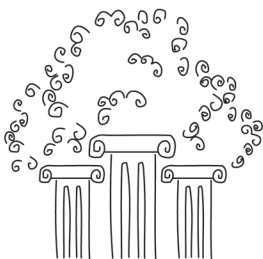


DEVELOPING CIVIL RIGHT TO COUNSEL PILOT PROJECTS



A resource for designing and implementing effective programs



Washington
APPLESEED

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INTRODUCTION

Studies indicate that as much as 80% of the legal needs of the poor go unmet.¹ While increased support of legal aid providers and the expansion of pro bono services can reduce this justice gap, only a civil right to counsel is designed to close the gap in a given class of cases. In 2006, the American Bar Association addressed this issue by calling on federal, state, and local governments to “provide legal counsel as a matter of right at public expense” in cases where “basic human needs are at stake.”²

Efforts to expand the civil right to counsel to indigent litigants have been pursued federally and locally, in courts and legislatures across the country.³ However, policy-makers and funders have sometimes balked at creating such a right without firm data about the costs, necessity, and impact of doing so. In response, advocates have created pilot projects that are designed, from the ground up, to generate hard statistical data illustrating both the importance and the challenges of expanding a civil right to counsel.

This manual is intended to outline the general issues confronted when developing a civil right to counsel pilot project, and to provide guidance on designing a pilot project that will best serve the civil right to counsel movement. It does not purport to set out a particular model pilot. Though many of the principles outlined in the manual are universal, those designing pilot projects must make decisions in accordance with local realities. The manual is designed to encourage project designers to ask questions that will lead to well-planned, executed, and documented projects, and will in turn help to advance the civil right to counsel movement. These questions are focused on the following topics:

goals	stakeholders
target audience	pilot partners
substantive legal area	funding
stage of litigation	evaluation and methodology
location	procedural uniformity
scope	

Our hope is that this manual will serve as a resource for the development of successful pilot projects that increase knowledge of the costs, benefits, and effects of providing an expanded civil right to counsel, and ultimately help increase access to justice for all individuals, regardless of their economic status.

1 Legal Servs. Corp., *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2009), <http://www.lsc.gov/justicegap.pdf> (last visited Nov. 26, 2012)

2 American Bar Association Task Force on Access to Civil Justice, ABA Resolution 112A on Right to Counsel (2006), 15 TEMP. POL. & CIV. RTS. L. REV. 507, 518 (2006), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lsc_sclaid_06A112A.authcheckdam.pdf (last visited Nov. 26, 2012)

3 See, e.g., John Pollock, *Where We've Been, Where We Are, Where We're Going: A Look at the Status of the Civil Right to Counsel, and Current Efforts*, 26 MEI JOURNAL 29 (2012), available at <http://www.nlada.org/DMS/Documents/1342803913.27/MIE%20CRTC%20articles%205-16-12.pdf> (last visited Nov. 26, 2012); Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503007 (last visited Nov. 26, 2012)

GOALS

The first question pilot architects must answer is: what do they ultimately hope to use their pilot data for?⁴ The answer to this question will affect the type of pilot project chosen, the partners, the scope, and many other considerations. This manual is designed primarily for those who are seeking to generate data that may help to build support for a right to counsel in civil cases. The design principles of a civil right to counsel pilot project may be useful in creating or optimizing many other types of programs, such as by a court seeking to improve its efficiency, or by a legal services provider wanting to better calibrate its services. However, because the goal of these types of projects is service—rather than data-oriented, they are not the focus of this manual.

From the outset, a pilot project should be designed with specific goals in mind. Those goals should be the yardstick against which all project decisions are made. Outlining the goals of the pilot at the beginning of the design phase will lay the best foundation for success.

Pilot projects are differentiated from civil legal aid programs by their essential function, which is to generate data for later consideration. While substantive legal aid programs are designed to address client needs first and foremost, a pilot project is designed to answer research questions that will guide future efforts to create new substantive programs. Much like a clinical drug trial, pilot projects may provide services to a pool of clients—but they do so with the overriding goal of measuring inputs and outcomes. Therefore, it is important to design your pilot, from the outset, with one or more discrete research questions in mind—and to be prepared for the possibility that the data generated by your research may not say what you expect it to. Answering your research questions thoroughly, and documenting your answers accurately, will ensure that your pilot project fulfills its defining function in the broader debate about establishing a general civil right to counsel for indigent parties.

KEY CONSIDERATIONS: GOALS

What question is the pilot setting out to answer?

How does the answer to that question advance the argument in favor of a civil right to counsel?

What outcomes will the pilot measure in order to answer the central research question?

Is the pilot dedicating any resources to activities that are not essential for measuring vital outcomes?

Who or what is the intended audience for the pilot's final report, and will the answer to the central question, and the data used to reach it, be persuasive to that audience?

⁴ A subsidiary but important question is also whether there is truly a need for new data, or whether existing data can be used (i.e., whether it is sufficiently analogous). To this end, it is extremely important to survey the field of existing studies prior to making a decision as to what sort of study to pursue.

Additionally, while it is important to carefully consider what a pilot project exists to measure, it is also important to know what a pilot will not address. In a project designed to provide aid to indigent clients, project designers may be tempted to widen the scope of their research in order to provide more services to people in need. However, as will be discussed later, the more extensive the evaluation goals, the greater the cost of the pilot. A pilot designed to evaluate every conceivable effect of providing counsel would be admirable, but almost certainly not affordable. On the other hand, a pilot designed to answer one or two targeted research questions may only serve a limited purpose, but be easier to fund. A successful pilot will have sufficient funding and resources to find answers for all the questions it sets out to ask. Clear objectives and boundaries are necessary for that type of success.

Finally, in considering goals, one must also determine the of the pilot's results: is it a public funder? A private funder? The legislature? The court system? Different audiences might find different kinds of data compelling. This, in turn, could affect the structure of the pilot in terms of project partners, methodology, and location.

Outlining the goals of the pilot at the beginning of the design phase will lay the best foundation for success.

Advocates in the national civil right to counsel movement have identified several areas that would benefit from additional empirical research. These include: (1) whether providing counsel causes better outcomes for litigants; (2) whether providing counsel leads to overall cost savings, or whether there are offsets that significantly reduce the cost of providing counsel; (3) what is the difference between providing full representation and something less; (4) what is the client's perception of access to justice ("client satisfaction"); and (5) whether providing counsel can reduce the pro se burden on the courts. Each of these research areas tests a different hypothesis. Though the goals of these pilots may not be mutually exclusive, some project design choices favoring one approach may be detrimental to others. The following subsections provide three theoretical examples of how different goals may affect pilot design decisions.

1. Examining the Effect of Providing Counsel on Outcomes

EXAMPLE: Pilot Project One (PP1) was designed to test the efficacy of providing counsel by selecting a pool of qualifying clients, providing services to a certain percentage of randomly selected clients from the pool, and tracking outcomes for all the clients in the pool. By comparing the outcomes of the represented clients to the unrepresented clients, PP1 was able to draw conclusions about the efficacy of providing counsel in the circumstances established by its pool qualification criteria.

Empirical information on the efficacy of counsel can support policy arguments to expand the right to counsel. A pilot project focusing on this goal would seek to develop data examining how providing counsel to unrepresented litigants affects legal outcomes.

Pilot project designers focusing on this goal should select a substantive area of law where the outcomes lend themselves to quantitative study. For instance, a claimant can either receive or be denied unemployment benefits; there is no middle ground. Conversely, a tenant may be evicted, but be provided with substantial time to vacate, a refund of rent, moving expenses, or a wide variety of other outcomes that would all be “victories” of one sort or another, but which may be difficult to quantify in a statistical report. Proceedings with win/lose outcomes are easier to use in a pilot project designed to measure efficacy.

However, project designers should also try to think creatively about what defines “efficacy” and add data points that might help round out the picture. For instance, efficacy might also be measured by a reduction in clients’ need for social services within a certain timeframe after receiving representation, or by fewer litigants filing repeat cases in the future.

Given that it is unlikely that all persons who are provided counsel will experience successful outcomes, the pilot designers will need to consider how much of an improvement in outcomes is statistically—or politically—significant. For instance, represented asylum seekers in a pilot project might succeed at a rate far higher than unrepresented asylum seekers, but still at a relatively low rate compared to unemployment claimants. Project planners may have to evaluate how the numbers will look to the target audience, and consider focusing on a substantive area of law where the improvement in outcomes is likely to be more dramatic.

Information from this type of pilot can be persuasive not only in public policy discussions, but also in litigation. One of the prongs of the balancing test for appointment of counsel established by *Mathews v. Eldridge*⁵ is the risk of erroneous deprivation, which is simply another way of saying that the courts consider whether the outcome is likely to be more accurate if counsel is provided.

⁵ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

2. Demonstrating the Economic Benefits of an Expanded Right to Counsel

EXAMPLE: Pilot Project Two (PP2) set out to measure the economic benefit of providing counsel to indigent litigants appealing the suspension of certain public entitlements in a given jurisdiction. PP2 provided counsel to all litigants who fit the selection criteria and measured both the cost of providing counsel and the value of the economic benefit generated in restored entitlements (including federal benefits brought into the state). It also measured downstream effects such as litigants' future reliance on social services.

Hard data about the costs and benefits of implementing an expanded civil right to counsel can support policy arguments that such an expansion is economically feasible. A pilot addressing this issue will have different challenges than a pilot designed to study the efficacy of representation. For example, instead of choosing a population to serve based on sufficiency of numbers to satisfy evaluation requirements, this type of study might extend an offer of representation to every potential client with a particular type of case in a particular geographic area.

Pilot designers should consider not only the costs and benefits of providing counsel for individuals, but also for the courts (e.g., reduced judicial intervention in cases, shorter “case open” lengths, etc.) and the greater community (e.g., avoided costs such as food banks, shelters, supportive housing, and other social service/emergency services, police departments and other government agencies, unemployment, health consequences, etc.). To do this, pilot operators likely will have to track participants for some period of time after the provision of services in order to see what types of costs (homeless shelters, public benefits, etc.) they create as a result of the outcome in their case. Such tracking must demonstrate a causal link between the case outcome and the incurred costs, a connection that becomes more difficult to demonstrate as more time passes since the case outcome. Designers should also consider the replicability of their delivery system in other substantive areas of law and jurisdictions.

As with the outcome-type study, information from a cost/benefit type of pilot can be persuasive, not only in public policy discussions, but also in litigation, since another one of the prongs of the balancing test for appointment of counsel established by *Mathews v. Eldridge* is the interest of the state in the “fiscal and administrative burdens that the additional or substitute procedural requirement (i.e. providing counsel) would entail.”⁶ Information regarding the benefits of providing counsel to states and municipalities supports the argument that providing a broad right to counsel would not place an undue burden on the government.

⁶ *Id.*

3. Comparing Different Levels of Legal Assistance

EXAMPLE: Pilot Project Three (PP3) set out to compare outcomes for clients represented by law students against outcomes for clients served by licensed attorneys. The attorneys and the law students worked in the same clinic in the same law school, handling clients who were referred via the same screening system.

Some project designers may be interested in learning whether limited representation by an attorney—or some other form of limited assistance—might provide benefits roughly similar to full representation in certain situations. In designing such a pilot, the term “full representation” has to be clearly defined in order to create a firm basis for comparison. For instance, does “full representation” include efforts by the attorneys to seek relief outside of the procedural framework of the legal proceeding? Does it involve a certain number of hours per case? Does it involve filing certain kinds of motions? It will be critically important to provide answers to these questions before the pilot begins, as course corrections during the pilot can potentially invalidate any data collected up to that point.

TARGET AUDIENCE

The question of a pilot's goal, i.e., what proposition the project is designed to test or prove, does not exist in a vacuum. It must be considered in the context of both the message the pilot designers hope to convey and the target audience for the message. For example, a pilot aimed at convincing a state legislature that an expanded right to counsel is necessary must be designed to answer a question that meets at least two conditions: the answer to the question must be compelling to the legislature and must be, at least, benign in the eyes of other stakeholders. A research question that addresses a rights-based argument to a money-focused legislature by posing a research question that turns on whether the State Attorney General's office is systematically violating the rights of plaintiffs in torts cases against the state is going to fail on multiple levels.

To give another example, while a court may be concerned with whether access to counsel leads to more accurate outcomes, the court may have a greater concern about the impact of counsel on court efficiency (measured by fewer continuances, less time spent by court staff or judges, more/shorter completed hearings, etc.), and some pilots may find that improved outcomes come at the cost of greater amounts of court process (although a closer look may reveal that while cases stay open longer, the court may have less involvement when attorneys are present).⁷ In any case, it is critically important to learn the interests of the target audience, and not simply assume that you know them.

KEY CONSIDERATIONS: TARGET AUDIENCE

Who is the target audience for the pilot findings? A court, a private funder, or some other interest group?

Are some types of data going to be more persuasive to that audience?

Are there ways in which the pilot can be developed, and questions that the pilot might study, that would be of greater or lesser interest to the target audience?

Will the research question, or the data it generates, bear on the interests of any key stakeholders or parties who may choose to become stakeholders in response to the pilot's efforts?

⁷ Another issue with efficiency studies is that they typically do not track what happens to the litigants after their cases are resolved. Some believe that when litigants have counsel, they are less likely to wind up back in court on the same matter after the issue is initially resolved, meaning that even if the initial resolution takes longer than for a pro se litigant, the use of court resources may be less in the long run.

SUBSTANTIVE LEGAL AREA

A major component of a pilot project's design will be determining on which substantive area of law to focus. Since different types of legal proceedings have different sets of procedures and possible outcomes, or are limited to courts of specific jurisdiction, some pilot goals may be better accomplished in one legal setting than another. This determination is ultimately tied to the goals of the pilot, the needs of the pilot's evaluation criteria, local realities such as docket sizes in certain types of courts, and the willingness of some courts to participate in the project. For example, even if a pilot could best meet its goals by operating in a family court, the family court in that jurisdiction may be too busy to participate or may be unwilling to work with the project for other reasons. Project designers should consider all of these issues in choosing a substantive area of law on which to focus.

Some project designers may want to create a pilot that covers more than one substantive legal topic, such as custody and property division, or evictions and foreclosures. One thing to keep in mind is that the outcomes from different legal topics may not be comparable given the different metrics or rates of “success” between the different types of cases; their outcomes may be “apples and oranges.” If a pilot sets out to measure the equitability of the division of property in divorce cases, outcome data from child custody cases is not going to fit into the data report from that pilot. In order to be useful at all, the child custody data would require an additional report—almost as if two separate pilots had been running at the same time. However, it may be difficult, after the fact, to parse the funding streams, attorney hours, and other issues relating to the two pilots. Given the complexity of getting useful data from pilot projects that address even relatively narrow topics, planners may want to avoid adding substantive legal topics that can further muddy the waters.

As different types of legal proceedings have different sets of procedures and possible outcomes, or are limited to courts of specific jurisdiction, some pilot goals may be better accomplished in one legal setting than another.

A careful consideration of the following five factors may help inform your decision:

1. Choosing a Substantive Area of Law in Light of Community Priorities

In selecting a substantive area of law for your pilot, you should be guided by the 2006 ABA Resolution, which calls for the expansion of a right to civil counsel in any case in which an indigent litigant's basic needs are at stake. ABA Resolution 112A (2006) defined “basic needs” as shelter, sustenance, safety, health, or child custody. While the resolution advises that these categories may not be inclusive of all areas in which a civil right to

counsel may be appropriate, the broadness of the ABA mandate and the generally limited funding for pilot projects suggests that most pilot projects will have to work on a comparatively narrow question that falls somewhere within the ABA spectrum of “basic needs.” Deciding which of the basic needs on which to focus should be a function of both the feasibility of addressing that need and the priorities of the community in which the pilot project will operate. One way to identify community priorities would be to ask representatives from local social services organizations or legal aid organizations where the most pressing need is for a civil right to counsel within the context of the ABA list of “basic needs.” Given that information, pilot planners will then be able to narrow down the range of potential substantive areas of law, and begin to explore practical questions relating to venue, docket size, etc.

2. Outcomes

When considering which substantive area of law to pursue, it is important to understand how the outcome of providing counsel relates to the central research question of your pilot project. Since different types of legal proceedings have different ranges of possible outcomes, some proceedings may be more appropriate for evaluating a specific question than others.

For example, if a pilot’s primary goal is to measure the effect of counsel for an individual litigant, it may be easier to focus the pilot in a substantive area where the outcomes are clear-cut and relatively easy to categorize. Conversely, if the pilot’s primary goal is to test a type of right-to-counsel delivery system, such as a helpline or a court appointment system,

an analysis of individual client outcomes may not be as important, and thus an area of law with more complex potential outcomes could be appropriate.

KEY CONSIDERATIONS: COMMUNITY PRIORITIES

How will “basic needs” be defined?

What is the most pressing need in the community?

What systems are currently in place to address that need?

Will these systems help or hinder the pilot efforts?

How will the pilot affect existing systems?

Will addressing this particular need help meet the goals of the pilot project?

KEY CONSIDERATIONS: OUTCOMES

What is the range of possible outcomes for the area of law being considered?

Can one clearly evaluate effectiveness based on these outcomes?

Do these outcomes support the point the pilot sets out to measure?

3. Complexity

The complexity of a substantive area of law can impact the outcomes of your pilot, the number of individuals served, and the overall cost of the project. As the substantive law becomes more complex, pro se litigants face greater challenges in effectively navigating the legal system and attaining positive outcomes. Providing counsel in a complex proceeding may create a dramatic increase in positive outcomes for clients, and may also help define the point in the legal process at which self-help procedures become insufficient (this would be a very interesting question for a pilot project to address in and of itself).⁸

However, the more complex the proceeding, the more time attorneys on the pilot staff will likely need to spend on each case in order to have an effect on outcomes. This may increase the cost of representation, and reduce the number of individuals served per project-dollar spent. Conversely, placing the pilot in a simpler legal area may lead to serving more clients with the same amount of funding—but showing a less dramatic improvement in outcomes among the clients served by the pilot.

KEY CONSIDERATIONS: COMPLEXITY

How complex is the substantive area of law under consideration?

How much time does it take to serve each case in this substantive area?

Do these levels of service meet the pilot's goals?

When is the optimum time, in this substantive area, to attach a civil right to counsel?

How does that change the resources necessary to address the need?

4. Represented vs. Unrepresented Opponents

Another consideration is the likelihood that an unrepresented litigant in a particular substantive area will face an opponent who is either represented by counsel or may be formidable even without representation. For example, eviction law is a substantive area where unrepresented tenants often face represented landlords or property management firms. Likewise, in cases that fall under the Federal Tort Claims Act, unrepresented or under-represented plaintiffs may be facing legally sophisticated government agencies or attorneys. There is a great deal of anecdotal evidence suggesting that, in such situations, pro se litigants are at a disadvantage in both presenting facts and arguing matters of law. The same sort of anecdotal evidence suggests that judges

⁸ See generally Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. SOC. JUST. 97 (2011); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010).

will sometimes take on a more active role in fact-finding—but that they will do so only if neither party is represented by counsel. This indicates that the effects of providing counsel would be greater (and thus, easier to measure) if the client was facing an adversary that was already represented by counsel. It also implies some of the same issues that come up when considering the complexity of a substantive area of law: representing clients who are likely to face represented or legally sophisticated opponents can require a much greater commitment of resources than would be necessary in other substantive areas of law. Pilot planners should consider these sorts of factors in selecting a substantive area of law.⁹

KEY CONSIDERATIONS: REPRESENTATION

Are most opponents in this substantive area represented or unrepresented? Or are there significant percentages of each type of opponent?

Will providing counsel in this substantive area correct an imbalance of power and increase access to justice?

5. Adjudicator Involvement, Procedural Rules, and Degrees of Collaboration

Another consideration in selecting a substantive area of law is that some areas of law mandate different types of legal proceedings, allow varying degrees of involvement from the judge or adjudicator, and place different degrees of responsibility on the parties. In some types of proceedings, the judge or adjudicator plays a relatively passive role, with most of the responsibility for presenting issues of fact or law falling on the parties. In other types of proceedings, the adjudicator may play a more active role by asking questions, giving feedback as the case proceeds, or requesting additional information. The latter type of proceeding is typically more accessible for a pro se litigant than the former. Likewise, pro se litigants are likely to fare better in proceedings where there is more procedural flexibility (for example, in the rules governing evidence), and where the interaction of

KEY CONSIDERATIONS: ADJUDICATORS, PROCEDURAL RULES & COLLABORATION

What types of proceedings are common to the substantive area of law being considered?

Does the substantive area of law include a mandate for certain types of procedures, e.g., mandatory arbitration or mediation?

Does the type of procedure common to this substantive area of law imply a high or a low degree of involvement in fact finding and legal inquiry on the part of the adjudicator?

⁹ This factor is particularly significant in light of the U.S. Supreme Court's recent decision in *Turner v. Rogers*, 564 U.S. ___, 131 S. Ct. 2507 (2011), which treated the fact that the opposing party was unrepresented as a factor weighing against the right to counsel. 131 S. Ct. at 2519.

the parties is more collaborative and less adversarial.

All of this suggests that a pro se litigant may benefit more from appointed counsel in a proceeding that relies on adversarial procedures, or in one where the adjudicator is less involved in searching out matters of fact or law. In those situations, effective counsel may help the litigant navigate the less forgiving procedural and adjudicatory landscape, and produce a more significant improvement in outcomes than in areas of law that favor mediation, negotiation, or greater involvement from the judge or adjudicator in the trial process. While this idea makes intuitive sense and has some anecdotal support, it has never been proven by a clinical study and would be an interesting research question to address in a pilot project.

STAGE OF PROCEEDING

Regardless of the type of proceeding, the effect of providing counsel may vary significantly depending on when counsel is introduced in the process. For instance, in housing cases, it may be that providing counsel to tenants at the notice-to-quit stage (as opposed to when the tenant has received an eviction complaint) gives the tenant's attorney more time to stave off the eviction, thus improving outcomes. Also, the procedural protections that exist in a preliminary or emergency hearing may be different than those in a permanency hearing, and this may increase or lessen the impact of counsel. Because the timing of attachment of counsel may have a significant effect on outcomes, project planners should attach the provision of counsel at the same stage for all pilot sites.

KEY CONSIDERATIONS: STAGE OF PROCEEDING

At what points could an attorney logically become involved in either an administrative or an adjudicatory procedure?

How does the timing of the commencement of representation affect outcomes?

How do the differences in these approaches meet the goals of the pilot?

An exception would be if a pilot intends to compare the efficacy of providing counsel at different stages of the proceeding. In that event, pilot planners would want to ensure that the cases they compared were of a similar class, with similar litigants and similar fact patterns and, if possible, at the same site (though one could naturally create separate pools of data at several sites, and combine them into a weighted aggregate data pool during project completion). This would minimize the impact of external variables and isolate the effects of the timing of attachment so that pilot planners could make reasonable, statistically supported inferences about the efficacy of counsel based on timing of attachment.

LOCATION

Determining the appropriate location for your pilot project, at the level of jurisdictional, social, and political geography, is a critical step in its success. Before implementing any project, it is necessary to have a good relationship with local courts, a firm understanding of the local client base, and a good relationship with existing service providers. It is also important, if you are considering operating the pilot in multiple locations, to account for material differences between locations that may affect the comparability of your data.

1. The Courts

Most pilot projects will require some level of cooperation from local courts in order to be effective.¹⁰ The level of collaboration necessary for success will depend on the substantive area of law chosen and the timing of an attorney's involvement in the client's case. At a minimum, if clients are found and screened by the pilot staff, the pilot should cooperate with the court to establish the project's operations in accordance with the court's procedures. Alternatively, the court may be willing to play a role in identifying litigants for potential entry into the pilot project by performing eligibility screenings and reporting functions, or the court may have access to key data that can be used for baseline comparisons to the study results (such as outcomes for unrepresented litigants in cases prior to the initiation of the pilot). It may, in fact, be difficult in some instances for the pilot projects to locate project participants without the assistance of the court.

Additionally, the court may have concerns about the pilots even if the court is not asked to do any direct pilot work. Some may feel that the increased presence of lawyers in the courtroom adds burdens to court clerks, such as more requests for file reviews, or that it slows down proceedings in other ways. In situations like this, pilot planners should take care to address the court's concerns well in advance.

It is worth noting that the court's awareness of the pilot could skew the pilot's results, i.e., if the judges handle

KEY CONSIDERATIONS: THE COURTS

What data does the court currently collect regarding cases and outcomes?

Is the court willing to participate in the data collection process or in the screening process?

Will the information provided by the court meet the goals of the pilot?

¹⁰ It is important to distinguish between seeking cooperation and surrendering control of what is being tested, or who must approve a final report. Pilot planners should beware of surrendering control to any outside party, or committing to consider the input of too many outside parties.

cases differently because they are aware they are being monitored., While this may suggest the possibility of operating the pilot without the court's knowledge, pilot planners should be aware that this tactic carries political risk as well as the danger that the pilot will not operate smoothly in practice.

2. Client Pool Size

The chosen forum must have a sufficient population of unrepresented litigants to meet the needs of the pilot's methodology and evaluation criteria. Different research methodologies imply different requirements for client pool size. For example, if the pilot is to include a randomized selection process, there must be both a sufficient number of clients that will be extended offers of representation and a sufficient population of clients remaining to function as a control group. Alternatively, if the goals of the project are such that it may be desirable to extend offers of representation to as high a percentage of the eligible population as possible, a forum with a smaller population of potential clients may be appropriate.

By way of establishing a contrast between these two ideas, consider the following: if a pilot is testing the efficacy of counsel in a given class of cases, it would make sense to have a randomized client selection process in order to compare outcomes for the client pool to outcomes for the control group. In that case, the pilot planners would want a large pool of potential clients so that they can maintain both a statistically significant client pool, and a similarly sized control pool. If, on the other hand, the pilot is attempting to establish a baseline for the cost of providing a right to counsel to all indigent persons in a certain class of cases, having a smaller client pool is to the advantage of the pilot. It allows for a smaller, less expensive project that handles fewer clients, without injecting the potential bias created if the pilot staff were selecting clients from a larger pool.

Different research questions may necessitate or favor different methodologies and, by extension, different optimum client pool sizes. Pilot planners should be mindful of the interaction of these variables, and open-minded about addressing obstacles that may arise as a result of that interaction.

KEY CONSIDERATIONS: CLIENT POOL SIZE

Are there enough potential clients in the legal and/or geographical area the pilot is serving to meet the mathematical and statistical needs of the pilot's chosen research methodology?

Given the number of potential clients in the pool and the rate at which their cases appear before the bar, how long would a pilot need to operate in order to serve a statistically significant base of clients?

Are there additional barriers to client participation in a pilot, such as language access, geographic distance, etc.?

3. Other Available Client Services

It is important to consider what legal aid or other client service programs might already be operating in the jurisdiction of the pilot project. There are many reasons for this: you may not want to infringe on the operations of an existing program; the existence of another program may skew your data by artificially depleting the availability of certain classes of cases or types of clients; other service providers may make it difficult to isolate your control group in an efficacy study; courts may be confused by the existence of multiple programs serving the same client base in the same jurisdiction; and so on. See the section on Pilot Partners for additional information.

KEY CONSIDERATIONS: AVAILABLE CLIENT SERVICES

Will existing programs help or hinder the pilot project?

What can one learn from past or present client service operations in the area?

Are there enough attorneys in the geographic area to successfully serve the client base in the pilot project?

4. Operating in Multiple Sites

If your pilot seeks to operate in multiple courts, you must consider whether those courts have structural differences that could make it difficult to compare data from the two sites. For instance, the courts may have different self-help services available, or mediation programs of varying intensity. Additionally, the background of the judges in the two sites might vary significantly and lead some to believe that the bias or ability of the judge was a larger factor in the outcome than the provision of counsel. Finally, if the courts are not served by the same legal aid program, then differences in outreach or screening protocols, or differences in the long-term impact of each legal aid program's work in that court, could also serve as uncontrolled variables in the experiment that would make data from different courts incompatible.

KEY CONSIDERATIONS: MULTIPLE SITES

Do the courts have comparable subject matter jurisdictions?

Are the judges in the courts comparable in terms of bar rating, education level, and experience?

Do any of the courts or judges have reputations that may affect how the target audience would view the results of your study?

If judges are elected, would the outcome of the pilot project have political implications for them?

SCOPE

The scope of the pilot embraces the defined range of the types of cases that will be handled, the types of clients who will be accepted, the type of representation that will be provided, and the research questions that will be addressed. Generally speaking, the broader the scope, the more expensive the pilot will be. It may therefore be to the advantage of many pilots to limit the scope of the project as much as practicable while maintaining the utility of the pilot for answering its central research question(s). One way of limiting the scope of the project to a more manageable size is to weigh the merits of each case individually, prior to accepting it into the project.

KEY CONSIDERATIONS: SCOPE

Does the scope of the pilot provide enough information to measure the desired result?

Does the scope include the right kind of cases to meet the project's goals?

How does the scope affect the level of expertise needed by attorneys participating in the pilot?

The ABA Model Access Act contemplates such a merits test—although the test is more rigorous for plaintiffs than defendants, and generally does not set a very high bar.¹¹ However, in spite of the ABA's endorsement, the case-by-case methodologies already used in some jurisdictions have been vulnerable to a number of critiques. For example, it is effectively impossible for a judge to determine the merits of a case prior to counsel being appointed, because the court has not been presented with a complete picture of the relevant facts and law.¹² Attempting to do so results in, at best, a judgment based on incomplete information, and may be more influenced by bias on the part of the judge or screening attorney than by the actual merits of the case. The problems caused by a pre-trial merits test compound themselves after the trial, because appellate courts cannot accurately review the harm caused by a failure to appoint counsel if the trial record is incomplete and one-sided due to the absence of counsel. A pilot project that relies on such a merits test to demonstrate its point might be ensuring that a similar merits test would be called for in later programs based on the pilot, and such tests may be prohibitively difficult to administer outside of the comparatively limited pilot context.

That said, there may be ways to reduce the scope of a civil right to counsel pilot without using a merits test, namely by identifying and choosing to focus on discrete subcategories of cases within a broader category. For instance, depending on the design and goals of the project, the pilot may serve a client population distinguished

11 "Full public legal representation services shall be available to a plaintiff or petitioner if a basic human need as defined herein is at stake and that person has a reasonable possibility of achieving a successful outcome. Full public legal representation services shall be available to a financially eligible defendant or respondent if a basic human need as defined herein is at stake, so long as the applicant has a non-frivolous defense." ABA Model Access Act §3.B.i (2010)

12 Presumably, an appointment authority is given more resources to investigate the particulars of a given case, and an investigative authority with sufficient resources may be able to substantially mitigate this problem. That is, in fact, what the ABA Model Access Act contemplates.

by either the common characteristics of the litigants (such as age, disability, or literacy) or the characteristics of their cases (need, procedural posture, or cases of greater complexity). The client population could also be limited by financial need (e.g., 125% or 200% of federal poverty) or other need-based determinations. Alternatively, the client population could be limited by defining the types of cases the pilot covers, such as cases where an opposing party is likely to be represented by counsel, those where there is likely to be a power imbalance between the parties, or those where representation would be more likely to affect the outcome. In making these decisions, it is important to consider the pilot's criteria in a real-world setting and estimate how many individuals you can expect to serve within the guidelines you set. Too few eligible clients would suggest a need to loosen restrictions, while an overabundance of eligible individuals suggests a need to add restrictions. And, of course, the potential client pool size should always be considered within the goals of your pilot and the number of clients you need to serve in order to both address a need and lend validity to your results.

The Boston Bar Association (BBA) Task Force on Expanding the Civil Right to Counsel designed its housing pilot project with a well-considered scope. The project provided counsel to a set number of litigants from two populations, as determined by the evaluation methodology requirements that the project planners developed. The first population was defined as indigent tenants with mental disabilities, whose cases involved criminal conduct, or who would face a substantial denial of justice in the absence of representation. The pilot further clarified that factors affecting whether a lack of representation would lead to a substantial denial of justice included:

- Factors relating to a tenant's vulnerability, such as disability, domestic violence, education, language, culture or age;
- Factors relating to the landlord, such as whether the landlord controls a large or small number of units, whether the landlord is legally sophisticated, whether the landlord is represented by counsel, and whether the landlord lives in the building;
- The affordability of the unit for the tenant, including whether the unit is in public or subsidized housing;
- Whether there appear to be cognizable defenses or counterclaims in the proceeding;
- Whether the loss of shelter might jeopardize other basic needs of the tenant, such as safety, sustenance, health or child custody;
- Other indicia of power imbalances between the parties.¹³

The second population eligible to be served by the pilot was indigent landlords whose cases fit all of the following criteria: a) the landlord resided in the building that was the subject of the eviction proceeding, b) the landlord owned no other interest in real property, c) the tenant was represented by counsel and d) the landlord's shelter was at stake in the proceeding.¹⁴

¹³ Boston Bar Association Task Force on Expanding the Civil Right to Counsel, *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*, at 11 (2008), available at http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf (last visited Aug. 7, 2011).

¹⁴ *Id.*, at Appendix 5C

STAKEHOLDERS

Input from local stakeholders will be essential to the success of any pilot project. Spending time on community outreach during the pilot planning phase will help pilot planners assess resources, build support for the project, and ensure that key components of the pilot are not planned without proper evaluation or inclusion. Participation from a broad range of stakeholders in the design and implementation of the project will also ensure that the results and conclusions of the pilot are credible and widely accepted.

A stakeholder can be any individual or organization with an interest in the local court system, access to justice issues, or the substantive legal area on which the pilot project is focused. The role of a stakeholder can be quite varied. Some stakeholders simply will be affected by the project you are designing and may want to stay in the information loop. Other stakeholders may facilitate relationships and help make connections that make the pilot possible. A small group of stakeholders will be interested in assuming a hands-on role in building and running the pilot project (more information about this group in the next section). Pilot planners should consider what role each potential stakeholder should play in the project and be transparent with them about expectations and limitations moving forward.

Necessary stakeholders should be included in the design planning at the earliest practicable phase of the process. While some necessary participants may be identifiable only after the design phase of the project has already begun, early inclusion of local stakeholders will increase the chances of acceptance and success. For example, the specific court(s) in which the pilot will operate can be identified only after the project planners have chosen the forum and jurisdiction in which to conduct the pilot; however, failing to include the input of the court system in the design of the project at the earliest possible moment could lead to future challenges as the pilot progresses.

KEY CONSIDERATIONS: STAKEHOLDERS

What groups or organizations are likely to be supportive of a civil right to counsel pilot?

What groups are likely to oppose these efforts or feel threatened by them?

How will the pilot designers reconcile disparate opinions and approaches within the base of support for the pilot?

Under what banner will work be completed?

What is the process for involving stakeholders in decisions relating to the planning and management of the pilot?

How will the depth of public support for the pilot be shown?

The National Coalition for a Civil Right to Counsel (NCCRC) has compiled a non-comprehensive list of civil justice system stakeholders who should be part of any local dialogue about a proposed civil right to counsel initiative:

Legal Services Corporation (LSC) funded legal services programs	Client groups (social service providers, law enforcement officials, advocacy organizations, relevant trade or industry organizations)
Non-LSC funded legal services programs	
Indigent defense providers	Bar associations
Publicly funded attorneys who handle existing civil right to counsel cases, such as in the juvenile court or civil context	Civil justice advocates
IOLTA administrators	Civil access to justice commissions
	State court executive administrators
	Chief judges within the state court system

In addition to considering potential allies in the civil right to counsel movement, it is important to consider the possibility of including potential opponents of the project in the planning process. For example, if the pilot is conducted in eviction proceedings, it may be useful to include representatives from landlords, county associations or other entities that might end up shouldering financial costs of additional attorney services. Soliciting such input during the planning process may lead to greater understanding and acceptance of both the pilot and any eventual civil right to counsel expansion.

PILOT PARTNERS

Most pilot projects operate as strong collaborations between existing organizations. During outreach to local stakeholders, it will become clear which groups are willing and able to dedicate resources such as staffing, administration, expertise, community outreach, and fundraising to the pilot project. Additionally, pilot planners should consider whether courts may play an active role as pilot partners. The most enthusiastic groups should work together to design and implement the pilot project. A successful pilot project design will clearly identify before implementation who will run the project, who will be providing the legal services, and who will be processing and reporting the assessment of the project.

The most pressing question is often whether the representation will be provided by an existing legal services organization or a new organization created specifically for the pilot. While an existing legal aid organization may have reasons for not wanting to provide representation for another program, the pilot could present an opportunity for the legal aid organization to demonstrate the value of its services. This, in turn, could provide a basis for the existing organization to win more funding for its own work, regardless of the outcome of the pilot. Furthermore, a pilot that is designed to be extended could result in an expansion of the legal aid organization, if continued funding could be secured.

From the perspective of the pilot planners, partnering with an existing legal aid organization creates obvious advantages. Besides providing a pool of attorneys for representation, an established legal aid organization can provide infrastructure for tasks such as client intake, administration, hiring, and training. Using these pre-existing systems will likely cost a pilot less than creating such infrastructure from the ground up.

However, it is important to note that there may be a marked difference between what the pilot is attempting to measure (which, in some models, might be efficacy of representation regardless of the merits of the client's case) and the mission of the legal aid organization (i.e., providing representation to the clients with the greatest need for counsel). If an existing organization is chosen as a partner, the pilot planners should make an effort both to define the parameters being tested and to articulate the difference between the pilot project's operation and that of the legal aid organization's normal function.

KEY CONSIDERATIONS: PILOT PARTNERS

What are the critical roles that need to be filled in the pilot project?

Will pilot partners share decision-making authority – or will project design be centralized within one organization?

Will certain participants enhance funding options for the pilot, or restrict them?

How can a pilot partner withdraw from the project?

In some instances, there may be ample reason not to partner with an existing organization, for example, no appropriate organization exists locally. The alternative to partnering with an existing legal services organization is to create a new one specifically for the pilot. Such an organization could be staffed by paid attorneys hired to participate in the pilot, pro bono attorneys committing some amount of time to the project, or even law students, although with these models it will be important to ensure that those providing the service have similar abilities to legal services attorneys.

In addition to the entity that provides the actual representation, a pilot could partner with any number of other organizations (including legal aid organizations) to handle the client intake and screening, administration, and pilot evaluation. For example, some courts may have existing legal aid screening procedures with which a pilot could participate in order to identify and refer potential clients. If there is no pre-existing screening infrastructure in place, the pilot may need to partner with the court and rely on it to make eligibility determinations.

Another opportunity for partnership is in designing the evaluation criteria that the pilot uses to measure its outcomes as a program. Partnering with an academic institution to develop evaluation criteria and methodology and to publish results can ensure that procedures are in place to collect data properly before the pilot begins, that the right data points are being isolated and assessed, and that the results and conclusions are credible and accepted. However, the entity conducting the data analysis may have its own priorities and mandates, and may be less focused on the concerns of the pilot designers, such as how the data is framed and whether it could be manipulated by those hostile to providing counsel to low-income people.

Any partnership, whether with one organization or several, should include clear agreements articulating each organization's responsibilities. Memoranda of understanding between parties outlining each organization's job descriptions and budget expectations will help ensure that the project remains successful. It is also extremely important to establish who owns the pilot data and how it can be used.

FUNDING

Funding a pilot project likely will present some significant challenges, especially in the current economic environment. While simply locating a source of funding obviously will be the biggest concern for pilot organizers, there are a few other factors that must be taken into consideration both when seeking and choosing to accept funding. Pilot planners should think broadly about potential funding sources, such as bundling smaller funding sources or establishing a fee-for-service relationship with an existing organization, while also maintaining an awareness of the politics of the local funding scene.

Of primary concern is the near universal belief among advocates that any new civil-right-to-counsel initiative should not cut into current funding for legal aid services. Consequently, targeting funding sources currently utilized by legal aid programs

should be considered with caution, if at all. Avoiding this conflict will ensure that the pilot retains the support of legal aid organizations and that the pilot does not adversely affect the local community.

A secondary concern is to create a budget for the pilot project that follows the conventions of cost accounting. This means, for example, planning the future costs of facilities, labor, and other expenses, and showing how those costs add up to the total projected budget of your project. It is also important to distinguish between costs associated with providing a civil right to counsel (such as the cost of providing representation, filing fees, and so on), and costs associated with pilot evaluation activities (such as data processing and publishing). Failing to distinguish those expenses in your budget will give the impression that the cost of providing counsel is higher than it actually is, and may discourage future civil right to counsel projects. It is also critically important to ensure you have sufficient funding for what you seek to accomplish. For instance, the more complex the study, or the more types of cases or total cases you plan to study, the more expensive the study will be, both in terms of provision of services and data analysis.

KEY CONSIDERATIONS: FUNDING

Will any applications for funding compete with any other legal services organizations' existing or proposed funding streams?

Does the budget for the pilot take into account all costs and distinguish between the costs of providing counsel and the costs of evaluating the pilot?

Who are potential future funders?

Is the budget for the pilot designed to separate the costs of providing services to clients from the cost of administering the pilot?

Civil right to counsel pilot projects have been funded both publicly and privately. The BBA Task Force pilots were funded by grants through the Boston Bar Foundation, the Massachusetts Bar Foundation, and the Boston Foundation. In Texas, the Border Foreclosure Defense Project and the Tenant Defense Project were funded through the Texas Access to Justice Foundation, which administers IOLTA funds. The California pilots authorized by the Sargent Shriver Civil Counsel Act are funded by a legislatively imposed ten-dollar increase in certain court filing fees.¹⁵ This California example suggests that one approach for funding a pilot is to seek a fee increase in the area of substantive law in which the pilot is placed. For example, if the pilot were to focus on eviction cases or other landlord-tenant issues, a small application fee could be attached to eviction filings, to fund the pilot and serve as a creative solution to the challenge of securing public funding.

¹⁵ This increase, however, occurred prior to the establishment of the pilots. The legislation establishing the pilots redirected the increase to the pilots for a period of six years.

EVALUATION AND METHODOLOGY

The evaluation portion of the pilot should be designed around a central research question: what is the pilot attempting to measure, model, or demonstrate? Answering this question is the primary goal of the pilot. The answer to this question may encompass one variable or several, but it should be clear and definite before the pilot planners address the issue of what metrics the project needs to track. Obviously, evaluation metrics will vary depending on whether the goal is to measure the efficacy of representation, the effects of representation on a system, or another variable, but pilot planners should be thinking about metrics that correlate to quantifiable data points. They should also be thinking about the budgetary implications of different types of metrics; client interviews, for example, are likely to be more expensive to acquire and evaluate than numerical information that can be easily retrieved from the public record. While the following suggestions might steer the discussion of evaluation criteria in the right direction, we recommend that any pilot include an experienced research partner to help design specific metrics tailored to the individual pilot's goals.

KEY CONSIDERATIONS: EVALUATION AND METHODOLOGY

Does the pilot contain procedures and practices designed specifically to answer the central research question or questions?

How do those procedures and practices help answer the central research question?

Is there a specific contingency plan in place to address the possibility that the study may not support the conclusions hoped for?

Do the research methodology, e.g., randomized sampling, class selection, etc., and evaluation tools support the goal of answering the central research question?

Who are potential research partners with expertise in designing evaluation tools and choosing research methodologies?

A pilot designed to measure the efficacy of representation presents a good example of the challenges that can arise in selecting evaluation criteria. The effects of legal representation cannot be adequately expressed solely by recording the outcomes of formal adjudication. While a favorable outcome may be the ultimate achievement for a client, other outcomes such as a settlement or a reduced judgment—or even a delay, such as postponing an eviction for several months—may be considered a victory for purposes of the pilot. Therefore, any study measuring the efficacy of representation should attempt to capture these intricacies.

A good example of how this can be accomplished is the proposal for the BBA Housing Pilot. The pilot recorded the outcomes of both litigants who were extended offers of representation and similarly-situated litigants who

were not represented by counsel. It also surveyed the court docket for a period of time before the pilot ran to gain a historical perspective. The pilot collected extensive anecdotal information to contextualize and augment the outcome data. This anecdotal evidence included client interviews with both accepted and rejected clients, court observations, interviews of court personnel (including judges, other attorneys, and court staff), and information collected from other sources, such as homeless shelters and other social service organizations that worked with the proposed client population.

Client interviews can be designed to elaborate on the effect that counsel had on the client's situation. Example questions, taken from the Boston Bar Association's proposed pilot project in contested child custody proceedings include:

How much of a help to you was your lawyer?

How much help was your lawyer in explaining the laws about custody to you?

Did your lawyer explain your options regarding custody?

Did your lawyer keep you informed of the progress of your case?

Was your lawyer available to answer your questions and concerns about your case?

How much help to you was having a lawyer to deal with the other parent's lawyer?

Was the result in your custody case fair?

How much of a help was your lawyer in getting a fair result?

Did you get the results you wanted in your case?

Did your lawyer understand what results you wanted?

Each question contained a range of prepared answers similar to the answers to question 1: (1) None at all; (2) Some help; or (3) A lot of help. Additionally, there was space provided for clients to make comments on each question. Obviously, these questions are targeted to reflect the specific client population and research goals of the BBA pilot. However, they are indicative of a thorough attempt to capture the full impact that an appointed counsel can have on a client's legal situation.

As previously discussed, a pilot can also collect data on the societal cost savings/effects of providing representation. A 2006 study of children with criminal records who were rearrested found that providing counsel to the repeat offenders saved money by causing reductions in court costs, detention costs, and costs to victims of crimes.¹⁶ Similarly, if a pilot is conducted to measure the cost savings of counsel in eviction proceedings, possible evaluation metrics could include the rate of evictions, the effect on homelessness rates, and the impact on surrounding shelters.

¹⁶ Stefan C. Norrbin & David W. Rasmussen, *An Evaluation of Team Child in Florida*, at 49-50 (2002), available at <http://www.nlada.org/DMS/Documents/1195243887.58/FL%20TeamChild%20Evaluation%20Report.pdf> (last visited Aug. 8, 2011).

When attempting to capture the full effects of legal outcomes, it should be noted that some effects can only be measured weeks, months, or even years after a judgment is entered. A litigant who is wrongfully evicted might only encounter homelessness or other severe consequences six months after his or her savings are exhausted. A pilot should make some effort to capture these long-term effects, but the more longitudinal the study, the greater the expense and the greater number of additional variables that could be causing the effects. Each pilot will have to weigh the questions being addressed, the likely timeframe of the impact of a judgment, and available resources in order to determine how long to track the possible effects of providing counsel to a given client.

Finally, the pilot must determine how the results should be communicated. If the pilot results are intended to be used as support for a litigation or legislation strategy to expand the civil right to counsel, it is helpful if they are published in an academic journal. This will ensure that the conclusions are subject to adequate peer review, that they are credible, that they are relied upon, and that they are widely available to advocates and to the general public.

Pilot designers must also prepare for the possibility that the study results will not be what the designers hoped for.

Pilot designers must also prepare for the possibility that the study results will not be what the designers hoped for. In that case, they must be prepared to present the pilot data in different ways, depending on the outcomes. This raises questions of the relationship between the pilot projects and the researcher(s) performing the data analysis, as they may have different goals and concerns that can put them into conflict with each other. It also raises the question of who ultimately “owns” the data results. Pilot project designers should plan ahead and answer these questions well in advance of launching the pilot.

Similar to the issues regarding evaluation, the challenges in designing a measurement methodology will be unique to the criteria being tracked. That said, there are important considerations that are likely to apply across the board. A meta-analysis of previous research into the question of how lawyer representation affects who wins and loses in adjudication concluded that, in all 12 studies assessed, litigants represented by lawyers were more likely than pro se litigants to win in adjudication.¹⁷ However, due to the methods used by the studies assessed, the author conceded that “[i]t is not clear from most existing studies how much of the observed difference reflects how lawyers actually change case outcome and how much is due to other factors, such as characteristics of the lay litigants or the cases themselves.”¹⁸ This lack of clarity was caused, in large measure, by the lack of a control group of unrepresented litigants that could then be compared to the sample group of pilot clients. Only one of the assessed studies used a randomized method to select which litigants were extended representation.

¹⁷ Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51 (2010).

¹⁸ *Id.* at 70.

That study concluded that represented tenants facing eviction for nonpayment of rent were more than 4.4 times more likely to retain possession of their apartments than similarly-situated unrepresented tenants.¹⁹ A different survey of existing empirical studies on the efficacy of representation concluded that few, if any, of them were statistically rigorous enough to draw adequate conclusions.²⁰

These studies sparked a valuable debate about the need for rigorous statistical methodology in pilot projects assessing the efficacy of representation.²¹ During the debate, there was some question about whether randomized studies are really the “gold standard” of analysis that some have claimed²², and whether it is possible to obtain reliable data without using a randomized study. Aside from questions about the efficacy of randomization, it is important to keep in mind that a randomized approach can be very costly in both time and money: in Boston, the housing pilots operated in two courts (one district court and one housing court), took three years to complete, and consumed \$385,000 in funding. Designers should also keep in mind that the smaller the variation between the control and client group, the larger – and therefore more expensive – the study size will have to be to reveal that variation. Randomization can also create problems if the control group is successful at obtaining assistance from another source, since such assistance could skew the results. Finally, if the goal of the pilot is to provide representation to all eligible participants, then randomization can raise some ethical concerns about turning away individuals who otherwise would be receiving assistance were it not for the choice of randomization.

In spite of these concerns, it is also true that randomized studies do much to address the “selection bias” of both the litigants and the service providers. In terms of provider bias, one possible criticism in a non-randomized study is that litigants who receive legal services might do better than those who are turned away because the legal aid program tends to choose the cases with the strongest merits. In a randomized selection approach, the legal aid program screens out meritless cases first; litigants are then randomized and selected for either full representation or no representation. This helps diminish the bias problem.

Additionally, some have speculated that litigants who typically pursue legal aid are more motivated and competent than those who do not, and that it therefore is problematic to compare the sophisticated actors who obtain legal assistance to the less sophisticated actors who do not. A randomized approach helps mitigate that problem by ensuring that both those who receive representation, and those who do not, reach the program in the same way.

19 Carroll Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001).

20 D. James Greiner and Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?* (July 29, 2011), 12 YALE L.J. 2118 (2011-12), available at <http://ssrn.com/abstract=1708664> (last visited Nov. 26, 2012).

21 Concurring Opinions, *Symposium (What Difference Representation)*, <http://www.concurringopinions.com/archives/category/representation-symposium> (last visited Aug. 8, 2011).

22 See, e.g., Jason Grossman & Fiona McKenzie, *The Randomized Controlled Trial: Gold Standard, or Merely Standard?*, PERSP. IN BIOLOGY & MED. 48 (4):516-34, available at http://muse.jhu.edu/login?uri=/journals/perspectives_in_biology_and_medicine/

The more variables that are introduced to a study, the more difficult it becomes to draw conclusions based on that study. Examples of variables that may skew study results include attorney background, the education level and race of the parties, and the substantive legal issues in the case. Even factors entirely external to the case, such as whether or not another legal services program has operated in the same court where your pilot is operating, may affect your outcomes. Your pilot project might also introduce other variables inadvertently, such as a scenario in which the court partnership for the pilot spurs the court to simplify its forms or procedures for pro se litigants.

Depending on the evaluation criteria, randomization may not be a necessary component of all research inquiries. If the goal is to measure the effect that expanded access to representation has on the system as a whole, it may be sufficient to measure pre- and post-pilot data points. For example, a pilot could be designed to extend representation to as many unrepresented litigants as possible in a certain venue (e.g. a specified eviction court). The pilot could then collect data from the court, other attorneys, and relevant third parties, such as social services.

Finally, it is important for pilot planners to understand that many pilot models will qualify as research on human subjects, for legal and ethical purposes. Should a given pilot qualify as research on human subjects, it may be required to follow specific research protocols. The requirement to follow human subjects research protocols may come from any number of sources. In some cases, it is a requirement of state or federal laws or regulations. In other cases, adherence to such protocols may be a condition attached to the funding for a pilot. Academic partners such as universities almost invariably have internal policies requiring strict adherence to such protocols. Pilot planners should investigate both the statutory and regulatory requirements for human subjects research, and the policy requirements of all funders and pilot partners, prior to project implementation.

PROCEDURAL UNIFORMITY

Pilot projects may be most effective when designed to address specific research questions in a highly controlled, clinical setting. The reason for maintaining a high degree of control over the operations of a pilot project is similar to the reason for keeping a laboratory environment clean and orderly: failure to maintain strict order in a research environment may allow for accidental contamination of the experiment, introducing unaccounted-for variables and voiding the results of the experiment or, worse, creating an outcome without a sound understanding of how that outcome was reached. In contrast, strict control of the research environment allows even “bad” experiment results to give researchers useful information because it allows them to analyze the process that produced the result, determine if the result is reproducible, and isolate the action or reaction that might have contributed to the unexpected outcome. Thorough

documentation and procedural uniformity are essential to the research utility of any experiment and therefore, by extension, to the design of a good civil right to counsel pilot project.

In a civil right to counsel pilot project environment, this issue manifests in several ways. First, pilot planners should take care to ensure that outreach and intake procedures are as uniform as possible, so that clients enter the research protocol on equal footing. An intake procedure that allows intake staff to enroll clients based on extraordinary need, even if those clients do not fall within the scope of the pilot’s research requirements, may skew or invalidate the data generated by the pilot. Second, pilot planners should thoroughly document basic project operations along traditional lines of inquiry: who, what, when, where, why, and how. For example, intake sheets should include the name of the staff member who carried out the intake, the details of the client’s case, the date, the location of the intake process, and any relevant details of the circumstances surrounding the intake procedure. This will allow project evaluators to notice if, for example, one intake location is staffed entirely by men, while another intake location is staffed entirely by women, or whether Spanish-speaking staff were available at a site where many of the clients may be Spanish-speaking.

KEY CONSIDERATIONS: PROCEDURAL UNIFORMITY

Does the pilot include a policy manual and documentation instruments that will be uniform across the project?

If the pilot results showed a significant statistical irregularity, would the policies and procedures in place provide useful tools to track the irregularity to its source?

Are there management professionals with the expertise to create uniform policies and procedures for the pilot?

The specific details of a given pilot's procedural uniformity and documentation requirements will vary depending on the nature of the project. However, as a general rule, pilot project designers should take care to ensure that procedures, documentation, and client interactions are as uniform as practicable throughout the case management process. Finally, as with evaluation and methodology, pilot project designers should consider partnering with an experienced clinical research project planner in order to ensure that their policies and procedures are uniform and produce effective documentation of the relevant variables.

CONCLUSION

There are many complex factors to consider in designing and implementing a civil right to counsel pilot project, and the process can be time-consuming and difficult. However, the payoff has the potential to far exceed the time/costs involved in running the pilot. With patience, planning, and thorough consideration, pilot projects provide research that is critically important in responding to some of the most significant objections to civil right to counsel: it is too expensive, litigants just need more self-help assistance, most people will not be helped even by a lawyer, and providing attorneys to poor people will bog down the courts. They also provide neutral, empirical data to dispel the assertion that legal services attorneys only press for more attorneys in civil cases due to self interest. And they allow the legal services community to identify and quantify the many different types of benefits that can be realized through the provision of counsel: improved outcomes, efficiency, stronger feelings of participation in the process by the litigants, cost savings, and so on.

Our hope is to create a learning community among civil right to counsel advocates. We welcome feedback on our best practices manual and hope to add to this guide as more information becomes available from pilot operators across the country.

APPENDIX A: RESOURCES

Bar Associations

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APPENDIX B: SUMMARY OF THE BOSTON BAR ASSOCIATION CIVIL RIGHT TO COUNSEL PILOT

This is a summary of the investigation of the Boston Bar Association Task Force on the Civil Right to Counsel (“Task Force”) into the importance of a right to representation by counsel for indigent persons in eviction cases. The pilot studies occurred during the period from 2009 to 2010. The Task Force was created by the Boston Bar Association in September 2007 to examine the question of “how to establish a right to counsel for situations in which a family or an individual faces the risk of a loss of shelter, sustenance, or other basic needs.”

The Task Force conducted two topically related but separate studies on the effect that the presence of counsel has in housing eviction cases. One study was based in the Northeast Housing Court a court specializing in eviction matters, with sessions in Lawrence and Lynn, Massachusetts,. The second study was based in the Quincy District Court located in Quincy, Massachusetts, the lowest level state trial court. In Massachusetts, District Courts handle about one-third of all eviction cases while Housing Courts handle the remaining two thirds. Both studies focused upon the effect of the presence of counsel in cases involving low income tenants being faced with eviction proceedings.

Goals

The goal of the two studies was to learn more about:

- the mechanisms for providing counsel,
- the effect of creating a right to counsel,
- the costs involved, and
- the potential cost savings to the Commonwealth

Substantive Legal Area

The studies were focused upon the effect that full representation by counsel through trial, or conclusion of a matter, would have upon the success of participants (tenants and small landlords) in the eviction process. The study organizers stated the challenge as follows:

“In Massachusetts, as elsewhere, most tenants appear without counsel, while many landlords obtain counsel representation. Nationally, data consistently show that tenants are rarely represented by counsel. At the same time, the representation rate for landlords varies from low to as high as 85 and 90% in others. Where landlord representation is high, the typical eviction case pits a represented landlord against an unrepresented tenant.”

The Task Force Report was also prepared to provide counsel to small, unrepresented landlords for whom shelter was an important issue, noting that it “also recognized that a landlord might be vulnerable and included a proposal for representation for landlords for whom shelter was at stake and where the tenant was represented.” However, because no landlords requested counsel, none were actually served in the study.

Location

The studies took place in two Massachusetts courts:

- Two sessions of the Northeast Housing Court, a specialized court focusing upon real property matters, located in Lawrence and Lynn, Massachusetts. The court sits in various geographic locations within its jurisdiction on a rotating basis. According to the Massachusetts Housing Court Department’s website:

“The Housing Court Department has jurisdiction of the use of any real property and activities conducted thereon as such use affects the health, welfare, and safety of any resident, occupant, user or member of the general public and which is subject to regulation by local cities and towns under the state building code, state specialized codes, state sanitary code, and other applicable statutes and ordinances. The Housing Court Department has jurisdiction of the use of any real property and activities conducted thereon as such use affects the health, welfare, and safety of any resident, occupant, user or member of the general public and which is subject to regulation by local cities and towns under the state building code, state specialized codes, state sanitary code, and other applicable statutes and ordinances.”

Notwithstanding its broader jurisdiction, the bulk of the court’s proceedings appear to be related to evictions. In 2011, 46.8% of all of the Northeast Housing Court’s matters were summary eviction proceedings.

- The Quincy District Court located in Quincy, Massachusetts, the lowest level state trial court with a subject matter jurisdiction that is greater than housing matters, but which includes them.

“The District Court hears a wide range of criminal, civil, housing, juvenile, mental health, and other types of cases... In civil matters, District Court judges conduct both jury and jury-waived trials, and determine with finality any matter in which the likelihood of recovery does not exceed \$25,000. The District Court also tries small claims involving up to \$7,000 (initially tried to a magistrate, with a defense right of appeal either to a judge or to a jury).

Both the Housing Court and the Quincy District Court serve multiple communities, but the Housing Court operates in several locations, while the District Court operates from a single location. Summary eviction proceedings appear to be a fairly small portion of a District Court’s activities. While statistics aren’t specifically available for the Quincy District Court, statewide data for all Massachusetts District

Courts (other than the Boston Municipal Court and courts incorporated therein) in 2011 indicate that summary eviction proceedings comprised only 1.7% of their overall case load.

Scope

The Task Force designed its housing pilot project with a well-considered scope. The pilot designers labeled the approach the “Targeted Representation Model.” The project provided counsel to a set number of litigants from two populations, as determined by the evaluation methodology requirements developed. The first population is defined as indigent tenants who have mental disabilities, whose cases involve criminal conduct, or who will face a substantial denial of justice in the absence of representation. The pilot further clarifies that factors affecting whether a lack of representation will lead to a substantial denial of justice include:

- Factors relating to a tenant’s vulnerability, such as disability, domestic violence, education, language, culture or age;
- Factors relating to the landlord, such as whether the landlord controls a large or small number of units, whether the landlord is legally sophisticated, whether the landlord is represented by counsel, and whether the landlord lives in the building;
- The affordability of the unit for the tenant, including whether the unit is in public or subsidized housing;
- Whether there appear to be cognizable defenses or counterclaims in the proceeding;
- Whether the loss of shelter might jeopardize other basic needs of the tenant, such as safety, sustenance, health or child custody;
- Other indicia of power imbalances between the parties.

The second population which the pilot study was designed to assist was indigent landlords whose cases fit all of the following criteria:

- The landlord resides in the building that is the subject of the eviction proceeding,
- The landlord owns no other interest in real property,
- The tenant is represented by counsel, and
- The landlord’s shelter is at stake in the proceeding.

In the Quincy District Court, study participants were selected by the following process:

- A Greater Boston Legal Services (“GBLS”) team went weekly to the court to review all new eviction case filings and then sent letters inviting tenants and small landlords to come to an

eviction clinic conducted by GBLS attorneys established for purposes of the study. The letters indicated that legal representation might be forthcoming as a result of participation;

- The clinics lasted 2 to 3 hours, with GBLS attorneys reviewing papers, assisting in answer preparations, etc. The attorneys evaluated each case for possible full representation and sent information sheets on tenants they selected for inclusion in the study to the Harvard University team supporting the project for randomization in the selection process;
- The Harvard team randomly selected prospects from the information sheets provided by GBLS, placing some into a control group which was to remain unrepresented by counsel and the remainder into the group that was to be represented by counsel to conclusion of the matter;
- In addition, the judges referred prospective clients to the GBLS team who would interview them and refer chosen tenants to Harvard for randomized selection.

Eventually, 470 tenants were served in Quincy in the clinics and 129 were admitted to the study. GBLS stated that the review process was through interview and that the application of selection standards may have altered from week to week. Overall, however, GBLS was satisfied with the rigor used in the selection process. Of the 129 participants admitted to the study, 76 were given an attorney who would represent them through trial, and the balance were not given counsel. Both groups were then followed in the resulting study.

In the Northeast Housing Court, intake into the study was conducted by Neighborhood Legal Services (“NLS”), a separate legal services office.. At the time the study was conducted, the Northeast Housing Court maintained a Tenancy Preservation Program designed to help fashion remedies to prevent the eviction of more vulnerable tenants (those with physical and mental disabilities), and NLS conducted a Lawyer for the Day program providing extensive legal advice to tenants appearing on any given day in eviction cases. The Lawyer for the Day program consisted of an on-the-spot initial meeting prior to a hearing, assistance in preparing answers, assistance in settlement negotiations, and possible assistance in presenting a settlement in court. According to the Task Force Report, “it is critical to understand that the (Lawyer for the Day) program really involves limited representation at every critical stage of the case short of trial, particularly in light of the fact that most cases settle at the mediation stage.”

For purposes of the Northeast Housing Court study, intake began when a potential client called NLS seeking assistance. Callers were asked to come in for a meeting where they were interviewed by NLS staff at an NLS office. Information was gathered, and eligible participants were referred to the Harvard team for randomization in the appointment of counsel. Of the 184 cases accepted into the study, 85 were provided an attorney who would represent them through trial, and the balance of referred participants were placed into the control group and not given counsel but were encouraged to use the NLS Lawyer for the Day program on the date of their hearings. Both groups were then followed in the resulting study.

Stakeholders

The two pilot studies had the following stakeholders:

- The Boston Bar Association (in response to the resolution adopted in 2006 by the American Bar Association supporting the right to counsel in adversarial proceedings where basic human needs are at stake);
- The Task Force (a very broad-based group including private law firms, public legal service provider groups, law schools, judges, advocacy groups for children and low-income persons, law reform institutes and advocates, court administrators, and access to justice proponents and commissions);
- The Quincy District Court (one of two study locations);
- The Northeast Housing Court (one of two study locations);
- Boston Bar Foundation (funding for study costs);
- Massachusetts Bar Foundation (funding for study costs);
- The Boston Foundation (funding for study costs).

Pilot Partners

- Harvard University (provided the pilot project design and statistical analysis of study results);
- The Quincy District Court (one of the two courts participating in the study);
- The Northeast Housing Court (one of the two courts participating in the study);
- The Task Force (a volunteer group appointed by the Boston Bar Association to oversee the project, with wide local representation);
- Greater Boston Legal Services (attorneys for Quincy District Court study);
- Neighborhood Legal Services (attorneys for Northeast Housing Court study);
- The Volunteer Lawyers Project of the Boston Bar Association (attorneys for qualifying, low income landlords who might become part of the project).

Funding

Funding for the study was obtained from three principal sources, the Boston Bar Foundation, the Massachusetts Bar Foundation, and the Boston Foundation. The amount of funding is unclear from the materials, but the Gideon's New Trumpet report prepared by the Task Force in advance of the studies estimated the cost of the study in both courts at \$385,000. The Task Force considered raising funds from a variety of other sources,

including increased filing fees and a contribution of a portion of punitive damages, but these sources were not deemed “to be promising” and were foregone.

Evaluation and Methodology

The two studies produced quite different results, which is not entirely surprising given the difference between the programs already in effect at the two courts prior to the time the study was conducted.

In the Quincy District Court, the impact of representation by counsel was clear and obvious. Compared to the control group of unrepresented participants, tenants given counsel, on average, did twice as well in retaining possession and almost five times better in terms of rent waived and monetary awards. Fully two-thirds of the represented group retained possession of their units, while only one-third of the control group did so, and this despite the fact that the “unrepresented” tenants did receive assistance with answers, discovery and motions from GBLS lawyers. As to rental relief, those in the control group received an average of two months’ rent and the represented group received an average of 9.5 months’ rent (the Harvard team estimates that the 9.5 month free rent was, perhaps, a substantial understatement.) As to damage awards, those in the unrepresented control group received \$72,723 and those in the represented group received \$306,415.

As to less quantifiable results, the Task Force supplemented the statistical findings for the District Court study with interviews with various participants involved in the study, including lawyers, judges, court personnel and members of both the unrepresented and represented participant groups. The lawyers concluded that they were far better able to assist represented clients by understanding their goals and that these clients were more in control of their proceedings than those who were unrepresented. They also found that represented clients were far more able to move out of units on their own schedule or to gain needed repairs if they were staying in their units. The judges interviewed indicated that the participants in the study receiving representation did far better than unrepresented participants, and that the project was a success in their estimation “if the goal of the project involved preventing evictions, protecting rights, and maintaining shelter.” The Harvard team’s analysis indicated that while cases involving represented tenants took 45 days longer to conclude than cases involving unrepresented tenants, there were fewer court appearances in the former group and the lawyers were able to work through issues without court assistance in those cases (over 90%) of the landlords in such cases were represented by counsel as well).

In the Northeast Housing Court, the differences were not as dramatic, presumably in part because of the Lawyer for the Day program, which operates as a limited representation program itself: most cases settled in mediation, and the lawyer for the day program provided representation to many tenants in the control in mediation. Thus, while tenants in the “treated” group were offered representation, many tenants in the “control group” received a form of representation as well. One of the study’s designers, Professor Greiner of Harvard, indicates that the two studies are not to be considered comparable and the Task Force agreed with that conclusion. Beyond the presence of the lawyer for the day program, which provided limited representation, other variables that could

have explained the differences between the two studies were the judge, the courts, the presence of the Tenancy Preservation Program, the cases selected (the Quincy cases had a higher percentage of Section 8 and Public Housing), and the lawyering approaches.

As opposed to the Quincy District Court study, about 54% of the cases accepted into the Housing Court study were taken at the notice to quit stage of the proceedings in order to try to obtain data as to whether pre-litigation representation might help keep cases out of court. The study found it difficult to determine whether representation at this stage was effective, since the landlords were not limited to filing their case in the Housing Court and some ultimately filed, instead, in District Court. As to cases which were filed in the Northeast Housing Court, the represented tenant participants did slightly better than the unrepresented participants, with 26% (as opposed to 3% in the unrepresented group) resulting in a dismissal or settlement before a summons and complaint was filed, and those agreeing to move receiving an average of 11.4 weeks to move (as opposed to an average of 4.6 weeks for the unrepresented group). As to financial results, those in the represented group received a total of \$122,235 as opposed to a total of \$109,778 received by the unrepresented group.

Despite the relative similarity in case outcomes between the control and study group, tenants in both groups retained possession at a much higher rate (roughly 33%) than the state average (below 10%). Since tenants in both groups received forms of representation, one possible inference is that representation mattered in the Housing Court study as well. Again, the study supplemented the results with interviews with the lawyers, judges, court personnel and study participants (both represented and unrepresented). The two NLS lawyers handling all of the fully represented cases felt that their clients had received better outcomes as a result of full representation, again opining that they were far better able to ascertain their client's goals as a result of full representation. The judges were unable to determine that full representation made an appreciable difference in their courtrooms, the judge purposefully not having been told which "full representation" appearances were due to the study and which were not.

The study design allowed for representation of small, qualifying landlords, but none were represented in the study despite the availability of counsel for this purpose.

As to the study's third goal (explore the connection between evictions and the societal costs of homelessness), the Task Force Report includes an Appendix A which estimates the effect upon both homelessness and medical care savings. Law students were employed to interview residents of homeless shelters to determine where they had been living prior to the shelters, and about 66% were found to have either been evicted or to have moved out in the face of eviction threats. The data in Appendix A were separately produced and the conclusions drawn, while reasonable and compelling, were not directly derived from the two court studies. An attempt was made by the Task Force to track participants in the study following the completion of the court cases, finding that at least 20 were subsequently evicted. The Harvard team made no such attempt due to difficulties inherent in the process.

APPENDIX C: SUMMARY OF THE SARGENT SHRIVER CIVIL COUNSEL ACT (CALIFORNIA PILOT PROGRAM)

In September of 2009, the California State Legislature passed the Sargent Shriver Civil Counsel Act to address the needs of the over 4.3 million Californians who were unrepresented in civil court proceedings each year.²³ The Act established a \$10 supplemental filing fee on certain post-judgment motions in state court, and allocated revenue from those fees to fund the first civil right to counsel pilot programs in the state.²⁴ The Act established that funding would be disbursed to multiple programs in different locations around the state. The Act designated the Shriver Civil Counsel Act Implementation Committee to oversee the project, the Judicial Council of California to select which programs would be funded, and the Administrative Office of the Courts to administer the funding. After a competitive request for proposal process, the Judicial Council selected seven civil right to counsel pilot projects to receive a total of \$9.5 million in annual funding between 2011 and 2014. The bill, AB 590, established the program for a three-year period and made available a three-year renewal option if the program is successful in its first term.^{25,26} The seven funded pilot programs are described below:

Goals

The Act has several goals that address distinct issues within the California civil justice system:

- Provide equal access to justice, regardless of income²⁷
- Improve the quality of justice by increasing access to the courts²⁸
- Promote more effective and efficient handling of civil matters²⁹
- Grow respect for the legal system and confidence in the outcomes produced in California courts³⁰

23 CAL. AB § 590(1)(b) (2009).

24 Carol J. Williams, *California gives the poor a new legal right*, L.A. Times (October 17, 2009), available at <http://articles.latimes.com/2009/oct/17/local/me-civil-gideon17> (last visited Nov. 26, 2012).

25 ADMINISTRATIVE OFFICE OF THE COURTS, *Fact Sheet: Sargent Shriver Civil Counsel Act* (AB 590) (Feuer) 1 (2011), available at <http://www.courts.ca.gov/documents/AB-590.pdf> (last visited Nov. 26, 2012).

26 It is worth noting that while the primary function of the legislation is to establish a Civil Gideon pilot program, it also provides funding for the courts to adopt innovative practices, which can include “procedures, personnel, training, and case management and administration practices that reflect best practices to ensure unrepresented parties meaningful access to justice and to guard against the involuntary waiver of rights, as well as to encourage fair and expeditious voluntary dispute resolution, consistent with principles of judicial neutrality.” CAL. GOV’T CODE § 68651(b)(4) (2011).

27 CAL. AB § 590(1)(h) (2009).

28 AB § 590(1)(e).

29 AB § 590(1)(e).

30 AB § 590(1)(g).

Substantive Legal Area

AB 590 grants the Judicial Council a broad mandate to select any civil legal aid program that addresses “critical legal issues that affect basic human needs.”³¹ This is presumably an allusion to ABA Resolution 112A (2006), which calls for the expansion of a right to civil counsel in any case in which an indigent litigant’s “basic needs” are at stake.³² The legislature provided a possible list of such issues that included: housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, and actions by a parent to obtain sole legal or physical custody of a child.³³ However, the projects funded in 2011 only encompass some of these topics, including child custody, housing, probate guardianship, and domestic violence.³⁴ In particular, child custody and housing cases have received the largest allocation of funding; at least one of these services is provided at each of the seven service providers selected for funding.³⁵

Location

The seven funded pilot projects operate in the following California Superior Court locations:³⁶

- San Francisco County
- Kern County
- San Diego County
- Santa Barbara County
- Sacramento County
- Yolo County
- Los Angeles County

Scope

Perspective clients in the California pilot programs are restricted by financial need; they must be at or below 200 percent of the federal poverty level to receive services.³⁷ Although no rigid restrictions exist on the types of cases

³¹ Gov’t § 68651(a) (emphasis added).

³² The ABA resolution defines basic needs as shelter, sustenance, safety, health, or child custody.

³³ Gov’t § 68651(b)(1).

³⁴ Fact Sheet, *supra* note 3, at 2.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1.

that can be taken under the program,³⁸ the Act does provide guidance on the factors that should be considered in determining whether to take a case:

- Case complexity
- Whether the other party is represented
- The adversarial nature of the proceeding
- The availability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case
- Language issues
- Disability access issues
- Literacy issues
- The merits of the case
- The nature and severity of potential consequences for the potential client if representation is not provided
- Whether providing legal services may eliminate or reduce the need for and cost of public social services for the potential client's household³⁹

Stakeholders

Key stakeholders and partners were identified by Bonnie Hough, Managing Attorney for the Center for Families, Children & the Courts (a division of the California Administrative Office of the Courts), who oversees the Pilot Program. The stakeholders were generally statewide organizations that played critical roles in helping persuade the legislature to pass the Act and in informing its implementation. They include:

- Legal Aid Association of California—Julia Wilson, Executive Director
- State Bar of California (Legal Services Division)—Mary Lavery Flynn, Director
- California Commission on Access to Justice—Mary Lavery Flynn, Staffperson & Justice Ron Robie, Chair
- California Chamber of Commerce—Erica Frank, Vice President
- Sargent Shriver Civil Representation Pilot Implementation Committee—Justice Earl Johnson (ret.), Chair & Justice Laurie Zelon, Vice Chair

³⁸ Though the act does provide that, The Act also provides that “Up to 20 percent of available funds shall be directed to projects regarding civil matters involving actions by a parent to obtain sole legal or physical custody of a child.” Gov’t § 68651(b)(2)(B).

³⁹ Gov’t § 68651(b)(7).

- Assembly Judiciary Committee—Kevin Baker, Legislative Aide
- Administrative Office of the Courts—Bonnie Hough, Project Manager & Karen Cannata, Evaluation Manager
- Manatt, Phelps, & Phillips LLP

Pilot Partners

According to the bill, each project is meant to be “a partnership between the court, a qualified legal services project. . . that shall serve as the lead agency for case assessment and direction, and other legal services providers in the community who are able to provide the services for the project.”⁴⁰

The seven selected primary service providers are:

- Bar Association of San Francisco Voluntary Legal Services Program
- Greater Bakersfield Legal Assistance
- Legal Aid Society of San Diego
- Legal Aid Society of Santa Barbara County
- Legal Services of Northern California
- Los Angeles Center for Law and Justice
- Neighborhood Legal Services of Los Angeles County

The primary service providers are responsible for case assessment and direction.⁴¹ However, they are not required to provide all of the representation to qualifying individuals. In fact, they are encouraged to seek out the help of other similarly situated groups or attempt to involve local law firms on a pro bono basis.⁴² The selected projects also serve as the point of contact for the courts so that they can refer potential clients.⁴³

Beyond the partnerships between the primary service providers and the courts, many of the projects have worked with other organizations in various capacities. They include:

- **Sacramento:**
Pacific McGeorge School of Law (mediation)
Private building inspector

⁴⁰ Gov’t § 68651(b)(4).

⁴¹ Fact Sheet, *supra* note 3, at 3.

⁴² *Id.*

⁴³ *Id.*

- **Yolo:**
 - Yolo County Department of Public Health (building inspector)
- **Kern:**
 - Better Business Bureau (mediation)
 - Local Bar Association (conflicts)
- **Santa Barbara:**
 - Local Bar Association (conflicts)
 - Area Agency on Aging (conservatorships/guardianships)
- **San Diego:**
 - Voluntary Legal Services Program (custody & conflicts for housing)
- **Los Angeles:**
 - Public Counsel (housing)
 - Inner City Law Center (housing)
 - Legal Aid Foundation of Los Angeles (housing)
 - Law Library (self-help referrals)
 - Asian Pacific Legal Services (custody)
 - Levitt and Quinn Legal Services (custody)
 - LA Center for Law and Justice (custody)
- **San Francisco:**
 - Cooperative Restraining Order Clinic (custody)

Funding

Approximately \$9.5 million per year will go toward funding the Pilot Program.⁴⁴ Service providers submitted competitive proposals to the Sargent Shriver Civil Counsel Act Implementation Committee, which made recommendations to the Judicial Council of California that eventually doled out the money.⁴⁵ In order to raise money to fund the Pilot Program, the state allocates \$10 from filing fees for certain post-judgment motions, including issuing writs for the enforcement of an order or judgment, issuing abstracts of judgment, recording or registering any license or certificate, issuing orders of sale, and filing and entering awards under the Workers' Compensation Law.⁴⁶

⁴⁴ *Id.* at 2.

⁴⁵ SARGENT SHRIVER CIVIL COUNSEL ACT IMPLEMENTATION COMMITTEE, *Sargent Shriver Civil Counsel Act: Selection of Pilots 4* (2011), available at <http://www.courts.ca.gov/documents/20110429itempt-revt.pdf> (last visited Nov. 26, 2012).

⁴⁶ AB § 590(2).

Evaluation & Methodology

The Sargent Shriver program was designed to provide data to measure and analyze the program's effectiveness. Participating service providers are required to employ standardized data collection tools to track all relevant case information on the referrals accepted and not accepted. Such data must include "the number of cases served, the level of service required, and the outcomes for the clients in each case."⁴⁷

The law also calls for the Administrative Office of the Courts to conduct a study on the effectiveness and continued need for the pilot program using the data collected by the independent service providers.⁴⁸ The report will be presented to the legislature in 2016 and must include:

- The percentage of funding by case type
- Impact of counsel on equal access to justice
- Effect on court administration and efficiency
- The impact on families and children
- Enhanced coordination between courts and other government service providers and community resources.
- The benefits of providing representation for the clients and the courts⁴⁹
- Strategies and recommendations for maximizing the benefit of that representation in the future
- Data on and an assessment of continuing unmet needs⁵⁰

47 Gov't § 68651(b)(9).

48 Fact Sheet, *supra* note 3, at 3.

49 One of the case assessment factors also mentioned in the Fact Sheet is "The possibility that providing legal services might help reduce social service costs", which implies that the pilots will look at avoided costs for the government in general, as opposed to just the courts.

50 *Id.*

APPENDIX D: SUMMARY OF THE WASHINGTON STATE PILOT PROGRAM

This summary describes the pilot Parents Representation Program (“Pilot PRP”) that the Washington State Office of Public Defense (“OPD”) established in July 2000, at the request of and with funding appropriated by the Washington State Legislature, to address the need for improved legal representation for parents in dependency and termination cases. The program was established after the 1999 Legislature requested a study by the State Office of Public Defense, which found that parents in dependency and termination cases were legally outmatched by the state, and therefore operating at a significant disadvantage.⁵¹

At the Legislature’s direction, the OPD conducted the Pilot PRP in two geographically and demographically distinct locations, which used different models of providing representation to parents in dependency and termination cases: Benton County and Franklin County Juvenile Court in Eastern Washington, and Pierce County Juvenile Court in Western Washington. The Pilot PRP ran until the 2005 legislative session, when the Legislature converted the Pilot PRP into a permanent, legislatively-funded Parents Representation Program (PRP) covering the pilot counties plus nine additional counties.⁵² The Legislature subsequently expanded the PRP to cover four additional counties in 2006, and seven additional counties in 2007.⁵³ The PRP is currently established in 25 Washington counties.⁵⁴

Goals

The Legislature established five program goals for the Pilot PRP designed to enhance the quality of defense representation in dependency and termination hearings:

- Reduce the number of continuances requested by pilot attorneys, including those based on their unavailability;
- Establish a maximum caseload requirement of 90 dependency and termination cases per full-time attorney;
- Implement enhanced defense attorneys practice standards, including reasonable case preparation and the delivery of adequate client advice;
- Use investigative and expert services in appropriate cases; and

⁵¹ Washington Courts Press Release available at: <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=32> (last visited Nov. 26, 2012)

⁵² Courtney, M.E. & Hook, J.L., *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, Seattle: Partners for Our Children at the University of Washington (2011) (hereinafter, “Partners for Our Children Report”), at 2 & Ex. A.

⁵³ *Id.*

⁵⁴ See <http://www.opd.wa.gov/> (last visited July 5, 2012).

- Ensure implementation of indigency screenings of represented parents, guardians, and legal custodians.⁵⁵

Substantive Legal Area

The Pilot PRP resulted from a 1999 report by the OPD, finding severe disparities between the funding the state provided to the Attorney General’s Office to initiate and process dependency and termination cases, and the funding the counties provided for legal representation of indigent parents, custodians and legal guardians involved in those cases.⁵⁶ After receiving the 1999 Report, the Washington Legislature appropriated funds for the Pilot PRP, directing the OPD to focus the pilot program upon the effect of providing competent and diligent representation to indigent parents of dependent children throughout the course of dependency and termination cases, which can include shelter care hearings held within 72 hours of a child being removed from a home by the Washington State Department of Social and Health Services (“DSHS”), through permanency planning hearings held to assess DSHS’s permanency plan for a removed child, and ultimately to termination proceedings, including motions, conferences and trials.⁵⁷

As one evaluation of the Pilot PRP described the challenge:

“Each party must be competently and diligently represented in order for juvenile and family courts to function effectively.’ Proper representation by defense attorneys will help to ensure that parents of dependent children retain their right to due process, as well as assist the court in complying with state and federal case processing time frames for achieving permanency for and ensuring the safety of children.”⁵⁸

Location

At the Washington Legislature’s direction, the OPD conducted the pilot program in two geographically and demographically distinct locations, which use different models of providing representation to parents in dependency and termination cases.

One location was the combined Benton County and Franklin County Juvenile Court, which is located in rural Eastern Washington. As of 2001/2002, Benton County had a population of approximately 142,500, which was

⁵⁵ *Dependency and Termination Parents’ Representation Pilot: Evaluation*, Washington State Office of Public Defense (February 2002) (hereinafter, “2002 OPD Evaluation”), at 7.

⁵⁶ See *Costs of Defense and Children’s Representation in Dependency and Termination Cases*, Washington State Office of Public Defense (Dec. 1999) (hereinafter, the “1999 Report”).

⁵⁷ See 2002 OPD Evaluation, at 6.

⁵⁸ See *Technical Assistance Brief, Improving Parents’ Representation in Dependency Cases: A Washington State Pilot Program Evaluation*, National Council of Juvenile and Family Court Judges, Permanency Planning for Children Department (August 2003) (hereinafter, “Technical Assistance Brief”), at 3.

86.2% white, 29.7% under the age of 18, and whose median household income was \$47,044.⁵⁹ Meanwhile, Franklin County had a population of approximately 51,000, which was 61.9% white, 34.6% under the age of 18, and whose median household income was \$38,991.⁶⁰ The Benton-Franklin Juvenile Court had between 113 and 160 dependency petitions filed annually between 1998-2001 and, prior to the Pilot PRP, it provided legal representation to indigent parents in those cases by contracting part-time with four private attorneys.⁶¹

The second location was the Pierce County Juvenile Court, which is located in urban Western Washington. As of 2001/2002, Pierce County had a population of approximately 720,000, which was 78.4% white, 27.2% under the age of 18, and whose median household income was \$45,204.⁶² The Pierce County Franklin Juvenile Court had between 389 and 511 dependency petitions filed annually between 1998 and 2001, and prior to the Pilot PRP, it utilized a public defender's office with one supervisor and four full-time parents' attorneys to provide legal representation to indigent parents in those cases. In 2001, Pierce County implemented a Drug Court to address a growing drug problem, and the Pilot PRP worked in partnership with the Drug Court to represent most parents served in Drug Court.⁶³

Scope

The primary focus of the Pilot PRP was on determining whether the provision of additional funding and staffing to existing county-funded programs for providing legal representation to indigent parents in dependency and termination proceedings would improve both the process and outcomes of those proceedings. Accordingly, the participating counties continued to fund the dependency and termination defense at their 2000 levels, and the Pilot PRP provided additional, incremental funding and resources for the defense of dependency and termination proceedings.⁶⁴ Specifically, the Pilot PRP provided the following resources at the participating locations:

- **Increased Staffing.** In Benton-Franklin County, the Pilot PRP initially added two half-time attorneys to the four existing part-time private attorneys providing defense of dependency and termination proceedings, placed all six attorneys on pilot contracts, and required all of them to spend half their time on their pilot cases.⁶⁵ By 2005, the Pilot PRP was providing five pilot attorneys in Benton-Franklin County.⁶⁶ Meanwhile, in Pierce County, the Pilot PRP initially

⁵⁹ *Id.*, at 4.

⁶⁰ *Id.*

⁶¹ *Id.*, at 3-4.

⁶² *Id.*, at 4.

⁶³ See *Dependency and Termination Parents' Representation Program Evaluation Report 2005*, Evaluation Services, Northwest Institute for Children and Families, School of Social Work (2005) (hereinafter, "2005 NICF Evaluation"), at 9.

⁶⁴ See *Dependency and Termination Defense Pilot Program: Interim Evaluation*, Washington State Office of Public Defense (January 2001) (hereinafter, "2001 OPD Evaluation"), at 6.

⁶⁵ *Id.*, at 7

⁶⁶ 2005 NICF Evaluation, *supra* at 5.

added two full-time attorneys and two paralegals to the public defender's dependency and termination staff.⁶⁷ By 2005, the Pilot PRP had eight full-time pilot attorneys working at the Pierce County public defender's office.⁶⁸

- **Training.** The OPD provided various training sessions, seminars and conferences for pilot attorneys, including pilot seminars in October 2000 and December 2000, a March 2001 statewide Children's Conference, and an October 2001 pilot conference.⁶⁹ Many pilot attorneys also attended a Family Preservation Services Conference in July 2001.⁷⁰
- **Attorney Guidelines.** The Pilot PRP also developed a set of guidelines for pilot attorney practice, which required pilot attorneys to: (1) meet and communicate regularly with their clients; (2) ensure parents have adequate access to services, including visitation; (3) prevent continuances and delays within their control; and (4) prepare cases well.⁷¹
- **Additional Resources.** The Pilot PRP also provided additional resources to the two pilot locations. In Pierce County, the public defender hired an in-house investigator/social worker, and pilot funds were also made available to Pierce County public defense attorneys to hire experts.⁷² In Benton/Franklin Counties, each program attorney was given a \$10,000 fund earmarked for expert and investigative services.⁷³
- **Indigency Screening.** Under state law, publicly funded counsel is provided only to people who are determined, pursuant to RCW 10.101, to be unable to afford to hire a private attorney.⁷⁴ The budget appropriation for the Pilot PRP therefore required indigency screening for all parents represented through the program. In Benton-Franklin County Juvenile Court, each parent filled out a state Indigency Determination form and was then questioned by the Court Commissioner, who determined if they were indigent.⁷⁵ In Pierce County, the Pre-Trial Services department conducted indigency screening interviews and directed parents they determined to be indigent to the Department of Assigned Counsel for representation.⁷⁶

67 2001 OPD Evaluation, *supra* at 6.

68 2005 NICF Evaluation, *supra* at 5.

69 2002 OPD Evaluation, *supra* at 9.

70 *Id.*

71 Technical Assistance Brief, *supra* at 4.

72 2001 OPD Evaluation, *supra* at 8.

73 *Id.*

74 2002 OPD Evaluation, *supra* at 10.

75 *Id.*

76 *Id.*

To permit evaluation of the effect of these incremental resources, the OPD worked with WSIPP to develop attorney data collection forms to capture how pilot attorneys spent their time, and the reasons for any continuances.⁷⁷ Later on, information about case outcomes was added to the forms.⁷⁸ Pilot attorneys were required to submit one form monthly per case in order to receive payment.⁷⁹ The OPD and WSIPP also developed a database, into which the data from these monthly attorney forms was entered.⁸⁰

Stakeholders

The pilot program had the following stakeholders:

- The Washington State Legislature (requested creation of the pilot, appropriated the necessary funding, and which mandated the objectives of the pilot program);
- The OPD, an independent judicial branch agency, created by the Washington Legislature in 1996, governed by an advisory committee consisting of legislators, judges, attorneys and lay people, and whose central mission includes implementing the constitutional right to counsel (set up and ran the pilot program, and had all pilot program attorneys under its ultimate direction and supervision);
- The Benton County and Franklin County Juvenile Court (one of two Pilot PRP locations);
- The Pierce County Juvenile Court (one of two Pilot PRP locations);
- Other Washington State juvenile courts (interested in outcome of Pilot PRP, and ultimately beneficiaries when PRP was made permanent and expanded to other counties).

Pilot Partners

- The OPD;
- The Benton County and Franklin County Juvenile Court (one of two pilot locations);
- The Pierce County Juvenile Court (one of two pilot locations);
- Washington State Institute for Public Policy (provided advice to OPD on methodology for initial evaluations of the Pilot PRP);
- Northwest Crime and Social Research, Inc. (performed statistical evaluation of data from program attorney forms for initial, interim evaluation of the Pilot PRP);
- Permanency Planning for Children Department of the National Council of Juvenile and Family

⁷⁷ 2001 OPD Evaluation, *supra* at 5 & Appendix II.

⁷⁸ 2002 OPD Evaluation, *supra* at 8.

⁷⁹ 2001 OPD Evaluation, *supra* at 5.

⁸⁰ *Id.*

Court Judge (conducted one evaluation of the Pilot PRP for the OPD);

- Northwest Institute for Children and Families (conducted one evaluation of the Pilot PRP for the OPD).

Funding

Nearly all funding for the Pilot PRP was provided by budgetary appropriations by the Washington Legislature. The stability of this funding varied over time. The Legislature appropriated funds for the Pilot PRP each year beginning in 2000; however, the governor vetoed the program's appropriation in April 2002 due to a budget deficit.⁸¹ The OPD located other funding to keep the Pilot PRP running as consistently as possible,⁸² but the program was not funded in the Benton-Franklin Juvenile Court for several months in early 2003.⁸³ Beginning in the Spring of 2003 and continuing through the remainder of the pilot program, the Legislature provided supplemental and then biennial funding for the Pilot PRP.⁸⁴

Evaluation and Methodology

As part of its budgetary appropriations, the Legislature directed the OPD to contract for independent interim and final evaluations of the Pilot PRP. Over the course of the pilot program, which was extended on several occasions, OPD ultimately obtained three sets of independent evaluations of the Pilot PRP, which differed in timing, scope and methodology.⁸⁵

- **2001 and 2002 OPD Evaluations.** At the beginning of the Pilot PRP, the OPD consulted with WSIPP regarding how best to evaluate the program and opted to utilize two primary methods of evaluation: (1) a pre-post comparison of practices based on data stored in the Washington State Office of the Administrator for the Courts Judicial Information System; and (2) creation, use and statistical analysis of attorney documentation forms completed by program attorneys.⁸⁶ The OPD issued two evaluation reports utilizing these evaluation methods: the 2001 OPD Evaluation and the 2002 OPD Evaluation (which also included brief letters from the court administrators of both

81 *Id.*, at 5.

82 Per Joanne Moore, Director of the OPD, the OPD sought and obtained several grants from foundations in 2002 in order to keep the Pilot PRP funded, including grants from the Stuart Foundation and either the Annie E. Casey Foundation or Casey Family Programs.

83 2005 NICF Evaluation, *supra* at 5.

84 *Id.*

85 In addition to these specific evaluations of the Pilot PRP, there have been subsequent evaluations of the entire PRP, including both the Pilot PRP and the permanent PRP that succeeded it. These include a February 2010 report by the OPD, in consultation with the Washington State Center for Court Research, entitled Reunification and Case Resolution Improvements in Office of Public Defense (OPD) Parents Representation Program Counties, which involved an analysis of dependency case outcomes in 1,817 cases, based on court record information, and a brief 2011 Follow Up to Parents Representation Program Case Resolution Study, both available at the OPD's website, <http://www.opd.wa.gov/> (as are all of the other evaluations referenced in this memorandum). In addition, Mark E. Courtney and colleagues at Partners for our Children, an organization founded by the University of Washington School of Social Work, DSHS and private Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care, available at the OPD's website, <http://www.opd.wa.gov/funders>, conducted a detailed analysis of the PRP, the findings of which they published in various formats, including a February 2011 discussion paper, Evaluation of the Impact of Enhanced Parental

86 2001 OPD Evaluation, *supra* at 5.

the Benton-Franklin Juvenile Court and the Pierce County Juvenile Court).

- **2003 PPCD Evaluation.** In November 2002, the OPD contracted with the Permanency Planning for Children Department of the National Council of Juvenile and Family Court Judges (the PPCD) to conduct an evaluation of the pilot program. The PPCD prepared both a full report submitted to the OPD in January 2003 and a Technical Assistance Brief published in August 2003.⁸⁷ The PPCD based its evaluation on a review of hearing protocols and procedures, and a comparative review of randomly-selected case files, both pre- and post-Pilot PRP implementation, focusing on case demographics, compliance with mandated case processing timeframes, child's out-of-home placement, and case closure outcomes and dates.⁸⁸
- **2005 NICF Evaluation.** Given the limited nature of the earlier evaluations, the OPD contracted with the Northwest Institute for Children and Families (NICF), at the University of Washington School of Social Work, to conduct a more comprehensive evaluation of the Pilot PRP involving both qualitative and quantitative methodologies.⁸⁹ The qualitative methods used involved: (1) in-depth, face-to-face interviews and focus groups with 28 individuals, including judicial officers, program attorneys, staff at the Department of Assigned Counsel, attorneys with the Attorney General's office, staff of the Children's Administration, and Child Advocacy Services Association representatives;⁹⁰ (2) written questionnaires to the same stakeholders; and (3) an analysis of approximately 25,000 monthly case report forms submitted by program attorneys.⁹¹ The quantitative evaluation involved an analysis of case dispositions, in-home placement and dismissal patterns before and after Pilot PRP implementation, conducted through a case file review.⁹²

These evaluations provided varying assessments of the Pilot PRP, which undoubtedly reflected the different time periods, data sets and methodologies employed. Among other things, as discussed above, the counties where the Pilot PRP was conducted had significantly different demographics and methods of delivering legal services to parents involved in dependency and termination proceedings. Therefore, it appears to have been difficult, and sometimes impossible, for the evaluators to make direct comparisons between the two Pilot PRP locations. In addition, the Pilot PRP did not formally make use of, or monitor the outcomes for, a control group (though certain of the evaluations included assessments of data on dependency and termination proceedings in different time period (i.e., prior to the implementation of the Pilot PRP) and in other locations (i.e., other Washington counties). However, these other data sets were largely drawn from publicly available information

87 Technical Assistance Brief, at 3 n.1.

88 *Id.*, at 5.

89 2005 NICF Evaluation, at 4.

90 NICF did not interview parents and children involved in the Pilot PRP cases due to time limits and insufficient time to apply for Institutional Review Board approval. However, interviewees were asked to share families' perspectives as appropriate. See *id.*, at 12.

91 *Id.*, at 6-7.

92 *Id.*, at 8.

that in some cases was not directly targeted to measuring the same data and may not have been collected or recorded in the same manner. Further, given the time for several of the Pilot PRP's initiatives to take effect (e.g., overcoming pilot attorneys' initial hesitancy to make use of newly available funding for investigators and the unwillingness of certain pilot attorneys to abide by the Pilot PRP's requirements),⁹³ as well as the lengthy lifespan of many dependency and termination proceedings, the earlier evaluations had a limited ability to accurately measure the effects of the Pilot PRP. Moreover, Washington State was in the process of implementing various structural changes in the wake of the 1997 Adoption and Safe Families Act in the years leading up to and into the pilot period, which likely had some effect on dependency and termination cases in the pre-pilot and Pilot PRP period. Finally, dependency and termination proceedings in Washington were affected by several broader changes during the pilot period, including a significant increase in dependency and termination filings, particularly in Pierce County;⁹⁴ a shift in the type of dependency and termination filings toward cases less likely to result in reunification;⁹⁵ and significant increases in parental substance abuse rates.⁹⁶

However, despite these factors, several consistent themes emerged across the evaluations of the Pilot PRP. First, they showed that the Pilot PRP resulted in increases in family reunifications, despite declining statewide reunification rates. Second, they showed consistent increases in the amount of time pilot attorneys could devote to cases, and resulting improvements in case preparation, client relationships and presentation at hearings and other court proceedings. Third, they found decreases in the number of unnecessary continuances of hearings. The specific evaluation findings were as follows:

- **2001 OPD Evaluation.** This evaluation concluded that there was evidence that (i) enhanced defense attorney practice standards are being implemented; (ii) program attorneys were spending a substantial amount of time on their cases, averaging 3.6 hours per month on active dependency cases and 5.5 hours per month on active termination cases; (iii) program attorneys were communicating regularly with their clients; (iv) program attorneys were reasonably preparing their cases; (v) continuances caused by program attorney overscheduling were infrequent, approximately 6% of reported continuances; (vi) few program attorneys had accessed the available funds for expert services.⁹⁷ On the issue of continuances, the 2001 OPD Evaluation found that 13.8% of all hearings were continued, and that defense attorneys were responsible for fewer continuances than either the Court or the Attorney General's office.⁹⁸
- **2002 OPD Evaluation.** This evaluation included assessments by several groups, each based on different methodologies and data. The judicial officers indicated that the Pilot PRP had

93 2001 OPD Evaluation, *supra* at 10; 2002 OPD Evaluation, *supra* at 9.

94 2002 OPD Evaluation, *supra* at 9.

95 2005 NICF Evaluation, *supra* at 6.

96 *Id.*

97 2001 OPD Evaluation, *supra* at 9-10.

98 *Id.*, at 10, 15-17.

significant positive benefits, including more equal justice and better due process for parents, better communication with parents and preparation for court, more agreed orders, and more information to the courts, resulting in enhanced decision-making.⁹⁹ Evaluation of approximately 13,000 attorney data forms submitted by pilot attorneys indicated that (i) pilot attorneys were communicating more frequently with parents, reasonably preparing for court, and using investigators, social workers and paralegals to enhance their representation; (ii) continuances and delays by pilot attorneys were infrequent; (iii) pilot attorneys meaningfully improved clients' outcomes, including a 60% average increase in court-ordered reunifications and a 25% average increase in obtaining orders allowing parents in termination cases to visit or periodically correspond with their children.¹⁰⁰ Finally, the pre-post data analysis indicated that, in Pierce County Juvenile Court, more hearing were held following implementation of the Pilot PRP, and hearing continuances decreased (data entry differences prevented any conclusions being drawn for Benton-Franklin County Juvenile Court).¹⁰¹

- **2003 PPCD Evaluation.** According to the Technical Assistance Brief, the PPCD found that (i) while there were actually slight decreases in overall compliance with statutory timeframes in some areas, there were significant reductions in the average number of days and the range of days from removal to shelter hearings; (ii) the average number of days spent in foster care declined, while the average number of days in the care of relatives increased; and (iii) there was a large increase in reunifications, and a decrease in terminations of parental rights between pre-pilot cases and cases initiated and closed within the pilot period.¹⁰² The Technical Assistance Brief also found that previous history with the court was a statistically significant variable with respect to the likelihood of reunification, which it suggested might correspond to the enhanced representation that the Pilot PRP provided.¹⁰³
- **2005 NICF Evaluation.** This evaluation included several major qualitative findings: (i) the Pilot PRP had a significant positive social justice impact, leveling the playing field between defense counsel and the Attorney General's office;¹⁰⁴ (ii) pilot attorneys had a greater ability to properly prepare for cases, resulting in better identification of and access to appropriate parental and family service needs, and provision of additional and more balanced information to the courts;¹⁰⁵ (iii) significant increases in the amount of attorney-client interactions and resulting improvements

99 2002 OPD Evaluation, *supra* at Executive Summary at 1 & Appendix I.

100 *Id.*, at Executive Summary at 1 & Main Report, at 12-15.

101 *Id.*

102 Technical Assistance Brief, *supra* at 6-7.

103 *Id.*, at 7.

104 2005 NICF Evaluation, *supra* at 12.

105 *Id.*, at 13-14.

in the quality of attorney-client relationships and use of appropriate support resources;¹⁰⁶ (iv) more successful handling of termination proceedings, include fewer termination hearings and less adversarial termination hearings;¹⁰⁷ (v) a more respectful, informed and focused courtroom environment in dependency and termination proceedings;¹⁰⁸ and (vi) a reduction in unnecessary continuances.¹⁰⁹ the Pilot PRP resulted in increases in family reunifications, despite declining statewide reunification rates. The study's quantitative findings varied by pilot location. In Benton-Franklin County Juvenile Court, the case file review indicated an increased capacity to reunite families, including a statistically significant reduction in the return-to-care rate, increases in the number of case dismissals, and a decrease in the time between return-to-care and dismissal, though there was an increase in the overall average time from petition filing to dismissal.¹¹⁰ In Pierce County, the set of cases that reached dismissal was too small to reach statistical significance; however, the number of dismissals, including reunifications, adoptions and third party custody agreements increased after implementation of the Pilot PRP.¹¹¹ Generally, the report found both locations' increased rate of reunifications particularly notable in light of decreasing reunification rates statewide, and challenges of unusually high levels of methamphetamine abuse in both locations.¹¹² Finally, the study noted that both locations had been able to handle increased dependency and termination caseloads, and more hearings per case during the pilot period, while still decreasing overall average times between petition filing and dismissal, reflecting overall capacity increases.¹¹³

106 *Id.*, at 15-17.

107 *Id.*, at 18-19.

108 *Id.*, at 19-20.

109 *Id.*, at 21-24.

110 2005 NICF Evaluation, *supra* at 39.

111 *Id.*

112 *Id.*, at 39-40.

113 *Id.*, at 40.

APPENDIX E: SUMMARY OF THE TEXAS CIVIL RIGHT TO COUNSEL PILOT PROJECTS

In October of 2009, the Texas Access to Justice Foundation (“TATJF”) announced it would fund a series of “Civil Gideon” Pilot Projects as part of its new initiative to expand the right to civil counsel in Texas.¹¹⁴ After soliciting proposals, TATJF funded two pilot projects with Texas RioGrande Legal Aid (“TRLA”) and Lone Star Legal Aid (“LSLA”). Both projects revolved around protecting the basic right of housing.¹¹⁵

TRLA’s project, the Border Foreclosure Defense Pilot Project, sought to address a gap in representation for low-income populations facing foreclosure through hearings under Texas Rule of Civil Procedure 736. LSLA’s project, the Tenant Defense Project, focused on providing counsel for tenants in eviction appeal hearings.

Goals

TATJF had the following goals:¹¹⁶ “The [Texas Access to Justice Commission] has discovered that not enough was known about how to implement a right to counsel in most substantive law areas. Consequently, pilot project proposals are being solicited with one of the goals to learn more about the mechanisms for providing counsel, the effect of creating a right to counsel, the costs involved and potential savings. Pilot projects should demonstrate the value of counsel to the parties and the courts and provide data for evaluation of alternatives such as the use of staff lawyers or private attorneys on assignments.”

The Border Foreclosure Defense Pilot Project had the following goals:¹¹⁷

- Prevent foreclosures where possible by providing effective legal counsel to low income clients at 736 Foreclosure Hearings;
- Encourage payment agreements, waivers of charges, and loan modifications so that families remain housed and communities remain intact.

¹¹⁴ Requests for Proposals for Special 2010 Initiatives Memorandum, Texas Access to Justice Foundation, Oct. 15, 2009, at 1 [hereinafter TATJF Request for Proposals].

¹¹⁵ See Lone Star Legal Aid, Grant Application for Texas Access to Justice Foundation Expansion of Civil Right to Counsel Project, Dec. 17, 2009 [hereinafter LSLA Grant Application]; Texas RioGrande Legal Aid, Grant Application for Texas Access to Justice Foundation Expansion of Civil Right to Counsel Project, Dec. 17, 2009 [hereinafter TRLA Grant Application].

¹¹⁶ TATJF Request for Proposals, *supra* at 2-3.

¹¹⁷ TRLA Grant Application, *supra* at 1.

The Tenant Defense Project had the following goals:¹¹⁸

- Pursue legal remedies to prevent loss of housing or secure time for evicted persons to locate new housing;
- Ensure that low-income persons have their rights protected to the fullest extent possible;
- Build upon the new legislative provision that allowed County Court Judges to maintain pro bono panels of attorneys for appointment to eviction cases.

Substantive Legal Area

The Border Foreclosure Defense Pilot provided representation to low-income litigants facing foreclosure hearings. Under Texas law, most foreclosures do not require court approval. However, those involving home equity loans, property tax loans, and reverse mortgages require a hearing under Texas Rule of Civil Procedure 736.¹¹⁹ The Border Foreclosure Defense Pilot sought to provide representation for this category of foreclosure hearings. In explaining the need for this legal service, TRLA cited high foreclosure rates along the Texas border. In addition, TRLA noted that high percentages of low-income people find themselves in foreclosure because they are victims of predatory lending practices involving home equity loans. Having representation at a foreclosure hearing not only increases a low-income client's ability to negotiate, it also holds lenders accountable for their predatory practices.¹²⁰

The Tenant Defense Project focused on providing representation to low-income persons in eviction appeals in order to address the perceived failure of a landmark state law. The law, which went into effect in 2009, provides for court appointments of pro bono attorneys for low-income persons involved in eviction appeals. However, Harris, Fort Bend, and Montgomery Counties have had difficulty securing help from volunteer attorneys. LSLA's project addressed this need by providing two full-time attorneys to accept judge-assigned court appointments for eviction appeals.

Location

The Border Foreclosure Defense Pilot Project served low-income people at the following locations:

- Webb County Courts;
- Zapata County Courts;
- Starr County Courts;
- Cameron County Courts;

¹¹⁸ LSLA Grant Application, *supra* at 1.

¹¹⁹ TRLA Grant Application, *supra* at 2.

¹²⁰ *Id.* at 3.

- Hidalgo County Courts;
- Willacy County Courts.

The Tenant Defense Project took place in the following locations:

- Fort Bend County Courts;
- Harris County Courts;
- Montgomery County Courts.

Scope

Due to the nature of the funds available by TATJF, grant conditions imposed overarching limitations on the scope of both projects. Since the funds awarded were Basic Civil Legal Service (“BCLS”) funds, the projects were required to serve only indigent clients.¹²¹

Both pilot projects endeavored to serve a large pool of BCLS eligible clients. The Border Foreclosure Defense Project sought to represent all income-eligible persons facing 736 Foreclosure Application Hearings in the six county locations.¹²² Their grant application anticipated serving roughly three-hundred households in the twenty-month project term.¹²³ The Tenant Defense Project planned to accept thirty-eight eviction appeal appointments each month from Harris, Fort Bend, and Montgomery County Courts. In addition, the Tenant Defense Project also planned to provide clients with a holistic assessment to determine the full scope of legal services required to help stabilize the individual.¹²⁴ In implementation, the projects served a much lower client population due to the difficulty they had obtaining appointments and assignments from the courts.

Stakeholders

The two pilot programs had the following stakeholders:

- Texas Access to Justice Foundation—Betty Balli Torres, Executive Director;
- Texas RioGrande Legal Aid—David G. Hall, Executive Director;
- Lone Star Legal Aid—Paul E. Furrh, Jr., Executive Director;

Pilot Partners

In its request for grant proposals, TATJF required that projects collaborate with courts whose jurisdiction

¹²¹ TEX. GOV'T CODE ANN. § 51.943.

¹²² TRLA Grant Application, *supra* at 1.

¹²³ *Id.*

¹²⁴ LSLA Grant Application, *supra* at 1.

included matters where basic human needs were at stake. It specified that these courts must agree to the assignment or appointment of counsel for BCLS eligible parties.¹²⁵ In accordance with this requirement, both projects planned to partner with several courts.

However, the relatively short period between the request for proposals and the start of the grant period complicated these plans.¹²⁶ Once TRLA and LSLA received their grants, they had only thirty days before the grant period commenced. Because of this strict timeframe, the projects had very little time to establish their partnerships with the courts. As a result, they struggled to obtain referrals and appointments throughout the grant period. This challenge highlights the importance of providing adequate time to establish clear relationships with courts prior to implementation.

The Border Foreclosure Defense Pilot Project listed the following courts as partners on their grant application:

- Webb County Judges and Clerks—referring litigants with pending 736 Foreclosure Applications to TRLA;
- Zapata County Judges and Clerks—referring litigants with pending 736 Foreclosure Applications to TRLA;
- Starr County Judges and Clerks—referring litigants with pending 736 Foreclosure Applications to TRLA;
- Cameron County Judges and Clerks—referring litigants with pending 736 Foreclosure Applications to TRLA;
- Hidalgo County Judges and Clerks—referring litigants with pending 736 Foreclosure Applications to TRLA;
- Willacy County Judges and Clerks—referring litigants with pending 736 Foreclosure Applications to TRLA.

The Tenant Defense Project Pilot listed the following courts as partners on their grant application:

- Harris County Courts, Judges, Clerks, and Court Coordinators;
- Fort Bend County Courts, Judges, Clerks, and Court Coordinators;
- Montgomery County Courts, Judges, Clerks, and Court Coordinators.

¹²⁵ TEX. GOV'T CODE ANN. § 51.943 (West 2011); Email from Jonathan Vickery, Associate Director & Director of Grants, Texas Access to Justice Foundation, to author (July 18, 2012, 10:45 WST)(on file with author). Funds from TATJF help low-income Texans. *Id.* For the distribution of BCLS funds, TATJF defines low-income as those who live at or below 125 percent of the federal poverty level. *Id.*

¹²⁶ *Id.*

Funding

TATJF provided funding for both pilot projects through its expansion of the civil right to counsel initiative.¹²⁷ The initiative was part of a larger plan to increase access to legal assistance for low income people.¹²⁸ LSLA and TRLA both submitted grant proposals for Civil Right to Counsel pilot projects. LSLA received \$310,389 for the Tenant Defense Project, and TRLA received \$347, 611 for the Border Foreclosure Defense Project.

Evaluation & Methodology

TATJF outlined the following evaluation criteria in its request for proposals:

- Each project must have the capacity to gather needed data regarding outcomes and benefits, including economic savings or impacts to the client and to the court system and community.
- Projects must follow up with clients ninety days following the closing of the case to determine whether their conditions have improved, stabilized, remained the same, or worsened since the service was provided.

For each case served, projects must perform economic assessments to determine:

- The cost to the client if legal assistance was not provided;
- The estimated cost to hire a private attorney for the same type of legal assistance provided;
- The estimated cost to the community if legal assistance was not provided;
- The estimated cost or benefit as a result of the legal assistance being provided; and
- The estimated time savings and or cost benefit to the court by the provision of legal assistance.

In their grant proposals, both projects included plans to assess these factors using client tracking systems. However, their final reports did not include all of the data that TATJF had specified should be collected for analysis.¹²⁹ While the projects provided individuals and families with crucial legal aid over the course of the grant period, they did not produce data correlating to the metrics described in the TATJF request for proposals, such as outcomes, estimated savings for the client and the community, or the potential cost to the client had counsel not been provided.¹³⁰

Lessons Learned

Though the two projects had limited success in studying the effects of a right to civil counsel, their experiences reveal significant lessons for future pilots.

¹²⁷ TATJF Request for Proposals, *supra* at 1.

¹²⁸ *Id.*

¹²⁹ Email from Jonathan Vickery, *supra*.

¹³⁰ *Id.*

First, in states where the legal aid community has not previously embraced the advancement of the right to civil counsel, greater time and attention should be devoted to ensuring that pilot projects are being internally driven by grantees as opposed to being externally driven by available funds.¹³¹ To accomplish this goal, grantors and potential grantees should engage in extensive discussions prior to the issuance of requests for proposals in order to arrive at a common understanding of the value and purpose of the civil right to counsel.¹³²

Second, grantors must clarify expectations regarding the importance of data collection so that grantees recognize it is as crucial as the other outcomes.¹³³ While TATJF held several preliminary conference calls with LSLA and TRLA following the grant awards, they did not engage in more thorough meetings. In retrospect, TATJF noted that in-person meetings could have been more instructive.¹³⁴ Clarifying expectations about data collection will help to ensure that pilot projects track relevant outcomes.

Finally, pilot projects that do not involve the courts in the early stages of the planning process risk meeting resistance from individual judges or whole courts, either due to ideological objections to providing more counsel or due to concerns about docket manageability if more attorneys are present in the courtrooms. It is therefore critical to reach out to the courts and gauge their interest in and support for the work being done.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*



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