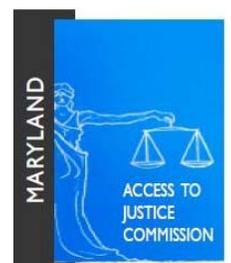


Implementing a Civil Right to Counsel in Maryland

**MARYLAND ACCESS TO JUSTICE COMMISSION
2011**

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Letter from the Chair



In its 2009 *Interim Report*, the Maryland Access to Justice Commission recommended Maryland support the principle that low-income Marylanders should have the right to counsel at public expense in basic human needs cases.

Over the past year the Commission has explored the one question that has hampered consideration of this important initiative – how might a civil right to counsel be implemented in our State? The Commission explored a range of implementation variables – issues that would need to be resolved if a program or entity were created to provide counsel for the many individuals who would be entitled to assistance should a civil right to counsel ever be established by legislation or case law.

The Commission also asked the unthinkable question – what might it cost to provide meaningful access to counsel should the right be established?

The enclosed document contains two parts. The first provides a substantive description of how a right might be implemented. The second provides a fiscal narrative, an effort to approximate a fiscal note for a civil right to counsel in Maryland.

The Commission is publishing this document in an effort to advance the statewide conversation about a civil right to counsel, as one vehicle through which we might achieve the Commission's goal of equal access to justice for all.

Sincerely,

A handwritten signature in black ink that reads "Irma S. Raker".

Irma S. Raker
Maryland Court of Appeals (ret.)
Chair, Maryland Access to Justice Commission

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Recommended Implementation Strategies for a Civil Right to Counsel in Maryland[†]

1. THE SCOPE OF THE RIGHT

1.1. Scope of Case Type to Which the Right Attaches

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

Comment 1.1(a). The promise of justice cannot be realized until all have a meaningful opportunity to participate in the legal system, in a way that ensures they understand and are guided through its many complexities. Limiting the right to counsel to basic human needs cases strikes a balance between resource constraints and the goal of improved well-being for all Marylanders.

Comment 1.1(b). Determining where there is a need for counsel in child access cases, whether contested or uncontested, would be the responsibility of the provider. Issues of custody, visitation and other solutions along the spectrum of parent-child involvement are not easily separated. As long as the provider determines the level of assistance required to meet the individual's needs, it is unlikely intensive legal assistance will be provided for truly uncontested matters where a litigant might proceed effectively self-represented, perhaps with limited support. Parties may secure counsel during the pendency of the matter, changing the balance of power in the case, or matters that begin uncontested may devolve into a contested posture unexpectedly. As these matters are of sufficient gravity and importance to warrant the right to counsel, that right should attach by virtue of case type, and regardless of case posture.

Comment 1.1(c). All parties to a dispute should have a right to counsel, as long as the case fits the criteria that triggers the right. Maryland should not establish a state-created right without providing the benefit to both sides in a dispute.

Comment 1.1(d). The ABA Basic Principles of a Right to Counsel in Civil Legal Matters (2nd Working Draft, 10 March 2010), define the categories as follows:

- “Shelter” includes a person’s or family’s access to or ability to remain in a dwelling, and the habitability of that dwelling.
- “Sustenance” includes a person’s or family’s ability to preserve and maintain assets, income, or financial support, whether derived from employment, court ordered payments based on support obligations, government assistance including monetary payments or “in-kind” benefits (e.g., food stamps), or from other sources.

[†] This document is the work of the Maryland Access to Justice Commission only. It does not represent the policy of the Maryland Judiciary.

- “Safety” includes a person’s ability to obtain legal remedies affording protection from the threat of serious bodily injury or harm, including proceedings to obtain or enforce protection orders because of alleged actual or threatened violence, and other proceedings to address threats to physical well-being.
- “Health” includes access to health care for treatment of significant health problems, whether the health care at issue would be financed by government programs (e.g., Medicare, Medicaid, VA, etc.), financed through private insurance, provided as an employee benefit, or otherwise.
- “Child custody” embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.

1.2. Narrow or Broad Subject Matter Criteria

Case type alone should determine subject matter eligibility.

Comment 1.2(a). A broader, simpler definition of case type is preferable to more complex, constraints often used in legal services programs to determine eligibility. Such additional criteria (e.g., mental disability, one-side represented, etc.) require more administrative oversight and necessitate the exercise of more discretion on the part of providers.

1.3. Narrow or Broad Case Posture Criteria

The right to counsel should attach when an individual is evaluating a legal problem or contemplating court action, although that right would be tempered by the screening decision of the provider or administering agency. An otherwise eligible person would consult with the provider to determine what, if any, legal services they needed and to which they would thus be entitled. The individual could appeal that decision to the administrative agency.

Comment 1.3(a). Civil matters must be distinguished from criminal matters in this regard. In criminal matters the right attaches once an individual has been identified as a suspect and the individual is the subject of State action. In civil matters, the individual herself may initiate the action. To fairly determine whether she has an actionable cause, the individual in a civil matter needs access to counsel before the commencement of court action.

Comment 1.3(b). When the right attaches can be seen on a continuum from the moment an individual recognizes they may have a legal problem, to the post-judgment and appeal phase. The closer you posit the attachment of the right to the beginning of that continuum – towards the “consultation” end – the more you increase the period of time for which the system is providing counsel, and the potential costs increase. On the other hand, providing access to counsel early on may help individuals with legal problems avert unnecessary litigation, avoid noncompliance with the law, and reduce the overall social costs of civil conflict.

1.4. Differentiated or Undifferentiated Forms of Legal Service

The level of service should be undifferentiated. The provider should be able to exercise discretion, based solely on the client's needs, the merits of the action, and ethical considerations.

Comment 1.4(a). Once the right attaches it should be up to the provider, as an attorney, to evaluate the client's needs and determine the most appropriate level of service. Some model acts envision a system where individuals with different needs are entitled to different levels of service. In such a system, the administering agency would then be determining what is best for the client. We feel that is something that is more appropriately done by the attorney directly.

Comment 1.4(b). Individuals concerned with the type or quality of representation afforded them would have available to them the normal grievance procedures.

1.5. Timeliness of Appointments

The court will normally not play a role in appointing counsel. The system will be client and provider driven. Clients entitled to counsel will request assistance directly from the provider. For plaintiffs, because the subcommittee recommends that the right would attach when the individual may need to file a petition of some kind in an adversarial matter in a basic human needs case, they could seek assistance prior to filing. Respondents should have a right to have counsel in sufficient time to ensure the assistance can be effective. It is incumbent upon all litigants to seek assistance in time to assure counsel can provide effective assistance without creating unnecessary delay.

Comment 1.5(a). This recommendation follows from the determination that the right should attach when an individual recognizes they may have a legal problem. (See 1.3, above).

1.6. Advice of Rights

There should be a meaningful public education campaign to provide general notice of the right, should one be created. A notice should be provided to all respondents when the pleadings are served. This might be an automated notice included with the summons. All parties filing initial court documents, who do not enter an attorney's appearance, should likewise receive an automated notice from the court advising them of the right. It would be a best practice for courts to likewise advise self-represented litigants that they may have a right to be represented.

Comment 1.6(a). Notice of a right is as essential to the efficacy of the right as the establishment of the right itself.

1.7. Merits Testing

The right should attach to all matters of particular case types without a lot of additional administrative overlay. It should be at the discretion of the provider to determine the level of legal service necessary to assist the client effectively, which may include a determination of merit, much as any attorney would do.

1.8. Rights on Appeal

Appellees should have a right to counsel in an appeal. An appellant should have a right if the appeal has merit in the eyes of the provider.

Comment 1.8(a). This should include a simple merits test, similar to that articulated for appellants in the California Basic Access Act. That act provides that eligible appellants or petitioners should have a right to full legal representation only if there is a reasonable probability of success on appeal. Financially eligible respondents or real-parties-in-interest, however, should, except in extraordinary circumstances, have full legal representation unless there is no reasonable possibility the appellate court will affirm the decision of the trial court or other forum.

2. ADMINISTRATION

2.1. Service Delivery

Maryland has a rich and diverse provider community. A civil right to counsel should be implemented to take advantage of the existing delivery community. The Commission envisions a mixed delivery model through which the administering entity would provide grants to a range of providers selected through a competitive grant application process.

Comment 2.1(a). The system established should build on and supplement, without replacing, the existing discretionary civil legal services system.

2.2. Independent Program Administration

The right should be administered by a quasi-governmental independent non-profit agency that makes grants to non-profit legal service providers.

The way the entity is setup is going to have an effect on its ability to effectively manage the program. Lessons from the national experience in administering the criminal right to counsel suggest that the entity needs to be independent. The program needs to be managed independently in two ways. It needs to be independent from political influence, and the administering of the right and the assignment of counsel needs to be independent from the judges hearing the cases, and from any agencies that

might have a conflict of interest. For this reason, the administering agency must not be housed in the Executive.

The administering entity should be fully funded with stable, general fund appropriations, but it should not be precluded from seeking other sources of funding as well. Diversity of funding can provide the program with flexibility during difficult times.

Comment 2.2(a). The Maryland Legal Services Corporation, MLSC, which administers the existing discretionary civil legal services system on behalf of the State, is an example of the type of administering agency envisioned. The Commission anticipates that a civil right to counsel could be administered by an existing entity, like MLSC, or a new entity. However it is administered, care should be taken to ensure that the funding and services directed to support a civil right to counsel do not subsume or replace the current discretionary delivery system.

Comment 2.2 (b). In crafting a government structure for the administering agency, the State should learn from the successful history of the 9-member MLSC Board and avoid structural issues like those that affected the Office of the Public Defender until its governing board was recently reconfigured.

2.3 Appealing the Provision of the Right

Individuals who disagreed with certain decisions made by the provider should be entitled to an administrative appeal. Appeals could be on determinations of:

- Financial eligibility
- Case type
- Whether to provide counsel on appeal

The quality of representation, and judgments made by the individual lawyer in representing the client would *not* be subject to administrative appeal as these would be covered by the normal grievance procedures.

Comment 2.3(a). Although, in general, the performance of attorneys is already covered by the ethical rules and grievance process, individuals may need recourse to appeal the decision made by the providing entity as to whether they were allowed to exercise their right to counsel.

2.4 Financial Issues

2.4.1. Funding

The implementation of a civil right to counsel should be at public expense, from State general funds. This follows the model of the Office of the Public Defender and funding for the Maryland Legal Services Program (MLSP), both of which were created to provide counsel where clients have

a right to be represented, and where, in both instances, funding is provided from State general funds. The State has established a precedent by grounding right-based representation programs on the most stable funding source available.

Comment 2.4.1(a). The implementation of a right to counsel should not result in the diversion of existing funding away from the current civil legal services delivery system, nor should it eliminate the discretionary legal services currently provided by that system.

Comment 2.4.2(b). The source of funds identified for programs implementing a civil right to counsel should reflect the significance and centrality of the right in a just and civil society. Funding should be provided from State general funds, the most stable and reliable source available, to ensure the right is not compromised in the future by changes in interest rates, special fund revenues, or State or federal grant funding priorities.

2.4.2. Compensation Rates for Counsel

As a mixed delivery model is envisioned, compensation rates for attorneys will vary. Where representation is provided by staff attorneys, salary rates should be comparable to salaries paid to attorneys employed by the Office of the Public Defender. When the service is to be provided by private attorneys on a contractual basis, those contracts should be competitively bid. Administrative costs should be provided in addition to sufficient funding for attorney salaries. Ultimately compensation rates will be determined by the administering agency.

2.4.3. Income-Eligibility Criteria - Uniformity

In administering the right, the State should use a uniform income-eligibility requirement for ease of administration and to support the appearance of fairness.

Comment 2.4.3(a). Despite regional economic differences, Maryland has a long history of applying statewide uniform income-eligibility criteria. MLSC, LAB and the OPD all use a uniform criteria. By adopting uniform criteria, the State can more easily predict and control the costs of program implementation.

2.4.4. Income-Eligibility Criteria – Level

A program to implement a civil right to counsel should be limited to low-income individuals who meet MLSC income guidelines.

Comment 2.4.4(a). While it might be optimal, it would be fiscally difficult to extend a State-funded right to counsel to moderate income Marylanders, but even a low-income standard can educate the public that there is a right to counsel.

2.4.5. Financial Contribution of the Parties

A program administering a civil right to counsel may charge an appropriate one-time registration fee to be determined based on case type, with a waiver for clients receiving public assistance.

Comment 2.4.5 (a). Current experience with the Judicare program suggests that in some case types, a one-time fee appears to have benefits for program administration. Clients are more likely to follow through with the case and the program operates more efficiently.

2.5 Quality Assurance

2.5.1 Caseload

The entity administering the civil right to counsel program should negotiate caseload standards with prospective providers, especially those that operate staff programs.

Comment 2.5.1(a). Caseload standards are easier to monitor in a staffed or contractual practice model, than if private or *pro bono* attorneys accept occasional cases to handle along with their regular workload. If the private bar is involved in the provision of the right, it may be best to allow the ethical rules and grievance process to function to ensure caseload does not compromise quality.

2.5.2. Quality Assurance Standards

In implementing a civil right to counsel, the State should develop and support quality assurance standards to ensure that programs implementing the right can support their practitioners in meeting their professional standards. We are presuming a level of competence and professionalism among the attorneys, but the program has to be structured, funded and staffed in such a way as to support practice at that level. Quality assurance standards can help support programs in advocating for funding by underscoring the impact funding shortfalls have on program performance. In all likelihood, these standards would be fairly generic to cover all practice areas. Standards may include provisions that address supervision, access to supervision, malpractice avoidance systems, among others.

Comment 2.5.2(a). Experience over the last several decades has shown that bar enforcement and ineffective assistance litigation has not been adequate to police the quality of work of the indigent defense bar. A lack of funding can too often be reflected in a decrease in the quality of representation. Having a quality assurance standard would help balance the inevitable pressure to increase caseloads and do more with less in publicly funded programs.

FISCAL NARRATIVE: Approximating a Fiscal Note for a Civil Right to Counsel

Step One: How many cases are we talking about?

- “Basic human needs cases” would presumably include: landlord-tenant matters, domestic violence cases, divorce and family matters involving child access issues, and a broad range of administrative hearings including those involving medical assistance, health insurance for children, child support, and income maintenance. The following data is from annual reports for the Judiciary and the Office of Administrative Hearings. This is an effort to estimate the number of persons currently appearing without counsel.

Case Type	No. Filed / Yr.	Percent SRLs	Subtotal	Percent Likely Eligible*	Total
Landlord-Tenant	633,425	95	601,753	48	288,841
Domestic Violence	29091	70 x 1 40 x 1	20,363 11,636	48	9,774 5,585
Divorce or Other	42,179	70 x 1 40 x 1	29,525 16,871	67	19,781 11,303
Domestic with Child Access Issues [from WLC Study estimates]					
OAH: Medical Assistance	4495	95	4,270	100	4,270
OAH: CHIP	389	95	369	100	369
OAH: Child support	96	95	91	100	91
OAH: Income Maintenance	4,691	95	4,456	100	4,456
Total			689,334		344,470

* The percentage of SRLs who are likely eligible for legal services from MLSC-grant funded providers is based on demographic data collected by the District Court Self-Help Center (DCSHC) and the Family Law Self-Help Centers (FLSHC) operated by the Maryland courts. Approximately 48% of DCSHC users report household incomes under \$30,000 per year (Dec 2009 – Oct 2010). Approximately 67% of FLSHC users report household incomes under \$30,000 per year (FY07).

- The figures in this table represent an estimate of the *unmet* legal needs of income-eligible Marylanders – those who currently proceed without the benefit of counsel. This fiscal estimate is an effort to identify the *additional* funds required to enhance, and not replace, the existing voluntary legal services delivery system. These costs would need to be added to the amount already expended to provide the existing level of legal services. It should also be noted that there is little data available on the income status of most court users, and it is therefore difficult to extrapolate what percentage of

those who appear in these cases are indigent. To approximate this information this estimate uses household income data collected from court-based self-help centers to estimate the percentage of the self-represented likely to be income eligible in any given case type. Because of the nature of these cases, it is likely that the percentage of litigants in these case types that are indigent is likely to be higher than the percentage of those who are indigent among the general population.

- Another way of looking at the question is to look at estimates of the unmet legal needs of low-income Marylanders. MLSC has reported that approximately 1 million Marylanders are eligible for MLSC services. Of those, approximately 470,000 per year have a legal problem or may need assistance. Currently approximately 105,000 receive help through MLSC-funded grantees, which means there are probably about 365,000 additional Marylanders with unmet legal needs.
- For the purposes of this estimate we will use this smaller, more conservative figure of 344,470.

Step Two: What is the cost per case?

- **Hours.** Many thousands of Marylanders are able to resolve their legal problem or question with brief advice. Presumably many Marylanders will be able to continue representing themselves in simple case types, but will be able to do so more effectively with help from a knowledgeable and supportive provider. Those with limited abilities, high conflict matters, or critical needs, will be able to get full representation in contested proceedings. In other words, the hours spent per case will vary based on each person's legal needs. A complex custody matter can require 100 hours of assistance; a simple legal inquiry may be resolved in 15 minutes. For the purpose of this estimate we will use 4 hours per case. This rough estimate attempts to arrive at a weighted average including large volumes of relatively simpler cases (e.g., most evictions) mixed with smaller volumes of relatively more complex and time-consuming matters (e.g., custody cases contested through trial).

It should be noted that this model is based on an assumption that services will continue to be delivered in the most efficient manner possible that will achieve access to justice in basic human needs cases. Undoubtedly a right to counsel will require a substantial increase in expenditures, but the implementation model proposed does not provide for unlimited representation where the case does not warrant it.

- **Hourly Rate.** For the purposes of this estimate we will use the \$80/hour currently provided by the Judicare program. This does not include administrative costs.
- **Cost per Case.** Based on these figures, the cost per case would be \$80 x 4 hours - \$320 per case.

Step Three: Will the program generate any income?

- **One-time registration fee.** The Judicare program charges a one-time \$25 registration fee. This has enhanced client follow-through and accountability and some participating providers report it has been a positive innovation. If the program were to charge a one-time fee, it should be waived for the most indigent. For the purposes of this exercise we will assume the waiver would apply to the 8.3% of Marylanders below the federal poverty line. This would be approximately 464,000 Marylanders. MLSC estimates about 47% of the total eligible population needs legal assistance, so we might extrapolate that that same percentage (47%) of 464,000 would have a legal problem and be eligible to have the fee waived. That means 218,080 individuals would get the waiver. The total amount generated by the fee would be 365,000 – 218,080 (waiver eligible) 146,920 X \$25 = \$3,673,000, if collected.

Step Four: Putting it all together.

- Based on these assumptions, we can approximate the cost of the extension of a civil right to counsel to basic human needs cases.

344,470 individuals X \$320 / case =	\$ 110.2 million
Less revenue generated from fee:	(\$ 3.6 million)

Total Cost:	\$ 106.6 million
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- For purposes of comparison we might note that the Office of the Public Defender had an appropriation of \$ 85 million in FY10, down from \$ 90 million in FY09. The agency handled approximately 220,000 cases in FY09 and estimated it would handle slightly more than that amount in FY10.

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