

Clearinghouse REVIEW

July–August 2006
Volume 40, Numbers 3–4

Journal of
Poverty Law
and Policy



INSIDE:

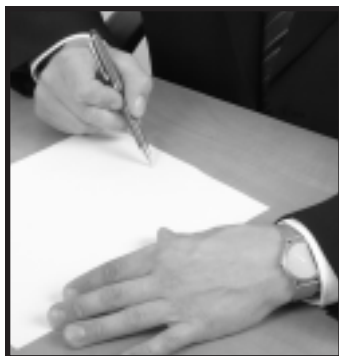
Right to Counsel in Civil Cases
The Scholarship
A Model Statute
Overcoming the Supreme Court's
Lassiter Ruling
Advocacy in
Maryland
Ohio
Washington
Wisconsin
Canada
Disparate Impact of
Lack of Counsel
Judges on Impact of
Unrepresented Litigants
Existing Right-to-Counsel Statutes
The Defender Experience
International Human Rights Law

A RIGHT TO A LAWYER? MOMENTUM GROWS



SHRIVER
CENTER

Sargent Shriver National Center on Poverty Law



The California Model Statute Task Force

By Clare Pastore

Clare Pastore
Senior Counsel

ACLU Foundation
of Southern California
1616 Beverly Blvd.
Los Angeles, CA 90048
213.977.5220
cpastore@aclu-sc.org

California has one of the oldest and most active Access to Justice Commissions in the country. Launched in 1997, the commission was instrumental in establishing an annual \$10 million state appropriation for legal services. It has been a vocal advocate for language access in the courts, has aided in institutionalizing limited-scope legal assistance, has supported expansion of court-based self-help centers, and has assisted in cementing a strong bond among the bench, bar, and legal services community to promote access to justice.

In 2004, the commission authorized the creation of a task force to draft a model statute providing for a right to counsel in civil cases for those too poor to afford private counsel: a civil Gideon. The commission created the task force 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. The task force set out to consider the large and small questions that must be answered if the legislature were ever to enact a civil Gideon. The task force confronted numerous questions. What would be the eligibility criteria for free counsel? Should such a right be limited to certain kinds of cases or certain kinds of litigants? Should there be a merits or significance test so that courts would appoint counsel only if the litigant had a chance (or a likelihood, or a probability, or a significant chance) of prevailing? Should certain kinds of cases be excluded, such as an uncontested divorce without property or children, trivial cases over such things as barking dogs, disputes which have not reached litigation, or clearly frivolous cases? Who would administer the program? How would a new statutory right mesh with the existing legal services structure and the private bar? The last question is a critical one, and, although our working group included considerable legal services experience, we envisioned a process in which we would incorporate more formal and widespread legal services participation and comment before we would suggest any draft bill to legislators.

While many advocates and some judges have long believed that a civil Gideon was necessary, actually writing one was a task full of daunting and complex questions. In this article I discuss some of the major questions we faced and the resolutions we proposed for many of them. I offer this as background for others who may be considering such efforts and as aid to inform the discussion of options in other jurisdictions where advocates may be considering a legislative approach.¹

Membership and Threshold Questions

We began with about ten members, some of whom are on the Access to Justice Commission. The task force, which I cochair, has several legal services veterans—direct service and support center practitioners and an executive director, a trial and an appellate judge, a public defender who had been a civil legal services lawyer, several law professors with legal services backgrounds, an attorney with the Administrative Office of the Courts, a Sacramento staffer from the Judicial Council

¹After September 1, 2006, see our draft model statute's link to the electronic version of this article at www.povertylaw.org/clearinghouse-review or download the draft model statute from the Brennan Center for Justice's website at www.brennancenter.org.

and Senate Office of Research (who had been a family law legal services attorney), and a private attorney who was a longtime Access to Justice Commission stalwart. We invited several out-of-state experts to participate as advisors—attorneys from Northwest Justice Project and Equal Justice Works and a veteran legal services director from Maryland. An invaluable advantage for us is that Justice Earl Johnson Jr. cochairs the task force.²

We compiled a bibliography of background materials (law review articles, statutes granting counsel in certain types of cases, and materials about foreign legal aid systems). Because the United States stands virtually alone in the developed world in failing to provide for a comprehensive right to counsel in civil cases, we looked in some detail at foreign legal aid systems, particularly those of Sweden, England, and Canada (Quebec).³ We culled a few common features:

- Most foreign jurisdictions provide a full subsidy to the poor and sliding scale subsidies for the near poor, lower middle class, and, in some countries, well into the middle class.
- Most have some sort of merits test, denying government funding for frivolous claims or defenses.
- Some have a significance test, allowing counsel only when the client has a right of significance at stake.⁴
- None limits representation to certain types of cases, but all exclude certain categories or types of cases.

We spent some time discussing our goals and concluded that we intended a civil Gideon statute to affect both the outcome of cases and the perception of justice and fairness in the courts and that these goals should inform our draft. A threshold question took root: should a civil Gideon statute take a comprehensive “everything but” approach, guaranteeing counsel for eligible individuals in every dispute, with certain exclusions? In the alternative, should it take a “fundamental interests” approach, limiting the right to counsel to certain presumptively important areas? Those wary of the latter approach reminded us of the danger of echoing language from federal constitutional jurisprudence that has defined fundamental rights in ways that do not correspond with the interests we were seeking to ensure in the model statute.⁵

Subcommittees researched and considered each approach, and afterward the task force decided to follow the path of most jurisdictions and embrace a comprehensive approach, albeit with certain exclusions and qualifications. However, the fundamental interests notion does inform our draft in that, as discussed below, we adopted a presumption that counsel should be available in certain cases: those involving the right to the litigant’s sole housing, maintenance of employment or income, health and other government benefits, custody and parental rights, and protection from domestic violence.

Scope of the Right

Next we considered a set of questions regarding the scope of the right we would

²Justice Earl Johnson Jr. has been one of the nation’s most committed advocates for the rights of indigent litigants. E.g., Earl Johnson, Jr., *Will Gideon’s Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 201 (2003); *id.*, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INTERNATIONAL LAW JOURNAL 583 (2000); *id.*, *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MARYLAND JOURNAL OF CONTEMPORARY LEGAL ISSUES 199 (1994); *id.*, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOYOLA OF LOS ANGELES LAW REVIEW 249 (1978).

³We used the original versions of these foreign statutes rather than the current ones because we were more interested in the original conception of the right in foreign jurisdictions than in later amendments driven by budgetary or other exigencies. See generally MAURO CAPPELLETTI ET AL., *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (1975) (containing the texts of Sweden’s Public Legal Aid Law of May 26, 1972, SFS 1972:429; England’s Legal Aid Act, ch. 4 (1974); and Quebec’s Chapter 14, Legal Aid Act (1972)).

⁴The English statute, e.g., essentially combines the merits and significance tests into one, asking whether a person of modest but adequate income would employ a lawyer to mount this defense or assert this claim. E.J.T. MATTHEWS & A.D.M. OULTON, *LEGAL AID AND ADVICE* 124, 127 (1971), cited in *id.* at 185 n.105.

⁵See, e.g., *Lindsey v. Normet*, 405 U.S. 56 (1972) (Clearinghouse No. 2802) (holding that housing is not a “fundamental right” under the U.S. Constitution).

propose. Should the model statute cover legal needs other than litigation, such as representation in administrative forums, nonlawyer assistance, advice and counsel, or self-help assistance? We decided in the affirmative on each. Thus we drafted our model statute not as a right to counsel *per se* but as an equal justice act. It provides for a range of services: full legal representation by licensed attorneys encompassing all the tasks involved in litigation; limited legal representation by licensed legal professionals (who may be attorneys or paralegals); individualized legal advice not involving the production of documents or contacts with third parties; legal assistance in the preparation of documents for undisputed matters or prelitigation activities in disputes that may or may not ever come to litigation (such as preparing correspondence or contacting adverse parties); nonlawyer representation by trained nonlawyers in administrative tribunals; and self-help assistance to those representing themselves in courts or other forums. In particular, we did not wish to infringe upon the highly successful model of nonattorney representation, typically by legal services paralegals and advocates, found in many administrative forums.

Merits and Significance Tests

We discussed at length whether the right to assistance should differ or be limited according to whether the indigent is a defendant or plaintiff and whether and how the merits or significance of the dispute should affect the right to assistance. We agreed that both merits and significance tests were important but found drafting them to be difficult. A particularly thorny issue was whether to provide publicly funded services where the indigent has a weak legal claim but could benefit (perhaps in settlement) from assistance or representation. The recurring example was an unlawful detainer case where the tenant has no viable legal

defense but could work out more favorable settlement terms if the tenant were represented. In the end, our draft embraces a concept from the English system, making assistance available to a plaintiff only if a reasonable person in the plaintiff's position, with the financial means to employ counsel, would be likely to pursue the matter in light of the costs and potential benefits.⁶ The standard we embraced for defendants is somewhat broader, on the theory that defendants do not choose to initiate the proceeding, and allowing them to risk defeat from a better-funded party merely because the costs might outweigh the benefits is fundamentally unfair. Therefore our draft specifies that defendants are eligible for services if they have a reasonable possibility of achieving a favorable outcome.⁷

Exclusions

We all agreed that certain less significant kinds of disputes and proceedings (suits against neighbors over hedge height or barking dogs, litigation over school valedictorian status, and the like) should not be publicly funded. In our draft, we spell out exclusions for libel, slander, defamation, name change, and uncontested marriage dissolutions not involving children, property, or support and leave it to the administrative body overseeing the new system to add categories that it determines are so nonessential that they do not warrant public legal services or that are uncontested and so simple that public legal services are unnecessary to have fair and equal access to justice.

We also wanted to be certain to preclude public funding for cases in which legal assistance is already available at low or no cost and so excluded matters where legal services are available through a contingent fee arrangement, insurance policy, or other avenue. After much discussion, we did not adopt a proposal to restrict eligibil-

⁶As noted above, this section includes a presumption that reasonable persons would be likely to pursue matters involving their sole housing, employment, income maintenance, health and other government benefits, custody and parental rights to children, and protection from domestic violence. Our draft specifies that the list is not exhaustive.

⁷Likewise, we adopted a more liberal standard for appellees than appellants, with services provided to appellants only if there is a reasonable probability of success on appeal. Respondents or appellees are eligible unless there is no reasonable possibility that the appellate court will affirm the decision under review. Once again, this is intended to limit services for those initiating the legal process to cases with some merit and to protect the party who did not initially choose to participate.

ity where the costs of representation or assistance might exceed the value of the matter at stake; we recognized this to be often the case in disputes involving low-income people. However, the cost-versus-benefit notion is encompassed to a degree in the requirement that the matter be one for which a reasonable person in the plaintiff's situation with the means to employ counsel would hire a lawyer.

We discussed at length whether uncontested matters or matters where neither side was represented should qualify for counsel and concluded in the affirmative on each, or at least that they should not be categorically excluded. However, we recognized the cost implications of potentially providing publicly funded legal services to both sides.

Financial Eligibility

Financial eligibility criteria are among the least detailed parts of our draft. We agreed that publicly funded assistance should be available to those in poverty, the near-poor, and the working poor and that services should reach well up into the middle class with a sliding scale or copayment system. However, rather than specify the precise income eligibility and copayment levels, we left it to the administrative body to do so by regulation, indexing for inflation. We did specify a set of factors (income, assets, family size, and others) for the administrative authority to take into account and precluded the consideration of income or resources of persons not financially responsible for those seeking assistance.

Administration and Eligibility Determination

We envision a new administrative agency, called the State Equal Justice Authority, which would oversee the provision of legal services under the statute. The agency would proceed by regulation under the state Administrative Procedures Act, which requires public hearings and a public notice process before regulations go into effect. The agency has the power to delegate authority to certain organizations (non-profit legal aid organizations, self-help centers in the courts, judges, or offices that the agency may establish) and to determine

eligibility, but no judge handling a case may participate in the determining eligibility for that client. We set forth criteria for appointments to the agency, with the state bar, governor, chief justice, legislature, and attorney general all appointing members of the agency.

Service Delivery System

We embraced a mixed system of service delivery, which would include both non-profit providers, such as existing legal services programs, and compensated private attorneys. We initially allocate certain kinds of cases, such as those involving certain government benefits, evictions, protection from domestic abuse, and child dependency to staffed attorney programs. We authorize the State Equal Justice Authority to consider allocating additional categories of cases for which a private market does not exist, such as employment or consumer cases, to the staffed attorney programs, and we provide for cases to be handled outside of the staffed attorney model in the event of conflict of interest or exceptional cases. Likewise, we allocate certain types of cases primarily to private attorneys: tort, contract, property disputes, and certain other cases. In each instance, the State Equal Justice Authority may alter the categories or experiment with new ones by regulation.

Finally, we specify that we do not intend the State Equal Justice Authority to replace or supplant existing legal services programs but rather to supplement their services.



The exercise of drafting the model statute proved both difficult and valuable. Although other advocates or members of the "access to justice" community may differ with some of the tentative conclusions we reached, each of the questions we confronted must be answered if we are ever to achieve a true comprehensive right to counsel in civil cases. Much work remains to be done, particularly on the critical question of how a statutory right to counsel would mesh with the existing legal services structure. We hope our process is a useful step in this journey, and we welcome discussion with those involved in similar efforts in other states.