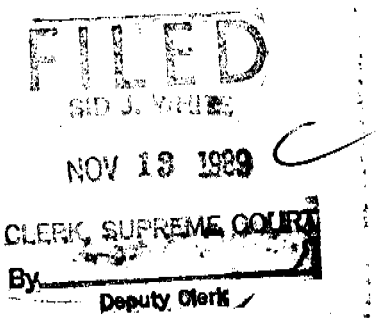
IN THE SUPREME COURT OF FLORIDA



In re: Petition for Provision of Legal Aid to the Poor

Case No. ~~89-~~ 74,538

Response of Joseph W. Little and Harvey M. Alper Opposing the Petition and Proposing an Alternative

Submitted by

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I. INTRODUCTION

We are against governmental tyranny and anti-democratic usurpations in all their forms. We are also in favor of making adequate legal representation available to poor people through appropriate private and public channels. The rub comes - as with the Petitioners' proposed rule - when a beneficial end is sought through dubious means.

Although we believe the Petitioners' proposal could be modified to achieve some beneficial purposes through legitimate means, we oppose the proposal as submitted for several reasons:

1. It unconstitutionally involves the Court in legislative and executive decisions that are outside its constitutional powers and outside the competence of the judiciary.
2. The underlying legal justification of the proposed rule is distorted, misconceived, and ultimately legally unsound.
3. The rule in application would violate constitutional rights of members of the Bar.
4. The method of proposing the rule is yet another in a series that threaten to destroy the collegial, bottom up, self-governing nature of the Florida legal profession with a continual series of top down mandatory impositions engineered by a core of well placed elites within the Bar.
5. The proposed rule cannot be successful.

We will touch upon each of these points in succeeding parts of this response. In the meantime, we will state specific objections to the proposals.

A. THE MANDATORY SERVICE RULE AND AN ALTERNATIVE

Proposed Rule 1-1.31(a) states:

> Duties. It is the duty of every member of The Florida Bar to provide aid to indigents as and when ordered by the courts, including orders issued pursuant to Rule 2.065 of The Florida Rules of Judicial Administration.

We object to this proposal as expressed for two reasons: First, the Florida Supreme Court has no inherent or constitutionally allocated power to order "as and when" lawyers to provide aid to indigents; and, second, any such rule applied as written would violate rights of the impressed lawyers guaranteed by the 13th and 14th Amendments to the United States Constitution and by the Declaration of Rights of the Florida Constitution. By contrast, we would have no objection to an alternative rule such as:

> Benefactions. Each member of The Florida Bar is exhorted to be a constructive force in improving the administration of justice in this State. Each member is urged to provide free legal services to indigent people including particularly those who are referred to the lawyer by the courts and organizations committed to making legal representation available to poor people.

B. THE LEGAL AID PLAN AND AN ALTERNATIVE

We specifically object to proposed Rule 2.065, "Legal Assistance to the Poor," (which to conserve space we do not reproduce) because it represents a usurpation of legislative and executive functions by the judiciary. As a consequence, the

proposed rule is anti-democratic in removing fundamental resource allocative decisions from the legislative sphere, and a threat to judicial objectivity by involving judges too intimately in the executive function of selecting counsel for litigants. As a substitute, we propose:

> Needs of the Poor.
> 1. The Florida Bar is directed to prepare and execute a State Legal Needs Plan for ascertaining and attempting to satisfy the needs of poor people in the State. The plan shall include at least the following elements:
>
> (a) The Bar shall create a State Legal Needs Committee to develop specific proposals under this rule for submission to the Board of Governors, to act as the clearing house for local legal needs committees, and to monitor the ongoing performance of the State Legal Needs Plan.
>
> (b) The Bar shall create a local legal needs committee in each judicial circuit of the State. This committee shall be composed of not fewer than seven members, no less than three of whom shall be electors of the State and circuit who are not members of The Florida Bar.
>
> (c) Each local legal needs committee shall undertake to determine the extent, if any, of unmet legal needs of poor people in its judicial circuit. Each committee shall develop its own means to make this determination but must include at least one public hearing at which persons with particular knowledge of this issue and the public are invited to provide information.
>
> (d) If a local legal needs committee determines that the poor people of the circuit have substantial unmet legal needs that should be provided by the public, that Committee shall prepare a proposed plan to satisfy those needs. Such a plan should, wherever feasible, rely upon enhancing existing, legitimate and effective resources, and may include: strenghtening existing legal aid programs, instituting or enhancing programs that refer needy people to lawyers

in the circuit, and other measures. Each plan should contain an element that depends upon the voluntary provision of free services by local members of the Bar. The voluntary element should include a sub-element that provides an opportunity for each and every member of the Bar to participate.

(e) Each local legal needs committee should undertake to support local voluntary efforts to meet the legal needs of poor people as its first and primary approach.

(f) If a local legal needs committee determines that public money needs to be allocated to the circuit by the Legislature and the Governor, it shall determine the amount of money needed and propose a list of organizations to which the money should be allocated.

(g) Each local legal needs committee shall submit a local plan to the State Legal Needs Committee not later than October 15 of each year beginning October 15, 1990. This plan must report on the findings as to the unmet legal needs of poor people in the circuit and a description of the plan developed to attempt to satisfy them. If the local plan requires public funding, the annual report shall include a statement of the needed public funding and a list of proposed recipients.

(h) The State Legal Needs Committee shall compile the annual reports of the local legal needs committees and produce a composite report of the unmet legal needs of the State and a proposed composite State Legal Needs Plan The proposed composite plan shall not be limited to a compilation of the local legal needs plans, nor shall the development of a composite State plan prevent a local committee from using local resources to support local efforts that are not included within it.

(i) The State Legal Needs Committee shall submit an annual State Legal Needs Plan to the Board of Governors by January 15 of each year, beginning in 1991. This plan shall include a composite proposed budget to fund the needed services that cannot be satisfied by the voluntary provision of services by members of the Bar under programs

included in the local plans.

> 2. The Board of Governors shall examine the proposed State plan and budget presented by the State Legal Needs Committee and shall transmit a proposed State Legal Needs Plan and Budget to the Florida Legislature and the Governor by March 1 of each year beginning in 1991. In approving a proposed State plan and budget for transmission to the Florida Legislature and the Governor, the Board of Governors may adopt or modify the proposed budget submitted to it by the State Legal Needs Committee and shall conduct at least one public hearing on the matter before taking final action.
>
> 3. The Board of Governors shall regularly confer with the State Legal Needs Committee to develop rules and procedures to assure the continued operation of this rule.

The Legislature might, of course, accept, reject, refuse to entertain or modify the Bar's transmittal. The Governor would also have complete freedom to ignore, support, or oppose the plan and budget or propose alternatives. The point is that the Bar would make a telling effort to carry out its professional obligations. Moreover, those portions of the plan that do not rely upon public funding would continue in operations in any event.

This plan is superior to Petitioners' proposals for several distinct reasons. First, it permits the Bar to develop a coordinated state plan without involving the courts in executive and legislative functions. Second, it emphasizes encouraged voluntary participation of all members of the Bar. Third, it places the burden of determining how much of the State's resources should be allocated to satisfy the unmet legal needs of the State over and above those satisfied by voluntary efforts of members of the Bar exactly where they belong; namely, initially,

upon the Legislature and Governor and, ultimately, upon the taxpayers of the State. And, fourth, it is more likely to succeed.

II. THE ASSERTED LEGAL BASIS OF PETITIONERS' PROPOSED RULE IS UNSOUND

Petitioners rely largely upon an antique, arcane, and now repealed (in England) statute of date 1495 (11 Henry VII, Chap. 12, 3 Fla. Stat. 51, 52 (1943)) to supply the legal underpinning of their proposed rule. Although the statute may in some technical manner still be viable in this State under §2.01 Fla. Stat. (1987), it does not have the force to carry the weight of the proposed rule. Moreover, as far as we can determine, it has never been mentioned in a decision of this Court, much less employed as the basis of an action or decision. Indeed, decisions of this Court such as Gideon v. Wainright, 135 So.2d 746 (Fla. 1961), reversed Gideon v. Wainright, 83 S.Ct. 792 (1963), and Argersinger v. Hamlin, 236 So.2d 442 (Fla. 1970), reversed Argersinger v. Hamlin, 92 S.Ct. 2006 (1972), while criminal in nature, suggest that the statute has no "spiritual" enforceability in Florida as urged by Petitioners. The statute in question states:

> The common and statute law of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this State.

§2.01 Fla. Stat. (1987). (e.s.). We have underlined the proviso, not because it has any weight of its own, but because it highlights the point that adopted English law of 1776 cannot control conflicting provisions of the United States Constitution, the Florida Constitution, and of more recent Florida statutes.

The ultimate twin cores of Petitioners' proposals are, first, judicially driven fact-finding and execution of local plans for providing legal services, and, second, compelled service of members of the Bar. The first of these is in direct conflict with several provisions of the Florida Constitution, notably:

> Article III, §1: "The legislative power of the state shall be vested in a legislature of the State of Florida consisting of a senate...and a house of representatives."
>
> Article IV §1: "The supreme executive power shall be vested in a governor"
>
> Article II §3: "The powers of state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Nothing in Article V of the Florida Constitution allocates to the Florida judiciary any of the welfare legislative powers of the state or the power to oversee plans to execute welfare powers of the State. We refer specifically to the judicial article, particularly §§1, 2 and 15 of Article V, with which the Court is thoroughly familiar. Moreover, the Florida Declaration of Rights confers no such legislative and executive powers upon the judiciary. Indeed, the theory and function of the Declaration of Rights is not to confer powers upon government, but is the exact

opposite; namely, to provide a shield against abusive governmental action. The courts must enforce that shield against the legislative and executive branches and against themselves, but are ceded no positive power by the Declaration of Rights to usurp legislative and executive powers to themselves.

Petitioners' attempt to ground a free standing constitutional right from the access to courts guarantee of the Florida Declaration of Rights cannot succeed. That provision, i.e., "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay"[1] derives from the Magna Carta and has been a part of every Florida constitution since 1838.[2] The purpose of that provision was, has been, and is to prevent the magistrates and the State itself from placing impediments in the paths of people as they come to court. In other words, it, consistent with the theory of Bills of Rights, is a bulwark against the abusive use of power by the State.[3] This Court in Flood v. State, 117 So. 385, 387 (Fla. 1928), quoted the following passage from Malin v. LaMoure County, 145 N.W. 582 (N.D. 1914) as stating "the meaning of [access to courts language] used in our Bill of Rights:"

> We realize that the clause of the MAGNA CARTA to the effect, 'Nulli vendimus, nulli negabimus aut differimus justitiam vel rectum,' and which we have paraphrased in our Constitution (section 22, art. 1) into, 'All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay,' has generally been construed not to prohibit the imposition of reasonable court costs and was aimed rather against the selling of

> justice by magistrates themselves, that is to say, bribery, than the imposition of reasonable fees.*** We are quite satisfied, however, that prior to the adoption of the North Dakota Constitution the meaning had extended its original boundary, and that the provisions which are to be found in the Constitutions of all of the states were aimed, not merely against the selling of justice by the magistrates, but by the state itself; in other words, that a free and reasonable access to the courts and to the privileges accorded by the courts, and without unreasonable charges, was intended to be guaranteed to every one.

Both Flood and Malin employed the provision to nullify state impositions in the nature of taxes upon the right to use the courts. Hence, history irrefutably establishes that the access to courts provisions were initially put into the Magna Carta and, later, state constitutions to stop sovereigns, judges and governments from barring or impeding access to courts, and not to require the State or the public to pay for anyone's attempt to use the courts. Indeed, history provides no more basis for the latter proposition than it does for a contrived (and false) conclusion that the right "to acquire, possess and protect property," guaranteed by Article 1 §2 Florida Constitution require the State and public to provide every person property. This would be a monstrous reading of our constitution and one that is insidiously at odds with our cherished individual freedoms. Indeed, it would smack of this provision of a different constitution: to wit, "The equal rights of the citizens of the Union of Soviet Socialist Republics are guaranteed in all fields of economic, political, social, and cultural life."[4] That collective rights theory of government now lies in open ruins before the eyes of the world. We urge this Court not to redefine

our theory of individual rights in a manner that embraces the failed system of collective rights.

Petitioners' reference to this Court's statement in The Florida Bar v. Furman, 376 So.2d 378, 372 (Fla. 1979), to wit: "Without question, it is our responsibility to promote the full availability of legal services," is not at odds with the foregoing analysis. The Court has definite and specific constitutional responsibilities in this field arising out of its authority to issue rules of practice and procedure, to impose rules of admission and discipline of lawyers (which were at issue in Furman), and to certify the need for judges. How the Court exercises these powers strongly affects how well the judicial system serves poor people. But none of this conveys welfare legislative and executive powers to the Court. The Court also plainly is within its jurisdiction to examine the needs of the poor for legal representation and to make its findings and recommendations known to the legislature and the executive. This is fully in keeping with the Furman dictum and with the content of Respondent's alternative proposal. After the Court has made known its findings and opinions, however, it falls to the legislative and executive branches to decide how much of the welfare resources of the State to allocate to legal assistance in lieu of state provision of food, shelter, medicines and other needs of the poor.

The second of the twin cores of Petitioner's proposal - compelled participation by members of the Bar - not only does not fall within the Court's power to regulate admissions and

discipline of members of the Bar, but, in application, would violate a member's rights under the 13th and 14th Amendments to the United States Constitution, and also Sections 1, 9 and 12 of the Florida Declaration of Rights. Because the Court is steeped in this issue from the recent mandatory pro bono petition and other matters, we see no point in burdening this response with legal authorities and argumentation. Instead, we will refer to the starkly different conceptions of human freedoms represented by the meat of Petitioners' proposal and the theory of individual rights that is the heart of constitutional liberty in this country.

Petitioners think it desirable that poor people have adequate legal representation, and so do we. Petitioners further think that this goal should be satisfied by compelling all members of the Bar to donate their time to this effort whether they wish to or not. We deem this to be at once a tyrannical attack on individual liberty and destructive of whatever shreds of professional collegiality that remain in the legal profession in Florida after the incessant attacks upon it from the Bar elites in recent years. The poor have always been with us and of concern to us, but the underlying genius of American government has been the constant safeguarding of individual liberty. Modern events have taught the world that even so-called benevolent totalitarian states do not achieve a better life, much less greater justice, for poor people than do the lands that protect individual liberty of thought and conscience as the first priority. Within very wide limits, government has no place and no power to force citizens to do or not do anything. Certainly,

government has no power to force anyone to be charitable. In these decisions a person has the right to flaunt charitable acts before the public, as some self-righteously do, or to follow the biblical injunction of not letting the right hand know what the left is doing. These decisions are as private and as entitled to constitutional protection as any, including those this Court has recently acknowledged in In re T.W., ___ So.2d ____, 1989 WL 118015 (Fla). This freedom has been acknowledged for 200 years. It is much too late in the day to assert that the State has a compelling state interest to obliterate this right, and no credible argument can be made that compelled charity from a few is the least restrictive means of attaining Petitioners' goals as long as the legislature still meets and the people of Florida remain relatively untaxed compared to taxpayers in other states and nations.

Compelling all members of the Bar to be charitable will also further erode the aura of professionalism within the Bar that has already declined to little more than a memory. A true profession must establish its ethical standards by a consensus. Superior motivations, performances and achievements should always set the aspirational course that keeps the profession on a high and ascending path. But, apart from adherence to the law and to basic standards of honesty, learning, industry and competence that set the threshold of membership in the profession, members must have wide latitude to differ in their views and actions pertaining to the profession and its relationship to the public. Imposing minimum standards of charity, however they are labeled,

from the top by the booted heel of state power crushes professionalism. Ironically, the worst hurt are the many who quietly and without fanfare devote much effort to representing poor people as a charitable act or one of aspirational obligation, but certainly not as a compelled duty.

This point was eloquently expressed in the concurring opinion of Justice Terrell in Gluck v. State, 62 So.2d 71, 74 (Fla. 1952), as follows:

> Autocratic power is no different from what it was when the Bill of Rights was extracted from the autocrats. It is different in name only. It was first called absolute or limited Monarchy. We now call it socialism or some form of totalitarianism, whether socialism, communism, fascism, or nazism is not material. They all have to do with the same concept in different states of its development. They proceed on the theory that the individual is inert, raw material that does not know what is good for him, but must look to the state for his economic, political and moral salvation. The guarantees vouchsafed us by the Bill of Rights would soon regress to the totalitarian pattern if not exercised with restraint and with due regard to the rights of others.
>
> Man's inhumanity to his fellow man may not be confined to countries behind the iron curtain where the law is tested in terms of its effect on the state. Democracy, to the contrary, places the emphasis on the individual and tests the law in terms of its effect on him. Tested in this manner, it becomes a guide to correct habit patterns, rather than a straight jacket to tether the individual to the caprice of the Gestapo or Gendarme. I prefer having my civil and political rights administered by the Bill of Rights, clothed with due process, rather than by any totalitarian pattern. Under the Bill of Rights I can challenge with assurance the right and the method of those who admeasure them, as the defendant did in this case. On the other hand, if I challenge the method of admeasurement under the totalitarian method, I do so at the risk of facing the hangman's

> noose, or the firing squad. This old world has been good to me and I do not care for such a precarious tenure.

III. PETITIONERS' PROPOSED RULE WILL NOT WORK

Petitioners have bravely set forth an ancient statute as the basis of a right, but wholly fail to examine whether the mechanism of the statute ever achieved its purpose. The statute of 1495 was enacted almost 200 years before the outbreak of the seventeenth century civil war that set England on the course of true parliamentary sovereignty. At the time of Henry VII the King was a true despot, hedged in some by the Magna Carta and the slight powers of parliament, but nevertheless the sovereign. The Petition of Rights and English Bill of Rights were still far in the future. Hence, the "King in his bench," as the statute in question refers to, was indeed "sovereign lord" over the courts and could require the attorneys that plead in them to do anything that pleased him that they do. Indeed, at that time, the King as King could decide any issue in the courts himself, if he chose to do so, irrespective of the opinions of the judges.

Still, even given the fact that lawyers of that day were servants of the sovereign in a factual sense, Petitioners have offered no evidence that the statute in question assured adequate legal representation for poor people in history. Indeed, history seems to prove the contrary. The statute itself was repealed by Parliament in 1883.[5] Moreover, in modern England, the right to counsel, a mechanism for effectuating it, and funding are provided by parliamentary statute.[6] Hence, in today's England, the taxpayers provide the funding for legal aid to the poor.

Indeed, the status of legal aid and the need for public funding are in a current furor in England deriving from certain changes in the legal profession proposed by a "green paper" issued by the Lord Chancellor.[7] In short, recent history has established that private efforts cannot adequately meet the legal needs of the poor in England. As one English commentator recently put it:[8]

> The fact is that private funding [i.e. self pay and volunteerism] is out of the question for the majority of the population and those who cannot afford to pay are faced with at best a second-class and at worst, increasingly, no service at all. The only hope of "the best possible access to legal services" - the Lord Chancellor's aspiration - lies in the imaginative expansion and proper funding of legal aid.

In addition, Justice Earl Johnson of a California appellate court, the author of the article to which Petitioners give credit with having stimulated their proposal, records that not only England, but also Sweden, The Netherlands, France, Germany, Norway, Denmark, and other countries provide for publicly compensated legal aid to the poor.[9] That is, the legislatures establish the mechanisms and provide public funding to support them. According to the same author, Italy purports to provide uncompensated legal aid to the poor but that the "system is administered in ways which minimize the amount of legal assistance the poor actually receive, as well as the degree of sacrifice the legal profession actually experiences."[10]

The point is, of course, that advanced western nations, including England, have acknowledged that private lawyers cannot alone be called upon to carry what is in fact a general public welfare burden. This point was well made by a respondent to

Justice Johnson's proposal (i.e., that the California Supreme Court acknowledge a constitutional right of counsel in civil litigation in California) as follows:[11]

> ..., the obligation framed by the [proposed] constitutional imperative we are discussing today is not the obligation of lawyers only, but of society as a whole. Something which is often overlooked, but should not be, is that the obligation to provide the wherewithal to meet that constitutional imperative is not exclusively that of lawyers. To the extent that society mandates legal services for the poor and the indigent, it should become the concern of all segments of society, not just lawyers. To urge otherwise would be similar to placing the full burden on the medical profession of supplying medical services to the poor and indigent, or the sole responsibility on farmers for feeding the poor. The legal rights and needs of the poor are a societal problem and responsibility.
>
> Just as doctors did not invent diseased people neither did lawyers invent the poor with their particular legal problems. The organized bar is pleased to participate with the rest of society in helping to alleviate these societal problems. But we cannot do it alone and we should not be expected to do it alone.
>
> I believe that this realization is what has caused the profession to sit up and take notice of, indeed, if not vehemently oppose, the concept that lawyers only bear the entire cost of providing these constitutionally mandated legal services to the indigent.

Indeed, Justice Johnson himself did not anticipate that the right he was espousing was one to be borne by the Bar alone. Instead, he said, "What could be a more justifiable use of public monies than those needed to ensure that the courts can do their job right and afford equal justice to all?"[12] In short, Johnson got it exactly right. It is the job of the people through their

constitutions and laws to create rights. It is the job of the courts to acknowledge and apply rights. And, it is the job of the legislature and ultimately the people to supply the money needed to effectuate rights that are not self-executing. Members of the legal profession have a major role in advocating rights before the courts, the legislature and the people, and in voluntarily employing their efforts to assist as many poor people as their time, talents and senses of aspirational obligation or charity permit. Nevertheless, the ultimate decisions as to how government is going to compel redistribution of wealth among competing welfare needs must be made by the people through their elected representatives and must be borne by all the people. Nothing in the constitution mandates that legal services leave priority over food, shelter, raiment and medicine; indeed such an order of priority would be approved by very few of the poor. In short,the true message of what is the first and perhaps the central constitutional right of the people of Florida is embodied in the first sentence of the constitution i.e., "All political power is inherent in the people." Article 1, §1, Florida Constitution. With the power goes the responsibility.

CONCLUSION

Respondents urge this Court to reject Petitioners' proposal. It is based upon unsound legal propositions, would be unconstitutional in application, and would not succeed. In its place Respondents urge the Court to consider the alternative rules proposed herein. These alternatives involve the members of

the Bar from the bottom up in ascertaining the needs of the poor, in augmenting voluntary efforts to satisfy the needs, and making known to the legislature, the governor, and the people the extent of the remaining unmet needs, a plan for meeting them with public monies, and a statement of the amount of public money needed.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing was mailed on the 7th day of November, 1989 to: Talbot D'Alemberte, Esq., P.O. Box 20289, Tallahassee, FL 32316, and John Harkness, Esq., The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

Harvey M. Alper

Footnotes

[1] Article 1 §22,Florida Constitution.

[2] See, e.g., Overland Construction Company, Inc. v. Sirmons, 309 So.2d 572 (Fla. 1979).

[3] For example, the state cannot tax attempts to use the courts, Flood v. State, 117 So.385 (Fla. 1928), nor take away established causes of action without providing alternatives, Kluger v. White, 281 So.2d 1 (Fla. 1973.)

[4] Art. II, Chap. 6, Art. 34, 1977 Constitution of the U.S.S.R.

[5] See Johnson, "The Right to Counsel in Civil Cases: An International Perspective," 19 Loy. L.J. 341, 342, n.6 (1985).

[6] Legal Aid Act of 1988. See also, Johnson, "Right To Counsel," 19 Loy. L.J. at 343.

[7] See, The Work and Organization of the Legal Profession, HMSO, Cm. 570, January 1989, and "Quality of Justice, The Bar's Response," General Council of the Bar, Butterworths, 1989.

[8] Geoffrey Bindman, "Unite and Fight for Legal Aid," 139 New L.J. 568 (1989).

[9] See Johnson, "Right to Counsel," 19 Loy. L.J. 344-347, 358.

[10] Id., at 346, n. 23.

[11] Patricia D. Phillips, "Financing the Right to Counsel: A View from the Private Bar," 19 Loy. L. Rev. 375, 380 (1980).

[12] Johnson, "Right to Counsel," 19 Loy. L.Rev. at 359.