

LEGAL SERVICES CORPORATION
BOARD OF DIRECTORS RECEPTION FOR THE
VISIT TO THE STATE OF ILLINOIS

Monday, October 17, 2011

Offices of Sidley Austin LLP, Chicago

REMARKS OF JUDGE DIANE P. WOOD,
U.S. Court of Appeals for the Seventh Circuit

It is such a pleasure to be here with so many people who are dedicated to making the promise of “Equal Justice Under Law” a reality for all of our fellow citizens. As the sobering statistics the Legal Services Corporation has published in its 2010 Annual Report attest, a daunting number of Americans are eligible for LSC-funded assistance, and only a fraction of those people actually receive the help that they need. This is a problem that touches all of us – it affects the safety and stability of our families (and thus the foundation on which our children stand), the reliability of housing markets, the protection of consumers from unscrupulous actors in the commercial arena, and the overall health of our communities, which are strengthened when people receive the assistance to which they are entitled by the law. Many of these areas are addressed primarily by state law – family law, landlord-tenant law, contract law, domestic violence protections, to name a few. What, you may ask, does a federal judge have to

say about that? Perhaps as a judge, not too much. As a concerned citizen and member of the bar, however, I do have some thoughts that I would like to share with you about the situation in which we find ourselves. Before doing so, however, I wanted to touch on the ways in which the people whom LSC serves do find their way into federal court and before federal agencies. Our overlaps are bigger than you may think, and thus our opportunities to work together are greater.

Let's start with the district courts. Rather than overwhelm you with endless numbers about each and every district, I thought that I would focus only on aggregate nationwide numbers and on the Northern District of Illinois, which is where you now find yourself. The Administrative Office of the U.S. Courts keeps statistics about an astonishing variety of subjects relating to the courts, and among them are some about the number of *pro se* cases that are coming through the doors. I put to one side criminal cases in which the defendant elects to represent him- or herself, because they are a special case, and because these defendants have a legal entitlement to counsel, even if they have opted to waive that right. On the civil side, almost 283,000 civil cases were filed in the federal courts during the 12-month period ending September 30, 2010.¹ Of that number, 72,900, or just over 25%, were *pro se*. If one divides the cases between prisoner petitions and nonprisoner cases, it turns out that out of the 52,000 prisoner cases filed over that time, almost 94% (about 48,600) are *pro se*, while on the nonprisoner side only about 10% (24,000 out of 231,000) are *pro se*. The numbers are similar for the Northern District of Illinois. Overall, 20% of the civil cases are filed by people acting *pro*

se (1,840 out of 8,900); the prisoners file *pro se* almost all the time – in 84% of the cases, while approximately 11% of the nonprisoners (817 out of 7,625) are acting for themselves.

The district courts are well aware of these numbers, and most of them – including Northern Illinois – have tried to address the unique problems these litigants experience. If you go to the website of the Northern District, one of the first things you see is a link for the *pro se* litigant. (Granted, one would need access to a computer to find it this way, but it is obviously also possible to go to the Clerk’s Office and ask.) The court maintains information about resources for persons who file a civil case without an attorney. It cautions that “[t]he rules, procedures and law that affect your case are very often hard to understand. With that in mind, you should seriously consider trying to obtain professional legal assistance from an attorney instead of representing yourself as a *pro se* party.” Realistically, though, there are thousands of people in Northern Illinois alone who cannot afford to pay an attorney, and many of them have no idea where to turn for free help. The staff of the Clerk’s Office is willing to help them by answering questions about procedures, but it is obviously not entitled to recommend a legal course of action, predict how a judge might decide an issue, interpret any judicial order, or interpret any rules of court or statutes. The office maintains a set of forms that are often used in civil cases, which serve both as a helpful guide to the *pro se* litigant and also as a good organizational device for the benefit of the judge.

The website also has a link to the District Court's *Pro Se* Assistance program, which is staffed by attorneys from the Legal Assistance Foundation of Metropolitan Chicago, in cooperation with the District Court and the Clerk of the District Court, with special funding from the Chicago Bar Foundation. The *pro se* assistance attorney can do several things to help the person move forward. It can, for instance, assist by providing information about federal court procedure and the law that might apply to that individual's situation; assist in the preparation of certain pleadings, motions, or other court documents; assist in pointing out other sources of information that might be useful; and refer the person to other providers of civil legal services or to social service agencies. There are important limits, however, on what they can do. They may not appear on the person's behalf in court, research or write court documents for the person; conduct any investigation into the facts of the case; or negotiate with the opponent or the opponent's attorney. Finally the *pro se* assistance attorney may decline to assist if the attorney has already been contacted by the opponent, the legal problem is beyond the scope of the program, or giving advice would pose problems under the Illinois Rules of Professional Conduct.

Sometimes a person is represented at the time a case is filed, but for one reason or another, the lawyer bows out. In other cases, the plaintiff begins on her own, but the district court recruits a lawyer to represent her. In the Seventh Circuit, we are quite insistent about the terminology that should be used in these instances: in an *en banc* decision called *Pruitt v. Mote*,² we set forth the standards that govern requests for

representation where no source of fees for the attorney is assured. We noted there that “[a]lthough there is no constitutional or statutory right to court-appointed counsel in federal civil litigation, an indigent civil litigant may ask the district court to request an attorney to represent him *pro bono publico*.” We established a two-part standard for the court to use when considering a litigant’s request for counsel: first, the district court is to ask whether the indigent person has made a reasonable effort to find counsel for him- or herself, and second, it should consider whether, given the difficulty of the case and the plaintiff’s competence, the plaintiff appears to be able to handle the case without legal assistance. Records from the Clerk’s Office for the Northern District of Illinois indicate that 306 attorneys were appointed (in the sense I have just described) in 2010: 150 for prisoner civil rights matters, 102 for employment cases, and 54 others.

These data are harder to come by for the courts of appeals. Information from the Administrative Office indicates that 27,112 appeals are *pro se* as of the time of filing, and a few more – 29,212 – are *pro se* at termination. Of those, most are civil – all but 2,085 at filing and all but 3,550 at termination. The civil cases are further broken down into federal prisoner petitions, “other” U.S. civil cases, state prisoner petitions, other private civil cases (think diversity), bankruptcy, administrative appeals, and original proceedings. At the Seventh Circuit, we had 1,568 *pro se* cases at filing, and 1,711 at termination, with ratios among the various types of cases that more or less mirror the national numbers.

What must be striking to everyone here is how small those numbers really are. As I said at the outset, the lion's share of the legal business of the poor occurs before administrative agencies, in state courts, and in out-of-court settings – the telephone call to the landlord, the encounter with the social worker, the exchange with the physician's assistant about health benefits. The only way that we as a society will come close to meeting the legal needs of this vast population is to redouble our efforts to be creative and to leverage our resources as far as they will go. You at LSC know that there will never be enough federal dollars to meet 100% of the need that is out there, even as you remain appreciative of the funding that comes your way – \$420 million for Fiscal Year 2010. That is why you have pioneered public-private partnerships and affiliations with the 136 nonprofit legal aid programs mentioned in your annual report. You have succeeded in increasing the involvement of private attorneys, and with the support of groups like the American Bar Association and the state bar associations, more of this may be forthcoming in the future – I certainly hope so.

But we are in need of new models and new approaches; otherwise, we risk leaving behind millions of people who are trying to cope with foreclosures, unemployment, bankruptcy, domestic violence, re-entry to civilian life after military service, and so many other problems. One thing that seems essential is what you might call more troops on the ground – more people to whom LSC-eligible clients can turn for help. People have discussed various forms of mandatory *pro bono* obligations for members of the bar as one way of expanding the number of lawyers who would be

available to meet this need. I do not want to take a position on the “mandatory” aspect of that debate here, but it does seem to me that we may have untapped resources. Let’s start with law students. Most law schools now include clinical education in their program, and many students take advantage of that. A great many clinics are devoted to serving needy people, and so that is helpful as far as it goes. But clinics are expensive for law schools to operate, and law school tuition has reached frighteningly high levels: I cannot imagine jacking it up even further in the interest of doubling the number of clinical programs. What might be possible, however, would be to expand academy/bar relationships so that each student devotes the equivalent of a course to some kind of service for the poor. This wouldn’t do much for people outside the cities and towns where the 200 ABA-accredited law schools are located, but this is one way in which we can take advantage of the extraordinarily large number of apprentice lawyers we are training every year.

At the other end of the age spectrum are the retired or semi-retired lawyers. Other groups have successfully tapped into those resources – I am thinking, for example, of the ABA’s Central and East European Law Initiative, or CEELI, which was active during the years immediately following the break-up of the Soviet Union and the return to democracy of the East European countries. If lawyers could be found who were willing to travel to a central European country for six months or a year (as they were), then we should be able to find lawyers who would need only to keep their bar membership active and volunteer 10 hours a week with a local legal aid society.

The health professions have used another way to expand services to patients. For every doctor, there are several people who are sometimes called “physician extenders.” This may be a nurse-midwife who works with the obstetrician, it may be a physical therapist who works with the orthopedic or neurologic specialist, or it may be a LPN who will give you a flu shot if you stop by Walgreens and pay \$20 or \$30. The legal profession has not been enthusiastic about throwing its doors open to non-lawyers who work directly with clients, even if this is done under the supervision of a lawyer, but we need to take a fresh look at this. Indeed, information that was presented to the ABA’s Commission on Ethics 2020 suggests that the market has left the organized bar in the dust. Internet sites abound that offer do-it-yourself legal kits for everything from incorporation, to divorce, to bankruptcies, to wills. Those of us inside the guild may bemoan this development, since the quality varies wildly and there is a serious risk that people may be harmed more than helped, but my guess is that such sites are here to stay. Rather than wring our hands and try to stamp them out, we should take a lesson from King Canute and recognize that we cannot stop the tide. There may be ways to turn these sites to positive uses, if we are clever enough to find a way to link them with qualified counsel.

Non-lawyers who can be of some assistance to *pro se* litigants have been a fixture in the prisons for many years. And many of them become quite good with experience! The Illinois Rules of Professional Conduct address a lawyer’s responsibilities for nonlawyer assistants (Rule 5.3), but they have little else to say about the possible ways

in which legal assistants – lawyer extenders, to borrow the physicians’ term – might enable one lawyer to help a greater number of people. One could imagine, for example, a lawyer whose primary job was triage: send the people with serious legal problems off to the lawyer’s office, send the people who really just need an educated advocate to make a few telephone calls or to help explain a complex document to the legal assistant. Naturally the assistants would need training and supervision, but there is a great deal that they could do.

Let me close with a description of a company that a former law clerk of mine, Rebecca Onie, started while she was at Harvard College 15 years ago and now heads. It is called Health Leads. Rebecca has been showered with awards for the innovative approach Health Leads has taken to delivering health care to low-income people – just to name a few, she was named to the 2010 Power List that *O! Magazine* compiles each year of twenty women who are “changing the world for the better”; she received a MacArthur “genius” grant in 2009 for her work on Health Leads (originally called Project Health); and she also received the John F. Kennedy New Frontier Award in 2009, which honors Americans under the age of 40 whose commitment to service is changing their communities and the country. I am telling you about Health Leads, and Rebecca’s transformative work with it, because it seems to me that there must be a way that we can emulate its model in the legal profession.

In the 22 clinics where Health Leads operates, physicians can “prescribe” food, housing, health insurance, job training, fuel assistance, or other resources for their

patients just as they do medication. The desks are located in pediatric outpatient, adolescent, and prenatal clinics, as well as in health department clinics and federally qualified health centers. Last year, they reached nearly 6,500 families. The core work of Health Leads is performed by carefully trained college student volunteers, who help to connect patients with the wide array of resources that they need. The volunteers work in close partnership with clinic physicians, social workers, and lawyers to ensure that the services are integrated across different providers and that they are effective in meeting the patients' real needs. The website is careful to note that the volunteers supplement the services of licensed professionals; they are not intended to replace anyone.

Something like that would be possible for legal services as well, since the services needed by the clients of legal aid clinics also run the gamut. Desks could be placed in readily accessible community locations – Social Security offices, public libraries, elementary schools, health clinics, or the local Wal-Mart. Partnerships with willing companies could expand access. Trained volunteers would know when to refer someone to the lawyer-in-charge, but that person would not necessarily need to be on-site.

If this idea doesn't work, then other ideas might. We need to be open to new thinking, because the toxic combination of huge numbers of people who need legal services and strained public budgets is not going away any time soon. The Legal Services Corporation is in an excellent position to collect, vet, and try out ideas that

hold promise. I applaud the work that you do; I look forward to your future accomplishments; and I thank you again for inviting me to join you for this meeting in Chicago.

¹ See Judicial Business of the U.S. Courts 2010, Table S-23.

² 503 F.3d 647 (7th Cir. 2007) (*en banc*).