



The Grasshopper and the Ant: Maryland's Effort to Imagine a Civil Right to Counsel

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In discussing the Maryland Access to Justice Commission's work on a civil right to counsel, Maryland Court of Appeals Judge Hon. Glenn Harrell,



Jr. Harrell, Jr. recently invoked the fable of the grasshopper and the ant in urging the creation of a Task Force on a Civil Right to Counsel in Maryland. In his tenure on the bench, Judge Harrell has seen several efforts by Mary-

land advocates to establish a civil right to counsel through litigation.² These issues will likely be raised again. There is an active, national dialogue happening in courtrooms, legislatures and around conference tables, about whether and how to address the civil legal needs of our nation's most vulnerable. Whether a right is established by case law or legislation, it behooves us to prepare. How might the state implement a civil right to counsel in basic human needs cases? What would such a right look like in our state given our particular constellation of programs and resources? What would it cost and how would it be funded? Better to prepare, like the ant, for the coming winter, than to fritter away the time, like the grasshopper, oblivious to changing winds. A civil right to counsel in Maryland is neither immediate, nor inevitable. Precisely why, suggested Judge Harrell, now is the time to examine our options and plan for possible implementation.

There are many aspects of a civil right to counsel that can be addressed by the Commission and its justice system partners. The Commission has been advancing the dialogue on a civil right to counsel by exploring implementation issues. Should a right be established, how should it be administered, who would provide the service, how would it be funded?

Steps Along the Way

Endorsing the Principle of a Right to Counsel. The Maryland Access to Justice Commission was created by Chief Judge Robert M. Bell in 2008, to enhance the resources available to support civil legal services, and improve access to the courts and to legal help for the most vulnerable Marylanders. It is significant that the first recommendation made in the Commission's 2009 *Interim Report* was the endorsement of a broader right to counsel:

Recommendation 1

The Maryland Access to Justice Commission supports the principle that low-income Marylanders should have a right to counsel at public expense in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.³

In that same report, the Commission articulated its intention to focus its efforts on the implementation of a right to counsel. Reflecting on activity to date nationwide, including the model acts, pilot projects, law review articles and policy documents, the Commission identified seventeen implementation "variables" — different decision points and practical choices that would need to be made in creating a civil right to counsel scheme.

Exploring the Options. A Commission subcommittee spent the better part of 2010 carefully exploring the options for each variable. What types of cases should invoke the right? Should a civil right to counsel program use narrow or broad subject matter criteria? Should case posture matter? Who would administer the right? Who would provide representation? How would it be funded? Finally, what might it cost? Any examination of the cost of a civil right to

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Continued from page 45

counsel would necessitate that each of the variables be described and an option selected. Each decision point would affect the ultimate cost of implementation.

After a year of deliberation, including discussions with legal services providers and other stakeholders, the Commission produced a document summarizing its work, *Implementing a Civil Right to Counsel in Maryland*,⁴ published in 2011, which delineates how the Commission believes a civil right to counsel might best be implemented in the state. For example, on when the right should be triggered, the Commission suggests the right to counsel should attach when an individual is evaluating a legal problem or contemplating court action.⁵ In civil matters, unlike criminal matters, the individual may initiate the action. “To fairly determine whether she has an actionable cause, the individual in a civil matter needs access to counsel before the commencement of court action.”⁶ The scheme envisioned by the Commission is largely provider-driven, and would be designed to take advantage of the existing, diverse delivery community. The Commission envisions a mixed delivery model through which an administering agency would provide grants.

Writing the Fiscal Note. When new bills are proposed in Maryland, all state agencies, including the Judicial Branch, are asked to prepare a “fiscal note,” summarizing the projected fiscal impact on the agency or branch, and on the state as a whole. The implementation of a civil right to counsel in any state will certainly have a significant fiscal note. Why talk about it now, with so many fiscal constraints on state and local government?

We use the language of rights to talk about a civil right to counsel. As such, it seems unnecessary, and perhaps unseemly, to explore the costs of fulfilling that right. Implementation was not addressed in *Gideon v. Wainwright*, 372 U.S. 335 (1963), or *DeWolfe v. Richmond*, ___ Md. ___ (2012) (declaring a right to counsel at an initial appearance before a District Court commissioner in Maryland in criminal cases). After all, a right is a right, no matter the cost. Yet, the feasibility of implementation looms as the proverbial elephant in the room. To ignore the costs of implementation would be, like the grasshopper, to deny the inevitability of winter. The failure to plan for implementation has haunted the legacy of the criminal right to counsel since *Gideon* was decided. Those exploring the possibility of a civil right to counsel have an opportunity to

assert a right, while simultaneously offering a plan for its implementation.

The Maryland Access to Justice Commission, therefore, used the implementation variables to create a fiscal narrative, articulating one variation on what it might cost to fulfill the promise of a right to counsel for one relatively small Mid-Atlantic state.

The Commission’s *Implementation* document does more than just create a number — \$106 million in the variant we chose to explore. It also shows that you can begin to have a conversation about cost without perfect data. The Commission created a simple fiscal model by answering three basic questions:

1. *How many cases are we talking about?* Here the Commission used data about critical case filings, and available data on the percentage of individuals in those cases appearing without counsel, to approximate the number of cases in which individuals would be eligible for counsel. This number was multiplied by the percentage of individuals likely to be eligible on the basis of income. For case types involving public benefits, it was projected all those without counsel would be eligible. For other case types, like landlord-tenant, domestic violence and family matters, the percentage was based on demographic information about self-represented litigants in the state. This data is collected from self-help center users.
2. *What is the cost per case?* The Commission estimated hours and hourly rates to come up with an aggregate cost per case.
3. *Will the program generate any income?* The Commission chose to assume program users would be charged a small one time fee of \$25.

The *Implementation* document also demonstrates that the fiscal impact is closely tied to each decision point in designing the implementation scheme. Change the point at which the right is triggered, alter the types of cases to which it applies, set attorney compensation rates and hours, charge or decide not to charge a fee — all of these variables affect the bottom line. It is beneficial to bring costs into the discussion early on — to ensure we are fully aware of the context in which the assumed right will be implemented.

Keeping the Conversation Going

Having worked with the Judiciary and the justice community to explore the implementation of a civil right to counsel, the Commission is exploring next steps. Before a civil right to counsel is implemented in

Continued on page 54

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Continued from page 36

- 16 See, ABA *Lawyer Demographics, 2010*, available at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf.
- 17 Where disparities in access to justice create a disparate impact on access to housing based on race, as they do in eviction and foreclosure litigation, a housing discrimination argument under Title VIII may well be available. See, e.g., *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), aff'd in part, 488 U.S. 15 (1988) (town's refusal to rezone was discriminatory under Title VIII of the Civil Rights Act of 1968, because of the disparate impact on minority population).
- 18 Disregarding, of course, the unofficial distortions of power and influence related to money that are attributable to lobbying and campaign contributions.
- 19 ABA *Resolution 104* (Model Access Act) (Aug. 2010), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.
- 20 See, e.g., John Pollock's article in this *Journal*; Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 *Touro L. Rev.* 132 (2009).
- 21 Some version of this "reasonable person" standard is applied in European countries. See, Johnson, Earl, *Equality Before the Law and the Social Contract*, 37 *Ford. U. L. Rev.* 157, 182-83, ("England combines the merits and significance tests in a formula that asks whether a person of modest but sufficient means would employ counsel to prosecute or defend the case.") See also, California Equal Justice Act, which would provide counsel to plaintiffs "only if a reasonable person. . . with the financial means to employ counsel, would be likely to pursue the matter in light of the costs and potential benefits" available at http://www.brennancenter.org/content/resource/state_equal_justice_act.
- 22 The Coalition for a Civil Right to Counsel has responded to many of these concerns in an "Informational Memo drafted by Laura Abel and David Udell. See, <http://www.civilrighttocounsel.org/pdfs/NCCRC%20Informational%20Memo.pdf>. Cathy Carr also addresses many of these concerns eloquently in her discussion of the evolution of her own thinking on the civil right to counsel in her article in this *Journal*.

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Continued from page 46

any state, a full range of stakeholders, including legislators, will need to be at the table. Until then, it is important to keep the conversation going.

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- 2 See, for example, *Fraser v. Barnhart*, 379 Md. 100 (2003).
- 3 Maryland Access to Justice Commission, *Interim Report, 2009*. Available at: <http://mdcourts.gov/mdatjc/pdfs/interimreport111009.pdf>.
- 4 Available at <http://mdcourts.gov/mdatjc/pdfs/implementingcivilrighttocounselinmd2011.pdf>.
- 5 *Id.*, p. 2.
- 6 *Id.*

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