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

23 January 2014
Annapolis, Maryland
1:30 p.m.

MINUTES

Present: Robert Neall, Chair. Susan Erlichman, Hon. Guy Guzzone, Kathy Howard, Hon. Sandy Rosenberg, Steve Sachs, Shawn Boerhinger, guest, John Nethercut, guest, Lonni Summers, staff, Pamela Ortiz, staff.

1. **Review of Minutes.** The review of the minutes of the December 3, 2013, meeting was deferred to a later meeting as there was no quorum present.
2. **Reminder of Open Meeting Provisions.** A list of key provisions of the Open Meetings Act was distributed to members, but discussion was deferred until a later meeting when more members would be present.
3. **Impact of Counsel and Economic Impact of Civil Legal Aid.** Ms. Ortiz provided an overview of the report issued by the Maryland Access to Justice Commission in 2013, *Economic Impact of Civil Legal Services in Maryland*. Copies of the report and a 2-page summary were included with the meeting materials. That report concluded the Maryland non-profit civil legal services programs generated approximately \$190 million per year in economic activity in the state, as a result of their advocacy. Of that, \$9.9 million in federal dollars are secured by legal aid lawyers, generating approximately \$12.6 million in economic stimulus. Another \$10.7 in direct financial benefits are secured for Marylanders. Those organizations also generated approximately \$160 million as the result of systemic advocacy in cases and in legislative work that benefits large groups of low-income residents. Finally, the State saves, at minimum, another \$5-6 million in costs that would be otherwise expended on health care, shelter costs or on tax revenue that would be lost, but for the work legal services lawyers do to keep their clients in the workforce, and to avert homelessness and domestic violence.

Two guests were in attendance to speak more directly about the economic impact of legal services lawyers. Shawn Boerhinger is Chief Counsel for Maryland Legal Aid. Maryland Legal Aid participated in the Economic Impact study by culling their files to gather data about the financial benefits secured for their clients. John Nethercut is the Executive Director of the

Public Justice Center. The Public Justice Center contributed to the report by gathering data about the economic impact of their work, especially relating to impact litigation and legislative advocacy.

- a. *Shawn Boehringer*. Mr. Boehringer reported that Maryland Legal Aid now has 14 offices and 250 staff statewide in Maryland. Over 150 of those staff members are lawyers. They focus on basic human needs cases, representing clients in individual cases. These are the types of cases the American Bar Association (ABA) was thinking of when they endorsed a broader civil right to counsel. Family cases, income cases (SSI, unemployment, SNAP), housing (eviction defense, subsidized and public housing matters, Section 8), and an array of special projects. Maryland already has a right to counsel in CINA cases, and Maryland Legal Aid attorneys practice in that area representing children in those cases. They also have special projects focusing on migrant workers and elder law. Last year Maryland Legal Aid had a budget just short of \$25 million, of which \$10.5 million came from the Maryland Legal Services Corporation (MLSC). They have a \$4.4 million CINA contract and federal Legal Services Corporation (LSC) funding in the amount of \$3.7 million.

A number of other states, including New York, Massachusetts, Illinois and Pennsylvania, among others, have done economic impact studies, similar to the one we did in Maryland. This report was done very conservatively. Other states used economists and consultants who were able to use multipliers. The Maryland study included only data that was easily available. Most legal services providers in the State were unable to provide data on the total amount of financial benefits secured for their clients, so the \$160 million figure is probably a low estimate of the overall impact. The report also only looked at several clear cost savings. There are broader economic impacts that might be captured in future studies.

The economic impact studies that have been conducted around the country have some common themes.

Cases that involve basic human needs often deal with public benefits that are part of the social safety net and require the expertise of legal services lawyers. This is a very specialized area of the law. Legal aid lawyers regularly practice in these areas which involve federal and state law, statutory and regulatory provisions, and a lawyer is really necessary to address these issues.

Another common theme is the value of bringing federal dollars into the state. Especially in public benefits, these are programs that are really supported at least in part by federal funds. Dollars secured for clients in these programs represent new monies brought into the state.

Another theme is the impact of multipliers. There is a ripple effect. If you spend a dollar on legal aid you bring more money into the state. It means cost savings in domestic violence, and it lessens dependence on shelters, law enforcement, and medical care. Many of the same benefits result from homelessness prevention. This type of legal work can prevent the negative effects of moving frequently that have a significant impact on children. The National Center on Family Homelessness has reported that homeless children are twice as likely as others to repeat a grade. Preventing a foreclosure or eviction can benefit children.

Methodology. Legal Aid gathered data primarily from cases where they provided in-court representation or full representation. They looked at the unpaid wages they recovered in employment cases, child or family support in child support cases, or lump sum benefits they captured from pensions or marital awards in divorce, as well as benefits achieved from both retroactive and monthly benefit awards prospectively for public benefits cases. For public housing cases they had to a more sophisticated analysis. If someone qualifies for subsidized or Section 8 housing, their rent is based on 30% of their income. If they lose that Section 8 voucher, they have to go on to the private market and rent a comparable unit. We looked at what that difference would

be. They found over \$20 million dollars in hard benefits. Considering the almost \$10.5 million we get from MLSC, that is a nice return on investment. There is a lot the numbers do not cover, which means that the economic benefit is much higher than that which is reported. There are benefits to the state, not captured in this report, that result from the screening legal aid lawyers do. If you are helping a client and learn they do not have a case, or a defense, you may advise them not to proceed, or perhaps suggest they devote their energies to moving to a new unit and not use judicial resources to fight a case they will lose. As another example, the study did not look at the economic benefit of CINA representation. A study in Florida showed that a similar program showed lower arrest rates for children, decreased costs for police, and reduced crime when children were provided with a lawyer in child abuse and neglect cases. Where we report on the fiscal impact of public benefits cases, for example, we were only reporting 12 months of monthly benefits that a prevailing claimant would have. But in, for example, in SSI cases, claimants are awarded benefits years after they applied, and they receive them for an average of 9.7 years. SSD recipients usually get benefits for 10.5 years. So the impact of work done today will reap financial benefits for the state for years to come.

Mr. Boehringer reported that it was a very valuable study for the civil justice community.

Del. Rosenberg asked whether there are any states that have created a civil right to counsel by statute or by court ruling. Mr. Boehringer replied that a number of states have created statutory rights in many of the areas where Marylanders have statutory rights, but no state has a broad civil right to counsel at this time.

Steve Sachs asked whether anyone has prepared a rebuttal to the report. It was noted the costs are addressed in the Commission's *Implementation* document. It was also suggested that the task force may want to get fiscal cost and impact data from other states as they have explored a civil right to counsel. Susan Erlichman noted that several states have funded pilot projects, notably California and Illinois. Ms. Ortiz will research the fiscal note that was created when California passed its Sargent Shriver Civil Right to Counsel Act (CA), and any that may have been prepared for the recent act passed creating pilots in Illinois.

Mr. Neall noted he is amazed at the number of law firms that specialize in social security disability. If a person is impoverished and had to surrender a portion of the disability claim as a fee, it would be better to go to Legal Aid. Mr. Boehringer responded that he believes the fee is collected from the retroactive award and there is a cap on what is collected. Legal Aid rarely gets involved with SSD cases. A claimant for SSI does not have enough of a work history to get a significant benefit and they focus more on SSI because they are not attractive to the private bar. Maryland Legal Aid has a policy that they do not compete with the private bar if there is a case that is likely to attract representation. For SSI there is no large retroactive award. It was noted that the cap is 25%. Usually private lawyers get the full 25%. Mr. Neall noted that the street lore is that if you really want to be successful filing a claim, you have to have an attorney. That is a concern because if you are disabled it shouldn't be that difficult. Mr. Boehringer indicated they generally do not get involved until it is before an ALJ. At that point the case has already been denied at initial review and reconsideration. Once it goes to an ALJ it really makes a difference to have a lawyer who can interpret and present the medical evidence, who is well versed in federal regulations and can effectively present evidence.

- b. *John Nethercut*. Mr. Nethercut reported that the Public Justice Center (PJC) is a small public interest law firm with a budget of \$1.8 million, and 20 staff. They do a lot of representation of tenants, unpaid workers, and children seeking admission to school. However, most of their work is in systemic advocacy. In systemic advocacy, you represent a client or group of clients in a matter that will cause a change in policy or practice that will have a larger social benefit. They believe it is

an efficient way to use legal resources. For example, if a single worker is being underpaid, it is often an issue affecting other employees of that employer.

This type of work has an economic multiplier effect. First of all, the examples in this report were just four examples. They are not the whole sum of their work. PJC and other organizations work on other initiatives that have had an impact, but the four referenced in the report were fairly recent and quantifiable. In the last few years, beginning in 2009, there have been a fair number of bills addressing the impact of foreclosure on tenants. Under prior law, a foreclosure would extinguish the underlying lease. Tenants would be summarily evicted, often without notice. From 2009-2011 PJC and others led an effort in the legislature to change the substantive law and procedural rights. Several bills passed that permitted a lease to continue at least 90 days or until the end of the current lease. This provided 90 days of additional secured housing to over 5,000 people in Maryland. The report took the average rent for 3 months and quantified the benefit, which comes out to \$22 million per year. And that benefit will now multiply every year that the law remains in effect. Once you do legislative work, there will always be enforcement work to be done, and now PJC is doing the litigation to implement the laws that were passed.

In another example, Debra Gardner and another attorney were asked by the Baltimore City Circuit Court to do an amicus brief regarding what was a reasonable attorney fee in a typical foreclosure case. Attorneys were submitting high fee petitions that seemed high. As a result of the amicus brief, Judge Cannon issued an opinion limiting the attorney fees in these cases, saving the typical client \$1,800 dollars. Multiplying that by the number of foreclosures handled in a year yields the cost savings for individuals.

PJC clients depend on a broad range of benefits. The state by law is required to make determinations on eligibility applications within 90 days. They were not processing applications quickly enough. Their compliance rate was only about 80%. PJC brought an action with the Homeless Persons Representation Project. They ultimately obtained an injunction that required the state to come into compliance with the law within a year. They reached 98% compliance within a year. The financial benefit was that over 4,000 individuals obtained those critical benefits in a timely manner. If we assume that they obtained an extra single month of benefits, it comes to over \$3 million in support for low-income Marylanders who needed those resources, and who were more likely to put those resources right back into the economy.

In addition to individual advocacy, the systemic advocacy, for relatively little legal work, can produce an outsized benefit.

Mr. Neall noted that there is a statutory patchwork, a geographic patchwork, of resources and legal help. He asked what the most important aspects of a civil right to counsel would need to be in place?

Mr. Nethercut replied that one reason the system is a patchwork is because of the funding. Funding drives what we can do. There is not an overriding principle, such as Civil Gideon which tells us which cases must be covered. In its *Implementation* report, the Commission recommended an organization like MLSC manage the funding for a broader civil right. To get to a systemic approach, you need some kind of overarching right.

Ms. Erlichman noted that many years ago, the *Bar Journal* did an issue on legal services and she submitted an article that described legal services in very similar terms. But the pieces are not random. MLSC tries to ensure the funding is not used in a duplicative way.

Ms. Howard noted that the private bar contributed by doing pro bono work and provides 1.7 million hours per year. That is another resource that needs to be considered.

Ms. Ortiz noted that the patchwork is colored in part by the history of the restrictions on LSC funding. Other niche organizations have arisen because of opportunities created by specific funding opportunities. For example, Violence Against Women Act (VAWA) funding permitted the creation of programs that provide legal services for survivors of domestic violence.

Mr. Neall asked whether we should we begin by listing areas where we think you should have an absolute right. Should we enumerate?

Mr. Boehringer suggested the task force follow the premise promoted by the ABA to focus on basic human needs cases. It is difficult for Maryland Legal Aid to do long-term strategic planning because the funding is unstable. LSC funding is vulnerable to changes in the political winds. MSLC funding is based in part on interest-based IOLTA accounts, and no one ever thought interest rates would bottom out for so long.

Ms. Erlichman noted it was very difficult to get attorneys to handle contested custody cases pro bono. About 10 years ago MLSC reinstated a Judicare program that paid modest hourly rates to private attorneys. They relaunched the program focusing on contested custody cases. The current program has now been existence since 2002. It is an area listed as a basic human needs area. Last year there were about 2,000 litigants who obtained representation through this program. That works well, but that is the tip of the iceberg. In over 70% of family cases, there is at least SRL, and in 40% of family cases there are two SRLs.

4. **Next Meeting.** Ms. Ortiz was asked to contact task force members to find a date for the next meeting.