial judges through partisan elections. The remaining one-quarter of our judges are appointed by the governor, the New York City mayor and other chief executives from around the State. Dating back to the State Constitution of 1846, the elective system in New York has produced some of the nation's finest State court judges — including Benjamin Nathan Cardozo, Charles Breitel, and many of the terrific Judges here in this room. At the same time, we have the appointive system to thank for our nationally renowned Chief Judge and for the highly distinguished members of our State's highest court, the Court of Appeals.

Personally, the more debate I hear about an elected versus appointed judiciary, the more I believe that there is no perfect system. My own view, to be quite direct, is that our mixed system of elected and appointed judges has served us well. It has produced a first-class judiciary — aberrational conduct by a very few notwithstanding. But what is unmistakably true, regardless of one's view, is that the endless debates do not offer the slightest promise of legislative willingness to change the State's method of selecting judges anytime soon.

We have to face facts and deal with reality: The predominant method of choosing judges in New York — today and for the foreseeable future — is the elective system. Given that reality, our responsibility to the public is to take immediate steps to ensure public trust and confidence and address the problems that we know exist — that judges by necessity must raise large amounts of money to run in competitive races; that a very few political leaders rather than the broader electorate determine who becomes a judge in one-party districts; and that voters are woefully uninformed about judicial elections in general and the candidates and their qualifications in particular.

Under the circumstances, is it not the obligation of court leaders to envision and push for a better, more meaningful elective system? To come up with a strong reform agenda that assures the public as to the integrity and independence of the courts? An agenda that opens the process to the public, promotes greater voter participation and expands efforts to inform voters about judicial candidates? An agenda that puts our trust in the politics of an informed electorate?

That's why Chief Judge Kaye appointed a Statewide Commission to Promote Public Confidence in Judicial Elections, led by John Feerick, the former Dean of Fordham Law School and former Chair of the New York State Commission on Government Integrity. After lengthy study and statewide hearings, the Commission came up with dozens of common-sense recommendations designed to make the elective system more meaningful and comprehensible to voters. Let me touch on just a few:

- The appointment of Qualifications Commissions to pre-screen candidates for the Judiciary at the pre-primary and pre-convention stages — not to dictate who local party chairs or the convention must support, but to give political parties a broad pool of qualified candidates from which they may select nominees to support.

- The public financing of judicial campaigns.

- The expansion of electronic disclosure of campaign contributions beyond Supreme Court races to all judicial elections.

- The introduction of voter guides to better inform the public about the candidates.

Thus far, in the public arena, the State Assembly has passed a bill embracing in one form or another the bulk of the Feerick recommendations, although right now it is clearly a one-house bill yet to be addressed by the Senate. What the Senate has done is hold a lengthy public hearing on the Feerick proposals, with an emphasis on the Qualifications Commissions. And the Administrative Board of the Courts has publicly proposed a set of internal rules for the judiciary, based on the Feerick recommendations, for possible consideration by the Court of Appeals. In the first instance, all agree that it is the prerogative of the Legislature to review the judicial election reform recommendations and we are waiting to see if concrete legislation is enacted into law. We believe, with the help of our friends in the Legislature, that meaningful reform can be achieved — not by tearing down the judicial elective system, but by strengthening it.

The main objections to the Qualification Commissions proposal revolve around what the composition of the panels themselves should be, and the feeling that they would bring an additional level of bureaucracy to the judicial election process in parts of the State that already have strong, independent screening panels. There really is no reason why these issues can't be readily resolved. In certain areas, with New York County being an example, the political parties themselves have already adopted screening panel models that would seem, in broad strokes, to pass muster, and we can look to some of these existing models to settle on the template for what the qualification commissions should look like. And there could surely be agreement on a system where commissions would not be put into place if appropriate nonpartisan independent screening panels already exist in a particular district or county.

I find it hard to believe that a system of qualification commissions or screening panels along these lines would be threatening to our political leaders. As much as anyone else, they are the most embarrassed when it turns out that their party has nominated or elected an unqualified person to the bench. We all benefit by putting the imprimatur of the State on the establishment of a system of truly independent screening panels that would make judicial elections better, more transparent, more rigorous, and more understandable to the public.

Campaign Finance Disclosure and Other Legislative Measures

There is also a real need to change the current election culture by making processes like the campaign finance disclosure system more accessible to the public. Judges must engage in fund raising under the present system, and that will continue to be the case until we have a system of public financing for judicial elections. But, as legitimate as the present need for campaign funds is, the process naturally raises concerns about the influence of money on judicial impartiality and independence. More sunlight should be brought to this area by requiring that all judicial campaign finance disclosures be filed in a publicly searchable electronic format. Creating a campaign disclosure database on the web can only promote public confidence in judicial independence.

There is a real debate as to whether judges, in the real world, are unaware of who contributes to their campaigns. After all, the judge who attends his or her own fundraiser knows quite well who his supporters are and must reasonably suspect that many of them are making campaign contributions. But whether they know that for a fact or not, there is no rationale as to why such information should not be made electronically available for all judicial campaigns, as they are now for Supreme Court judicial races.

Voter Guides

Another judicial election issue that needs to be addressed is the public's almost total lack of knowledge about judicial candidates. Many jurisdictions around the country publish official voter guides or ballot pamphlets containing informational profiles of judicial candidates, which are distributed to households with registered voters and made available at polling places. In parts of New York, the League of Women Voters and some other groups have done a very good job of putting out their own voter guides. Voter guides also serve to convey the findings of any state- or bar-sponsored screening systems. The State judiciary has taken the initiative in this area and is developing web-based voter guides for all Supreme Court elections in 2005. However, what is really needed is for the

State to finance a system of official judicial campaign voter guides and mailings to every New York voter.

Who, among even the most savvy and aware voters, can remember the names of the judicial candidates they voted for just five minutes after they left the voting booth? Very, very few! A system of State-sponsored voter guides will address the fundamental issue of providing voters with enough information to make informed decisions about judicial candidates, and the very real problem of voter apathy — to put it kindly — in judicial elections.

Judicial Discipline

We can take another major step to enhance public confidence in the New York courts by joining the 38 other states that have public judicial disciplinary proceedings. There is renewed public interest in this issue and in the New York State Commission on Judicial Conduct as a result of several recent decisions and upcoming hearings, including the public censure of three state judges — a criminal court judge, for coming off the bench and grabbing the lapels of a legal aid attorney; a Family Court Judge for intervening with her colleagues on behalf of litigants she knew; and an Acting Supreme Court Justice for showing favoritism toward a lawyer friend appearing before her on his own personal case. Many observers have criticized the recent determinations as overly lenient and argued that removal from the bench was more appropriate. Regardless of how one feels about the results in these particular cases, once probable cause is found, the voters who elected the judge and the public at large have an interest in learning about the conduct at issue, hearing the judge's defense and observing for themselves how the judge is treated by the disciplinary system — just as they have the right to watch their fellow citizens confront the justice system. This is one arena where openness only serves to reaffirm public trust, whereas secrecy only tends to invite suspicion about even-handed justice.

Under current law, however, disciplinary charges against judges are not public unless and until those charges are sustained by the Commission on Judicial Conduct following a closed hearing. Make no mistake, a strong shield of confidentiality is essential to protect against the tainting of a judge's reputation by unwarranted or irresponsible charges of misconduct, but it is possible to balance the interest in confidentiality with the public interest in observing the workings of the judicial disciplinary system.

Under a legislative proposal submitted by the Chief Judge and myself, the interest in confidentiality would be paramount until the investigation has been completed, probable cause found, and formal charges filed. But once formal charges are filed, the public interest in judicial integrity, including the integrity of the disciplinary process itself, would become paramount and subsequent hearings would then become public. Because there may well be some rare instances where some or all of the misconduct proceedings against a judge should remain outside public view, the measure permits the affected judge or the Commission to apply to the Appellate Division for an order closing the proceedings.

This is an issue that deserves careful consideration in light of what is sure to be continuing attention and discussion about Conduct Commission rulings. As in most other states, judicial disciplinary hearings should be open, in the best interests of our judges, the public, and those committed to ongoing court reform. I should note that the Commission itself has so advocated for many years, arguing quite correctly that it would be a stronger institution as a result of improved public knowledge and understanding of its processes and decisions.

Court Restructuring and Problem-Solving Justice

I find it difficult to participate in a forum about court reform in New York without expressing disappointment at the failure to achieve constitutional restructuring of our antiquated court structure. As you know, Chief Judge Kaye and the Judiciary previously

submitted proposals to amend the State Constitution to consolidate the present tangle of nine jurisdictionally different trial courts — the most complex court structure in the country — into a much more simplified organizational flow chart consisting of just two trial courts. The present court structure undermines court efficiency, impedes public access, makes litigation more expensive, and seriously hampers our ability to serve the public effectively.

You've heard the arguments pro and con for almost a decade now. It's been eight years and counting, and to many we still seem no closer to achieving constitutional court reform. But, court reform is not only about what is right for the courts in the 21st century, it is also very much about what is doable. While in no way losing interest in the struggle or promising to be anything less than persistent and tireless in our efforts to achieve the New York court reformer's nirvana — merger of the State's trial courts — I want to point out that there is an equally noble goal that is doable now and that we are pursuing each and every day in the New York courts — working within our existing constitutional powers to operationally reform and revamp the courts to better serve the public — our ultimate constituency.

We have done everything we can to create a modern, cutting-edge judiciary capable of handling the millions of cases that swell our dockets, cases that increasingly involve the cohesion of families and the safety of our communities. There is no getting around the sad truth that the courts have become the emergency room for society's worst ailments — substance abuse, family violence, mental illness, and so many more. And if we are to fulfill our constitutional mission in the face of these plagues of modern-day life — if we are to remain relevant and responsive to the public's needs and expectations — we have to engage these cases and the societal problems they reflect, with all their complexities and, for us, the nontraditional challenges they present.

And we are doing just that. To take one example, we are very proud of our problem-solving Integrated Domestic Violence (IDV) Courts, in Rensselaer County and around the State, which put the legal issues of one family before a single judge who is given the necessary jurisdiction, training and resources. What we found over the years

was that domestic violence victims were in a sense doubly victimized because they typically faced the added burden of litigating in several different trial courts – Family Courts for child custody/visitation, Criminal Courts for assault, and Supreme Court for divorce. We now have 18 operational IDV Courts — where all of these issues are handled in a single court before one judge without regard to the artificial boundaries between courts that now exist because of our archaic court structure. These courts have assisted 4,300 families and handled nearly 18,500 cases, and there are eleven more courts in the planning stages. By the end of 2005, three quarters of New York's families will be able to have their cases resolved holistically, humanely, and efficiently by IDV courts. Integrated family justice is a reality in New York and is spreading throughout the country. With IDV courts in place, domestic violence victims will no longer fall between the cracks of the justice system, where one hand of the system doesn't know what the other is doing.

New York has been at the forefront of an emerging national trend toward what we call problem-solving justice. Starting in the 1970s, there was a growing frustration, both within the criminal justice community and among the public at large, with the perception that the same offenders were being recycled through the system as they committed the same crimes over and over again. At the same time, there developed a new "broken windows" theory of law enforcement and of dealing with crime, which hypothesized that tolerance of so-called petty crime ultimately led to an epidemic of more serious crime because of a societal culture that did not take criminal conduct seriously enough, particularly lower level offenses.

Thanks to the innovative leadership of Chief Judge Kaye and some entrepreneurial judges and criminal justice professionals, we began to re-engineer how courts deal with drug-related crime, domestic violence, and quality of life offenses. There was a feeling that courts needed to do a better job of addressing the underlying problems that brought people to court — whether as victims or defendants. While the traditional adversarial model worked well enough for serious crime, a huge and growing percentage of state court caseloads consisted of minor offenses — low-level drug possession,

shoplifting, fare-beating, and prostitution — being committed by people who were addicted or homeless or suffering from other difficulties.

And make no mistake here — there is nothing minor about any of these crimes for the victims or the affected communities. Rather, it was becoming crystal clear that standard court processes just were not working for these types of cases, and that we needed to come up with better solutions to deal with our changing caseloads.

And that is what problem-solving justice is all about — fitting the process to the problem. It's about fashioning responses designed to change the behavior of offenders, improve victim safety, and enhance the quality of life in our communities.

There is a danger when talking about problem-solving courts that the uninitiated will perceive them to be doing social services work — unbecoming for courts of law. Let's be clear: The reason these courts work so well is because they emphasize offender accountability and rigorous judicial monitoring. Less adversarial? Yes. Social work? No. Offenders' participation in drug treatment and other mandated services is closely monitored by the judge through regular court appearances, and noncompliance is punished swiftly to reinforce the importance of meeting the conditions and requirements imposed by the court. Problem-solving courts do help people — that is not a bad thing. Problem-solving courts do facilitate social services for people who need them — that is not a bad thing. And problem-solving courts do change the traditional passive role of the judge to be more proactive and relevant to the people appearing in their courts — and that is a very good thing.

Take the typical offender arrested for drug possession — not the big-time drug dealer with the violent history, but the nonviolent hardcore drug addict who repeatedly engages in low-level crime in order to feed his or her addiction. The standard choices are jail, probation, or dismissal, none of which tackle the root cause of the criminal behavior, i.e., the offender's habit. In a Drug Court, the offender's drug addiction isn't a background issue — it's at the very heart of the process. Everyone — the judge, the D.A., the defense lawyer — is on board with changing the defendant's behavior through

treatment, counseling, and training. Offenders return to court frequently, sometimes weekly, to submit to urine tests and demonstrate their compliance with the judge's orders — a kind of tough love regimen. The judge publicly recognizes successes, usually in very moving graduation ceremonies, and the charges are dropped. Failures are incarcerated, with no questions asked, pursuant to a predetermined jail sentence.

So far, 10,000 offenders have graduated from our Drug Courts, with 7,000 presently enrolled. The large majority of the men and women who participate get clean and return to productive lives, which means we don't have to waste scarce resources prosecuting and incarcerating the same criminals again and again, and our communities and streets are safer. And the research data backs this up. In New York, drug court graduates reoffend at a rate that is 71 percent lower than offenders who go through the standard court process. We now have 148 operational drug treatment courts, with another 46 in various planning stages.

Whether drug courts, or the IDV courts we've just discussed — or community courts that focus on community service sentences to not only punish the offender but make justice less distant and removed from the community — or mental health courts, which use early screening to identify the mental health issues that are often the underlying cause of a defendant being in court and that require, above all, treatment — the lesson of the problem-solving revolution is that the judiciary's accountability to the public extends beyond case-processing benchmarks that tell us whether we are hearing and disposing of cases expeditiously. Rather, it is clear that our communities expect much *more* from the courts. They know that what happens in our courts matters. By helping to solve the problems that we confront in our courthouses, we help to solve the problems we face as a society. There is clearly a role for the courts beyond just saying "granted or denied," "guilty or innocent" — and this new problem-solving role has been embraced by all of us because true court reform can only be achieved by a court system that doesn't just count cases, but rather produces better outcomes for the individual litigants and, as a result, for all New Yorkers.

Judicial Salary Reform

Finally, I would be greatly remiss today if I did not discuss another issue that is very much on our minds as a responsible and accountable judiciary that seeks to retain and attract to the Bench the absolute best in the legal profession. That issue is judicial pay reform. New York lacks a mechanism for regular, responsible adjustments to the salaries of State Judges. As a result, judges have gone for intolerably long periods of time without pay adjustments and are relegated to returning to Albany periodically, hat in hand, to ask for the fair and reasonable compensation they deserve — not exactly a way to promote judicial independence or to preserve the courts as a separate but co-equal branch of government.

New York State judges received their last raise in December 1998. That pay raise is only the second increase that judges have received in the last 18 years — that's right, two pay increases in 18 years! Meanwhile, we have seen such a significant increase in New York's cost of living that the value of judicial salaries has seriously eroded. In the interim, federal judges, with whom our Supreme Court Justices have traditionally enjoyed pay parity, have received regular cost-of-living adjustments; and their salaries have now grown well beyond those paid to New York's judges. Indeed, judicial compensation, once competitive with that of lawyers in other government service and in private practice — the pool the State relies upon to produce its judges — now lags far behind.

This March, we submitted a legislative proposal to reform our system for compensating State-paid judges, which has since been introduced in both houses by the Judiciary Committee Chairs, Senator DeFrancisco and Assemblywoman Weinstein, respectively. The bills provide for immediate adjustment of the salaries of judges to restore them to parity with judges of the Federal District Courts, and most importantly from our perspective, the bills provide that judicial salaries will be adjusted annually, rather than relying on the present system of hoping that the moons are in the right alignment every 6 to 10 years.

As judges, we are the first to acknowledge that a career in public service surely demands a measure of sacrifice, but the system we have today — if you can call it a system — is just not good public policy. The judicial branch's legitimacy depends on public confidence in the high expertise, productivity, professionalism, and accountability of our judges. Continued salary stagnation can only deter the best lawyers from seeking the bench. This is exactly the opposite of what we all want for the New York State judiciary. Judicial compensation reform is critical if we are to be a strong, vibrant, and, again I emphasize, co-equal branch of government.

Conclusion

With all the areas we've talked about today, I hope that the message is clear. Court reform is not just the occasional major initiative or a series of responses to problems after they arise. Rather, court reform comes from accountability and our responsibility to examine the work of the courts critically, to be responsive to the needs of litigants, to anticipate problems before they arise, and to make the most efficient use of scarce resources. By so doing, we create the prism through which the public and our partners in government view the courts. Court reform provides the context within which our individual adjudicative decisions, like them or not, should be viewed. Court reform gives us credibility and independence and helps insulate us from the vagaries of the political process and the most current political correctness, from whichever end of the political spectrum. Court reform is a way of life — it is the engine that drives the court system's agenda. We are very pleased to have made so many advances in the New York State courts, and we recognize that there is so much left to be achieved. Please join us in this ongoing endeavor.

Thank you so much for your time this morning.