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Michael A. Millemann

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SETTING AN AGENDA FOR THE FUTURE DELIVERY OF LEGAL SERVICES TO THE POOR IN MARYLAND

MICHAEL A. MILLEMANN*

On October 11, 2007, The University of Maryland Law Journal of Race, Religion, Gender and Class sponsored a symposium on the delivery of legal services to the poor in Maryland in recognition of the twenty-fifth anniversary of the Maryland Legal Services Corporation. In the afternoon of that all-day program, there was a roundtable discussion about the future of legal services in Maryland. It became apparent during the course of the discussion—and in its aftermath—that the key legal services institutions in Maryland are in the process of identifying and implementing creative new legal services initiatives that promise to provide more and better legal assistance to the poor in civil matters. These initiatives are vitally important both in Maryland and nationally. What follows is a summary of this important roundtable discussion.

I. CIVIL GIDEON: FINDING THE FUTURE IN THE PAST

Stephen H. Sachs, a former United States Attorney and former Attorney General in Maryland, is a volunteer attorney with Maryland's Public Justice Center. He and Debra Gardner, Legal Director of the Center, are leading the Center's efforts to establish a constitutional right to counsel in some civil cases. Mr. Sachs described the Center's arguments in *Frase v. Barnhart*,¹ the Maryland Court of Appeals' decision in which three of seven judges would have recognized such a

* Jacob A. France Professor of Public Interest Law, University of Maryland. In writing this article, I relied heavily on a report I prepared for the Maryland State Bar Association in 2007, through its Section on the Delivery of Legal Services. See MICHAEL A. MILLEMANN, FINAL REPORT AND RECOMMENDATIONS ON THE POTENTIAL USE OF PRIVATE LAWYERS, WHO ARE PAID REDUCED FEES BY A LEGAL SERVICES FUNDER, TO REPRESENT LOW-INCOME PERSONS IN MARYLAND WHO CAN NOT OBTAIN LEGAL ASSISTANCE IN CIVIL CASES (2007) [hereinafter 2007 MILLEMANN REPORT]. I deeply appreciate the strong support I received on that project from Tracy Brown, the Chair of the Section, and the other members of that Section; the Maryland Administrative Office of the Courts through State Court Administrator Frank Broccolina and Executive Director of Family Administration Pamela C. Ortiz; the Maryland Legal Services Corporation, through Executive Director Susan M. Erlichman and Deputy Director Harriet Robinson; and many other people in Maryland's legal services community. I also deeply appreciate the excellent work of my research assistants: Benjamin Hu, Michael Gerton, and Bryan Saxton.

1. 840 A.2d 114 (Md. 2003).

right had the case not been decided on other grounds.² He also described the key role the Public Justice Center is playing in the national effort to establish a right to counsel in civil cases.

In the Maryland Court of Appeals, Mr. Sachs argued that Ms. Frase—like other indigent parents faced with the loss of custody of their children—had a Common law and State Constitutional right to court-appointed counsel.³ If recognized, such a right would be one of the most important modern-day developments in the delivery of legal services to the poor, not only in Maryland, but nationally. Interestingly, several of the litigation theories that Mr. Sachs and his Public Justice Center co-counsel asserted in support of this modern day reform date back to Magna Carta and the earliest articulation of the rights of Englishmen in thirteenth century England.⁴

Alternatively, Sachs argued that Article 19 of the Maryland Declaration of Rights guaranteed Ms. Frase a right to court-appointed counsel.⁵ That article, which derives from Magna Charta, provides: “That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.”⁶ This, Sachs said, is a guarantee of effective access to the courts to protect important legal interests, like Ms. Frase’s right to the custody of her children. Quoting Judge Earl Johnson, a leading Civil Gideon proponent, Sachs said that a right of access to courts without a right to counsel to make that right of access effective is like the right of access that the Christians had to the Roman Coliseum just before they were thrown to the lions.⁷

Under state constitutional separation of powers principles, judges also have the obligation to make sure the judicial process—for which they are responsible—is fair, Sachs argued at the roundtable discussion. In support of this argument, he cited *Attorney General v.*

2. *Id.* at 131–39. Deciding on other grounds that certain conditions on Ms. Frase’s right to custody of her children violated her Due Process right to raise her children as she saw fit, the Court did not consider constitutional right-to-counsel issues in this case. *Id.* at 119–27. However, three Justices—including the Chief Justice Bell—concurred in the result, but dissented from the failure of the majority to decide the right-to-counsel question. *Id.* at 131–39 (Bell, C.J., Cathell, J., & Eldridge, J., concurring and dissenting). These three Justices stated that they would have reached and resolved the issue in favor of the right to counsel. *Id.* at 138.

3. *Id.* at 129.

4. *See id.* at 130; *see also* Stephen H. Sachs, Remarks at the Maryland Legal Services Corporation 25th Anniversary Symposium (Oct. 11, 2007) (transcript on file with author).

5. *Frase*, 840 A.2d at 129–30.

6. MD. CONST. DECL. OF RIGHTS. art. 19.

7. Sachs, *supra* note 4.

Waldron,⁸ in which the Maryland Court of Appeals observed that one of the essential prerequisites to fairness in our adversarial system is representation by counsel. The Court said:

In this country, it is a well known maxim that attorneys function as officers of the courts, and, as such, are a necessary and important adjunct to the administration of justice. This truism necessarily derives, in our view, from the very theory of the structure of our system of justice.

The adversary process integral to the design of our dispute-resolving scheme is perhaps one of the more remarkable accomplishments of western jurisprudence. It is this process, whereby truth is garnered from the articulation of opposing points of view, that is the preeminent tool through which fairness is achieved in the administration of justice in this country.⁹

In *Frase*, Sachs and the Public Justice Center also argued that the failure to appoint counsel for Ms. Frase violated a statute enacted by English Parliament in 1494 that authorized courts to appoint counsel to represent indigent litigants.¹⁰ This statute, they contend, has been made part of Maryland's law through a state constitutional "incorporation" provision.¹¹ Embodied in Article 5 of the Maryland Declaration of Rights, most early states included a similar provision within their constitutions as well.¹² Such provisions incorporate those parts of English law effective in 1776 that the state has not repealed or effectively nullified, which, in Maryland, includes the 1494 right-to-counsel statute enacted by Parliament.¹³

8. 426 A.2d 929 (Md. 1981).

9. *Id.* at 936.

10. *Frase*, 840 A.2d at 129.

The common law right, she says, stems from a statute enacted by the English Parliament in 1494—11 Henry VII, ch. 12. That statute, among other things, required the judges of the King's Bench, upon the return of any writ that commenced a civil action, to assign to a "poor" plaintiff an attorney, who "shall give their Counsels, nothing taking for the same." Ms. Frase argues that this statute was made part of the common law of Maryland by Article 5 of the Maryland Declaration of Rights and, although it has never been involved or enforced in any way, has also never been repealed.

Id.

11. *Id.*

12. *Id.*

13. *Id.* In Maryland, the definitive authority on whether Article 5 incorporated, and made effective in Maryland, an English statute is the work of the nineteenth century

Finally, Sachs noted that procedural due process should assure that litigants like Ms. Frase have the right to counsel. He emphasized that this state constitutional right, guaranteed by Article 24 of the Maryland Declaration of Rights,¹⁴ should be read in *pari materia*, not with the federal constitutional counterpart, the Due Process clause of the Fourteenth Amendment to the United States Constitution,¹⁵ but with state constitutional provisions like the access to courts provision (Article 19 of the Maryland Declaration of Rights), separation of powers principles, and the “incorporation” provision (Article 5 of the Maryland Declaration of Rights).¹⁶ Read together, he argued, they should guarantee some civil litigants a right to counsel under state law.

For the future, Mr. Sachs and the Public Justice Center are looking for the right plaintiff, with the right set of facts, to present their right-to-counsel arguments, once again, to Maryland’s appellate courts.

In the meantime, the Public Justice Center continues to be the leader in a national coalition that has made substantial progress in developing a civil right to counsel across the country. The Public Justice Center’s website describes this important role:

The Public Justice Center was a founder and continues as the facilitator of the National Coalition for a Civil Right to Counsel (NCCRC). This modern civil right to counsel movement has active members in 31 states, and has already:

Chancellor of Maryland, William Kilty. In his report to the Maryland General Assembly, he listed English statutes that were not applicable to Maryland, those that were applicable but were not proper to be incorporated into Maryland law, and those that were applicable and were proper to be incorporated. WILLIAM KILTY, A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES; AND OF SUCH OTHERS AS HAVE SINCE BEEN MADE IN ENGLAND OR GREAT-BRITAIN, AND HAVE BEEN INTRODUCED, USED AND PRACTICED, BY THE COURTS OF LAW OR EQUITY; AND ALSO ALL SUCH PARTS OF THE SAME AS MAY BE PROPER TO BE INTRODUCED AND INCORPORATED INTO THE BODY OF THE STATUTE LAW OF THE STATE (1811), available at <http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000143/html> (last visited Jan. 16, 2009). Kilty found that 11 Hen. 7, c. 12 was applicable to Maryland and was proper to be incorporated. *Id.* at 229. The Chancellor noted that he had “found some instances of this statute being practi[c]ed [in Maryland] in the years 1664 and 1672.” *Id.*

14. See MD. CONST. art. XXIV (“That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.”).

15. See U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”); see also KILTY, *supra* note 13.

16. See generally KILTY, *supra* note 13.

- Persuaded the American Bar Association to call on all states to recognize the right,
- Supported litigation in the states in support of the right,
- Authored model laws that would secure the right,
- Conducted legal research and reviewed social science research in support of the right,
- Coordinated publication of an issue of *Clearinghouse Review* devoted entirely to the legal and policy arguments surrounding the right, and,
- Educated the public about the significance of the right.¹⁷

II. JUDICIAL LEADERSHIP IN PROVIDING EFFECTIVE ACCESS TO JUSTICE

State Court Administrator Frank V. Broccolina described the improvements in the delivery of legal services to the poor that have resulted from the leadership of Chief Judge Robert M. Bell, who—since 1996 when he was named Chief Judge—has made access to justice his most important initiative. In the past decade, the Administrative Office of the Courts (AOC)—under the leadership of Chief Judge Bell and Mr. Broccolina—has helped to create, support, and fund “an array of family law-related legal services.”¹⁸ These include the self-help centers in each of Maryland’s twenty-four jurisdictions;¹⁹ Protective Order Advocacy Representation Projects, which provide legal advice and representation, as well as other services, to victims of family violence; and a legal representation project for contested custody cases.²⁰ Mr. Broccolina also mentioned the critical support of the Chief Judge and judiciary for the adoption of

17. Public Justice Center, Right to Counsel in Civil Cases, <http://www.publicjustice.org/our-work/index.cfm?pageid=88> (last visited Feb. 7, 2008).

18. See generally 2007 MILLEMANN REPORT, *supra* note *, Frank V. Broccolina, Remarks at the Maryland Legal Services Corporation 25th Anniversary Symposium (Oct. 11, 2007) (transcript on file with author).

19. See Administrative Office of the Courts (AOC) Self Help Programs, <http://www.peoples-law.org/finding/pro-se/pro-se%20home.htm> (last visited Jan. 16, 2009).

20. 2007 MILLEMANN REPORT, *supra* note *, at 22; see also JOHN M. GREACEN, REPORT ON THE PROGRAMS TO ASSIST SELF REPRESENTED LITIGANTS OF THE STATE OF MARYLAND: FINAL REPORT 6 (Nov. 14, 2004).

a filing fee surcharge that now generates almost seven million dollars per year for civil legal services.²¹

In looking to the future, Mr. Broccolina announced two new projects. First, he said that the Chief Judge will soon appoint a statewide Access to Justice Commission. In its August 2007 Report, a Work Group on Self-Representation in the Maryland Courts—an internal committee of the State judiciary appointed by Chief Judge Bell and chaired by Court of Appeals Judge Clayton Greene, Jr.—recommended creating such a commission.²² The Work Group had made a series of access-to-justice proposals, including proposals intended to help self-represented litigants represent themselves more effectively,²³ to enhance the responses of court employees to self-represented litigants,²⁴ to enhance the response of judges in the courtroom to self-represented litigants,²⁵ and to “[s]upport . . . [i]mprovements in the [l]egal [s]ervices [d]elivery [s]ystem.”²⁶ In explaining its call for an Access to Justice Commission, the Work Group said:

As a small, internal committee of the Judiciary, the Work Group on Self-Representation in the Maryland Courts was limited in its ability to recommend change that might affect the broad range of stakeholders that, together with the courts, are a part of the justice system. A broader multidisciplinary group should be convened to aid the Judiciary in implementing the recommendations made in this report, and to institutionalize those changes over time.²⁷

The Work Group added that an Access to Justice Commission could “coordinate the Judiciary’s efforts to improve access to justice for the self-represented and those of limited means” and “become the focal point for coordinating a range of initiatives and activities.”²⁸

21. See generally Broccolina, *supra* note 18.

22. MD. JUDICIARY WORK GROUP ON SELF-REPRESENTATION IN THE MD. CTS., CLEARING A PATH TO JUSTICE 2, 16 (Aug. 2007).

23. *Id.* at 4–7.

24. *Id.* at 8–9.

25. *Id.* at 10–11.

26. *Id.* at 12–15.

27. *Id.* at 16.

28. *Id.* These access-related activities included:

forms management; forms distribution technologies including document assembly; e-filing; self-help centers; multilingual access and resources;

By establishing an Access to Justice Commission, Maryland will join several other states that have done the same, including the State of Washington, which has been a national leader in this respect.²⁹ The Washington State Supreme Court created the Access to Justice Board as an autonomous body in 1994, and made it permanent in 2000.³⁰ The Board considers access to civil litigation to be a “fundamental right.”³¹

Mr. Broccolina said that the Maryland Commission will “examine access to justice across all case types” and “look well into the future” to “make significant and lasting improvements in access to justice.”³²

The second future initiative that Mr. Broccolina announced was the support of the AOC for expansion of the role that private lawyers, working for reduced fees, play in the provision of legal services to the poor.³³ He said that the AOC and Maryland Legal Services Commission (MLSC) would jointly fund and support a re-instituted *judicare* program that would engage additional private lawyers in representing the poor in family cases in Maryland’s circuit courts.³⁴ He also said the AOC and MLSC were prepared to make a two to three year commitment to this initiative.

ADA and physical access issues for Maryland courthouses; development of written materials for the self-represented and other litigants; development of video materials for the self-represented and other litigants; web-based materials for self-represented litigants; collaboration with the State Law Library on People’s Law Library; collaboration with Judicial Institute on judicial education with regards to self-represented litigants; policy and rule development affecting access to justice issues including self-representation; education on legal advice vs. information; collaboration with legal services delivery partners on *Judicare*; discrete task representation and other innovations; *pro bono* reporting and implementation of *pro bono* plans; data collection on self-represented litigation and other access to justice issues; [and] administration of funds to support innovative access to justice pilots.

Id. at 16–17.

29. Legal Foundation of Washington, *Civil Legal Aid in Washington State*, http://www.legalfoundation.org/pages/civil_legal_aid_in_wa (last visited Jan. 16, 2009).

30. See Washington State Access to Justice Board, *Mission of Access to Justice Board*, <http://www.wsba.org/atj/board/default1.htm> (last visited Jan. 16, 2009).

31. *Id.*

32. Broccolina, *supra* note 18.

33. *Id.*

34. See Broccolina, *supra* note 18; Michael Millemann, *Diversifying the Delivery of Legal Services to the Poor by Adding a Reduced Fee Private Attorney Component to the Predominantly Staff Model, Including Through a Judicare Program*, 7 U. OF MD. L.J. OF RACE, RELIGION, GENDER & CLASS 227 (2007).

In January, 2008, MLSC announced grant awards for a “Judicare Pilot in Maryland,” with the purpose of “expand[ing] representation in family law matters at reduced fees.”³⁵

These new initiatives build on the AOC’s decade-long campaign to provide enhanced legal services and access to justice to Maryland’s poor.

III. SUBSTANTIALLY INCREASING THE FUNDING FOR CIVIL LEGAL SERVICES THROUGH IOLTA COMPARABILITY

MLSC Executive director Susan Erlichman described the Commissions’s “revenue streams” as revenue dedicated to civil legal assistance programs from: (1) a filing fee surcharge; (2) the sale of abandoned property; and (3) interest on lawyers’ trust accounts, the “IOLTA Program.” This revenue allows the MLSC to fund over thirty legal services programs and projects in Maryland.³⁶

Ms. Erlichman briefly described the history of the IOLTA Program; created by statute in 1982,³⁷ the program is regulated by the Maryland Rules as well.³⁸ In short, those provisions require attorneys to deposit identified trust funds in interest-bearing accounts for the immediate benefit of the MLSC and the ultimate use of programs that provide legal assistance to the poor in civil matters.

Ms. Erlichman focused her presentation on a then proposed rule, called the “IOLTA Comparability Rule,” which would require that lawyers maintain their IOLTA deposits in Maryland financial institutions that agree to pay comparable rates of interest on IOLTA accounts as they pay on similarly situated non-IOLTA accounts.³⁹ She

35. See Maryland Legal Services Corporation, *MLSC Announces Grant Awards for Judicare Pilot in Maryland*, Jan. 15, 2008, <http://www.mlsc.org/archives.htm> (last visited Jan. 16, 2009). MLSC awarded four grants for January 1 through June 30, 2008 to create these pilot projects to the Allegany Law Foundation, Community Legal Services of Prince George’s County, Harford County Bar Foundation, and Maryland Volunteer Lawyers Service. *Id.*

36. Susan M. Erlichman, Remarks at the Maryland Legal Services Corporation 25th Anniversary Symposium (Oct. 11, 2007) (transcript on file with author).

37. MD. CODE ANN., BUS. OCC. & PROF. §§ 10-301 to -307 (West 2007). In general, this legislation requires attorneys to deposit their trust funds in interest-bearing accounts for the benefit of the Maryland Legal Services Corporation when the lawyer “reasonably expects that, for the period that the lawyer expects to hold the trust money, the interest that it would earn: (1) would not exceed \$50; or (2)(i) would exceed \$ 50; but (ii) would not cover the cost of administering an interest bearing account on which interest is payable to the client or beneficial owner.” *Id.* at § 10-303(b).

38. MD. R. CTS. JUDGES, & ATT’YS. 601–612.

39. Janet Stidman Eveleth, *MSBA Backs IOLTA Comparability Rule to Boost Funding for Legal Services to the Poor*, MD. B. BULL. (June 2007), available at http://www.msba.org/departments/commpubl/publications/bar_bult/2007/jun/iolta.asp.

estimated that adoption of the rule by the Maryland Court of Appeals would dramatically increase the income of the MLSC, perhaps doubling it from six million dollars per year or so to twelve million, depending on the effective interest rates.

After the Symposium, on December 3, 2007, the Maryland Court of Appeals unanimously adopted the Comparability Rule.⁴⁰ Effective April 1, 2008, the new rule is similar to those that have been adopted and implemented by seventeen other states.⁴¹ Banks participating in the IOLTA Program either must offer interest rates to IOLTA clients that are comparable to those of non-IOLTA customers who have similar balances and banking needs, or offer a “safe harbor” rate that is equal to fifty-five percent of the Federal Funds Target Rate.⁴² In setting interest rates on IOLTA accounts, a bank may consider factors ordinarily considered by the institution at that branch when setting non-IOLTA interest rates, as long as those factors do not discriminate between the two types of accounts.⁴³

The move towards a new comparability rule came in response to plummeting interest rates on lawyer accounts.⁴⁴ When IOLTA was created in 1982, its accounts enjoyed an average return rate of over five percent.⁴⁵ When commercial interest rates dropped over time, IOLTA rates followed. However, although non-IOLTA accounts recovered, IOLTA accounts—with interest rates remaining at one percent or less—did not.⁴⁶

IV. THE NEED FOR INCLUSIVE STRATEGIC PLANNING TO DEVELOP CLEAR GOALS AND EFFECTIVELY ALLOCATE SCARCE LEGAL RESOURCES IN THE REPRESENTATION OF THE POOR

The oral presentation of Hannah E. M. Lieberman, former Deputy Executive Director of Maryland’s Legal Aid Bureau, Inc.,

40. Liz Farmer, *Md. Court of Appeals Adopts IOLTA Comparability Rule*, DAILY REC., Dec. 4, 2007.

41. See American Bar Ass’n., *Funding News, Maryland and Louisiana Adopt IOLTA Interest Rate Comparability*, 61 LEGAL SERVICES NOW, January 14, 2008, at 1 available at <http://www.abanet.org/legalservices/sclaid/lisn/docs/lisnjan08.pdf>.

42. MD. R. CTS. JUDGES, & ATT’YS. 610(b)(1)(D).

43. *Id.*

44. See Farmer, *supra* note 40.

45. *Id.*

46. *Id.*

tracked much of her written remarks published as part of this Symposium.⁴⁷

She began by identifying many of the formidable obstacles—and changing forces—the poor face in obtaining the basic necessities of life.⁴⁸ There is a growing national hostility to immigrants. Returning veterans, many of whom are physically and emotionally injured, have a “marginal safety net, at best.”⁴⁹ Many others are facing the loss of safe and affordable housing. The young and the old face special challenges.

While the needs of the poor are acute, former avenues of relief—for example the federal courts—are “closing,” and civil rights generally are under attack.⁵⁰

To respond to these challenges, Ms. Lieberman proposed an inclusive, rigorous,

strategic planning process that identifies systemic issues, sets clear goals, develops coherent and comprehensive forms of advocacy (that reach all branches of government, the media, and other policy-makers), explores a full range of solutions to problems, and proposes measurable results.⁵¹ She noted that an initial step in this process is to conduct a survey of client needs, which will inform the planning process and strengthen the connections the LAB has to the communities it serves.⁵² She said the LAB has done much of this and is evaluating the results.⁵³

Ms. Lieberman stressed the capacity of staff programs like the LAB, where experts in poverty law work on a daily basis with the people they serve to provide a broad spectrum of high quality, client-centered services to the people and communities they represent.⁵⁴ In her article, Ms. Lieberman further develops these points and others.

47. Hannah Lieberman, *Legal Services: Meeting New Challenges with Delivery Systems that Promise Lasting Impact for Maryland's Poor*, 7 U. OF MD. L.J. RACE, RELIGION, GENDER & CLASS 253 (2007).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

V. THE ROUNDTABLE DISCUSSIONS: AN ASSESSMENT

The speakers demonstrated the diversity and creativity of Maryland's legal

services delivery system: the staff (LAB) model, which is the core of the delivery system; judicial and administrative leadership, which is essential in creating more effective access to the justice system; specialized not-for profit projects (in this case a litigation project in which an experienced volunteer and staff lawyer are partners); and creative and committed legal services leaders and resource managers.

Remarkably, in major respects, the future that they outlined already is occurring. The Court of Appeals has adopted the IOLTA Comparability Rule, and the MLSC and AOC are in the process of expanding representation in family law matters through both reduced-fee private attorneys and the staff model.⁵⁵ Although the courts have not yet generally accepted the Civil Gideon arguments, the arguments themselves are persuading many bar leaders, legislators, and other policy-makers that more must be done to provide legal services to the poor. Most importantly, in Maryland, the various parts of the delivery system are working together to give the poor more effective access to justice.

55. Farmer, *supra* note 40; see also 2007 MILLEMANN REPORT, *supra* note *, at 52-55.

