2010

Guest Editor's Introduction, Special Issue: Ensuring Access to Justice for Self-Represented

Amy Applegate

GUEST EDITOR'S INTRODUCTION

OCTOBER 2010

Imagine not being able to afford an attorney and facing a court case in our adversarial legal system about the one thing in the world that matters most to you—your family. Imagine further that the other parent of your children, who knows all about you (including and especially your weaknesses) from the loving relationship you used to share, is hostile and litigating actively to prevent you from spending much, if any, time with your children. Imagine still further that your children's other parent has an aggressive attorney who you find intimidating.

Before I started teaching in the law school clinical world, and for most of the time I worked in a private civil litigation practice representing companies and well-to-do individuals, these terrible thoughts did not cross my mind. Now, however, I teach and supervise law students who provide family law mediation services to low-income and sometimes no-income clients. As a result, these are not just terrible thoughts, but the unfortunate reality which many people routinely experience in family law cases. As the Chief Justice of Indiana observes in his article in this special issue, "at least one litigant in one out of every three Indiana families involved in a dissolution is facing . . . potentially life-altering changes . . . without the benefit of trained legal counsel."[1] Though there are no national statistics on the extent of the problem, courts are continuing to see an increase in the numbers of self-represented litigants, especially in domestic relations matters, such as divorce, custody and child support, protective orders, and other kinds of civil matters.[2] Although some self-represented litigants choose not to hire an attorney, most of the self-represented litigants I see do not make this decision by choice, but rather are forced to self-represent by their inability to pay for an attorney. Some self-represented litigants express distress or despair because they do not have an attorney; others do not even appear to realize the risks that they face or how an attorney could be helpful to them.

Since starting to teach and supervise law students in 2001, I have spent most of my time, directly or indirectly, on access-to-justice issues. I am fortunate to teach at a law school that encourages and supports these efforts. I teach an interdisciplinary mediation program, through which law students become registered domestic relations mediators in Indiana and then provide mediation services to indigent and low-income litigants in disputed custody, parenting-time, and other family law cases. With colleagues from psychology, we conduct research on how violence and abuse in family law settings can be uncovered and addressed as part of the mediation process and how to best help parents in mediation decrease their conflict and reach parenting agreements that are good for their children.

One of my primary service areas is the delivery of pro bono services. In that regard, I was a member of the Indiana Pro Bono Commission (2003–2009) and co-chair of the Indiana State Bar Association (ISBA) Pro Bono Committee (2007–2009), and I continue to serve as secretary of the District 10 Pro Bono Project, Inc. A significant part of my work as co-chair of the ISBA Pro Bono Committee involved coordinating "Unequal Access to Justice: A Comprehensive Study of the Civil Legal Needs of the Poor in Indiana," which was sponsored by Indiana Legal Services, the Indiana Bar Foundation, and ISBA and released to the public in 2009. As part of this study, I also helped organize a statewide Conclave on Pro Bono in Indiana. As a result of these efforts and recommendations from the study and the Conclave, I am currently part of a working group consulting with the Indiana Supreme Court to create an Access to Justice Commission in Indiana.

Correspondence: aga@indiana.edu

FAMILY COURT REVIEW, Vol. 48 No. 4, October 2010 604–606

Accordingly I am pleased to be the guest editor of his special issue of *Family Court Review*, which focuses on "Access to Justice for Self-Represented Litigants." I am even more pleased that this issue includes articles written by some of the leaders of Indiana's pro bono legal community; several outstanding students; my collaborators who conduct research about the effect of self-representation in the mediation context, especially where there is intimate partner violence or abuse (IPVA); and colleagues in the national clinical and law school pro bono community whose students provide pro bono services to disadvantaged or marginalized individuals with family law problems.

The first two articles in this special issue come from leaders in the pro bono community. Indiana's Chief Justice Randall T. Shepard, a state and national leader in encouraging the delivery of pro bono services (and one of my personal heroes), provides an insightful analysis of the extent of the problem of the self-represented litigant in Indiana, a comparison of Indiana's statistics in this area with national trends, Indiana's attempt to provide access to justice for self-represented litigants over the past ten years, and current and ongoing projects in Indiana. Monica Fennell, the executive director of Indiana's Pro Bono Commission and a leading state expert in both legal needs of the poor studies and access-to-justice programs, contributes an important article about best practices for state legal needs studies (including quantifying and classifying the legal problems faced by low-income families) that support informed recommendations for obtaining and making the best use of resources. I am proud to have worked closely on access-to-justice issues with Ms. Fennell over the past seven years.

The next three articles in the special issue concern issues involving self-represented litigants in mediation, my primary teaching and research area. In the first, my collaborator, Connie J. A. Beck, Professor of Psychology at the University of Arizona, with colleagues in Arizona and Indiana, presents the findings of an exploratory study of the effect of self-representation on litigants in mediation in two very different jurisdictions, Arizona and Indiana, particularly considering the presence or nonpresence of IPV/A. Using empirical data, this article provides descriptive statistics concerning the types of representation of clients entering mediation in these jurisdictions and the number of sessions attended by attorney-represented versus self-represented litigants and the levels and types of violence and abuse reported by these two groups of litigants. Finally, the article explores the relationship between representation, violence and abuse, and reaching agreement in mediation. In the next, one of my primary collaborators, Amy Holtzworth-Munroe, Professor of Psychology at Indiana University–Bloomington, and Professor Beck and I introduce our new IPV/A screening measure, the Mediator's Assessment of Safety Issues and Concerns (MASIC), a behaviorally specific IPV/A screen that assesses various types of violence and abuse, including lethality indicators, and offers optional recommendations for procedural changes in mediation based on IPV/A. Though the MASIC has not yet been validated, we recommend the use of systematic IPV/A screens in family mediation and suggest that such measures may prove especially important in providing unrepresented parties a safe and appropriate environment for mediation. In the last article in this section, my scholarly and thoughtful law student Michael M. Pettersen, along with collaborating psychology students and faculty, including psychology graduate student Robin Ballard, provides a compelling empirical study of issues raised when one party is attorney represented and the other is self-represented in family law mediation. The article presents and analyzes data, based on each mediating couple's representation status, for example, both represented by attorneys, both self-represented, or one attorney-represented party and one self-represented party (mixed-representation cases), on mediating parties' premediation concerns, fears, and feelings of preparedness, as well as their postmediation satisfaction with the mediation process.

The last article in this part of the special issue is intended to highlight creative ways law schools have approached access-to-justice issues. I selected clinical and public interest law colleagues Dale Margolin (University of Richmond School of Law), along with Steven Berenson (Thomas Jefferson School of Law), Lisa Martin (Catholic University Columbus School of Law), Karen Pearlman (The Earle Macke School of Law at Drexel University), and Maryann Zavez (Vermont Law School), to share the development, structure, and challenges of pro bono and clinical programs at their law schools. In these programs, law students, under the supervision of law professors or community professionals, provide assistance or legal representation to underserved and often marginalized

populations needing help with family law problems, including parents accused of abuse and neglect, youth aging out of foster care, homeless families, survivors of domestic violence, homeless veterans with addiction problems, and female prisoners. Through identification of community needs and creative collaborations, each of these law schools, in its own way, is providing transformative educational opportunities for law students, while empowering and providing increased access to justice for the clients served.

In the final article in the special issue, my public service–oriented student Elliot Anderson, with a big heart and an even bigger portfolio of pro bono experience acquired during law school, articulates a practical and ethically sound goal for the delivery of unbundled legal services in pro bono family law limited legal services programs (also known as brief advice clinics). Through the lens of a goal spectrum, derived from the theoretical goal of access to justice, the article focuses on practical considerations and ethical concerns in articulating the goal.

In closing, I would like to thank Professor Andrew Schepard for his guidance, friendship, and support and for giving me this wonderful opportunity to be the guest editor of *Family Court Review*. Professor Schepard has been a tremendously important mentor to me. And I would like to thank Dean Lauren Robel for her excellent leadership in, among other things, encouraging our faculty and students to work toward the goal of ensuring access to justice for all. Though Dean Robel is too modest to disclose this, as an associate professor of law in 1989, she was the founder of our law school's Protective Order Project (assisting victims of IPVA), and she served for many years as its faculty director. Indeed, even with all her decanal and teaching obligations, she inspires the rest of us at the law school with her service to those in need of help, including her ongoing pro bono representation as appointed counsel to litigants in criminal, habeas, and civil rights cases in the U.S. Court of Appeals for the Seventh Circuit.

Amy G. Applegate
Clinical Professor of Law
Indiana University Maurer School of Law

NOTES

1. Randall T. Shepard, *The Self-Represented Litigant: Implications for the Bench and Bar*, 48 FAM. CT. REV. 607 (2010).
2. National Center for State Courts Self Representation Pro Se Statistics Memorandum, Sept. 25, 2006, *available at* http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm#other.

Amy G. Applegate is a clinical professor of law and the director of the Viola J. Taliaferro Family and Children Mediation Clinic at the Indiana University Maurer School of Law–Bloomington (Law School). She teaches and supervises an interdisciplinary clinical program at the Law School, through which her students become registered domestic relations mediators in Indiana and then provide mediation services to indigent and low-income litigants in disputed custody, parenting-time, and other family law cases. She and her students also collaborate in research and training with faculty and graduate students from the Indiana University Department of Psychological and Brain Sciences in Bloomington, including how to uncover and address violence and abuse in family law settings as part of the mediation process and how to help parents in mediation decrease their conflict and reach parenting agreements that are good for their children. Among other activities, she is the chair of the Executive Committee of the American Association of Law Schools Section on Clinical Legal Education (2010–2011). She has also been extensively involved at the state and local level in the areas of delivery of pro bono services and mediation ethics, including serving as a member of the Indiana Pro Bono Commission (2003–2009) and co-chair of the Indiana State Bar Association Pro Bono Committee (2007–2009).