All Family Law Parties Need Access to Justice

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My last three columns discussed the increase in the number of self-represented parties in family law actions, the Family Law Section’s Strategic Plan to help members adapt to the change, and five actions family lawyers and the judiciary can take to reduce the number of self-represented parties and foster the valuable role lawyers play in the family law process. The response has been extremely positive, and with continued discussion, positive change is inevitable. The overall message is that the partnership among the State Bar of Wisconsin, its members, and the judiciary can bring justice to thousands of parties while enhancing the valuable role lawyers play in the access to and administration of justice.

Another piece of the puzzle, however, is to be mindful that despite our efforts to encourage parties to engage family lawyers, there will always be those individuals who cannot afford legal representation. This group does not include those parties who can afford some level of representation but choose not to seek legal services for the reasons stated in earlier columns. There will also always be those individuals who cannot navigate the legal system because they are unable to effectively comprehend and communicate because of language barriers, illiteracy, or cognitive or other disabilities. For purposes of this discussion, the focus is on those parties truly without sufficient means to obtain any legal representation or those who cannot navigate the system alone.

In a perfect world, access to the court system is a basic right of a civilized and modern society. After all, what good are those rights provided to us if we are denied a forum in which we can affirm those rights? Access to justice means more than just helping people get physically into the courtroom. Access to justice means offering individuals the opportunity to present their cases to the courts in a legally meaningful way. Many civil cases involve determinations that affect the essentials of life, and the loss of those basic human needs can have devastating effects. Many family law decisions are related to the care and control of children or to safety issues for families on a daily basis. Strong and compelling arguments can be made for the right to counsel in all civil cases.1 And, judges have the inherent authority to appoint counsel in cases if they conclude that either the efficient administration of justice so warrants or due process considerations outweigh the presumption against such appointments.2 However, for purposes of this discussion, the focus will be on what we can do now to address this compelling problem.

I took an informal and completely unscientific survey of many family lawyers who dedicate their practices to representing low-income parties or those unable to navigate the system, and of family lawyers who volunteer to represent low-income parties or those unable to navigate the system. I also read several articles on the legal system and the hurdles such individuals must overcome to gain meaningful access to the court system. While I am not representing that my
research or survey was exhaustive, there appear to be five things lawyers and the judiciary can do to increase meaningful access to the court system for those unable to afford any kind of legal services or those who cannot navigate the system alone.

1. **Volunteer to represent at least two parties per year on a pro bono basis.** Overwhelmingly, the respondents in the survey and the literature support the concept of *actually* volunteering! A State Bar of Wisconsin “comprehensive study that examined unmet civil legal needs of low-income people in [Wisconsin] revealed that 500,000 residents face serious civil legal problems without legal assistance.”3 These parties “can’t get legal help because they can’t afford it, or don’t qualify for legal aid services, or do qualify but get turned away because of the legal aid agencies’ case overloads.”4 While not all of these individuals need family law representation, it is not a stretch to assume that at least one-third, or 167,000 individuals, needs assistance in a family law related matter. The reality is that public interest firms and organizations will never be funded sufficiently to meet the needs of all of the eligible and needy individuals. The access to justice problem cannot be addressed without a commitment from individual lawyers to volunteer to represent such individuals. And, a commitment from lawyers to volunteer to represent such individuals is *not* satisfied with “unintentional” pro bono work that results from poor client selection.

The suggestion that each lawyer take on two cases pro bono per year (including acting as a guardian *ad litem*) does not have to be a burdensome commitment. First, not all of the cases are complicated. Second, experienced lawyers will spend less time on a family law case than new lawyers or lawyers without family law experience. Third, Legal Action of Wisconsin’s Volunteer Lawyers Project staff provides a great deal of support for volunteer lawyers including mentoring, technical support, library, meeting rooms, malpractice insurance coverage, litigation expense fund, and interpreters. Fourth, you can be selective about which cases you take from calls you receive from the public. If you volunteer to take cases from public interest organizations, you can specify the kind of cases you take and in which county or counties. Fifth, any lawyer in the state can receive free high-quality continuing legal education credits through Legal Action of Wisconsin, Inc., by agreeing to take on one pro bono case per year. For more information, contact attorney Patricia Zeeh Risser at pzr@legalaction.org at Legal Action of Wisconsin, Inc. (serving 39 southern Wisconsin counties), or Marka Henkelman at www.judicare.org at Wisconsin Judicare (serving 33 northern Wisconsin counties).5

2. **Utilize unbundled services to expand your services to low-income parties.** One of the frequent comments by lawyers as to why they do not take on pro bono cases is fear of a significant time commitment. Although a self-represented party may not have sufficient assets or income to argue about, there is a likelihood that the lawyer will encounter placement, domestic abuse, and other non-financial issues. This fear is understandable. Even inexperienced family lawyers know that 80 percent of a lawyer’s time is taken up by 20 percent of the lawyer’s clients. What happens if a pro bono client takes a great amount of time? What happens if the pro bono client’s case goes to trial?

A study published in 2008 in the *Journal of Dispute Resolution* showed that not having to take the case to trial was a factor that increased the respondents’ willingness to accept cases on a pro bono basis.6 An effective way to address this issue is to provide limited representation legal services without charge. This limited representation could include providing meaningful initial consultations, consulting throughout the case, appearing in court for a single issue, reviewing documents, drafting documents, or assisting the party in obtaining the necessary information
(legal, valuation, etc.) to make an informed decision. You might decide to limit your representation of a client to participating in a mediation or a collaborative divorce, or, if you have mediation training, you might provide pro bono mediation of all issues to low-income parties. You could also mentor volunteer lawyers in their pro bono cases. A limited representation could be a single appearance for a domestic violence injunction. A limited representation could include appearing in court to argue for supervised placement or a safe exchange arrangement. In each example, valuable legal services are provided, as well as access to the system, without providing a blank check to the lawyer’s ultimate time commitment. I will be raising and discussing some of these issues as part of a panel on unbundling at the Wisconsin Judicial Conference in November.

3. Volunteer to help at pro se clinics. Although required forms are not the panacea solution to the pro se problem, and the forms can sometimes create more problems than they solve, many forms are here to stay, and there will always be a segment of the public that can be served by such services. Pro se clinics are becoming more frequent in courthouses throughout the state. Those clinics should focus the work on those parties who are unable to afford legal services and perhaps reach out to those parties who had fees waived due to indigency. Volunteering to work at such a clinic for that segment of the population for one to two hours per month is a small time commitment. If you are unable or unwilling to take on one or two pro bono cases per year, then a two-hour monthly commitment to a pro se clinic is a good use of your volunteer time and will help many people. If a significant number of lawyers made such a minimal time commitment, then a large segment of the public would gain some access to the court system.

4. The judiciary needs to encourage lawyers to volunteer. As part of my survey, two concerns were raised about the judiciary’s support of volunteer representation. One concern was that the judiciary does not encourage or support volunteer representation. The concern is that lawyers with established private practices who take on low-income cases are questioned by judges as to why that lawyer took that case. Rather, when any lawyer represents a low-income or otherwise disadvantaged party on a pro bono basis, the judge should thank that lawyer and use the lawyer as an example for all other lawyers to follow, rather than thinking less of a lawyer for making such sacrifice. The judiciary should raise the bar and expect some level of volunteerism from all lawyers.

The other concern was that judges need to accommodate the volunteer or legal services lawyer in such a way as to increase the lawyer’s ability and interest in representing such parties. Although a judge should never lower the standards for a lawyer who volunteers to represent a low-income individual, the judge could do many of the things discussed in earlier columns: allow the volunteer lawyer’s case to be heard first or out of order, conduct some proceedings over the telephone, require mediation, support unbundled services, and make all contacts with the court meaningful. In addition, there are some lawyers who believe that some judges will demand more of a lawyer representing a low-income party, particularly when the other side is self-represented, than the judge would in a case in which the party was paying for the services. For example, lawyers not charging fees may be ordered to take on additional discovery or investigation that would not be considered in a case where the client is paying his or her lawyer. Overburdening a lawyer working for a low-income party limits and discourages the lawyer from taking on other such cases. Therefore, the judiciary should at all times be respectful of the time commitment the lawyer has undertaken and encourage future representation by making the representation as efficient as possible.
5. Support efforts to address meaningful representation to all. In addition to volunteering time and slightly adjusting the way in which you practice law or administer justice, it is critical to support the various efforts to assist low-income parties. First, the Wisconsin Supreme Court has created an Access to Justice Commission; support the Commission in its beginning work, and support and act on the recommendations of the Commission when made. Second, efforts should be made to clarify the rules and lower the requirements to allow more fees to be waived. Third, the mandatory mediation proposal made in the last column that included a panel of lawyers willing to be appointed as mediators should have a *pro bono* portion to it. Finally, each family lawyer should donate the equivalent of at least one billable hour per year to a legal aid organization. For example, if your rate is $200 per hour, an annual donation of $200 would be extremely meaningful to the organization and relatively minor to your annual bottom line.

My first column discussed the value of lawyers. There is no better way for lawyers to demonstrate the value of lawyering than to provide *pro bono* legal services for those who have no resources or who are disadvantaged for whatever reason in navigating the system.

Family law lawyers, the judiciary, and the State Bar of Wisconsin can work together to reduce the number of self-represented parties in the system, increase lawyer assistance, and provide meaningful representation to all parties regardless of economic means. If we work together on a unified goal and support change in each other, then it is possible that we can have the best of all worlds: the judiciary remains a system in which justice can be dispensed fairly and effectively, family lawyers can continue to make a contribution that is valuable and relevant, and all members of our society can have equal and meaningful access to the justice system.

### Endnotes

1 See Triggiano and Ebbott, “GIDEON’S NEW TRUMPET,” 82 Wisconsin Lawyer 5 (June 2009).
4 *Id.*
5 Lawyers may register for the Volunteer Lawyers Project by going to Legal Action’s website, [www.legalaction.org](http://www.legalaction.org) and following the “Volunteer Attorneys” link and selecting “Join Up,” or following this link: [http://www.badgerlaw.net/Home/PublicWeb/VLP/VLP_Register_Document](http://www.badgerlaw.net/Home/PublicWeb/VLP/VLP_Register_Document). The next CLE program is November 11, 2009, in Madison. Additional pro bono family law opportunities can be found at [www.wisbar.org/probono](http://www.wisbar.org/probono).