

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

*December 3, 2013  
9:30 a.m.  
Annapolis, Maryland*

**MINUTES**

**Present:** Robert Neall, Chair. Hon. Ben C. Clyburn, Susan Erlichman, Del. Guy Guzzone, Kathy K. Howard, Sen. Richard S. Madaleno, Hon. Irma S. Raker, Del. Samuel I. Rosenberg, Stephen H. Sachs, Pamela Ortiz, staff. Deb Gardner, guest.

- 1. Welcome and Introductions.** Mr. Neall called the meeting to order and welcomed the task force members. Members introduced themselves.
- 2. Review of Task Force Charge.** Mr. Neall reviewed the charge of the task force as described in Senate Bill 262.
- 3. Housekeeping.** Ms. Ortiz asked members to send travel reimbursement forms to her. Those who are not state employees should also forward a completed W-9 form so they can be reimbursed.
- 4. Meeting Regulations.** The task force reviewed the proposed draft meeting regulations. Del. Rosenberg moved the regulations be adopted. Judge Raker seconded the motion. The regulations were adopted unanimously.
- 5. Civil Legal Services in Maryland.** Ms. Erlichman provided an overview of the civil legal services delivery system in Maryland. She started by providing a history of civil legal services in Maryland. The first organized program was created in 1911, the Legal Aid Bureau, created as a private charity. It served 234 persons the first year. It remained a private charity until 1969. Beginning in 1966, as part of the War on Poverty, the Office of Economic Opportunity (OEO) was created, and federal funding was made available throughout the country. The Legal Aid Bureau was given federal funding that year, and remains the only grantee in Maryland to receive those federal funds. The OEO was replaced by the federal Legal Services Corporation (LSC). At that time, the Legal Aid Bureau began opening offices around the state. By 1980 the Legal Aid Bureau had 14 offices. In 1975, Maryland created the first state funding for civil legal aid, creating a Judicare program operated by the Department of Human Resources. A Judicare program provides private counsel for indigent person, paying those private counsel a basic hourly rate. At that time, the rate was \$35. It peaked in 1980 with about 2.5 million dollars for Judicare. Judicare served a broad range of case types. They included overwhelmingly family law cases. Things began to decline precipitously beginning in 1981. Under the Reagan Administration, there was an effort to eliminate LSC. While not successful, funds were significantly

slashed. During the recession, state funding for Judicare was also reduced significantly. In 1982, the Maryland General Assembly created the Maryland Legal Services Corporation (MLSC), to administer the newly created Interest on Lawyers Trust Accounts (IOLTA) program. The IOLTA program uses interest earned on attorney trust accounts to generate funds for civil legal services.

We have two civil legal aid systems in Maryland. There are certain case types in Maryland where there is either a statutory right, court rule or case law where you have a right to court-appointed counsel – TPRs, adult guardianship, commitment in mental health facilities, and CINA cases. Where the state has recognized the right, and administers the appointment of counsel, it does so through contracts administered by government agencies. In most of those cases, the court does technically sign an appointment order, but the lawyer is provided through the contractual system.

In other types of cases, however, the system is a voluntary or discretionary system, through which there is no right to court-appointed counsel, and indigent persons are only able to secure representation where resources are available.

MLSC is a statutorily-created private non-profit, with a board appointed by the Governor and confirmed by the Senate. Maryland was the 4<sup>th</sup> state in the country to establish an IOLTA program.

Ms. Erlichman reviewed the legal findings included in the original MLSC Act. The first grants were made in 1985 for 4 providers totaling \$312,000. Initially, the IOLTA program was voluntary; it has since become a mandatory program. IOLTA is unstable as it is based solely on interest income. When IOLTA income declined in 1998, the General Assembly passed a filing fee surcharge to generate additional funds. The amount of the surcharge was increased in 2004, and again in 2010 with a 3-year sunset. The General Assembly extended the sunset by another 5 years in 2013. The General Assembly also enhanced the statutory appropriation from the Abandoned Property Fund which goes to MLSC from \$500,000 to \$1.5 million. Ms. Erlichman thanked Del. Guzzone and his colleagues who were instrumental in securing those benefits.

We still do not have close to the amount of resources we need to meet the goal of providing access to justice for all in Maryland. This year MLSC grantees served nearly 170,000 individuals. However, the bulk of those services are brief advice services. The majority of litigated cases reported to them are CINA cases – because there is a statutory right to counsel in these matters and a dedicated funding stream to support them. If you look only at the discretionary services, fewer than five percent involve an attorney representing an individual client in court. Ms. Erlichman feels that more clients would benefit from full representation, but the system is unable to provide that level of representation for all. Eighty-percent of the services provided are brief information, advice and referral services. There are over 1 million Marylanders eligible for services under

MLSC income guidelines. Most studies demonstrate that we are serving only 20 – 25% of the need.

Del. Rosenberg asked who is the on the other side in these cases and does the other side have a lawyer?

Chief Judge Clyburn responded that in summary ejectments, 95% of tenants are self-represented. In consumer matters, most of the plaintiffs are represented by attorneys, but probably over 80% of defendants are self-represented.

Mr. Neall suggested that we need to fully understand the nature and the extent of the problem. Before we get into a discussion of what we do and how we do it, we will have to clearly establish what the need is. There may be instances in court where people are not represented who do not need to be represented.

Ms. Erlichman responded that in some case types, representation is critical, for example in contested custody matters. MLSC manages a new Judicare program through which low-income individuals in contested custody matters can be represented by a private attorney who is paid a low, hourly rate. This model has helped provide representation in critical cases, but does not meet the full need.

Mr. Neall asked whether there are any geographic disparities? Do individuals in some areas of the state find it more difficult to find legal help than in others? He has heard that in some areas, it is more difficult and there are fewer resources.

Ms. Erlichman responded that the services that are provided through MLSC approximate the poverty population in local areas around the state. She noted that we have a network of self-help centers and a robust pro bono program in the state. We are one of only a couple of states that have a mandatory pro bono reporting program. Pro bono programs closed about 8,000 cases, about 5% of those who receive services through MLSC grantees. However, about 20% of those cases are litigated. These programs are designed to secure counsel for those cases most in need of representation.

Despite these resources, there is a significant gap for indigent Marylanders and the only way to provide for that need is to mandate and fund a system to deliver those services. There are 276 staff attorneys in MLSC grantee programs. There are over 1 million Marylanders eligible to be served by those attorneys. Compare that to the 37,000 lawyers in Maryland, which translates to one attorney for 159 people in the general population. Most people do not realize that they do not have a right to counsel in the types of civil matters we will be discussing.

Sen. Madaleno asked whether Ms. Erlichman could frame what she would define as the problem.

Ms. Erlichman responded that in Maryland we have done a good job of developing a diverse system of helping people address their legal needs, but the gap remains. She supports the ABA's Resolution that all individuals who cannot afford counsel should have access to representation in a basic human needs case.

Judge Raker noted that the task force's charge was to explore that question. Even in alternative dispute resolution, mediation, etc., individuals need counsel to advise them of their rights and assist them in using that system well. The Commission developed an Implementation Document that included a fiscal narrative.

- 6. Civil Right to Counsel – The Maryland Context.** Mr. Neall welcomed speaker Debra Gardner, Legal Director of the Public Justice Center (PJC), a non-profit legal advocacy organization and MLSC grantee. PJC focuses on impact advocacy. Prior to her work there, she was a staff attorney and later supervising attorney with Maryland Legal Aid for 16 years. Ms. Gardner presented information to the task force on the history of the civil right to counsel issue in Maryland.

Ms. Gardner began by following up on a few of the points discussed by Ms. Erlichman. In the vast majority of cases in which only brief services are given, the sole reason why service is limited to brief advice is because the programs are severely limited in their resources. They do not have enough staff to accept a greater percentage for full representation. They engage in a difficult process of triaging cases to determine which to take on for full representation. These are individuals who face losing their children, their homes, etc., and yet you can provide them perhaps 30 minutes of support.

In terms of geographic disparity, while the resources are evenly distributed, there is a significant disparity in the number of lawyers available to aid the indigent. Some courts have on-site self-help services, but in small counties the attorney providing help that day may be your opponent's lawyer.

One way to conceive of the problem is to ask whether a reasonable person with means would hire a lawyer. If the case would normally prompt a reasonable person with means to hire a lawyer, then a poor person should likewise have an attorney.

There are only a few areas where individuals have a statutory right to counsel: CINA, TPR, public adoptions, guardianships, civil commitments and civil contempt. There is no right in other important areas including foreclosure, child custody, access to healthcare, subsistence income, domestic violence.

The "justice gap" that has been noted, the ability to serve only 20% of the need, remains despite our efforts here in Maryland. Maryland is a leader in trying to address that access to justice gap. We have engaged in all the significant funding

innovations, including the use of the IOLTA program and filing fee surcharges. We have also engaged in all the significant delivery innovations -- self-help, limited scope practice, pro bono practice. We have devoted resources to innovative programs to meet as much of the need as we possibly can. Despite those innovations, we still only meet about 20% of the need. That has been a primary impetus for seeking recognition for a right to counsel in civil cases involving critical needs.

How does the lack of a right to counsel affect low-income litigants in Maryland? Most of the folks who face a civil legal matter in District Court are unrepresented. Approximately 95% of tenants are unrepresented in eviction cases. In domestic cases, both parties are self-represented in 40% of cases, and about another 30% include one self-represented litigant. In housing court, a study in NY showed that the number of tenants who defaulted went down from 28% to 6% when individuals had representation. In Delaware, family cases were dismissed in 30% of the cases where the parties were unrepresented. That was reduced by half if the parties were represented.

Whether a person has a lawyer also affects how well they are able to present their case. Studies have shown self-represented litigants engage in discovery 0% of the time, while those with counsel make use of discovery 62% of the time. Self-represented litigants raise defenses 2% of the time, while that figure goes to 80% for those with counsel.

Representation also affects the outcome of the case. In Maryland there was a study that in Medicaid denials, 76% of those represented got the denial reversed, but only 21% of persons appealing the denial actually had representation. The reversal rate doubles if you have representation in any type of benefits cases. In cases involving state benefits in Maryland, if the person had no representation, the reversal rate overall was 40%. If they had representation, it was 80%.

In a study of protective order hearings, Prof. Jane Murphy of the University of Baltimore found that survivors of domestic violence were able to obtain a protective order 82% of the time when they were represented by counsel. Those who were unrepresented were able to secure protection only 32% of the time.

In a New York study, tenants who had attorneys got repair orders in 65% of cases, compared with 25% for unrepresented tenants.

In another family law study, when fathers had representation but mothers did not, mothers' chances of winning custody dropped by half.

In a meta-analysis of critical civil matters, people were 5 times more likely to succeed if they had representation.

What happens if people are not represented? Marylanders may lose the ability to parent their children, may become homeless, may be forced to stay in substandard housing, or may lose their income. There are also tremendous social costs that need to be on the other side of the ledger when we think about the costs of a right to counsel. What can Maryland save? There are costs for homeless shelters, reductions in property tax revenues from blighted neighborhoods, costs associated with school dropout, juvenile delinquency, which can be the direct result of people not having representation in civil legal cases. There are also significant impacts on the operation of the courts. It matters greatly to judges when parties are unrepresented. They are frustrated because they see injustices, they may have insufficient information, and the unrepresented take up a lot of court and clerk time. There is also loss of economic stimulus when people lose their income, their home. It takes money out of the income stream. Providing people with lawyers increases their confidence in the judicial system, and it can change social behavior. A study from the Midwest showed a correlation between the level of representation in domestic violence, and the level of domestic violence in the community. Battery goes down when people can assert their rights.

The Maryland Declaration of Rights and the Maryland Constitution are significant sources for the potential recognition of a right to counsel. The Due Process Clause contained in Art. 24 of the Declaration of Rights may be broader than the federal due process. The Open Courts article, Art. 19, the Separation Powers provisions, the Equal Protection Clause in Art. 24, and Article 5 which incorporates the British Common Law, including 11 Henry VII, a Tudor era statute which provides for a right to counsel, are all possible authority for the creation of a right. PJC hopes one day the Court of Appeals will rely on these to find a civil right to counsel. In *Frase v. Barnhart*, a 2003 decision of the Court of Appeals, the issue was raised and three judges would have recognized a right in a contested custody case. The court ultimately found for the unrepresented mother on other grounds.

Included in the materials is the amicus brief submitted by the Maryland State Bar Association (MSBA) in the *Frase* case that makes clear that it is a societal obligation to provide counsel to indigent persons in critical cases.

The PJC coordinates a national networking coalition for folks working on this issue, the National Coalition for a Civil Right to Counsel. Among their achievements is the adoption by the American Bar Association (ABA) of its 2006 resolution endorsing the civil right to counsel in critical needs cases. Ms. Gardner was instrumental in the drafting of the resolution. Mr. Sachs was a member of the group that worked on the resolution and Mr. Greco, President of the ABA at the time, was very proud the resolution was unanimously adopted. The National Coalition played a significant role in that project. The current director of the Coalition, John Pollock, should also be seen as a resource for the task force, in addition to Ms. Gardner.

Del. Rosenberg asked what types of questions we should be asking as we try to establish our priorities for Maryland.

Ms. Gardner noted that the current providers are very good at triage, but we do it based on resources. Given the current paucity of funding, case acceptance guidelines have to be very complex and restrictive in order to limit the number of cases provided representation. The questions to ask include:

- i. What resources do we need to have to send people on their way?
- ii. What's the nature of the proceeding?
- iii. Is there a lawyer on the other side?
- iv. Even if there is not a lawyer on the other side, what other power imbalances are there?
- v. Is there a need for discovery, expert witnesses?
- vi. Will the rules of evidence be applied?

There are a variety of ways to conceive of implementing a right to counsel. A number of states and the ABA have adopted model statutes. The Commission's implementation document also represents another way to prioritize access to counsel.

Mr. Neall noted that in popular culture, individuals may have an impression they can easily speak in front of a "judge" like Judge Judy. They may fail to perceive what it means to represent themselves in court.

Ms. Gardner confirmed they are not advocating for a lawyer in every simple small claim, but for complex litigation. Litigants often have no idea how to do discovery, or how to follow the rules of evidence to effectively present testimony or submit evidence.

Sen. Madeleno asked whether, in those cases where the state has created a civil right to counsel, most of those are types of cases where the state is the opposing party. If one side is acquiring a lawyer, and proceeding in a custody case, for example, is it fair for the public to pay for the other side?

Ms. Gardner responded that if the case is one in which critical needs are at stake, and the person is indigent and unable to hire a lawyer on their own, that is the reason the state ought to provide a right to counsel. Otherwise, the proceedings will not be fair. We only do it at public expense for those who are indigent.

Sen. Madaleno asked whether that would apply in child support cases.

It was noted that there is a federally funded child support enforcement administration that provides representation on behalf of the custodial parent to seek child support for the non-custodial parent.

- 7. Launching a Conversation – The Maryland Access to Justice Commission’s Work to Date.** Judge Raker reported on the work of the Maryland Access to Justice Commission to date. Herbert S. Garten chairs the Public Education Committee of the Commission and the Commission has developed written materials, posters, videos and school programs to enhance the public’s understanding of the law and how to get legal help.

One of the Commission’s first steps was to endorse 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 stake such as those involving shelter, sustenance, safety, health or child custody.

To further that goal, the Commission undertook an in-depth examination of how a right, once established might be implemented.

In creating this task force, Maryland is joining a national dialogue on the important role access to justice plays in our civil society. California passed a bill to fund several pilot projects. The Boston Bar Association funded and evaluated two civil right to counsel projects in housing court, and New York added \$25 million to its funding for civil legal services to expand access to counsel. This task force allows us to bring legislators and other critical stakeholders into the conversation.

Chief Judge Clyburn presented information on the efforts the Judiciary has made to overcome the “justice gap.” He noted that District Court judges are right there on the front line, where you see people who are victims of domestic violence, are or are at risk of homelessness, or who have been taken advantage of by a creditors’ lawyer. The District Court created a statewide District Court Self-Help Center in 2009 to provide basic to support those we who are unrepresented. Many with good cases do not prevail because they did not understand how to use the rules of evidence or present their case effectively. They lose their trust in the justice system as a result. Until we can educate that citizen, and put that person on a level playing field with their opponent, we will not have public trust and confidence in that system. The District Court Self-Help Center works. Judges report they see better pleadings and better direct examinations. Clerks are not spending as much time with the litigants. Judges are not walking that fine line, appearing to be biased in favor of one side over another. Sadly, space has restricted the program which operates in a single location in Glen Burnie. The program serves users statewide via phone and live chat as well. The program is operated for the court by Maryland Legal Aid. The attorney assesses that person’s legal needs, provides forms, assists them in completing the proceedings, and coaches them on how they can effectively represent themselves in court. There are also law clinic students from the University of Maryland who provide some additional assistance.

Because they see a high volume of certain case types, the District Court Self-Help Center has helped the court identify some problems in debt collection cases and court practices. The Judiciary has been able to address some of those issues with rule changes. The Rules Committee developed a checklist that helps judges implement the rules regarding affidavit judgments.

Chief Judge Clyburn noted that the Judiciary is in the process of developing a new electronic case management system. They hope to explore the use of new technologies to make services easier to use remotely.

The courts see the impact on families when they do not have legal representation. Individuals are not living in conditions fit for human habitation. Because of the recession, they may have debt and credit problems that will have a ripple effect on their finances and families and devastate their lives, if they do not have the opportunity to participate in the court process.

- 8. Proposed Schedule and Work Plan.** Mr. Neall indicated he would like to have at least one meeting during the legislative session – perhaps in January, before the legislators get busy. The task force is required to report to the 2015 General Assembly with our findings. He thinks we need at least 6-8 in-person meetings. Ms. Ortiz was asked to contact members via email to schedule the next meeting.