

COMMENTARY

MIND THE GAP

Taking Steps to Bridge the Gap in Access to Civil Legal Services

Thomas G. Wilkinson Jr.



Every year millions of Americans attempt to navigate the legal system without the assistance of a lawyer. For a growing number of citizens, private counsel is unaffordable, free legal services are unavailable and they are forced to represent themselves in civil cases. In fact, each year less than 20 percent of low-income individuals with civil legal problems obtain legal assistance. Yet these legal issues involve the most basic rights that lawyers are sworn to protect, including cases involving but not limited to housing, health care, child custody and protection from abuse.

Though roughly 45 million Americans have incomes low enough to qualify for federally funded legal aid, representation is hard to find, resulting in an ever-widening “civil justice gap.” Nationally, our courts are facing a crisis of access. Reports published in 2005 and 2009 by the Legal Services Corp. (LSC), the nation’s largest federally funded source of civil legal representation, found that nearly one million cases per year are rejected because LSC-funded programs lack sufficient resources. For every person served by an LSC-funded program, another who is eligible and asks for help is turned away. And this does not include the many who do not reach a LSC-funded program for help.

This civil justice gap continues to expand against the backdrop of the worst economic downturn since the Great Depression. According to *The New York Times*, The Legal Aid Society, one of the largest providers of free legal services, turns away eight out of nine persons seeking civil legal aid. A *Times* writer characterized the situation as the “triple whammy,” because “more people are struggling financially; more people need legal services to cope with foreclosures, evictions and credit and

employment problems that could push them into long-term poverty; and state and federal financing for legal services has plunged.” According to the LSC, only one legal aid attorney is available for every 6,415 low-income persons.

This lack of representation has major implications. Many find the barrier to the legal playing field simply too high due to financial constraints and the inability to understand the system. Those who do represent themselves face an uphill battle and little chance of success. Anecdotal evidence suggests that unrepresented individuals are falling “prey to an adversarial system that they are not equipped to navigate,” often accepting settlements or waiving rights they don’t understand. And pro se litigants are not the only ones suffering from the civil justice gap. Cases involving them often progress more slowly, adding delays to overburdened court dockets at significant financial cost.

The legal community is grappling with how to address this growing crisis. Many have begun to advocate for some form of “civil *Gideon*” mandating that indigent civil litigants be entitled to legal counsel funded by the government, like indigent defendants in criminal matters, except that the right would only apply in civil cases involving basic human needs. In fact, in 2006 the American Bar Association (ABA) House of Delegates unanimously passed a resolution urging the states “to provide legal counsel as a matter of right at public expense where basic human needs are at stake, such as ... shelter, sustenance, safety, health or child custody.” A number of states have since taken steps to implement a state-funded civil right to counsel in cases involving basic human needs and various concerned constituencies within the ABA have produced a Model Access Act to assist legislators in enacting a statutory right to counsel or implementing pilot projects to provide counsel in a limited range of cases. The PBA passed a similar resolution in November 2007.

There can be no question that support for pro bono service from the state’s highest court can spur participation. Earlier this year Chief Justice of Pennsylvania Ronald D. Castille wrote a letter to the nearly 70,000 attorneys registered in Pennsylvania. Acknowledging the crisis in access to justice, he urged every lawyer to provide pro bono assistance and to contribute financially to legal aid programs.

In a watershed development, New York’s highest court has turned to the new generation of attorneys and asked law students to help address the civil justice gap. Chief Judge Jonathan Lippman has spearheaded a program requiring aspiring lawyers to perform 50 hours of law-related pro bono service as a condition of admission to the bar.

The New York template is the result of a massive task force report on the state of the legal system there. Terming the current situation “a crisis in the delivery of justice,” Lippman noted that cases with pro se litigants require that courts expend significant time explaining the proceedings and procedures, slowing down overburdened jurisdictions and placing judges in a very challenging position in attempting to ensure that all issues are fairly explained. “Unrepresented litigants present an ethical dilemma for judges,” said Lippman. “While the judge must take time to explain the law and its applicability in the case, there is a fine line that a judge must walk to try and be fair and neutral to both sides and not give the appearance of favoring the unrepresented litigant.”

The nearly 10,000 lawyers who apply to the New York state bar each year will soon be required to demonstrate that they have performed 50 hours of pro bono work. This requirement is effective immediately for law students now in their first or second year of law school, and it will apply to every applicant for admission to the New York bar on Jan. 1, 2015. Rather than a Band-Aid approach, Lippman’s



Chief Justice Castille testifies at the state Senate Judiciary Committee hearing in Philadelphia, May 23



Samuel W. Milkes, executive director of the Pennsylvania Legal Aid Network, testifies at the May 7 hearing

objective is to make pro bono service an integral part of every attorney's legal practice. "I want to get into their DNA the idea that if you want to be a lawyer you have to embrace the core values of the profession. More than anything else, that means service to others."

Due in large part to the groundbreaking changes in New York, a New Jersey Supreme Court task force has issued recommendations calling for a preadmission pro bono requirement for New Jersey bar applicants. These developments, along with a parallel effort by the California state bar, led the Conference of Chief Justices recently to adopt a "Resolution in Support of Encouraging Pro Bono Service in Law Schools."

The New Jersey courts' Working Group on the Proposed Preadmission Pro Bono Requirement ultimately recommended that the state bar require applicants to complete 50 hours of pro bono work prior to admission. They predicted the program would meet a number of objectives, with serving low-income residents deemed the highest priority. The working group also hoped to provide law students with hands-on courtroom training and positive pro bono experiences to encourage ongoing service while helping to ensure that the courts' adversarial system operates as envisioned.

Urging every lawyer to render at least 50 hours of pro bono service to the indigent per year is not new. ABA Model Rule of Professional Conduct 6.1 has for two decades provided that lawyers should devote a substantial majority of the 50 hours of legal service "without fee or expectation of a fee" to "persons of limited means" or through nonprofit organizations in matters designed primarily to address the needs of the poor. While there is mandatory pro bono reporting in various states, the frequently expressed objection to it is that it will lead to adoption of a mandatory pro bono rule. The argument is that pro bono legal service and the form it takes should be left to the individual lawyer and not mandated upon pain of discipline, especially when new lawyers are struggling to find jobs and practicing lawyers face increased competition in a down market. In May 2007, the PBA unanimously adopted a resolution encouraging pro bono service and referencing for guidance the ABA's aspirational 50-hour rule, but the PBA did not endorse that guideline.

While all Pennsylvania attorneys contribute to legal service programs through their annual registration fee, there is no doubt that more lawyers and would-be lawyers performing pro bono service can help narrow the justice gap. But it is not the solution in and of itself. Pro bono programs require the infrastructure,



training and guidance of legal aid providers. Many pro bono lawyers do not have the expertise to handle the range of problems presented by legal aid clients in areas such as public assistance, disability, landlord-tenant and child custody law.

In Pennsylvania the effects of the civil justice gap are pervasive. A PBA survey of Pennsylvania legal service providers found that only 20 percent of those in need receive full representation from legal services providers. Nearly 1.9 million Pennsylvanians qualify for legal aid, yet nearly 80 percent of those legal needs go unmet. The Pennsylvania Legal Aid Network (PLAN) reports that until recently there were roughly 240 legal aid attorneys working in PLAN programs, responsible for handling more than 100,000 cases annually. For the last fiscal year, the case count has dropped to an unprecedented 85,000 cases and staffing is down by about 12 attorneys.

More recently the state Senate Judiciary Committee, under the leadership of Sen. Stewart J. Greenleaf, has begun public hearings focusing on civil legal services and the justice gap. According to Greenleaf, the mission of these hearings is to “explore and create awareness of the current state and scope of the unmet need for civil legal services by low-income Pennsylvanians confronting legal problems involving basic human needs.”

The hearings were spurred by the concerted efforts of a recently formed statewide Civil Legal Justice Coalition, which includes members of the legal aid community and representatives of the PBA and the Philadelphia and Allegheny County bar associations.

The hearing record is extensive, including testimony by lawmakers, bar leaders, judges and representatives of the state’s various legal aid programs. Testimony was also taken from those who benefited from legal services. The testimony paints a stark picture of the overwhelming need for more funding and more resources. The low-income individuals who testified spoke of living in deplorable conditions with no recourse. For example, one Philadelphia family was forced to live without a toilet for a month because their landlord refused to fix it and the family could not afford a lawyer. A disabled Army veteran spoke about his inability to get assistance until he received help from an attorney at Community Legal Services in Philadelphia. Another man involved in a custody dispute said he would never have been able to see his daughter had it not been for the help of MidPenn Legal Services.

Judges testified that unrepresented litigants mire the courts in delay and place judges in untenable situations. Monroe County President Judge Margherita Patti Worthington explained that pro se litigants often make it virtually impossible for judges to appear impartial: “A litigant with a lawyer starts to wonder why am I paying for a lawyer when it appears that the judge is bending over backwards to accommodate the other side, who is not represented.” Senior Judge Chester Harhut of Lackawanna County, who also serves as the president of the PLAN Board, testified that self-represented parties find themselves at a distinct disadvantage, with their cases often not settling due to lack of lawyer involvement and the associated delays bogging down the entire system.

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Wilkinson testifies before the Senate committee at the Capitol on May 7

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it was when the commonwealth first started to support legal services. LSC and local legal aid agency funding has been cut by double-digit percentages over the last several years as a result of the economic downturn. Not surprisingly, the downturn has shunted more people into the civil courts as a result of foreclosures, evictions, bankruptcy and other legal problems tied to the recession. And more Pennsylvanians have been rendered eligible for services due to loss of employment. As middle-class families have become legal-aid eligible, legal aid agencies have been forced to make budget-related cuts in staff and services or to close their doors entirely.

Castille, in his testimony before the Greenleaf committee, underscored the need to consider civil *Gideon* to help close the justice gap. "As a commonwealth, we should be treating civil legal services for indigent individuals and families as an important government service," he said, supported by a dedicated line item in annual budgets, "like roads and police service and courts."

Castille is not alone in urging Pennsylvania lawyers to do more in an effort to stem this crisis. A recent president's "Side Bar" column in *The Pennsylvania Lawyer* magazine urged every PBA member to take on at least one pro bono case. The column highlighted the fundamental importance of equal access to justice, quoting late U.S. Supreme Court Justice Lewis F. Powell Jr., who said, "Equal justice under law is not merely a caption on the façade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. ... It is fundamental that justice should be the same, in substance and availability, without regard to economic status."

It appears that the groundswell of concern and support for closing the civil justice gap in Pennsylvania has not fallen on deaf ears. This June the state House Judiciary Committee unanimously passed a resolution urging the state Supreme Court to require pro bono service as a condition of admission to the bar.

The effort to engage more attorneys in pro bono is not without its critics. Some say that a pro bono requirement for bar admission would impose a burden on law students who are already pressed for time and have substantial debt burdens. Some law school deans have said that mandating pro bono service as a precondition to bar admission could serve to further increase law school tuition, as boosting clinical programs and externships will require significant financial resources. And some practicing lawyers warn that a pro bono requirement for new bar admittees may lead to a pro bono requirement for continued bar membership.

America is in the midst of a deepening civil access-to-justice crisis. The pernicious effects of this justice gap have been studied and discussed at the local, state and national levels, with no fewer than 28 states convening access-to-justice commissions. Even with greater pro bono participation from members of the bar and increased volunteer time from law students, there is no revenue stream in sight sufficient to serve as the foundation for a statewide civil *Gideon* program designed to address only the most serious cases. The conundrum remains: Where will the requisite funding come from when state and county budgets are strapped and the budgets of other social service programs are slashed?

The ongoing state Senate hearings serve to highlight the scope of the problem as well as the life-changing benefits to those fortunate enough to gain access to counsel in crisis situations. Pennsylvania has not yet achieved the goal of equal access to civil justice. Indeed, there are insufficient legal resources available to address even "basic human needs."

None of the forward-thinking measures adopted in New York with the strong and visible leadership of the judiciary would, if implemented here, serve to close the civil justice gap in Pennsylvania. That noted, the New York template shows an aggressive, multifaceted approach that involves the entire legal community to generate more self-help programs for the

unrepresented and more pro bono programs from law schools, bar associations, law firms and the courts. Public funding for legal services is also an indispensable component, but volunteerism at all levels of the legal profession is the keystone to meaningful progress.

The ideal of a broad-based civil *Gideon* right for low-income persons facing adversarial proceedings involving basic human needs remains a daunting challenge on multiple fronts. The hard work of Pennsylvania's Civil Legal Justice Coalition has served to highlight the serious lack of adequate legal services. Only time will tell whether the state Supreme Court, the Legislature, the organized bar, law schools and others will fully recognize the extent of the civil justice gap and come together with the shared objective of closing it. ♦

Editor's note: The full text of this article, including footnotes with links to cited material, is available for members-only access on the PBA website at www.pabar.org/members/lawyerhome.asp (member login required).



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This commentary is not an official position or policy of the PBA.

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Update from the Pennsylvania Board of Law Examiners on 50-hour Pro Bono Requirement as a Condition for Licensure

The chair of the Pennsylvania Board of Law Examiners (PBLE) has informed the Pennsylvania Bar Association that his organization is not “inclined to support or otherwise propose” a provision similar to the New York Court of Appeals’ adoption of a 50-hour pro bono requirement as a condition of licensure to practice law. Applicants who successfully pass the bar exam in New York must demonstrate that they have performed 50 hours of qualifying pro bono service before applying for admission to practice. The pro bono requirement does not apply to attorneys who seek admission on motion.

In an Aug. 20, 2013, letter to PBA President Forest N. Myers, PBLE Chair Stuart W. Davidson expressed concern about inequities in access to the judicial system but also questioned whether requiring law students to fill the void is appropriate.

In his letter Davidson said the PBLE discussed the issue at its June 2013 meeting and had concerns about mandatory pro bono as a condition for licensure. “In addition to the New York rule, the [PBLE] studied the Report of the Working Group on the Proposed Preadmission Pro Bono Requirement recently submitted to the New Jersey Supreme Court,” wrote Davidson. “The Working Group proposed that the rule be reevaluated after two years. This wise insertion of a mandatory review of purpose cuts at the core of the issue, whether such a rule or program really increases access to justice for the underserved.”

Davidson indicated that some PBLE members saw it as “advisable to wait to see the results of the

implementation of the New York, and likely New Jersey, rule,” and “other board members believe that some law schools already require pro bono service hours, and others involve a significant number of their students in field placements in legal services offices, judges’ chambers and government agencies.”

Davidson said it is also “notable that the American Bar Association committee charged with reviewing law school accreditation standards voted in July 2013 to require law students to complete at least six credit hours of experiential coursework, which includes clinics, externships or simulation courses.” He said this represented an increase from the current one credit-hour requirement. “Since most clinics and externships are in the same offices that qualify for the pro bono work contemplated by the New York and New Jersey rules, such a change by the ABA will serve to make the licensure requirements a verification process rather than a catalyst for change,” he wrote.

In conclusion, Davidson said that in terms of increasing access to justice, the PBLE “proposes further consideration of the issue of the obligation of licensed lawyers to engage in pro bono work.” Davidson indicated that the PBLE is “aware of the hearings held to examine the state of the civil justice gap in Pennsylvania. We are also aware of the fact that many county bar associations have effective ‘mandatory’ pro bono programs through which members must serve or financially contribute to service. We support these efforts and the ongoing discussions to address how to provide adequate access to justice.” ♦