

Justice, Continued

By CECIL J. THOMAS

Equal and exact justice to all ... should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety.

—President Thomas Jefferson
First Inaugural Address (March 4, 1801)

This is my second column expanding on “Justice” in this year’s theme, “Together for Justice, Together for Equity, Together in Service.” In my last column, I explained the particular need for our profession to contend with, and find solutions to, the serious civil access to justice gap that faces Connecticut litigants in housing, family, and other matters involving personal safety, security, and stability. Every day, thousands of Connecticut residents of every economic background navigate these complex and potentially devastating legal disputes without the assistance of counsel. The causes of this access to justice gap, as well as potential solutions, are far-reaching and complex, and require coordinated and committed strategy and action.

Even a cursory evaluation of our current systems reveals a fundamental disparity between these bedrock principles, and a troubling present reality. According to Connecticut Judicial Branch data, 70 percent of litigants in evictions and 57 percent of litigants in foreclosures filed between July 1, 2018 and June 30, 2019 were unrepresented.¹ In family cases, 71 percent of litigants in dissolution cases, and 77 percent of litigants in custody cases filed between July 1, 2020 and June 30, 2021, were unrepresented.² These are legal processes that are incredibly complex, with devastating potential personal and multigenerational consequences. MacArthur “Genius”

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Award recipient Professor Rebecca Sandefur has found that, “Americans spend large proportions of their lives experiencing civil justice problems: for example, eighteen-to-thirty-four-year-olds can expect that, on average, 44% of the rest of their lives will be overshadowed by these problems. And these problems involve a range of hardships, affecting health, relationships, financial and housing stability, and substance use.”³ In these moments of personal legal crisis, the legal system and our profession come into high focus, leaving an indelible lasting impression.

That public perception remains, unfortunately and unfairly, largely negative. A 2013 Pew Research Center study found that “about one-in-five Americans (18%) say lawyers contribute a lot to society, while 43% say they make some contribution; fully a third (34%) say lawyers contribute not very much or nothing at all.”⁴ A 2013 review of two decades of lawyer public perception surveys found that “more than half of all Americans in polls sponsored by the organized bar have agreed with the following statements: ‘lawyers are greedy,’ ‘lawyers make too much money,’ ‘it is fair to say that lawyers charge

excessive fees,’ and ‘lawyers are more interested in making money than in serving their clients.’”⁵ We, within the profession, know these statements to be broadly untrue. But public perception matters, as it influences individual and collective action and choice. This trend is one we must address, as it affects not just the economically-disadvantaged, but also those who are able to afford our essential services.

Bar associations, including the CBA, have long wrestled with the issue of access to justice for those who are economically-disadvantaged. In 1910, the CBA appointed a special committee to study the expense and delay of judicial proceedings, and the resulting impact on the indigent. This committee was led by Justice Simeon E. Baldwin, who had been one of the principal founders of both the CBA and the American Bar Association (ABA) in 1875 and 1878 respectively. Justice and the Poor, a report published in 1919 by Reginald Heber Smith,⁶ served as the inspiration for the ABA’s focus on the legal needs of the poor in 1920. ABA President Charles Evans Hughes launched the ABA Standing Committee on Legal Aid, which just celebrated its 100-year anniversary.⁷

“If one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the unprotected - those, precisely, who need the law’s protection most! — and listens to their testimony.”

—James Baldwin, *No Name in the Street* (1972)

The CBA also formed a committee on the report in 1920. In the ensuing century, the CBA has launched similar evaluations at periodic intervals, most recently the 2016 Report of the Taskforce to Improve Access to Legal Counsel in Civil Matters.⁸

While we have made significant advances in access to justice in the last 100 years, Reginald Heber Smith’s report, in 1919, could very well describe our situation today. “The administration of American justice,” he wrote, “is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.”⁹ Among the three primary defects identified by Smith in 1919 was the cost of legal counsel. Even in 1919, “[t]he lawyer is indispensable to the conduct of proceedings before the courts, and yet the fees which he must charge for his services are more than millions of persons can pay.”¹⁰ Smith estimated that there were 35,000,000 individuals in America “whose financial condition renders them unable to pay any appreciable sum for attorneys’ services”¹¹ in 1919. In 2017, almost 100 years later, the Legal Services Corporation issued its Justice Gap Report, finding that 71 percent of the 60 million Americans that lived at or below the federal poverty line had experienced at least one civil legal problem in the prior year, including problems with domestic violence, veterans’ benefits, disability access, housing conditions, and health care, and that 86 percent of those reported civil legal problems received inadequate or no legal help.¹²

During this period, however, the number of lawyers has increased significantly. According to the ABA,¹³ there were 122,519 lawyers across the country in 1920. In 2017, the year the Justice Gap Report was

issued, the number of U.S. lawyers had grown to 1,335,963. However, this increase in lawyer population has not decreased the access to justice gap. The National Center for Access to Justice (NCAJ) maintains a Justice Index, which measures access to justice on multiple fronts, including access to civil legal aid lawyers. NCAJ recommends a ratio of 10 legal aid lawyers for every 10,000 individuals living below 200 percent of the federal poverty line.¹⁴ In 2020, Connecticut had just 151.2 total civil legal aid attorneys across the state, or less than two attorneys for every 10,000 low-income individuals.¹⁵

Pro bono efforts certainly help, but may be relatively modest in the aggregate. In 2018 and 2019, the Judicial Branch included a voluntary questionnaire on pro bono services during the annual Attorney Registration process. Participation rates were exceptionally low, but in both years, only a few hundred attorneys answered that they had provided pro bono services to an individual. If we are to shrink the civil access to justice gap, we need to improve our systems of delivering civil legal services broadly and comprehensively.

“The system,” noted Reginald Heber Smith in his seminal report in 1919, “not only robs the poor of their only protection, but it places in the hands of their oppressors the most powerful and ruthless weapon ever invented.” This unfortunately still rings true today. The civil access to justice gap is a systemic issue that requires a systemic response by and within the legal profession. Consider, for example, our civil legal aid funding mechanisms, originally heavily reliant on Interest on Lawyers Trust Accounts, and more recently, on court filing fees. Civil legal aid funding dropped significantly at two major moments in recent history: during the Great Recession of 2007-2009, when interest rates plummeted, and during the

first phase of the COVID-19 pandemic, when court closures and the halt of most court business caused significant declines in filing fee revenue. These periods of funding decline unfortunately correlate with periods of significant increases in Connecticut’s poverty rate and civil legal need. Connecticut’s newly-created Eviction Right to Counsel program, which is an unprecedented investment in access to legal counsel for tenants facing eviction, is funded by federal pandemic-relief funds, and will require long-term funding and support to prevent another regression in the years ahead.

We need to continue to expand attorney engagement with our pro bono programs across the state, with a heightened emphasis on full representation in the areas of greatest civil legal need. Even a cursory review of the history of the Legal Services Corporation tells us that support for equal access to justice has moved from a foundational principle of our government to a fraught political issue, with those in greatest need caught in the middle. We need to work together, in a sustained and organized manner, to address public misperceptions of our profession. In doing so, we must demonstrate the value of our services, and the honor, integrity, and commitment to service and justice that are the hallmarks of our great profession. We must engage with the public to identify solutions that are measurably impactful and conceived with a focus on the public good. New technology and virtual platforms can promote access to justice, but the digital divide poses the risk of only deepening the access to justice gap for those who are economically disadvantaged.¹⁶ Leveraging technology, efficient law practice management, and other efficiencies will allow our profession to deliver our services at a lower cost, while also delivering personal and professional benefits to our members.

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President's Message

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What has the CBA done, and what will we do? In the past few years, we have created or broadly expanded pro bono volunteer programs.¹⁷ We have created a new CBA staff position—director of access to justice initiatives—to provide support for our pro bono programs and other access to justice efforts. We have created a new Legal Aid and Public Defense Committee to “advance the promise of equal access to justice for people in Connecticut who are economically-disadvantaged.”¹⁸ We are organizing conferences on law practice management and technology, as well as limited scope representation to aid our members in their practices and promote greater access to justice. We are enhancing our educational materials for the public, to promote the profession to all. These, and many other long-range solutions, require study, hard-work, and broad-based action and support. For these reasons, it is also time for a renewed CBA effort focused on the civil access to justice gap, to build on and advance over a century of work by our predecessors. In all of these efforts, and those still ahead, we “hasten to retrace our steps” towards equal ac-

cess to justice, and “regain the road which alone leads to peace, liberty, and safety.” ■

NOTES

1. Pre-pandemic data was utilized, because pandemic-related moratoria impacted specific foreclosure and summary process filings.
2. Statistics provided to the CBA by the Performance Management & Judicial Branch Statistics Unit.
3. Rebecca L. Sandefur & James Teufel, *Assessing America's Access to Civil Justice Crisis*, 11 UC IRVINE L. REV. 753 (2021).
4. “Public Esteem for Military Still High,” Pew Research Center (July 11, 2013) www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/ (last retrieved on December 10, 2021).
5. Paul F. Teich, “Are Lawyers Truly Greedy? An Analysis of Relevant Empirical Evidence.” *New England Law*, Boston Legal Research Paper Series, October 9, 2013.
6. Reginald Heber Smith, *Justice and the Poor: A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal Their Position Before the Law, with Particular Reference to Legal Aid Work in the United States*. Carnegie Foundation for the Advancement of Teaching (1919).
7. www.americanbar.org/groups/legal_aid_indigent_defense/about-us/sclaid-100/ (last retrieved on December 10, 2021)
8. Connecticut General Assembly, Report of the Task Force to Improve Access to Legal Counsel in Civil Matters (2016) www.cga.ct.gov/jud/tfs/20160729_Task%20Force%20to%20Improve%20Access%20to%20Legal%20Counsel%20in%20Civil%20Matters/Final%20Report.pdf (last retrieved on December 10, 2021)
9. Smith, *Justice and the Poor*, at p. 8.
10. *Id.* at p. 31
11. *Id.* at p. 33.
12. Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (2017) <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> (last retrieved on December 10, 2021)
13. ABA National Lawyer Population Survey (2021) https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf
14. National Center for Access to Justice, *Attorney Access* (2020) <https://ncaj.org/state-rankings/2020/attorney-access> (last retrieved on December 10, 2021)
15. *Id.*
16. *See, e.g.*, *The Digital Divide in Connecticut: How digital exclusion falls hardest on low-income households in cities, older adults, communities of color, and students* (2020) www.dalioeducation.org/Customer-Content/www/CMS/files/DigitalDivide_Report_2020_Final.pdf
17. www.ctbar.org/probono
18. Legal Aid and Public Defense Committee | Connecticut Bar Association (ctbar.org)

Willfulness

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court to award attorney's fees in certain family matters absent a finding of contempt. Section 46b-62 provides in relevant part that “[i]n any proceeding seeking relief under the provisions of this chapter [pertaining to dissolution of marriage] ... the court may order either spouse... to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in [General Statutes] section 46b-82....” In

Dobozy, supra, the Supreme Court held that § 46b-62 authorizes a trial court to award attorney's fees to a party who proves a violation of a child support order even if the obligor is not found in contempt. *Dobozy v. Dobozy*, 241 Conn. 499.

28. *DeMartino*, 192 Conn. 271, 280, 471 A.2d 638 (1984) (emphasis supplied).
29. *Id.* 279 (citing *McComb*).
30. It is reasonable to ask whether §§ 46b-62 and 46b-87, discussed above, limit or constrain a Superior Court's inherent powers as described in this article. The Supreme Court expressly declined to address this question in *Dobozy v. Dobozy*, 241 Conn. 494, and n.4. Again, only the Supreme Court can answer this question definitely. However, nothing in the text of either statute or their legislative histories suggests that the General Assembly intended to constrain the Superior Court's ancient, common law authority to enforce its own orders through the award of compensatory damages which, according to *DeMartino*, may include a reasonable attorney's fee.
31. *See Weitzman v. Stein*, 98 F.3d 717, 719 (2d Cir. 1996) (“while willfulness may not necessarily be a prerequisite to an award of fees and costs, a finding of willfulness strongly supports granting them”). Accord *John Zink Co. v. Zink*, 241 F.3d 1256, 1261 (10th Cir. 2001) (showing of willfulness not required in Second, Third, Fifth, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits). But see *King v. Allied Vision Ltd.*, 65 F.3d 1051, 1063 (2d Cir. 1995) (holding, one year before *Weitzman v. Stein*, that “[i]n order to award fees, the district court had to find that [the defendant's] contempt was willful”); *N. Am. Oil Co. v. Star Brite Distrib., Inc.*, 14 F. App'x 73, 75 (2d Cir. 2001) (noting but declining to resolve apparent conflict between *Weitzman* and *King*).
32. *See McDaniel v. McDaniel*, NNH FA144064115S, 2019 WL 5549569 (Super. Ct., Sept. 23, 2019) (court may award attorney's fees as part of compensation for non-wilful violation of court order).
33. 260 Conn. 232, 796 A.2d 1164 (2002) (equitable power to vindicate judgments “does not derive from the trial court's contempt power, but, rather, from its inherent powers”).

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