

**TASK FORCE TO STUDY IMPLEMENTING A
CIVIL RIGHT TO COUNSEL IN MARYLAND**

April 24, 2014

9:30 a.m.

Annapolis, Maryland

MINUTES

Present: Robert Neall, Chair. Del. Kathleen Dumais, Susan Erlichman, Del. Guy Guzzone, Kathy K. Howard, Hon. Irma S. Raker, Del. Samuel I. Rosenberg, Stephen H. Sachs, Lonni Summers, staff. Pamela Ortiz, staff. Guests: John Pollock, Coordinator, National Coalition for a Civil Right to Counsel, and Sharon Goldsmith, Executive Director, Pro Bono Resource Center of Maryland.

1. **Welcome and Introductions.** Members and guests were introduced. The Task Force was joined by John Pollock, Coordinator of the National Coalition for a Civil Right to Counsel, and Sharon Goldsmith, Executive Director of the Pro Bono Resource Center of Maryland.
2. **Review of Minutes.** The minutes of the meetings held on December 3, 2013, and January 23, 2014, were approved.
3. **National Perspective on a Civil Right to Counsel.** John Pollock presented information on efforts around the nation to promote a civil right to counsel. Those efforts have been built on the resolution adopted by the American Bar Association (ABA) in 2006 that endorsed a right to counsel in civil matters in basic human needs cases. Mr. Pollock described the National Coalition on a Civil Right to Counsel, which he coordinates. The coalition includes over 250 participants from 36 states.

The term “access to justice” is an umbrella term that includes a broad range of strategies including pro bono, help for self-represented persons, simplifying and reforming court processes, as well as state-funded legal representation in basic human needs cases. Improvements in the former areas can take the pressure off of the demands for full representation, but there will always be instances where critical needs are at stake and where full representation is warranted. The focus of the civil right to counsel movement is to promote access to full legal representation at state expense in those instances where there is no good substitute for representation. A civil right to counsel is just a part of a larger, nuanced civil legal aid system. It is not intended to replace or supplant the existing civil legal aid system.

Mr. Pollock reviewed federal case law on this topic. He suggested that the U.S. Supreme Court has expanded the right to counsel in criminal matters over the years, but on the civil side, has contracted the right to counsel, on constitutional grounds. While there is no federal constitutional right in these matters, with the exception of juvenile delinquency where a right to counsel was established in *In re: Gault*, states have continued to make

tremendous progress enhancing a civil right to counsel in key case types, either on state constitutional grounds or through statute or rule changes.

Most states have established a right to counsel in these areas, including Maryland, where noted:

- i. Child abuse and neglect (rights to counsel for both parents and children) (MD)
- ii. Termination of parental rights (both parents and children) (MD)
- iii. Civil commitment (MD)
- iv. Quarantine (MD)
- v. Judicial bypass
- vi. Guardianship (MD)
- vii. Civil contempt (MD)

Many, but not most, states have established a right to counsel in:

- i. Adult protective proceedings (MD)
- ii. Paternity (MD)
- iii. Nonconsensual adoption (MD)
- iv. SDP/SVP
- v. Parole revocation

1 or 2 states have a right to counsel in:

- i. Custody (notably New York)
- ii. Domestic violence
- iii. Public benefits
- iv. Minors: special immigrant juvenile status
- v. All civil cases (discretionary)

No state has established a right to counsel in:

- i. Housing (eviction or foreclosure)
- ii. Health (outside of the commitment/guardianship context)

Judicial Discretion. Task force members briefly discussed how right to counsel provisions work when the judge is given discretion to make appointments as appropriate. Mr. Pollock noted that where statutes or rules permit a judge to appoint counsel, but do not mandate it, the source of payment is not generally addressed, and thus, judges are often reluctant to exercise their discretion to appoint counsel. In most of these schemes, the funding for counsel comes from the court's own budget. Mr. Pollock noted that this is why a right to counsel in these matters is important, because it takes the pressure off the bench when considering whether counsel is necessary. There are no studies that provide data on how discretionary systems work. In case law, courts have tended to create higher hurdles, further restricting appointments, to protect the impact on their budgets.

Legislation. Mr. Pollock reviewed the efforts in other states to have legislation passed to establish a right to counsel in certain critical civil case types. Notable were the following:

- San Francisco passed an ordinance declaring they were a “right to counsel” city and created a one-year pilot program to provide pro bono representation for all otherwise unrepresented persons in civil matters.
- Washington State passed a rule authorizing appointment of counsel in court proceedings a “reasonable accommodation.”
- New York City is considering a bill that would provide a right to counsel for all tenants in housing cases. They have also considered providing a right to counsel for seniors and small children.
- New York State is considering a bill that would expand the right to counsel in a number of basic human needs cases, including child support, housing and health.

Litigation. He also reviewed recent and pending litigation brought to establish a broader civil right to counsel in the various states. There has been a significant amount of litigation brought to establish a right to counsel in areas where the state legislature has not acted.

Pilots. Mr. Pollock described the efforts in California, Massachusetts, Illinois, and elsewhere to establish pilot projects to explore the impact, cost and benefits of providing a civil right to counsel in basic human needs cases.

- In California, Illinois and New York, funding for civil right to counsel pilots was provided by the state.
 - California provided \$11 million over several years to fund projects using existing staff attorney and pro bono programs.
 - The San Francisco pilot is driven by pro bono providers, and the funding is used to coordinate the pro bono programs.
- In Massachusetts, three foundations collaborated to fund several pilot programs to evaluate the impact of a right to counsel in housing cases. They are funding a new right to counsel program in housing using funds from their Attorney General that came from the foreclosure settlements. In Maryland, civil legal aid providers received some funding from those settlements as well.
 - The evaluation of the Massachusetts pilots was provided for free by Harvard researcher, Jim Greiner.
- You need a significant number of cases in the pilot to get statistically significant results to evaluate its impact. In Massachusetts, the pilots handled 300 cases during the 1 ½ year pilot period.

Mr. Neall stated that any pilot should be scalable, i.e., it should model a delivery system that could be expanded to other geographic regions and other case types.

Leadership. Mr. Pollock acknowledged that many of the efforts advancing a civil right to counsel have been the result of extraordinary leadership including, for example, Chief Justice Lippman (NY), Chief Justice Ron George (CA), and California Supreme Court Justice Earl Johnson. Chief Judge Bell and Mr. Sachs both participated in the ABA task force that created the 2006 ABA resolution.

What Can Maryland Do? Mr. Pollock made several suggestions for steps the task force might take to further explore the potential for a civil right to counsel in Maryland:

- i. **Pilots.** Maryland might consider establishing a pilot program to quantify the need, and establish the cost savings and impact of providing a civil right to counsel in basic human needs cases. A pilot would require a meaningful commitment of funds so the model could be fully developed and adequately evaluated. A pilot should evaluate not just the impact of representation on the outcome of the case, but on the long-term well-being of the individual or family, and on the collateral effects.
 - ii. **Feasibility Studies.** The *Implementation* document prepared by the Maryland Access to Justice Commission suggested what a right to counsel might cost. Additional studies should be done to determine the “cost offset” of financial benefits to accrue to Marylanders and the state with a civil right to counsel. This could complement the Commission’s recent *Economic Impact Study*, focusing on a civil right to counsel.
 - iii. **Legislation.** All of the basic human needs identified in the ABA 2006 resolution remain critical, but Maryland might consider expanding a civil right to counsel in one or more needs to begin. Consider prioritizing:
 - a. **Child Custody.** There can be serious balance of power issues in these cases, especially when one parent has an attorney and the other does not. Studies have shown that recidivism, or ongoing post-judgment litigation, is more common when the parties are unrepresented.
 - b. **Foreclosure.** A potential loss of a home has cascading consequences, driving families into poverty. Providing a right to a lawyer in housing cases including foreclosure can help stave off the collateral consequences that affect a family when they lose their home.
4. **The Role of Pro Bono Publico in Maryland.** Sharon Goldsmith presented information on the history of pro bono practice in Maryland and provided information to help task force members understand the role pro bono may play in a civil right to counsel. She sent regrets on behalf of Judge Karen Murphy Jensen, Chair of the Standing Committee on Pro Bono Legal Service, who was unable to attend.

History of Pro Bono in Maryland.

- In 1975, the State created the first Judicare program through which attorneys would represent low-income clients for a low hourly rate. The program was defunded in the early 1980s as federal Legal Services Corporation funding was cut. Around that time, the General Assembly created the Maryland Legal Services Corporation (MLSC) through legislation, which directed funds to civil legal aid providers in the state. Funding for MLSC was largely from the Interest on Lawyers Trust Account (IOLTA) program.
- In 1989 there were 12 civil legal aid programs in the state.
- In 1987 the Cardin Commission issued a report noting that fewer than 20% of Marylanders had access to legal services. Among their recommendations was the proposal that the state require mandatory pro bono service from Maryland lawyers.
- In lieu of mandating pro bono services, the Maryland State Bar Association (MSBA) agreed to launch a significant volunteer effort. They created the organization now known as the Pro Bono Resource Center of Maryland (PBRC), which Ms. Goldsmith directs. They work with potential volunteer lawyers, providing training and connecting them with programs, and create new pro bono programs and opportunities where needed.
- In 1988 MLSC grantees reported 1,688 pro bono cases. By 1993 that had increased to 6,000 per year. During the 1990s, the number plateaued at about 7,000 - 8,000 per year.
- To further promote pro bono, the Court of Appeals appointed a Commission on Pro Bono. They made several recommendations including a rule to mandate pro bono reporting and establish an aspirational goal of 50 hours per year for active members of the bar.
- The court passed new rules creating a mandatory reporting requirement, which took effect in 2002. The court created a Standing Committee on Pro Bono Legal Service, and passed rules requiring local jurisdictions to establish their own local pro bono committees.
- Some of the local committees have been very active. Notable is the committee on the Eastern Shore which established the Mid-Shore Pro Bono Program, serving five mid-Shore counties.
- Maryland celebrates National Pro Bono Month each October. This past year the state held 48 pro bono-related events, 34 of which were public service events.
- Today there are 4 local bar-affiliated pro bono referral programs (Allegany, Prince George's, Harford & Montgomery), 1 regional program (Mid-Shore Pro Bono), and 1 pro bono program serving most of the rest of the state, the Maryland Volunteer Lawyers' Service (MVLS). There are several other programs that make pro bono referrals in certain case types.
- Maryland Legal Aid is the state's only federal Legal Services Corporation (LSC) grantee. LSC requires they spend 12.5% of their funding on private bar involvement.
- In recent years, approximately 9,000 pro bono cases have been reported to MLSC each year.

Longitudinal Study of Pro Bono Reporting. The Maryland Access to Justice Commission and the Standing Committee on Pro Bono recently released a joint report examining the data collected from the mandatory reporting process over the past 11 years.

- The study provides an important look at the demographics of the Maryland bar, and has insights about the type of work Maryland lawyers do, their primary practice areas, where they practice, and other information that can be helpful in examining the potential impact of pro bono.
- There are approximately 37,000 lawyers on active status in Maryland.
- 14% of those report they are not practicing law.
- 19.89% report they work for a government entity.
- 42.2% report their primary office is outside Maryland.

Despite that the report also shows:

- 57% do some pro bono.
- The number of those who provide over 50 hours of service has increased over the years, as has the number of total hours of service provided by Maryland lawyers.

There are some other issues that should be kept in mind as well.

- While family law is the area most lawyers provide pro bono, it is consistently ranked as only the 7th or 8th primary practice area for Maryland lawyers. The skills Maryland lawyers have may not match the demand for low-income residents.
- The median bar admission is 1995, but it still older attorneys who do more of the pro bono work.
- Pro bono representation is not free. To match potential clients with attorneys requires administrative staff and funding to run the referral program.

Ms. Goldsmith urged the task force to consider pro bono part of the spectrum of services that provide access to justice in the state, and suggested it should have a role to play in a civil right to counsel.

Mr. Neall suggested Maryland may want to consider a fundraising campaign to augment the civil legal aid system.

5. **Announcements.** There were no announcements.
6. **Next Meeting.** Staff will contact task force members to schedule monthly meetings through September.