

Minutes
Public Access to the Courts
2/24/06
Granite State Independent Living

Attendance: Cheryl Killam, Claudia Nixon, Clyde Terry, Ralph Littlefield, Ken Barnes, Ginny Martin, Al Cantor.

The committee met to review the draft of the recommendations to be presented to the commission.

Report to the Citizens Commission on State Courts

From the Research Committee on Access to the Courts

February 28, 2006

I. Our first priority has two equal sub-parts.

A. All Courts in the State of New Hampshire will meet or exceed the requirements for compliance with Federal and State laws pertaining to accessibility. Currently there is one courthouse that is not accessible, and the majority of the courthouses in this state have some areas that are not accessible. All court facilities shall have provisions for:

- Compliance with all applicable building codes for the removal of all structural barriers that prevent or impede physical access.
- The deployment and usage of effective and accessible methods of communication such as NH Relay, Telecommunication Devices for the Deaf (TTY), Assistive Listening Devices (ALDs), Computer Assisted Real-time Translation services (CART), Video Relay Services (VRS), accessible (508-compliant) websites and alternative formats for all printed materials (large print, Braille, audio-tape and computer disk).
- The removal of language barriers for non-English speaking citizens by providing translation services, Oral or Sign Language Interpreters, and translated written materials.
- Discrete funding sources for payment for communication access and for support of annual disability sensitivity training.

Rationale: Accessible court facilities are required by the Federal Law, Title II of the Americans with Disabilities Act. In May

Decision. of 2004 this was upheld by the [Tennessee v Lane US Supreme Court](#)

- **The following laws require accessible buildings and programs:**
 - [The Rehabilitation Act - Section 504](#)
 - [The Americans with Disabilities Act](#)
 - [Title II Regulations](#)
 - [Title III Regulations](#)
 - [The ADA Standards for Accessible Design](#)
 - [The NH State Building Code - NH RSA 155-A](#)
 - [The New Hampshire State Fire Code - NH RSA 153:5](#)
 - [The Architectural Barrier-Free Design Code for the State of New Hampshire](#)
- **Effective and Accessible Methods of Communication are required by the following laws:**
 - [The Rehabilitation Act of 1973 - Nondiscrimination on the basis of a disability – Section 504](#)
 - [Electronic and Information Technology Access - Section 508 of the Rehabilitation Act](#)
 - [Title II of the Americans with Disabilities Act](#)
 - [Title VI of the U.S. Civil Rights Act](#)
 - [The Telecommunications Act of 1996](#)
 - [NH Interpreter Law RSA 521-A](#)
 - [NH Interpreter Licensure Law RSA 326-I](#)

I. B. Fund full staffing for traditional civil legal services.

Rationale: Meaningful access to the New Hampshire Courts is limited by the inability of many people to pay for traditional legal services. Economic and procedural barriers present challenges for a growing percentage of our population. It is estimated that among low-income citizens, only a small fraction of those involved in civil matters have their legal needs met by the current levels of legal assistance services. Moreover, a growing segment of the moderate- and middle-income communities find themselves unable to afford or access conventional legal representation.

Because of this inability, many people forgo the justice system, even when they face problems in their lives that could be addressed by the legal system. They know they cannot afford a large retainer, so they never even begin to pursue their potential legal claims.

Another option for low-, moderate-, or middle-income people who cannot afford to pay the cost of legal services is to represent themselves in court. The rise in the number of *pro se* litigants has many negative effects: *pro se* parties are not trained in the law and hence do an inadequate job of representing themselves; justice is compromised; and litigants are deprived of their full rights. The growth of untrained litigants also serves to undermine the smooth functioning of the courts by introducing delays and inefficiencies – a process that adds further to the legal costs for all.

We have come to realize that, before we suggest new and innovative methods and strategies for dealing with economic barriers to legal access, we should recognize that our current network of civil legal assistance is excellent, and in many ways a model in terms of the quality of representation and the level of cooperation among providers. That being said, the system is woefully overburdened, and by some estimates only 20% of the low-income people who need legal services are receiving them. This is a delivery system that is tried and true – but lacks the resources to achieve full success. We urge that there be a commitment to full funding.

II. Commit New Hampshire to a “Civil Gideon,” – that is, to recognize that, in the same way that criminal cases that may result in the loss of liberty compel the state to provide an attorney for a defendant, so too should civil cases that could result in significant loss – such as the custody of a child or the loss of a home – compel the state to provide legal representation to those who could not otherwise afford it.

Rationale: This in many ways defines who we are as a society. Should people lose custody of their children or be evicted from their homes simply because their legal opponent has more money? This recommendation is not a particular strategy so much as it is a philosophical commitment to a fair society, with liberty and justice for all.

III. Support and promote a variety of means of obtaining and improving access to justice, including:

- a. Encouraging alternative dispute resolution (ADR);**
- b. Promoting the development and use of legal insurance;**
- c. Creating a committee to study access to justice issues, including an assessment of specific legal needs in particular areas, and how best to address them; and**
- d. Creating a Statewide Citizens' Advocate, to look out for the legal needs of the average resident of New Hampshire.**
- e. Streamlining court scheduling and promoting greater use of technology for court conferences and hearings.**

Rationale: We must do all we can to provide citizens with ways to get fair resolution to their legal issues in the most effective, expeditious, and efficient way possible. If a client can avoid costly and time consuming court costs by problem-solving through alternative dispute resolution, justice will be served and the burden on the court system and our citizens will be reduced.

In addition, we urge the creation of a system of legal insurance, whereby for a reasonable premium, average people would have access to a lawyer to advise them on their rights and duties and to assist them in advocating for their legal interests. Legal insurance would help people with moderate and middle incomes who are unable to afford private lawyers to represent them, but who are ineligible for the system created to assist the State's low-income population (New Hampshire Legal Assistance, Legal Advice & Referral Center, and the Bar's Pro Bono Program). Legal insurance could be like health insurance, helping the average person out when the need arises (which presumably would be a lot less often than health needs). The premiums could be paid by the State, employers, and/or individuals on a sliding scale.

At the least, we would encourage the State to create a system of catastrophic legal insurance, provided free to those who could not otherwise afford it. This would be akin to catastrophic medical insurance: there are clear parallels, in that only a very few in our society could afford the very large out-of-pocket costs of either a medical or legal disaster. Perhaps it is time to encourage the development of a vehicle so such insurance is universally available.

The Committee also recommends that the State create an Office of the Citizens' Advocate, to make the kind of work our (and other) committees are doing sustainable into the future. The Citizens' Advocate could be modeled on the Public Utilities Commission (PUC) Consumer Advocate (for utility issues) [and the Attorney General's Consumer Protection Unit (some consumer issues)], or on similar programs adopted in other states.

The Citizens' Advocate would work to assure that the justice system meets the legal needs of the average person. The Office would monitor the system and advise the courts as to whether there are any procedural improvements that the court system can make (like the suggestion for case managers), including changes that might be necessitated by changes in NH's population (e.g., the need for language interpreters) or by changes in types of cases filed. The Advocate's staff would also evaluate trends in legal issues and court results which might have widespread impact on litigants and the community. As to the latter issues, the Advocate's Office might recruit volunteer attorneys willing to take on systemic advocacy on behalf of average citizens.¹ Or such issues could be referred to advocacy organizations such as New Hampshire Legal Assistance (if the client is low-income), the Disabilities Rights Center (if the client has a disability), consumer groups, etc., to be approached from a class-wide or systemic perspective. We recommend that, in addition, the Citizens' Advocate be authorized to bring cases on its own, in order to help average citizens to address particular issues they could not otherwise afford to address.

The Office of the Citizens' Advocate should also undertake a systematic study, in detail, of exactly what kinds of legal needs are not being served adequately in different parts of New Hampshire. In which geographic areas, at which income levels, for which types of legal issue, are the unmet needs the greatest? The study should include, in addition to the needs of people who choose to represent themselves, the legal needs of people who despair of even entering the legal system because they know they cannot afford to pay for the legal representation necessary to have a fair chance to vindicate their rights. Some legal areas (e.g., family law) seem to have a high number of parties unable to afford legal representation, but other legal problems no doubt exist where people would be better off if they could obtain legal representation but do not have access to it because of a disability or financial, language, or cultural barriers. The proposed study committee would assess where the needs are, and analyze what kind of solutions might best address each particular need. The Citizens' Advocate would then lead the effort, along with the court system, to make the necessary solutions a reality.

¹ Many legal issues affect large numbers of people in similar ways. Some of these can be efficiently addressed by the recruitment of a panel of private lawyers who would be willing, pro bono, to bring a systemic challenge to particular procedures or practices. The private bar ordinarily would not accept such cases, because they require a large investment of unpaid attorney time. But in the spirit of public service, we believe a number of attorneys would be willing to cooperate with the Citizens' Advocate and accept cases that could potentially benefit a great many people who otherwise could not afford legal representation. This could greatly increase the enforceability of legal rights beyond what the current staff of legal services organizations can provide.

Streamlining court scheduling to eliminate the “cattle call” of attorneys and litigants would reduce the amount of down time at the courthouse for attorneys and litigants and the resulting associated costs. Current scheduling practices, which do not provide litigants with specific hearing times, drive up the cost of representation and can translate into lost wages and/or increased child care expenses for litigants, both pro se and represented. At the same time, certain hearings may lend themselves to telephone and/or video conferencing, reducing time and cost in travel to the courthouse.

IV. Create ways to support *pro se* litigants, including:

- a. Creating a public education program to educate people who may have legal claims about the court's procedures; the resources available to them; and legal issues that people should consider in evaluating their legal needs. One such resource is "unbundled" legal services, where attorneys are permitted to work with a client on a portion of a legal case, even if they do not handle the entire case;**
- b. Expanding the "case manager" system, ideally with a well-trained case manager in each court, who would interview clients, and either refer the client to legal services providers, recommend and facilitate alternative dispute resolution, or provide procedural guidance and support if the client chooses to move forward *pro se*;**
- c. Encouraging the use of non-lawyer professionals to provide simpler law-related services within their areas of competency;**
- d. Helping people involved in uncontested divorces to handle their own cases, by developing an "uncontested divorce kit" and providing paraprofessional support to guide people through the court process.**

Rationale: Our conclusion is that a little bit of a lawyer is better than none at all. Keeping in mind that the ultimate ideal is to have full representation by an attorney with a thorough and integrated knowledge of the client and his/her needs, the fact is that a shrinking percentage of the population is in a position to hire an attorney in that manner. Until the day arrives when New Hampshire can achieve the ideal, we should not pretend that the *pro se* population will go away; instead, we need to find ways to support and facilitate the *pro se* process.

Encouraging attorneys to provide unbundled services (in appropriate circumstances) will provide critically important representation to many litigants who otherwise would not have a lawyer at all. Additionally, building a "case manager" system would be a cost-effective way to triage *pro se* cases, deflecting many from the court system (and increasing the efficiency of those that remain). For certain legal issues, a lay person can handle many tasks on her own, with assistance/guidance from a lawyer or paraprofessional. Such assistance should be made available, ranging from the development of a "kit" (as for uncontested divorces) to guide people, to a clinic where attorneys, in person, walk the party through the necessary forms and other filings.

V. Explore and encourage innovation in how regular legal services are billed, including:

- a. Alternatives, where appropriate, to a billable hour system; and**
- b. Fee-shifting and fee-sharing in family law cases, where one party has access to much greater financial resources than the other.**

Rationale: Supreme Court Justice Stephen Breyer and others argue that the billable hours system puts lawyers on a treadmill and seriously impacts their ability to perform *pro bono* work and other public service. Some argue that hourly billing also creates a gap between the value of services and their cost – which can result in higher costs for those who are indeed paying for legal services, or who hope to. We recommend that the Bar encourage and explore other structures for compensation, including “value billing” (setting a flat fee for performance of a specific task or completion of a particular project).

We also recommend fee-shifting and fee-sharing in family law disputes – where one party has access to much greater financial resources than the other – as a way of fairly sharing family assets between both parties, but also as a way to de-escalate legal disputes and encourage settlement.

The committee felt that it had completed its work. If anyone wanted to submit any last minute changes please get them to Ken Barnes so they maybe included into the submitted draft. The next meeting will be at the State House on March 13, 2006. The Committee adjourned.