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SPECIAL FEATURE: FINDING THE NEXT GREAT LEGAL ISSUES — AND THE TIME TO TAKE THEM ON

Features

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Walking Before Running: Implementation of a Right to Counsel in Civil Cases

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In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the U.S. Supreme Court held that indigent criminal defendants in state court felony cases have a categorical right to appointed counsel, replacing the Court's previous rule from *Betts v. Brady*, 316 U.S. 455 (1942), that made appointment of counsel a case-by-case determination. Although not explicitly mentioned in *Gideon*, the Court was apparently heavily influenced by the fact that "a succession of cases had steadily eroded the old rule and proved it unworkable." *Miranda v. Arizona*, 384 U.S. 436, 532 (1986) (White, J., dissenting).

At the same time that the *Gideon* Court acknowledged the unworkability of the *Betts* approach, it did not explain how the categorical right to counsel should be implemented to avoid any new unworkability issues. Indeed, such was not the Court's role; its job was only to determine whether the Sixth Amendment right to counsel was "a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment." *Gideon*, 372 U.S. at 340. Questions of implementation were thus left to the state legislatures. Nonetheless, implementation problems can wind up back in the courts; as the Missouri Supreme Court put it, "Beyond simply ensuring that counsel is appointed to assist every defendant who faces the possibility of imprisonment, a judge also must ensure that the defendant has *effective* assistance of counsel … Effective representation under the Sixth Amendment requires appropriate investigation, preparation and presentation of the client's case by counsel." *State ex rel. Missouri Public Defender Com'n v. Pratte*, 298 S.W.3d 870, 875 (Mo. 2009).

The indigent defense systems that have arisen to meet the demands of *Gideon* have been staffed by dedicated attorneys who have suffered through insufficient funding, extreme caseloads and lack of training. For instance, in *Pratte,* the Missouri Supreme Court noted that despite the imposition of statutory limits on the caseloads of public defenders, "As of July 2009, every Missouri public defender office was over its calculated capacity under 18 CSR 10-4.010." 298 S.W.3d at 880. The court noted that this problem might one day oblige the court to decide whether to require attorneys to take uncompensated appointments or force the state to fund more attorneys. *Id*. at 889.

On the civil side, the right to counsel has been significantly more limited due to the Supreme Court's 1981 decision of *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981), or perhaps more accurately due to its interpretation by lower courts. In *Lassiter*, the Court established that in the proper case or category of cases, due process may require the appointment of state-financed counsel. However, it instructed lower courts to apply the *Mathews v. Eldridge* factors (personal interest at stake, risk of erroneous deprivation, state's interest) to the case or type of case, and in cases where physical liberty is not at stake, balance these factors against a presumption that there is no right to counsel. In the decades since, many lower courts have incorrectly cited *Lassiter* for the proposition that there can never be a federal due process right to counsel except where physical liberty is at stake, ignoring the Court's mandate to apply a balancing test.

Nonetheless, every state has created (via legislation or court decision) rights to counsel in some or all of the following civil areas: termination of parental rights, dependency, and cases where personal liberty is threatened (such as involuntary civil commitment, quarantine, and paternity). But at times, these new rights have been plagued by the same implementation problems as on the criminal side, as revealed by the fact patterns of some cases challenging such systems. For instance, California requires counsel to be appointed for most

children in dependency proceedings. In *E.T. v. George,* F.Supp.2d, 2010 WL 121018 (E.D. Cal. 2010), a federal district court in California considered an appointment system where some public defenders were handling almost 400 dependency cases each and where there was an insufficient number of referees to hear the cases. The court commented that "[t]he complaint depicts a court system in which the voices of these children are not heard and their stories are not told while important decisions affecting their health and welfare are being made."

Desiring to address the seriousness of these implementation questions, the National Coalition for the Civil Right to Counsel (NCCRC) distributed a memo to all National Legal Aid and Defender Association members entitled *Information for Civil Justice Systems About Civil Right to Counsel Initiatives*. The memo explores some of the common questions raised about implementation of new civil rights to counsel and posits some responses and approaches to such concerns. This article explores how some of the newest "on the ground" efforts, such as pilot projects in Massachusetts and California, the American Bar Association's (ABA) Draft Model Act for the Civil Right to Counsel, and the ABA's Draft Basic Principles for a Right to Counsel in Civil Legal Matters respond to the types of implementation issues addressed in the NCCRC memo. By their very nature, pilots and model acts are "testing-the-waters" approaches that focus on implementation planning as well as data gathering in order to answer the questions inevitably raised by expansions of the right to counsel.

What emerges is that a right to counsel can be made real in a way that is incremental, locally driven, fiscally responsible, accompanied by representation standards, appropriately timed, planned with the involvement and support of all necessary stakeholders, and integrated with existing legal services delivery systems. In fact, rather than creating more problems for legal aid, a carefully implemented and incremental civil right to counsel (created either via legislation or recognition by a state court of a constitutional right) can justify and encourage additional legal services funding by demonstrating cost efficiency, legal need, and feasibility.

Pilot Programs

In October 2009, California Governor Arnold Schwarzenegger signed into law AB 590, a bill establishing pilot programs to provide counsel in some cases involving basic human needs. The goals of the California pilots are to examine and demonstrate how a right to counsel could be implemented, gather information on both the scope of need for and potential savings derived from providing such counsel, evaluate the effectiveness of the model chosen, and foster new and innovative partnerships between courts and legal service providers to expand and improve representation.

The California pilots are the result of a methodical process dating back to 1994, when the California State Bar's Working Group on Access to Justice produced a justice gap study that led to the creation of the California Access to Justice Commission (ATJC). Given that funding was tight at the time, advocates began to lay the groundwork for when the financial picture improved by taking such steps as seeking increased funding for legal aid and starting self-help centers. An important next step was the ATJC's creation of a Model Statute Task Force, which produced the California Basic Access Act and the California Equal Justice Act. AB 590 borrowed much language directly from the California Basic Access Act (particularly in the "findings" section), further demonstrating how the pilots were the culmination of a gradual process that laid the foundation for each next step.

AB 590 enjoyed broad support from many local stakeholders across the political spectrum. It was championed by Chief Justice Ronald George and supported by the California State Bar, the Legal Aid Association of California, the California Access to Justice Commission, and even the California Chamber of Commerce (which has a seat on the Access to Justice Commission). In order to keep support broad, the pilots contain some limits to keep them fiscally acceptable. For instance, the judiciary previously increased the fee for certain postjudgment filings in order to pay for certain judicial expenses, and the bill redirects $10 of those filing fees to the pilots starting in mid-2011. However, once the pilots end, the fees will go back to their previous level, a fact that gained the support of parts of the business community. Additionally, because the pilots draw funding from court fees, they do not decrease the state's general revenue.

Steps were taken to gain the support of existing legal services providers. To start, Assemblyman Mike Feuer, who introduced the bill, is a former legal services director. The bill also requires the pilot projects to be a partnership between the courts and existing legal services organizations. Moreover, the funding structure does not endanger existing funding for legal services, since the bill specifically states that "[t]he services provided for in Section 5 of this act are not intended to,

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and shall not, supplant legal services resources from any other source." The subject areas covered by the bill (housing, domestic violence, conservatorships/guardianship, elder abuse, and private child custody, with a 20% cap on the last type of case) were a compromise between and among the different legal services units (such as family law and housing) and Assemblyman Feuer, as there were competing interests for focus areas.

Accountability is central in the bill. It requires the Judicial Council (the rulemaking body for the courts) to develop an evaluation process before any funding is provided. The bill also requires each court partner to develop "court procedures, personnel, training, and case management and administration methods that reflect best practices to ensure unrepresented parties in those cases have meaningful access to justice …" The bill also specifies the formation of an advisory committee tasked with "facilitat[ing] the administration of the local pilot project, and to ensure that the project is fulfilling its objectives."

The Massachusetts housing pilots grew out of a 2008 Boston Bar Association Task Force report entitled *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*, which urged the state to go further than merely endorsing the ABA's 2006 resolution calling for a right to counsel in basic human needs cases. The Task Force, which is now implementing the pilots, has membership from across the legal spectrum: the judiciary, the IOLTA Committee, legal services, the public defenders, the state and local bar associations, academics, the pro bono community, and practitioners from small and large firms. Furthermore, the existence of strong legal services programs already in operation in certain courts was a key factor in determining where the pilots would operate.

Recognizing the tremendous number of housing cases, the pilots take a measured approach by targeting only the areas determined to be of highest need. These include: a) evictions tied to mental disability or criminal conduct; and b) cases where there is an imbalance of power between the parties combined with a viable defense. Moreover, as with the California pilots, there is no cost to the public fisc; funding is provided by the Boston Foundation, the Boston Bar Foundation, and the Massachusetts Bar Foundation.

As with the California pilots, the Massachusetts pilots emphasize the creation of evaluation standards so as to gauge in real time whether counsel is being provided in an efficient and appropriate manner. The pilots will also be gathering data to determine actual need (and not merely estimated need) as well as actual dollars spent per case, and will be doing follow-up interviews with represented clients to learn more about the impact of the representation. And in order to determine what best to expect on the ground should a right to counsel in housing cases be implemented, the pilots are operating in both housing courts and district courts (which also have jurisdiction over housing cases). This is because the housing courts tend to feature court personnel with more specialized knowledge and greater resources (such as housing specialists serving as mediators as well as tenancy preservation projects), while the district courts handle a wide range of cases and do so with fewer resources.

The California and Massachusetts pilots are a bold step forward in the right to counsel movement. Yet at the same time they are incremental steps whose purposes are to gather information on implementation issues and dangers, collect data on true costs and cost savings involved in providing counsel, identify revenue sources, and build the alliances necessary to fully support new rights to counsel.

ABA Model Act and Basic Principles

In 2006, the ABA's House of Delegates unanimously passed a resolution urging federal, state, and territorial governments to provide counsel in adversarial proceedings where basic human needs (such as those involving shelter, sustenance, safety, health or child custody) are at stake. In 2009, the ABA created a Civil Right to Counsel Working Group to focus on planning the next steps in advancing the right to counsel, and the Working Group produced a draft of a "Model Access Act." Additionally, the ABA's Standing Committee on Legal Aid and Indigent Defense (SCLAID) developed a draft of a companion document entitled, "Basic Principles of a Right to Counsel in Civil Legal Matters." While the plan is for these documents to be introduced to the ABA House of Delegates in August 2010, they are still just drafts and are not yet ABA policy. However, their general purpose is, among other things, to provide a smoother rollout of new rights to counsel by providing flexible guidance to state legislatures and advocates on implementation questions.

In terms of working with the existing legal services delivery system, the current draft of the Act states in the "Legislative Findings" that "[t]he services provided for under this Act are not intended to and shall not supplant legal services resources supplied by any other

source, and this act does not override the local or national priorities of existing legal services programs." Moreover, while the draft Act allows the state administrating agency to contract with either legal services organizations or private attorneys as appropriate, the Act's Commentary suggests that "appropriate" times to use private attorneys are when a) the contract legal services organizations are unable to take the case for various reasons; or b) a private attorney has a particular area of expertise or experience that "better serves the goals of effectiveness, cost-efficiency, and fair and equal access to justice." The Commentary also says that if eligibility and scope-of-service determinations are delegated by the administering agency, LSC and IOLTA-funded entities are automatically certified to be appointed to make such determinations.

As with the pilot programs, the draft Act seeks to address the financial and administrative concerns raised by new rights to counsel. It only contemplates a right to counsel in five categories of cases (the five specified in the 2006 ABA Resolution), and suggests a cap on income eligibility at 125% of the federal poverty level. It would not provide representation in the following situations: a) in uncontested cases (unless the interests of justice require it); b) in non-adversarial proceedings (such as ones where there are relaxed rules of evidence or where the judge is more active in fact-finding) and where the opposing side does not have legal representation and the litigant is able to self-represent; or c) in pre-litigation disputes (such as where the landlord has sent a tenant a Notice to Quit but has not yet filed a complaint in court).

The current draft of the Act also suggests additional limits on the scope of representation. For instance, while both the Massachusetts and California pilots consider the merits of the litigant's case as one factor in whether to represent, the draft Act would go a step further and impose a prerequisite merits test, albeit a fairly liberal one, for all cases at the trial level. Indigent plaintiffs would be provided counsel if a basic human need is at stake and the plaintiff has a "reasonable possibility of achieving a successful outcome," while defendants would be provided counsel unless they lack a "non-frivolous defense." Moreover, the draft Act would allow limits on the type of legal services provided in some cases: it distinguishes between "full representation" and "limited representation," with an administering agency determining which classes of cases or individual cases can receive "fair and equal access to justice" with only limited representation. However, the draft Act's Commentary calls for a presumption that limited representation is insufficient in proceedings where representation is only permitted by an attorney and the opposing party has full representation. The Commentary also suggests that this presumption cannot be overcome unless the administering agency "finds the particular matter involves exceptional circumstances that allow the applicant to enjoy fair and equal access to justice despite this disadvantage."

As additional feasibility insurance, Principle #6 from the draft ABA Basic Principles suggests that "[c]aseload limits are established to ensure the provision of competent, ethical, and high quality representation." The comments to Principle #6 cite to developing ethics jurisprudence on the criminal side that attorneys with excessive workloads are obligated to decline the assignment of new cases, and the comments urge the state's appointing authority to "set caseload standards and reasonable limits on the number of appointments a particular attorney can accept at any one time …" At the same time, Principle #8 would require appointed counsel to be fairly compensated and to be adequately supplied with all other resources necessary for fair representation.

The drafts of both the Act and the Principles recognize the need for ongoing monitoring of the newly implemented rights. Principle #7 provides for ongoing evaluation of the performance of appointed counsel for quality, effectiveness, and efficiency. The Act suggests reporting and monitoring requirements for the administering agency that address the need for legal services, the sufficiency of the different types of legal services provided, and cost effectiveness issues.

As seen above, the draft Act may have some differences from the two pilots, but its basic goal is the same: to demonstrate how a state could adopt limits and controls on the provision of counsel, integrate a right to counsel with the existing legal services delivery system, and provide for accountability as well as awareness of the efficacy of the counsel provided. The development of the Act, like the pilots, is an incremental step towards the right to counsel, but one that can build a strong base of support for the right as well as help to avoid the implementation pitfalls that have plagued new rights to counsel in the past.

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