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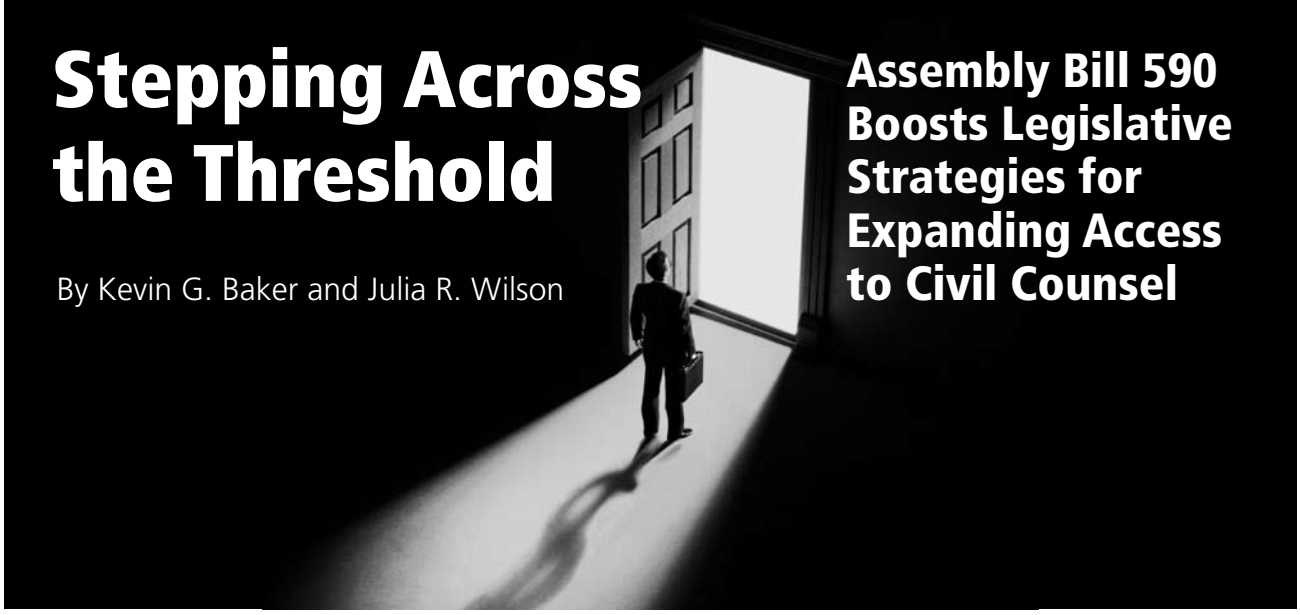
Stepping Across the Threshold

Assembly Bill 590 Boosts Legislative Strategies for Expanding Access to Civil Counsel

By Kevin G. Baker and Julia R. Wilson



> I would like to say we are on the threshold of a third major phase of civil legal aid history, and we may well be. It is not the threshold of a doorway, but the threshold of a wide porch, leading to that doorway, I fear. Yet, I am optimistic we will cross that porch eventually.[1]

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Nearly four years ago in Clearinghouse Review Paul Marvy surveyed the literature advocating recognition of a right to counsel in civil matters and collected over fifty articles.[2] Although a 1923 law review article suggested a statutory mechanism for the appointment of civil counsel for poor litigants, no recent article on Marvy's list argued for a legislative strategy. Perhaps because the legal profession is so much more geared to litigation than to legislation, the focus of scholarship and advocacy has historically been on the courts as the means to expand civil access to counsel—as reflected in branding the movement "civil Gideon," even where the possibility of a legislative strategy and the essentially political nature of the right-to-counsel movement have been acknowledged. The passage of Assembly Bill (A.B.) 590 in California, however, may revive interest in legislative strategies.[3] Moreover, the bill's success shows that when legal aid providers help shape and direct proposals to expand access to civil counsel, the proposals need not cause the providers any concern.

The events that set the stage for A.B. 590 may have been unique, but the bill's passage holds lessons for other equal-access-to-justice campaigns. It demonstrates a way to achieve a substantial increase in state indigent legal aid resources in a period of severe budget limitations and advances the principle that appointment of counsel for low-income clients in critical civil cases is fundamental for meaningful access to jus-

[1]Justice Earl Johnson Jr. (Ret.), Keynote Address at the California State Bar Pathways to Justice Conference: Three Phases of Justice for the Poor: From Charity to Discretion to Right (June 7, 2008), http://bit.ly/cQ0Naz.

[2]Paul Marvy, *Thinking About a Civil Right to Counsel Since 1923*, 40 Clearinghouse Review 170 (July–Aug. 2006).

[3]2009 Cal. Stat. ch. 457. For the text of the bill, see http://bit.ly/aEftrG. Assembly Bill (A.B.) 590 is codified at Cal. Gov't Code §§ 68650–68651.

tice. These accomplishments should aid other efforts to close the "justice gap."

Here we describe how A.B. 590 became law through judicial leadership and advocacy by the legal aid community and its legislative allies. We then summarize the content of the bill and the reasons for the preferences that it reflects.

Fluke or Foretelling?

In other countries the adoption of a general right to counsel has occurred largely by statute, as has the more limited recognition in many states of the right in specific civil matters, such as in child-abuse proceedings.[4] But surprisingly few commentators have focused serious attention on legislative strategies.

Clearinghouse Review helped rebalance the discussion by publishing new work in its July–August 2006 special issue: *A Right to a Lawyer? Momentum Grows*. Among the articles in that issue is the report on the California Model Statute Task Force, initiated by the state Commission on Access to Justice in 2004.[5] That special issue set in motion a chain of events, led by the Legal Aid Association of California joining forces with former legal aid lawyers now working in politics. The result was the enactment of A.B. 590—the first state statute providing for the appointment of counsel at public expense for indigent parties in a wide range of civil matters involving basic human needs.

The right-to-counsel movement has had no tradition of a coordinated state or national campaign for "test-case" legislation as opposed to litigation, although the National Coalition for Civil Right to Counsel has shown interest in exploring potential legislative strategies. A.B. 590 was not the result of years of study and planning, or even of significant coordination with the model statute task force. A.B. 590 arose from a perceived political opportunity, created largely by concerned judicial leaders, seized by legal aid advocates and based on the persuasive truths distilled and sharpened by the burgeoning civil-right-to-counsel movement.

Was California an aberration, or did the surprise that greeted A.B. 590's passage simply reflect how rarely wide-ranging legislation has been attempted?[6] Every political outcome is the product of a unique set of circumstances, but other states, if not Congress, may be at least as well situated for success. Indeed, few predicted legislative victory in California with a Republican governor, a notoriously dire economic climate, and severe budget cuts in both social services and the courts.

The underlying arguments of the right-to-counsel movement have been developed to persuade judges, who best understand the practical workings of the court system. Nonetheless, we may overlook good prospects to advance the cause if we assume that courts are more amenable to these arguments than legislatures.[7] Even sympathetic judges must hurdle precedential barriers to recognizing a civil right to counsel, to say nothing of the perceived political and fiscal barriers. Judicial leaders, however, may be

[4]E.g., Earl Johnson Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 Fordham International Law Journal 83 (2001); Laura Abel & Max Retig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 Clearinghouse Review 245 (July–Aug. 2006).

[5]Clare Pastore, *The California Model Statute Task Force*, 40 Clearinghouse Review 176 (July–Aug. 2006).

[6]When the American Bar Association adopted its landmark 2006 resolution supporting a right to counsel at public expense in cases affecting basic human needs, the accompanying report cited only one example of recent legislation: an unsuccessful 2005 Texas bill to establish a civil right to counsel for low-income tenants in certain eviction appeals (American Bar Association Task Force on Access to Civil Justice, Report to the House of Delegates: Resolution 112A at 12, http://bit.ly/5xIiIS [hereinafter ABA Resolution 112A Report]). A New York City Council proposal to establish a right to counsel for low-income New York City seniors facing eviction in housing court was reportedly postponed in 2007 because of budget restrictions. Our research found no state statute generally providing for a right to counsel or for the appointment of counsel in more than one class of cases. However, a statute apparently mandating appointment of counsel, albeit without a source of compensation, existed briefly in Indiana before being amended to make the appointment of counsel simply permissive (see *Sholes v. Sholes*, 760 N.E.2d 156 (Ind. 2001); *Secor v. Indiana Department of State Revenue*, 2002 Ind. Tax LEXIS 18 (Ind. Tax Ct. April 18, 2002).

[7]See ABA Resolution 112A Report at 7. ("Courts perhaps more than legislatures are familiar with the truth of [the] principle embodied in the … right to counsel" that lawyers are essential to the functioning of an effective justice system).

more willing to add their voices to those of legal aid providers and bar leaders in educating legislatures about the need for additional resources for indigent legal services. Moreover, a legislative approach allows for incremental steps, such as A.B. 590, while demonstrating democratic support that may ultimately help foster greater judicial recognition of a right to counsel.

Stage Set by Bar Activists and Judicial Leaders

The 2004 model statute project was undertaken

> not with the idea that such a statute would become law or even be introduced in the legislature anytime soon … but with the commitment to begin thinking through the issues so that if and when the opportunity arises—in California or elsewhere—to expand the rights of indigent litigants by statute, advocates can hit the ground running.[8]

Accordingly the task force did not include legislative representation, and it acknowledged that greater legal aid input would be needed before suggesting a draft bill.

Independently of the task force, the Conference of Delegates of California Bar Associations adopted a resolution proposing an amendment to the state constitution following the American Bar Association's resolution 112A in August 2006, which called on both state and federal governments to expand the right to counsel. State Supreme Court Chief Justice Ronald M. George embraced this resolution and commented publicly that equal access requires counsel in certain civil cases, such as landlord-tenant, and suggested that counsel be funded through the courts.[9]

State legislators, notably Dave Jones, Assembly Judiciary Committee chairman and former legal aid lawyer, quickly commended the chief justice for his support. Committee staff members began to explore the prospect of a statutory alternative to the bar resolution's more ambitious proposed constitutional amendment; they noted the Sargent Shriver National Center on Poverty Law's interest in the issue as reflected in the Clearinghouse Review special issue on the civil right to counsel. That effort was boosted when Chief Justice George asked Gov. Arnold Schwarzenegger to fund a pilot project for the appointment of counsel in critical civil cases and mentioned the historic role that Sargent Shriver, the governor's father-in-law, had played in advancing indigent legal services. Within weeks, the governor unveiled his proposed 2007 state budget, which included a three-year, $5 million "Access to Justice Pilot Program" in three superior courts that would provide representation to unrepresented litigants in a wide range of civil matters.[10]

From Rhetoric to Reality—a Cautionary Tale for Answering the Many Questions Raised by Appointment of Civil Counsel

The governor's sketchy description of the proposed program left many questions unanswered, and interested groups and individuals offered a variety of sometimes conflicting visions in the months that followed. Some stakeholders disagreed about which types of legal disputes should be served; some wanted to promote pro bono or test so-called low-bono service models for a broad range of income groups; some questioned whether local courts should decide who would be entitled to representation. Others, including some who are in the legal aid community and were more interested in tackling housing law enforcement problems through specialized housing courts, did not believe that a civil-counsel program should be the top priority for any new equal-access initiative.

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[8]Pastore, *supra* note 5.

[9]*George Endorses Free Legal Services in 'Core' Civil Matters*, Metropolitan News-Enterprise (Oct. 10, 2006), http://bit.ly/9IjQct.

[10]See Governor's Proposed Budget 2007–2008, http://bit.ly/at9UX3.

At the legislature's urging, an informal "joint advisory task force" composed of representatives from the courts, the legal aid community, and the state access to justice commission convened and reached consensus on many of these issues. Nonetheless the proposal ultimately faltered in the legislative process for many reasons, some policy-related (e.g., should family-law cases be prioritized?), and some reflecting fiscal concerns (e.g., how important are legal services when social service budgets are being cut?). Other stumbling blocks involved legislative procedure (should the issue be pursued as a policy measure through the judiciary committees or simply as a budget proposal through the fiscal committees?) and political dynamics (the proposal emanated from the moderate Republican chief justice and governor to a legislature dominated by Democrats, with few moderate Republicans, and lacked a formal legislative author and sponsor).

Shaping the Proposal and Framing the Debate

The failure of the 2007 budget effort caused some supporters to believe a legislative approach was doomed.[11] No doubt others were quietly relieved, fearing that a civil-counsel program could undermine support for the traditional poverty-law focus of legal aid programs, or that alternative visions could divide legal aid advocates from others in the equal-access coalition. After a one-year hiatus, however, Assembly Member Mike Feuer, another former legal aid lawyer who had risen to chair the Judiciary Committee, revived the issue. Mindful of the model statute, committee staff members began consulting with the Legal Aid Association of California to sponsor a new bill that incorporated the fuller legal aid participation that the model statute task force envisioned. Inspired by the Shriver Center and the legacy of Sargent Shriver, A.B. 590 was named the Sargent Shriver Civil Counsel Act.

While legal aid advocates pursued the bill as a social justice measure, their arguments were grounded less in a liberal appeal to fairness or constitutional rights than in more conservative notions of economy, pragmatism, and public trust in court authority and the rule of law.[12] As others have noted, expanding access to civil representation may be justified not only by a concern about outcomes but by the difficulty that unrepresented litigants pose for courts' smooth operation.[13] Especially in light of the state's severe budget crisis, including cuts to the courts' budget, supporters believed that to argue for equity was less persuasive than to argue for hardheaded efficiency.

Echoing the rhetoric of court administrators, supporters noted that, despite California's robust and innovative self-help programs, the number of *pro se* parties was overwhelming the courts' capacity and eroding the public's confidence in the judicial system and that self-help services were often inadequate. Supporters also maintained that assisting unrepresented parties in an adversary system would improve court efficiency and case administration, facilitate settlements, preserve judicial neutrality, limit inappropriate filings and inaccurate paperwork, prevent unproductive court appearances (reducing employee absences for businesses), redirect some parties to agencies better suited to resolve their problems, promote better understanding of and compliance with court orders, and relieve congestion and reduce costly delays for all court users, including commercial cases where the parties need prompt resolution.

According to supporters, resolving conflicts through the legal system promotes public safety, improves the business climate, and promises financial and eco-

[11]Jim Brosnahan, *Civil Gideon: If Not Now, When?*, San Francisco Recorder, April 18, 2008, http://bit.ly/bRTXDO ("[I]t appears there is no practical hope that the Legislature will ever address, much less enact, a program for civil representation.").

[12]Across the country, similar legislative efforts that focus on representation in child welfare actions have reportedly also largely eschewed fairness arguments in favor of more practical appeals (see Laura Abel, Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws, http://bit.ly/am5h5b).

[13]Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 Temple Political and Civil Rights Law Review 697, 706 (2006).

nomic benefits by reducing the need for and cost of other state services. Supporters used court budget cuts to their advantage, noting that the economic downturn amplified the need for the bill, both by increasing the number of cases involving the critical needs that the bill covered and by cutting funding for social services at the same time as funding for the courts.

As explained below, supporters believed that while further research would be helpful, they could substantiate these contentions. But the arguments for the bill were never publicly questioned, perhaps because they are so manifestly true.[14] Ultimately the bill earned support from court leaders, business groups such as the Chamber of Commerce, civil defense bar, and legal aid organizations and members of their boards of directors and received bipartisan votes in the legislature.[15]

Key Elements of the Sargent Shriver Civil Counsel Act

A.B. 590 provides for the appointment of counsel for low-income clients, at public expense, in cases involving basic human needs where there is an independent determination that the client may benefit by representation. A.B. 590 directs the Judicial Council of California, the statewide court administrative agency, to establish pilot programs over six years from proposals submitted jointly by nonprofit legal aid organizations and local courts. Each program will have a court-administration component by which the participating courts will provide procedures, personnel, and other "best practices" for unrepresented litigants. Pilot programs will be funded by a $10 increase in certain court fees, beginning in 2011. Legal aid advocates shaped key provisions—reliance on nonprofit legal aid programs as "lead agencies" responsible for developing proposals, determining client eligibility, case assessment and direction, and delivery of services or referral to a subcontracted provider.

Although sometimes described as a "civil Gideon" measure, the bill is best understood not as a guarantee of representation but as an equal-access act designed to secure more just legal outcomes and a better-functioning court system by recognizing the need for appointment of counsel for those who cannot afford a private attorney in the most critical civil matters. A.B. 590 is intended to complement the state's many other access-to-justice initiatives, such as court-based self-help services, simplified court procedures, and unbundled legal services.[16]

Legislative Findings. A.B. 590's purpose is "to address the substantial inequities in timely and effective access to justice," which "often give rise to an undue risk of erroneous decision because of the nature and complexity of the law and the proceeding or disparities between the parties in education, sophistication, language proficiency, legal representation, access to self-help, and alternative dispute resolution services."[17]

Legislative findings, many drawn from the model statute, are supplemented by declarations of the fundamental need for and value of legal services, the legal and societal costs of failing to meet this need, the shortcomings of self-help services and other alternatives, and the courts' duty to ensure meaningful access to justice. The bill specifically states that, in some cases, justice is not achievable if one side is unrepresented due to indigence. These findings provide statutory recognition for the constitutional and common-law foundations of a right to counsel.

[14]The Senate Republican analysis of the bill argued that it inappropriately expanded government services and could result in questionable lawsuits against small businesses and landlords. This analysis also complained that the bill went "too far" in its legislative finding that legal aid programs' free legal services to the poor are a valuable public service. Subsequent criticism asserted that the bill would waste court resources by prolonging parent custody disputes and cause rents to rise by making it more difficult and expensive for landlords to evict tenants (Tamara Audi, *"Civil Gideon" Trumpets Legal Discord*, Wall Street Journal (Oct. 27, 2009), http://bit.ly/90yaom.

[15]The legislative affairs office of Manatt, Phelps & Phillips contributed pro bono assistance.

[16]The legislature took into account that these issues are the subject of separate efforts, most notably via the Judicial Council's Elkins Family Law Task Force (see http://www.courtinfo.ca.gov/jc/tflists/elkins.htm).

[17]Cal. Gov't Code § 68651(b)(1).

Manner of Providing Counsel. As in criminal cases, the manner in which counsel is provided may affect the quality of representation.[18] A.B. 590 thus ensures that only institutional providers with demonstrated expertise and a history of success as a recipient of funds from the Interest on Lawyers Trust Accounts (IOLTA) program may seek funding. Only organizations that voluntarily apply will operate a program, using their own staff members with their own training, case selection, and service protocols.[19] If the legal aid provider cannot handle a matter due to a conflict or, for other reasons, believes that a subcontracted provider can handle the matter more effectively, the legal aid provider will refer the prospective client. This approach ensures high-quality services while limiting start-up, administration, and oversight costs.

An independent Judicial Council committee, not local judges before whom the lawyers will appear or others with a perceived political stake in the appointment, will select programs and their compensation.

Funding. Funds for the pilot programs come from increased court fees for miscellaneous services, many relating to postjudgment activities such as issuing orders for the enforcement of judgments. Especially given the dire budget condition of both the courts and legal aid organizations, finding new resources was essential. Because of the legislature's difficulty in raising general funds through taxes, the only realistic prospect for revenue was a fee.

State law requires that fees be closely related to the purpose for which they are used. Although chosen by necessity, a court fee added political value; while the obligation and benefits of funding civil counsel belong to the larger society, beginning the effort with a demonstration of support from those most involved in the legal system was prudent. Relying on court-user fees allowed supporters to point out that the bill would help improve the quality and efficiency of court operations for all users. The fees also had the virtue of being relatively low and thus less controversial.

After the bill was introduced, the bill's author agreed to court leaders' request to delay implementation for two years while the courts use these fees for general operations. In effect, then, the bill will redirect a source of court funding from generic support to a specific court need. To those who contended that initiating a "new program" in a budget crisis that had reduced court funding was inappropriate, supporters responded that these fees would not be diverted away from the courts but would help the courts manage their core functions more productively, particularly in the types of cases that have spiked in response to the economic downturn.[20]

Total funds are projected to be approximately $11 million. This figure is unrelated to the scope of the need, but it compares favorably with the governor's proposed $5 million pilot proposal. State legal aid funding from the IOLTA program totaled roughly $23 million in 2009. Pilot program funds must supplement, not supplant, resources. To ensure appropriate representation and keep caseloads manageable, the Judicial Council is to set a rate and basis for payment that will ensure adequate compensation, not a lump-sum obligation to serve all eligible clients.[21]

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[18]See Laura Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 15 Temple Political and Civil Rights Law Review 527 (2006).

[19]Cf. model statute Section 501 reserving eviction and domestic-violence cases, among others, to nonprofit legal aid organizations.

[20]This funding, commented Chief Justice Ronald M. George, is "a small cost for an initiative of such importance both to the court system and to individuals seeking justice" (see Minutes of Judicial Council Meeting, October 23, 2009, http://bit.ly/aMHYp8).

[21]The bill expressly recognizes that not all eligible parties will necessarily receive legal representation; participating courts will need to adopt best practices for unrepresented parties involved in disputes affecting basic human needs when the other party is represented by counsel.

Eligibility for Representation. Clients with incomes up to 200 percent of the federal poverty level are eligible. While one could defend a higher threshold, particularly in light of the state's high cost of living, this figure is consistent with Legal Services Corporation criteria.[22] The nonprofit lead agency is to use its asset-limitation policy.[23]

Covered Case Types. A.B. 590 projects are limited to civil matters involving housing, domestic-violence and civil-harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child.[24] For much of the legislative process, the bill simply referred to cases involving "basic human needs," leaving further definition to the Judicial Council. This approach avoided potential controversy.[25] The bill might well have remained in that form, given the consensus among commentators on the case types the term covered, the good working relationship between the courts and legal aid advocates, and the knowledge that advocates' participation in the selection committee would ensure consideration of their perspective. Ultimately the bill added more detail at the request of the Judicial Council, which preferred that the legislature make the determination.

The bill limits family-law cases to the specified child custody actions, with preference for cases where the opposing party has counsel.[26] This limitation reflects the recognition that child custody, along with dependency, represents the most compelling family-law need. California already requires appointment of counsel for both children and parents in dependency cases, but not in custody matters or in domestic-violence cases. Recognizing that many institutional and political interests favor greater legal assistance in a variety of family-law matters because they present significant challenges for the courts, the bill's supporters were nevertheless concerned that the volume of family-law cases might quickly overwhelm a pilot program with limited funding. Supporters were also concerned that the impact of the pilots be demonstrable both in terms of outcomes and speed, which may be more difficult to document in family-law cases.[27]

Many commentators argue for other case types, including maintenance of employment or income, health, and other government benefits. Supporters of A.B. 590 did not disagree but were obligated to prioritize and believed that including employment disputes could have drawn opposition from politically powerful business interests. Likewise, including government-benefits cases could raise fiscal concerns about lawsuits against the state and, because benefits cases often involve administrative proceedings, conflict with the message that the bill ad-

[22]The Conference of Delegates resolution covers "those who cannot afford such representation." The ABA resolution speaks of "low-income persons" and leaves to each jurisdiction the definition while acknowledging that the current national Legal Services Corporation eligibility guidelines are widely considered underinclusive. The model statute likewise leaves eligibility to be determined, suggesting a sliding copayment scale ranging from full eligibility without copayment for those at or below federal poverty guidelines to no eligibility for those above 300 percent of the poverty level.

[23]Court procedural reforms, discussed below, are not subject to the same means test.

[24]A.B. 590 refers to "domestic violence and civil harassment restraining orders," in contrast to the model statute, which provides a right to counsel for "protection from domestic violence." This difference was important to judicial branch representatives who wanted to avoid any appearance that a court-administered program might benefit only one side of a dispute (see Cal. Gov't Code § 68651(b)(1)).

[25]Landlords did not oppose A.B. 590, perhaps because it did not mention eviction or because they perceived as untenable any opposition to including housing among basic human needs. By contrast, a 2005 Texas bill, H.B. 2124, sponsored by the state's access commission, expressly sought to provide counsel to indigent tenants in eviction cases; it was reportedly opposed by rental property owners and failed passage in its first hearing.

[26]The bill's author's and sponsor's primary interest was housing cases, as reflected in the preference for matters where disparity in representation predominates. The state access to justice commission's civil representation committee also reportedly prioritized housing.

[27]Cf. Section 502 of the model statute, generally assigning family law to the private bar rather than the staffed legal aid organizations that are the service delivery providers under A.B. 590. The legislature recognized that assistance for *pro se* parties in family-law matters would be addressed by the Judicial Council's Elkins Family Law Task Force. In light of the robust family-law bar, greater legal assistance is expected to focus on steps to utilize private practitioners better.

dressed court needs. Of course, specifying case types in the pilots is only a starting place.[28]

Pilot Selection. To limit costs and to focus scarce resources on the "ultimate breakdown of the adversary system," A.B. 590 emphasizes case types where the opposing party is most likely to be represented by counsel because that power imbalance presents a high risk of substantial injustice.[29] For this reason, housing and child custody cases involving domestic violence are expected to be high priorities.

Other factors are whether representation is likely to affect the outcome; the likelihood of reducing the risk of erroneous decision; the nature and severity of potential consequences of lack of representation; whether legal services may reduce the need for and cost of public social services; the unmet need for legal services in the geographic area; and the availability and effectiveness of other types of court services, such as self-help.[30]

Case Selection. Assuming that the potential client has a "reasonable possibility of achieving a favorable outcome," case selection is left to the lead legal aid agency. In addition to the merits of the case, the agency is to consider case complexity; whether the other party is represented; the adversarial nature of the proceeding; the availability and effectiveness of other types of services; language, literacy, and disability issues; and whether providing legal services may eliminate or reduce the need for and cost of public social services for the potential client and others in the potential client's household.

Types of Legal Services. While A.B. 590 reflects a preference for representing persons who face represented opponents, the bill does not limit services to assistance by a lawyer or to litigation.[31] Although the negative effects of *pro se* litigants on court dockets was a strong argument for the bill, and a client's appearance or potential appearance as a party in court is expected to be a significant factor in determining the population served, advice and counsel, brief service, preventive and prelitigation activities, administrative representation, and nonlawyer assistance may be appropriate, particularly where that level of service is the most economical and effective and preventing litigation is a tangible benefit.[32] For example, providers may offer nonlitigation services to keep otherwise unrepresented parties out of court, such as where a tenant is not paying rent because government benefits to which she is entitled have been wrongly denied and restoring the benefits resolves a threat of eviction.[33]

Court Innovation. Appointment of counsel for unrepresented low-income parties is the preferred means to ensure greater fairness when the parties face represented adversaries. However, A.B. 590 recognizes that not all indigent parties, even those with meritorious cases, can be represented—and that California's court-based self-help services can-

[28]The bill states that it addresses not all cases involving human needs but "critical issues affecting basic human needs."

[29]See, e.g., Engler, *supra note* 13, at 711; Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 Hofstra Law Review 533 (1992); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law and Society Review 419 (2001); Rebecca Sandefur, Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes 3 (unpublished paper).

[30]Cal. Gov't Code § 68651(b)(5); see, e.g., Laura Abel & Susan Vignola, Economic and Other Benefits Associated with the Provision of Civil Legal Aid (2009), http://bit.ly/cHKM5C.

[31]Only child custody matters are limited to litigation; the bill specifies that these case types must involve "actions" as a limiting criterion in light of the potentially overwhelming volume.

[32]Cf. ABA Resolution 112A Report ("The right defined in this resolution focuses on representation in adversarial proceedings; it does not propose a generalized right to legal advice or to legal assistance unrelated to litigation in such forums.").

[33]One of the evaluation challenges will likely be how to measure the impact of legal services for clients who are not represented in litigation; among such clients are court-referred clients whose needs the legal aid provider determines would be better served without litigation services.

not meet the needs of all *pro se* parties, particularly when they face represented opponents. Therefore, as a corollary to the legal representation services, pilot courts will adopt "best practices" to ensure meaningful access to justice for *pro se* litigants facing represented opponents.

Judges could level the playing field by ensuring that *pro se* parties understand the court process, know their options, and can participate meaningfully in the proceeding. Judges might be more active in eliciting evidence and pursuing questions to guard against unknowing or unwilling waivers. Likewise, judges might supervise negotiations and exercise heightened scrutiny of proposed settlements and stipulations to ensure that *pro se* parties understand, have knowingly agreed to, and can comply with the terms and that opposing counsel have not given improper legal advice to a *pro se* adversary. Judges might relax pleading requirements and rules of evidence.[34]

A court seeking to partner with a legal aid agency that offers representation in housing cases, for example, might undertake measures similar to those employed by successful housing courts around the country (e.g., combining civil and criminal dockets to enhance holistic understanding of the context in which problems arise and to enforce housing laws comprehensively). The court might augment training in housing law for judicial officers and other court personnel. Extending judicial assignments beyond the customary two-year term would allow judges to retain the expertise that they develop. Pilot court judges might be assigned a number of subordinate judicial officers to handle lower-level tasks. These steps should enhance the stature and desirability of judicial assignments to eviction cases—assignments which are often perceived to be less desirable than others.

Many successful housing courts employ investigative staff members whose functions may be combined with duties such as referring clients to and collaborating with social service agencies and shelter providers and providing more extensive self-help assistance and aftercare services to ensure that unrepresented parties understand and comply with court orders. Other measures may be interpreter services and mediation by trained court staff or pro bono mediators; these may be voluntary if more powerful parties have sufficient additional incentives to mediate, or mandatory, at least where one side is represented by an attorney. Pilot courts might also develop nonadversarial proceedings to allow litigants a fair hearing without representation.[35] Development of new alternative dispute resolution processes is expected to be a component of all pilot programs and one that may be an attractive source of pro bono opportunities.

Evaluation. Data must be collected for both the civil representation and court-innovation components of the pilot projects and evaluated for potential extension or revision of the legislation. Factors should include the needs of parties, procedures, and services provided, outcomes, costs and savings, and impact on courts, court users, communities, and social service providers. Study methodologies and data collection will be initiated before commencement of the pilots.

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[34]See, e.g., New York County Lawyers' Association, The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It? (2005), http://bit.ly/bfnikD; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks*, 67 Fordham Law Review 1987 (1999).

[35]See ABA Resolution 112A Report at 14 (Some jurisdictions have redesigned proceedings to be nonadversarial, and self-help assistance permits a litigant to have a fair hearing without any form of representation before the court. With rare exceptions, this approach will be possible only when the substantive law and procedures are simple; both parties are unrepresented; both parties are individuals; both have the intellectual, English-language, and other skills required to participate effectively; and, instead of the proceedings being adversarial, the judge assumes active responsibility for identifying the applicable legal standards and developing the facts).

Private funding is hoped to be found for the evaluation. If the projects are determined successful after six years, the evaluation results should inform future steps.

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No doubt there is a compelling jurisprudential basis for extending *Gideon* to critical civil cases, and several states have seen notable successes. However, we must also acknowledge that judicial strategies face serious legal hurdles as well as the practical obstacle of asking courts to create new mandates without new financial resources. Legislative strategies must generally be incremental, but, with the political support of the judicial branch and legal aid advocates, legislators may be as amenable as judges, if not more so, to solving the problems that lack of civil representation and the loss of legal rights cause for the courts and the public, especially when basic human needs are at stake. A legislative approach allows legal aid supporters to make common cause with the judicial branch and its political allies to bring additional resources to civil representation.

Authors' Note

We dedicate this article to Jack Daniel, a legal aid lawyer whose compassion, humor, and tireless dedication to the law as a tool of social justice inspired so many. [Editor's Note: A tribute to Jack Daniel will appear in the May–June 2010 Clearinghouse Review.] We owe thanks to many people, especially Mitchell Kamin, Neal Dudovitz, Chris Schneider, and Gary Smith, for their thoughtful contributions to the development of A.B. 590.

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—The Editors

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