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Increasing Court Access Through Fee-Waiver Reform: California's Model

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Access to justice is a fundamental and essential right in a democratic society. It is the responsibility of government to ensure that all people enjoy this right.

—CALIFORNIA COMMISSION ON ACCESS TO JUSTICE¹

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Our focus here is on fee waivers as a tool for the poor to access the courts in California, the problems associated with fee-waiver denials, the need for procedural fee-waiver uniformity in California courts, and the need for advocacy to ensure this uniformity.² We also present a model used in California to promote access-to-court advocacy and systematic reform. Our hope is that this model can be replicated in other states.

In many jurisdictions across the United States basic court fees and costs are steadily increasing in response to the declining economy. The requirement to prepay these high court fees and costs, often imposed by statute, can prevent an indigent person from accessing the courts to seek redress for life-altering matters. Proceeding *in forma pauperis* by obtaining a court fee waiver makes it possible for the poor to participate in the court system.

Background

The U.S. Supreme Court recognizes that indigent litigants have a constitutional right, guaranteed by the due process clause of the Fourteenth Amendment, to access the courts.³ In *Boddie v. Connecticut* the Supreme Court interpreted this right of access to require that, “absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.”⁴ The Supreme Court determined that the state court’s refusal to allow an indigent person to file for divorce because she did not pay the filing fee was a denial of due process of law because she was deprived of the opportunity to be heard due to her poverty.⁵

¹*Cruz v. Superior Court*, 120 Cal. App. 4th 175, 180 (2004) (quoting California Commission on Access to Justice, *The Path to Equal Justice: A Five-Year Status Report on Access to Justice in California* 36 (2002)).

²The laws on obtaining *in forma pauperis* status are so varied among states that here we focus on the inherent fee-waiver problems in California as an example of barriers to accessing the courts.

³*Boddie v. Connecticut*, 401 U.S. 371, 377 (1971); *Johnson v. Avery*, 393 U.S. 483, 487 (1969); *M.L.B. v. S.L.J.*, 519 U.S. 102, 123 (1996); *Mayer v. Chicago*, 404 U.S. 189, 199 (1971).

⁴*Boddie*, 401 U.S. at 377.

⁵*Id.*

The federal constitutional right of access, however, is far from absolute, and in later cases the Supreme Court constricted that right.⁶ Thus indigent litigants seeking to have court fees waived usually rely on state statutes and constitutions, court rules, and common law.

In California, for example, courts have long recognized indigents' right to equal access to the courts.⁷ In 1979 the California Legislature codified this fundamental right by requiring the courts to waive fees for indigent people. California Government Code Section 68632, effective July 1, 2009, sets forth three ways in which individuals may be eligible for a fee waiver. First, Section 68632(a) mandates fee waivers for litigants who receive aid from specified government programs. Second, under Section 68632(b) litigants can show that their household income falls below 125 percent of the federal poverty level and automatically qualify for a fee waiver. Third, Section 68632(c) states that even when a litigant does not automatically qualify for a fee waiver because of her income, the court still must exercise its discretion and grant a fee waiver if the applicant cannot proceed "without using moneys that normally would pay for the common necessities of life." The statute and the California Rules of Court prescribe such procedural protections as the right to have pleadings filed even if eligibility is in question, the right to a

hearing, and the right to keep fee-waiver proceedings confidential.⁸

Access-to-Court Problems

Despite statutes, rules, and case law guaranteeing the right to fee waivers for indigent people, obtaining such relief has been difficult and burdensome in practice. In California inconsistent court procedures, court clerks who are improperly authorized to make judicial decisions, and judicial officers ignorant of fee-waiver laws, among many other problems, create barriers for litigants seeking fee waivers to access the courts.⁹

Advocates across California routinely report problems with court clerks who act as quasi-judicial officers when rejecting fee-waiver petitions.¹⁰ Court clerks serve as gatekeepers to the court and routinely reject fee-waiver applications because they do not conform to their court's standards, which often deviate from the mandated fee-waiver procedures. For example, clerks often require fee-waiver applicants to fill out additional sections of the application form or require them to submit additional burdensome documentation to support their applications.¹¹ These practices are blatant violations of the law and make fee waiver exceedingly difficult for indigent *pro per* litigants.

Courts have been very innovative in their attempt to discourage fee-waiver ap-

⁶See, e.g., *United States v. Kras*, 409 U.S. 434, 445 (1973) (*Boddie* did not extend to no-asset bankruptcy proceedings because no fundamental interest depended on availability of a discharge in bankruptcy); *Ortwein v. Schwab*, 410 U.S. 656, 661 (1973) (\$25 appellate court filing-fee requirement was not denial of due process because petitioners had agency hearing regarding reduction of welfare assistance; no fundamental interest depended on relief sought; and fee did not violate equal protection clause because fee was rationally justified to meet court expenses and did not unconstitutionally discriminate against the poor).

⁷See, e.g., *Earls v. Superior Court*, 6 Cal. 3d 109, 113–14 (1971) ("The right of an indigent civil litigant to proceed in forma pauperis is grounded in a common law right of access to the courts and constitutional principles of due process."); *Isrin v. Superior Court*, 63 Cal. 2d 153, 156 (1965) ("[R]estricting an indigent's access to the courts because of his poverty ... contravenes the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed in forma pauperis."); *Payne v. Superior Court*, 17 Cal. 3d 908, 911 (1976) ("[R]ight of access to the courts has been reaffirmed and strengthened throughout our 200-year history."); *Ferguson v. Keayes*, 4 Cal. 3d 649, 658 (1971) (appellate courts have the power to waive filing fees for indigents and an applicant need not establish total destitution in order to qualify for *in forma pauperis* relief); *Martin v. Superior Court*, 176 Cal. 289, 296 (1917) (trial courts have inherent power, deriving from common-law usage, to permit indigent civil litigant to sue *in forma pauperis*).

⁸CAL. R. CT. 3.50–3.63 (2007).

⁹See examples of access-to-court problems in Updates, www.wclp.org/Resources/WCLPInformationalPublications/tabid/1097/Default.aspx?PublicationID=6.

¹⁰*Id.*

¹¹CAL. R. CT. 3.51(b) (2007) ("No applicant may be required to complete any form as part of his or her application under this rule other than forms adopted by the Judicial Council ..."); *id.* 3.53(b) (courts may not require all fee-waiver applicants to submit documentation to support information in application).

plicants. One court improperly required fee-waiver applicants to be physically present to file their fee-waiver forms and to give personal identification and proof of income. Other litigants were not subject to such requirements. No California statute or rule of court authorizes singling out indigent litigants for such unfavorable treatment.

In one egregious case, a court denied a fee-waiver application and required the applicant to make installment payments of \$20 per month toward the unwaived filing fee even though she met the income qualifications for an automatic waiver. Not only was this an undue burden placed on the applicant, but also it violated her right to equal access to the courts.¹²

Across California, courts routinely fail to issue a hearing prior to denying an applicant's fee-waiver application or fail to give appropriate notice of a hearing.¹³ Some courts also fail to give litigants prompt written notice of the reasons for the fee-waiver denial, thereby denying litigants the opportunity to correct any problem and resubmit the application.¹⁴ Even when fee waivers are properly denied, some courts fail to give fee-waiver applicants notice of denial; would-be litigants are in the dark about what is going on and often miss court dates or other deadlines.

These barriers prevent the poor not only from accessing the courts but also from obtaining temporary restraining orders or a divorce from an abusive spouse, answering unlawful detainer complaints, adopting children, eking redress for an injury, and other time-sensitive court matters. As a result, the poor are forced to endure their problems until they can

navigate the courts' *in forma pauperis* procedures or until they save enough to pay the required court fees. These illegal policies create a chilling effect on indigents' pursuit of justice by denying them their constitutional due process rights.

A Court Decision on a Systemic Problem

In 2003 public attention was drawn to court-access issues in California when, in a massive slum housing case, a superior court commissioner denied all nineteen *in forma pauperis* applications filed under a statute which authorizes a court to waive court fees when a litigant shows inability to pay without sacrificing the "necessaries of life."¹⁵ In the applications the litigants indicated that their household expenses exceeded their income, in some cases by hundreds of dollars per month. The trial court not only summarily denied all these fee waivers but also failed to schedule a hearing.

The litigants filed a petition for an appellate writ, which was granted. The court of appeal in this case, *Cruz v. Superior Court*, directed the superior court to vacate its orders denying the fee-waiver applications. The court of appeal held that a trial court must promptly issue a hearing prior to denying an applicant's fee-waiver application if the trial court determined a substantial evidentiary conflict concerning the applicant's eligibility.¹⁶ The appellate court explained that unless the dollar amounts listed in the application were indisputably unreasonable, a judicial officer's individual doubts about the applicant's declared financial need resulted in an evidentiary conflict, in which case a hearing must be conducted.¹⁷

¹²Courts have no authority to deny a fee-waiver application to an individual on the basis that she may be able to accumulate the funds necessary to proceed in court: "The adoption of such a concept could virtually eliminate relief in forma pauperis since it would be a rare case in which a litigant could not deny himself necessities of life to save some sum over a period of months or years, and then file his action when he had saved the total amount necessary" (*Earls v. Superior Court*, 139 Cal. 3d 109, 117-18 (1971)).

¹³Cal. R. Ct. 3.58(a) (2007).

¹⁴See, e.g., *Earls*, 6 Cal. 3d at 115 ("A statement of reasons for denial is essential not only to enable a prospective litigant to renew his application before the trial court if the defect can be corrected, but also to provide an appellate court with a basis for reviewing the trial court's denial.").

¹⁵Cal. Gov't Code § 68511.3(a)(6) (recodified at Cal. Gov't Code § 68632(c), effective July 1, 2009).

¹⁶*Cruz*, 120 Cal. App. 4th at 190-91.

¹⁷*Id.*

The *Cruz* court clarified the situations that required hearings:

[N]either a monthly income that exceeds all monthly expenses by a small amount nor the existence of a modest savings account, whether considered alone or in combination, constitutes such compelling evidence of an applicant's ability to pay the court fees and costs without sacrificing the necessities of life that denial of such an application without a hearing is justified.¹⁸

Accordingly the court must always conduct a hearing unless there is an exceptionally strong reason to deny the fee waiver.

A victory, *Cruz* helps low-income Californians enforce their legal rights despite their inability to pay the required filing fees. As a result of *Cruz*, advocates from the Western Center on Law and Poverty and the Legal Aid Foundation of Los Angeles met with superior court officials, at the court's request, to discuss the problems surrounding fee-waiver access and to ensure that indigent litigants have an equal right to access the courts.

Need for Advocacy

Cruz highlighted the need for uniformity in fee-waiver procedures throughout California courts and the need for advocacy to ensure this uniformity. Some advocates, especially those who are particularly close to the courts or from smaller jurisdictions, feel uncomfortable challenging an improper court procedure because they fear damaging their relationship with the courts. Because of this and other factors such as time limitations or lack of personnel resources, advocates frequently follow the courts' improper procedures or advance court fees on behalf of a client when a fee-waiver application is denied. Although following this practice helps resolve the individual litigant's problem, it perpetuates the courts'

improper procedures because they are continually unopposed.¹⁹ Improper fee-waiver procedures prevail and become more difficult to challenge because they have been systematically implemented for so long. *Pro per* litigants bear the burden because they have no one to turn to for monetary or technical assistance and must navigate the courts' fee-waiver procedures alone.

Access to Justice Project

In light of the *Cruz* case, the recognition that indigent litigants face many barriers in their struggle to exercise their legal rights in court, the need for uniformity in fee-waiver procedures, and the need to strengthen advocacy in this area of law, the Western Center on Law and Poverty and the Legal Aid Foundation of Los Angeles partnered to create the Access to Justice Project. A fellowship, funded through Loyola Law School's postgraduate fellowship program, was created to devote two years, 2004–2006, to this effort. The project served as a clearinghouse for access-to-court problems throughout California. It focused on monitoring court compliance with fee-waiver laws after the *Cruz* decision and on other problems—such as those involving language and physical access to the courts—faced by indigent litigants.

The Access to Justice Project tracked problems throughout California and offered technical assistance to *pro per* litigants and advocates serving clients who had access-to-court problems in their jurisdictions. The goal of the project was to educate advocates and *pro per* litigants so that they could (1) understand proper fee-waiver procedures in California, (2) spot illegal fee-waiver procedures, (3) understand various approaches to solving fee-waiver problems, and (4) learn how to monitor fee-waiver procedures systematically to ensure compliance with California laws and to increase advocacy in this area of law.

¹⁸*Id.* at 189.

¹⁹A variation on this is the practice of some courts to grant fee waivers when filed by local legal aid attorneys but to impose barriers to *pro per* litigants' applications.

Access-to-Court Strategies

The Access to Justice Project trained advocates throughout California on fee-waiver laws and on how to overcome a particular court's improper fee-waiver procedures. Although funding for the project ended in 2006, the project informally operates and continues to encourage advocates to work with the courts rather than against them to resolve fee-waiver matters. This means attending meetings with court staff members, trial court administrators, judicial officers, and presiding judges to discuss correcting fee-waiver problems and procedures. If these remedies fail, writing letters to the court supervisor or presiding judge (1) can serve to alert the court to specific fee-waiver problems, (2) is an opportunity to clarify the law for the court, and (3) allows the supervisor or judge to resolve the problem.²⁰ However, appealing to the court supervisor or judge may be problematic because it may require advocates to pay court fees for clients until the court responds, the court may take long to respond or fail to respond, or the supervisor or judicial officer may ignore the problem. Often the courts are open to discussion and try to comply with mandated fee-waiver laws; at least this is our experience in California.

If advocates believe that the court will be unresponsive to access problems, they may request a hearing after the fee-waiver denial. Calling for a hearing has the same threefold advantage above: it alerts the court to fee-waiver problems; it is an opportunity to clarify the law for the court; and the court is forced to address the fee-waiver problem. However, this may be time-consuming, the client may not want to cooperate, or the court may refuse to follow the law. If this occurs, advocates should consider challenging fee-waiver denials by using whatever procedural mechanism is available.

To increase awareness of access-to-court problems in California and to increase advocacy in this area of law, the Access to Justice Project regularly produces *Access to Justice Updates*, an e-mailed list of various access-to-court problems affecting individuals throughout California.²¹ Advocates are encouraged to submit access-to-court problems to the Western Center on Law and Poverty and the Legal Aid Foundation of Los Angeles so that everyone is aware of ongoing problems.²²

The advocacy approach used by the Access to Justice Project increased awareness about fee waivers as a tool for indigent people to access the courts in California. As a clearinghouse, the project educates advocates on access-to-court issues and shares methods on how to increase procedural uniformity and compliance with mandated laws. It also serves to motivate advocates so that they can resolve access-to-court problems on their own and encourage their counterparts to do so as well.

A Model for Increasing Access to Courts

We developed the following model to help advocates in all parts of the country deal with the court-access problems they see in their jurisdictions.

1. Identify the Problem.

What access-to-court problem does the client face?

Is it a simple problem or is it systemic?

What are the community's needs?

Talk to intake screeners and self-help clinic advocates.

2. Identify Practical Partnerships.

Which organizations are taking up court-access problems?

²⁰Contacting the court by letter is appropriate despite the normal rules prohibiting ex parte communications with judicial officers. In most states, fee-waiver proceedings are not adversarial proceedings between the parties and are confidential.

²¹See *supra* note 9.

²²Advocates may contact Richard A. Rothschild, Western Center on Law and Poverty, at rrothschild@wclp.org or Phong S. Wong, Legal Aid Foundation of Los Angeles, at pwong@lafila.org.

Develop a relationship with the courts.
Balance knowledge, expertise, and resources.

3. Identify the Resources.

Consider fellowships from Equal Justice Works or AmeriCorps.

Seek grants from law schools, bar associations, nonprofit organizations.

Work with law clerks to improve their understanding of fee waivers and the importance of fee waivers for indigent litigants.

4. Identify Solutions to Systemic Problems.

Contact the courts via phone calls and letters.

Attend hearings; file writs.

Advocate change in policy or legislation.

5. Implement Solutions: Work Toward Systematic Reform.

Act as a clearinghouse to monitor problems.

Create a working list and document frequency of problems.

Notify court officials about list of problems.

Support overburdened advocates.

6. Get the Word Out.

Pool together a list of networks.

Send project updates to list of networks.

Create new contacts with legal aid organizations and the courts.

7. Create a Self-Sustaining Project.

Train advocates and pro bono attorneys in other counties.

Supply free materials and guides.

Maintain partnerships and networks.



Although some positive change has come from the efforts of advocates to increase court access for the poor, the fight is not over. Advocates must continue to monitor and challenge improper court procedures that limit their clients' right to access the courts. Otherwise some of the most vulnerable members of our society are at risk of being shut out of the court system altogether.

COMMENTS?

We invite you to fill out the comment form at <http://tinyurl.com/JulyAugustSurvey>. Thank you.

—The Editors

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