



First Annual Justice Initiatives Summit

Addressing the Needs of the Unrepresented

Summary of Events

April 12, 2010
State Bar of Michigan
Lansing, MI

Justice Initiatives Cabinet Members

W. Anthony Jenkins, President-elect, State Bar of Michigan

Janet K. Welch, Executive Director, State Bar of Michigan

Hon. Cynthia D. Stephens, Co-chair, Committee on Justice Initiatives, State Bar of Michigan

Terri Stangl, Co-chair, Committee on Justice Initiatives, State Bar of Michigan

Linda K. Rexer, Executive Director, Michigan State Bar Foundation

Presenters/Speakers

Chief Justice Marilyn J. Kelly, Michigan Supreme Court

Professor Russell Engler, New England School of Law

Justice Cynthia Cohen, Massachusetts Appeals Court

Welcoming Remarks – Chief Justice Marilyn J. Kelly

The Chief Justice began by noting that we are confronted by a problem whose severity and scope rivals that of the Depression. It is incumbent on those of us in leadership to find the answers. Unlike previous times when almost everyone went to court with a lawyer, that is not so today. Some courts report that 40% of litigants are unrepresented, and these are low to middle income people with family, consumer, immigration cases. Improvements to the court data system would help us understand the challenge better. Legal aid does a great job but there are only 180 legal aid lawyers in Michigan.

Our approach today is to explore a continuum of services, including the “civil Gideon” concept recognized last October by California as a right to counsel in certain civil cases. An unbundling rule can help and may allow solo practitioners to get more business. Lawyers make a positive difference and people do know that. We need to understand that people will use courts without lawyers, and we should adopt processes that use alternative dispute resolution, informal settlement conferences, pamphlets, internet, and self-help centers.

The Chief is committed to raising awareness of access and fairness issues, and to making progress together. She commended those present on their efforts and said that if we are to maintain public trust and confidence, we all need to work together to make sure that the justice system is open and available to all.

Michigan Overview – Linda K. Rexer

An increasing number of poor persons are representing themselves; the majority are women, petitioners and poor. There are three self-help centers in Michigan, located in Grand Rapids, Berrien County and Washtenaw. Most people who use the centers are low-income, most need help completing forms, and most need help with family law matters, although assistance with housing, probate, consumer and other areas are available. The numbers of unrepresented are not comprehensively tracked by the State Court Administrative Office, although some courts collect information periodically. Berrien County found that at least one person appeared in pro per in 80% of divorce cases. The Legal Assistance Center (LAC) in Grand Rapids conducted time studies at one circuit court of court clerk staff time spent assisting the self-represented before and after the LAC was established. It concluded that there was a difference equal to 2.5 fewer FTE staff positions once the LAC was open. Recent efforts show that the poor and women have surprisingly high internet access. The reasons people do not hire a lawyer is that the “can’t afford one” or “my case is simple enough.”

The Michigan State Bar Foundation conducted a study of existing self-help resources and found many duplicates and gaps in both web resources and paper materials, often of uneven quality. Many web sites are not user friendly, have broken links and are not up to date. Illinois has been a leader in central website support, see www.illinoislegalaid.org. Unlike many other states, Michigan’s ethics rules do not directly address “unbundled” legal services which allow lawyers to perform discrete task/limited appearance representation so that clients can handle other aspects themselves.

Among the Bar Foundation study findings were a lack of uniformity in forms and procedures used in courts across the State and that not all judges and court staff have had training regarding the self-represented.

Michigan does not have a formal civil Gideon requirement, but courts have found a right to counsel in some non-criminal matters. Those include parental rights termination, failure to pay child support, and others.

The Big Picture Vision – Professor Russell Engler

The big picture includes lots of topics in this area, and conversations must include all of the voices. The single most important challenge of the unrepresented is that every day people without lawyers are forfeiting important legal rights. We must not only focus on improved processes but must look at case outcomes. We do know that the representation by counsel has an impact on case outcomes. In housing courts, 90% of tenants have no counsel, and 19% have a chance of better outcomes once a lawyer enters the picture. There are three exceptions to this – representation does not matter for landlords, employers and creditors.

We can use three prongs to make sense of this:

1. Courts, including judges, mediators, systems, and administrative agencies can expand their provision of access.
2. Everything in between – self-help, limited assistance, lay advocacy should be paired with an evaluation of case outcomes to assure that rights are not forfeited.
3. Civil Gideon should be expanded to include right to counsel for something critical at stake where nothing short of full representation is fair.

If we do better with everything in the first two prongs, the cost of a civil Gideon is not that high. This is demonstrated by a Cambridge court study of non-payment of rent evictions by the housing commission. By working with the housing commission and HUD to find alternatives to eviction, it became clear that power and power imbalances matter, and that the greater level of imbalance of power the more intervention was needed. Simple advocacy is not enough, but subject matter expertise is necessary.

To tie this information back to national trends overview, we should know that early efforts looked at the involvement of the judge, who is not really restrained by ethics and case law but by culture and customs. There are trainings, protocols and administrative directives dictating the inquiry that a judge must make when ordering a stipulation. Ethics and cases do not come down against judges who are transparent in their help, but they do punish for being abusive and steam-rolling.

One System's Response – Judge Cynthia Cohen

In Massachusetts, the reaction to a 1990's effort to simplify, help at court, and tweak the unbundling rule was vocal and extremely antagonistic. With a feeling that it was best to do nothing, systemic efforts halted for three years. The number of unrepresented people

swelled and became a bigger burden on the courts. Lawyers were challenged to work against unrepresented litigants. Solo and small firm lawyers lost business. Pro se litigants were at risk of receiving no justice.

The sine qua non was judicial leadership. The chief judge created a steering committee to create a system wide response with a “just do it” message. It was to be an action committee and the support and cooperation of the bar was essential. The group began with self-education, outreach and priorities for action. It had no budget whatsoever. It did not look at right to counsel issues. Its multi-faceted approach included:

1. Limited scope/unbundling. This is an essential part of the access to justice continuum. It leverages legal resources, allows legal aid and pro bono to do more and let’s lawyers be hired for “a-la-carte” matters. Unbundling places the agreement for limited representation between the lawyer and the client; it is not the judge’s choice.
2. Judicial guidelines and training programs. A survey of every judge showed that judges were confused about what to do and that there was a broad range of discretion. The guidelines encourage pro active support, scrutiny of settlements. Curriculum is available.
3. Court staff guidelines and training. Permissible assistance was not understood. “A Guide By and For Court Staff” is available.
4. Handbook resource to be used system wide. This tool should be collected in one place and include what is expected, where and how to find a lawyer and self-help resources, and basic facts about the court system.
5. Investigate the use of technology. Certain key information was collected by staff and a system wide data collection was already in place. Future progress can be made with central web and document assembly resources.
6. User-friendly courts initiative. Space, resources and system review better serve. Signage and information desk were installed. No money was needed to do these.

Notable recommendations include using “Best Practices” from the National Center for State Courts, and institutionalizing access to justice in the court system.

How to Start – Professor Russell Engler

A joint Boston/Massachusetts Bar conference on civil Gideon in 2007 focused on the value of interfacing with the existing legal services system. It looked at cost savings from a basic human needs perspective. The approach of the conference:

1. Identify issues that are important.
2. Look at existing data.
3. Put the two together.
4. Review the small claims process.
5. Seek political consensus.
6. Collect data.
7. Look at existing resources.

8. Identify a delivery system for a pilot project.

Find a starting point, and don't use the lack of resources as an excuse!

Breakout Sessions

Group discussion occurred on the following:

Considering the continuum of the self-represented, limited representation including unbundling, and full representation including civil right to counsel,

- a. What are opportunities or challenges in Michigan related to each part of this continuum?
- b. What is your vision of (1) what we should be doing and (2) your role?
- c. What ideas or specific tasks could be accomplished by you or others?
- d. Who should we talk to or enlist?
- e. Are you aware of underutilized resources we could tap?

Breakout Group Reports:

First Report

1. Michigan needs to collect data.
2. We need to have perspectives from all in planning and evaluation to promote interconnection between court and outside of court. Community based solutions should be thought of as well as court based questions. Can we link to 211 systems better? Can we train human services providers?
3. The unique needs of rural areas need to be addressed. There are no law libraries or law students, but community agencies could be used. We are no longer tightly bound by geography because hotlines and the internet can be used.
4. Can these ideas be used in the criminal arena? Can a consult at the beginning of a case be okay? Pro bono is never a solution for criminal cases.

Second Report

1. We need to address the limitations on limited representation. The Ethics Committee may be coming out with new interpretations and the door may be open to educate judges, lawyers, and others.
2. We need more support for automated forms and a strong centralized website. Law schools can write content.
3. We need to increase pro bono. We should expand MCR 8.120 to allow students to practice with pro bono lawyers, not just legal services clinics.
4. We need to build methods for people to connect with resources outside of courts such as libraries, human services agencies.

Third Report

1. Today's initiative and leadership indicates a will to address this now.
2. We need statewide resources with local capacity to access.
3. Police stations and hospitals are additional places to provide assistance.
4. There must be uniformity across counties, especially with court forms.
5. We need to let the public know about the need to address legal problems early, and to educate the funding community about the cost-benefit analysis.
6. We can focus on the care and protection of children as a starting point for civil Gideon.
7. The Bar Leadership Forum, Crossroads and the Association of Corporate Counsel of America need to have this on the agenda.
8. Pilot programs are necessary so we can build the program, collect data, and evaluate.

Fourth Report

1. Pro bono opportunities exist at every step of the continuum.
2. A handbook and guidelines are essential.
3. We need to define unbundling – how to do it, how to approach it.
4. We should take advantage of the leadership opportunity we have with the Supreme Court, and not let the lack of money quash opportunities.
5. See what other states are doing and do not reinvent the wheel.
6. We need community options for representation to the public.
7. We need training outside of the Michigan Judicial Institute.

Fifth Report

1. We should look at the laws and court rules that make pro se difficult and see what can be changed. The requirement of a debtor to submit an affidavit of merit with an answer to a complaint was cited as a barrier.
2. We should generate more pro bono.
3. Even without a new unbundling rule, judges should allow limited appearances to answer complaints.
4. Civil Gideon is a good idea but a lower priority than pro se and unbundling.
5. We should investigate the possibility of AmeriCorps positions for Michigan.
6. We should ask the Chief Justice to appoint a steering committee.

Closing Thoughts

Al Butzbaugh, Chief Judge, Berrien County Trial Court

This is a very important time in our careers because of leadership opportunities we have. In Berrien County in December of 2008, after very tough budget cuts, our county commissioners voted unanimously to fund a staffed self-help center. The county did this because it's the right thing to do, and because it's the smart thing to do – it saves time and money in the courthouse. If we did it, you can do it too.

Lorraine Weber, Director, Michigan Supreme Court Access and Fairness Office

We need to respond with serious action and create a statewide systemic approach. My office is prepared to effect collaboration through the collective energy of the legal and judicial system, communicate that this is a win-win situation, and work to create a systemic response including uniformity of services. Training is key. We must address the growing pessimism that government systems don't serve people and we can do that if we address this issue. It is a matter of public trust and confidence.

Bob Gillett, Executive Director, Legal Services of Southcentral Michigan

This problem can be defined in many different ways, and we need to define it as “better outcomes for clients in our courts.” Our system is no longer one in which lawyers work in lawyer-driven adversary systems. We need to look for a system-wide solution.

Janet Welch, Executive Director, State Bar of Michigan

From the reception this event has received today, it appears that we have managed to convene the right people, at the right time, on the right issues. The First Annual Justice Initiatives Summit is adjourned.