

Ten Admonitions for Legal Services Advocates Contemplating Federal Litigation

by Judge Patricia M. Wald

The following remarks were made by Judge Patricia M. Wald at a federal litigation training for legal services attorneys on December 8, 1992, in Chevy Chase, Maryland. Judge Wald, who currently sits on the U.S. Court of Appeals for the D.C. Circuit, has a long and distinguished record of work in legal services.

In 1965, Judge Wald prepared the working document for the National Conference on Law and Poverty, which spawned the federally financed program of civil legal assistance to the poor. In 1968, she went to work in the law reform unit of the District of Columbia Neighborhood Legal Services Program. At the time, Judge Wald was 40 years old, with much experience and a national reputation, largely in the criminal justice field. Over the years, Judge Wald also worked at the Center on Law and Social Policy and at the Mental Health Law Project, where she was litigation director. She was counsel in *Mills v. District of Columbia Board of Education*, 348 F. Supp. 866 (D.D.C. 1972) (Clearinghouse No. 7141), the case that was the forerunner of the Education for All Handicapped Children Act. She was active amicus in *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974) (Clearinghouse No. 5723), which not only reformed the treatment of juvenile offenders in Texas but is a national landmark case in the juvenile justice field.

During the Carter Administration, Judge Wald was Assistant Attorney General for Legislative Affairs. In 1979, President Carter appointed her to the D.C. Circuit; she was Chief Judge from 1986 to 1991.

In 1968, just about the time Richard Nixon was elected President, I joined up with legal services. A rerun myself, I had returned to the labor market only a few years before, after a decade pursuing family values in the form of five kids, all aged within seven years of each other. I had not had a full-time job since 1953, but had recently worked part-time writing policy reports for various commissions and conferences. Because of my almost total lack of courtroom experience, I was assigned to the Law Reform Unit, housed above several bail bondsmen's offices in a tenement on Fifth Street. No Xeroxes then — mimeograph machines, which had to be inked afresh each ten pages, one secretary for four to five lawyers, an old desk pushed into a corner in a room with

half a dozen young crusaders, at least a dozen years younger than me, but years older in practical skills and know-how.

The company was superb — Florence Roisman was reigning over a burgeoning legal revolution (we hoped) in landlord-tenant law; Peter Smith in AFDC (we were one of the cases consolidated in *Shapiro v. Thompson*¹ in the Supreme Court); MaryBeth Halloran in consumer credit (remember the *Walker-Thomas*² case pioneering the “unconscionable contract” theory in poverty law). The indefatigable Larry Silver — still in the public interest movement today — presided over us all. Although my sole litigation experience was as court-assigned counsel representing alleged looters in the 1968 riots, within six

¹ *Shapiro v. Thompson*, 394 U.S. 618 (1969) (Clearinghouse No. 238).

² *Patterson v. Walker-Thomas Furniture Co.*, No. 5393 (D.C. Cir. May 10, 1971) (Clearinghouse No. 6510).

months I was arguing a pre-*Bodie*³ landmark case in the D.C. Circuit Court of Appeals on the right of an indigent woman to get a divorce without prepaying attorneys' fees and costs. Back then, before the Court Reorganization Act of 1970, we could take a discretionary appeal from the highest District of Columbia court to the federal court of appeals, which consisted of Chief Judge Bazelon, Skelley Wright, Spotts Robinson, Harold Leventhal, Carl McGowan, Charles Fahy — not a bad lineup.

It was a heady time: the first wave of poverty law reform coughed up big issue cases; the federal courts were hospitable, even eager to help us make new law for the poor and disadvantaged; a mildly benevolent Supreme Court smiled from on high with the likes of Chief Justice Warren, Justices Black, Douglas, Harlan, Stewart, Fortas, Brennan, and Marshall on it. We felt confident in "going for it," "doing the right thing," raising constitutional issues freely — almost profligately — seeking activist intervention from the courts, raising Cain with the welfare and the health care bureaucracies. We won the vast majority of issues we litigated.

The intervening years have been sobering. In the words of the 1930s ditty, "the rich got richer and the poor got poorer"; the Supreme Court got progressively less comfortable with expansive theories of constitutional rights, for the poor or anyone else — except maybe property owners; federal courts of appeals became increasingly conservative; successive Administrations were openly hostile to legal services; and Congress did little more than keep legal services alive. The public interests that could find a constituency of their own — women, the disabled, children, the elderly, environmentalists, even consumers — formed their own lobbying and litigating groups. Even the homeless identified themselves as a separate subset of the poor. Anatole France told us that there are two things always with us: the poor and taxes. In the 1980s they were about on a par in popularity.

Legal services lawyers became progressively fewer, their pay got lower, staff turned over faster, and caseloads got bigger. Even the mission, we are told, went from the ambitious "achieving social change" to the more modest "attaining equal access to justice."

I believe legal services has a good shot at regaining its former competence, importance, zest and elan in the coming years, but only if you plan your strategy carefully.

As for federal litigation, in Alice in Wonderland fashion, it got littler and littler until it almost disappeared altogether. According to the recent *Hastings Constitutional Law Quarterly* survey

of the decade past,⁴ with the exception of a few law school-related clinics, there was virtually "no reported federal litigation by legal services programs during the last ten years." The *Hastings* article contains some sobering statistics: from 1965 to 1974 the legal services program put 164 cases before the Supreme Court — 119 were accepted for certiorari and 80 got full press treatment. Seven percent of all Supreme Court opinions during that period involved poverty law issues. By comparison, in 1990, legal services programs nationwide made only 95 appearances in federal district court and 273 in state courts — only half as many as in 1981.

While involvement in federal litigation may not be the only or even the best test of the effectiveness of a program, the *Hastings* author argues that the lack of involvement in federal litigation evidences a failure to provide quality services for clients, since the credible threat of litigation is often necessary to ensure statutory and constitutional rights. Even in settlement fora like the alternative dispute resolution programs springing up in federal district courts, the poor can be well represented only if their lawyers have the capacity to go forward if the mediation or arbitration does not work. The authors conclude pessimistically, "If something is not done to restore sustenance to the body of legal services, the soul, passionate as it is, may no longer be willing to continue a desperate battle."⁵

I am more optimistic. I believe legal services has a good shot at regaining its former competence, importance, zest and elan in the coming years, but only if you plan your strategy carefully. Recent events have clearly helped you. With the election of a new President, you may enjoy a less tense and tentative environment in which to pursue your objectives. As one of my young legal services friends put it, "For years we were always fighting the enemy; now we have to decide what to negotiate for at the peace table." Peace, however, with its attendant obligations for allocating efforts and achieving gains can in its own way be more burdensome than war. And the

³ *Boddie v. Connecticut*, 401 U.S. 371 (1971) (Clearinghouse No. 1692).

⁴ Allen Redlich, *Who Will Litigate Constitutional Issues for the Poor?*, 19 *HASTINGS CONST. L.Q.* 745 (Spring 1992).

⁵ *Id.* at 782.

war itself is worthless that produces no lessons for the peace to follow.

So it behooves your generation of new poverty lawyers to meditate on and perhaps recast your role in the dawn of a post-Reagan/Bush world. In my brief remarks this noon, I want to suggest a few things — ten, to be precise — that you may need to factor into that rethinking.

First, there is federal litigation and there is federal litigation. Federal courts are overwhelmed with drug busts, and civil calendars are running a year or more behind. The Civil Justice Reform Act of 1990⁶ requires district courts to plan and manage, and in some cases track, their litigation and to settle or mediate cases when feasible. District and appellate judges — whatever their philosophical coloration — are increasingly impatient with vague facial challenges to statutes or rules that do not have apparent, serious, demonstrable, real-life consequences for real folk. And similarly — I will be candid — most judges are reluctant to take on long-lasting supervisory or monitoring functions over agencies, institutions, schools, or broad programs; the numbers of Wayne Justices or Frank Johnsons willing to devote years of oversight to recalcitrant governmental institutions has also diminished in the tidal wave of litigation flooding the federal courts. The U.S. Judicial Conference is routinely opposing legislation that creates new federal causes of action, like the Domestic Violence Bill. So, while federal courts are the forum of necessity and even choice for statutory and federal rule challenges, use them selectively for cases that really count. That kind of selectivity will be necessary to your credibility as well as your effectiveness.

Second, regardless of who appointed them, judges react negatively to the “gotcha” lawsuit. By that I mean the lawsuit based on some technical nonobservance of a law or regulation whose consequences are undocumented, or at best vague. We judges want to know the facts, the real-life conditions, the actual practices underlying a legal challenge. The trial record should be spilling over with such evidence in any challenge, facial or applied, to a statute or regulation. Judges search for meaning in what we do. You need to convince us that the law or the regulation is important in poor people’s lives. That calls for factual, consequence-oriented evidence,

not a sentence or two in a stipulation. I have seen important lawsuits lost by public interest groups because they too readily stipulated conclusory facts in order to get to the legal issue.

In this context, remember that judges have enormous discretion in certain areas of the law, such as whether there is substantial evidence to support an agency action or whether the agency’s rationale is reasonable or has not covered all the bases. In other cases, we have less discretion and so we need even more compelling reasons to come out for you and against the agency. The momentum in the judiciary is to stay with the status quo — with the established way of doing things. Even the doctrines — such as preponderance of the evidence, deference to agencies and presumptions of constitutionality — all point away from successful challenges. Therefore, while showing that a rule or law hurts your clients will never be sufficient, it will almost always be necessary.

Third, be realistic. Take your victories where you can. I have always been skeptical of the Owen Fiss “Against Settlement” school myself. Few legal victories are clean; the offending agency is often told to go back and rewrite the rule or reinterpret the statute, and the trench warfare begins anew. To the extent — and it should be easier from here on out — you can win with the agency or in a negotiation, do it. Advocates, especially for the underdog, have a tendency to disparage anything but a traditional legal victory. That is a mistake. Relief for your clients is your goal; cooperate in the alternative dispute resolution programs, mediation, early neutral evaluation, “reg-neg” at the agency level. The federal courts will become increasingly managerially oriented and impatient with having to decide cases that could have been settled with a modicum of good will on either side. Learn to be a good negotiator, a creative settler. This is not a glory game. Litigation should be only a part of a broader strategy. Think hard on follow-up; most appellate courts do not deal in clear victories, only clear defeats.

In a related vein, procedural rights are often easier to win than substantive ones. Most judges feel courts are supposed to enforce constitutional and statutory due process, but are apt to be more cautious in recognizing new substantive rights. Of course if you win on procedural grounds, that is all you get, new procedures, but if

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⁶ Civil Justice Reform Act of 1990, 28 U.S.C. §§ 1 note, 471-482.

you have other arrows in your quiver, say a new law or a new agency head in the offing, the procedural victory may help.

Fourth, as the hard times of the past decade should have taught all of you battle-scarred veterans, you must fight in all available fora — often simultaneously. Even if the courts become more hospitable to your causes, do not think of them as your Maginot line. A new Administration provides a new opportunity to forge responsible relationships with new policymakers at every level — the individual agency, the Justice Department, even the White House Office of Management and Budget crew. To make the most of such opportunities, try to avoid a litigator's reflexive adversarial stance with your potential friends. I remember all too well in the early days of the Carter Administration being rudely awakened to the fact that, like the Pogo cartoon, the enemy was now us. Organizations that had been my allies and even my clients were now poised for battle if their wish lists were not granted as they walked through the door. They later admitted that the compromises we proposed were far better than anything they could hope for in the later years, but by then it was too late for both of us. I do not suggest you give up all of your ideals or goals, but do be realistic about what any new Administration can give you and in what time frame. Finding the right balance between fighting for your clients and strategizing for the doable is harder than drafting a complaint, but at least until the new Administration proves itself untrustworthy, it deserves a real try. In plain terms, give them a little time and a rebuttable presumption of good will before you take them to court.

Fifth, as an extension of the "multiforum" approach, try to plan your federal litigation as part of an overall game plan that furthers national priorities. Look not just to the necessary but wearying suits to keep the benefits and food stamps coming in, but also to the legal challenges that can get poor people into job training or into jobs, or help the youngest of your clients, the children, somehow pull themselves up from their bitter beginnings. Courts like to feel they are doing more than pushing back the waves in a storm-tossed ocean. Look for litigation that moves the ball forward, instead of just holding the line. To do that you may have to involve yourself in some side disciplines — economics, education, labor theories. But in my view, litigation never accomplishes much by itself; it can break logjams, but rarely can it bestow substantial benefits on large numbers of people. Litigation should be conceived and

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executed in a context of community or governmental efforts that are advancing in the same direction, not pursued in isolation by readers of the fine legal print, no matter how benevolent their motives. The coming years present many opportunities for this kind of fusion. Don't miss out on them.

Sixth, try to attain your goal with the least insult to our past precedent that you can, even if you disagree with it and would like to see it changed, and always argue (in the lower courts) within the boundaries of Supreme Court doctrine. Remember — it may sound naive, or even vacuous, but dozens of advocates every year don't seem to know it — courts of appeals can't reverse or ignore Supreme Court precedent or even their own; the only way we can rule counter to a prior panel is to en banc the case, so it is usually useless and often irritating to tell us not to follow our own precedent or to change it. If you honestly think reversal of our precedent is the only route, petition for an en banc. But first, please count your votes to assure that you have a fighting chance at getting one. Otherwise you will only hammer a few more nails

into your client's coffin, as an en banc petition provides a new opportunity for a committed majority to indicate their continued adherence to the old precedent you so dislike. And when you must go for broke, by bringing an en banc petition in our court and if necessary by appealing to the Supreme Court, tell the panel ahead of time that's what you plan to do. Veiled criticisms of existing precedent or mere hints to a panel that you would like the precedent overruled will only up our irritability quotient. And as a final caveat: en bancs are very selectively granted, take a long time, usually produce a plethora of opinions, and are generally only a way station to the Supreme Court. So if you can attain your legal goal in a narrow, undramatic way, you are usually far better off.

Seventh, remember that while precedents seldom get overruled outright, they do fall into disuse. Experienced judges know instinctively that some brave declaration in a case of the 1960s or 1970s, though never expressly rejected, simply doesn't carry much weight anymore. Seemingly inconsistent cases can often coexist in circuit law for years. So it is well to study the most recent precedent of a court and scope out its likely tilt; never think "Eureka, I have found it" when you locate a 1967 decision going your way. Also, study Supreme Court law carefully; it is often possible to argue that a distasteful precedent has been implicitly overruled by a more recent Supreme Court case. (That has not, I

grant you, been too easy for poverty lawyers in recent years, but it might get easier in the remoter future.)

Eighth, always put your program's best foot forward. Let the most proficient advocate in the program argue the important case — regardless of how the case came to you or who had it originally. The best advocate of any case is not necessarily the most experienced or the most senior, but the one most familiar with that case and the most at home in the courtroom. If you're not the best advocate for a case, step aside. I have seen some regrettably weak performances from legal services and other public interest groups that might have

been avoided except for the irrepressible ego factor. The best cause in the world argued badly to the most sympathetic judges in the world risks grave harm to that cause.

My last two points — nine and ten — are related, and can be summed up in an admonition to forget glamour and to get to know the boring basics of federal jurisdiction and that beast called administrative law. These staples are crucial for poverty lawyers.

The cases you will bring in federal courts are most likely to be administrative law appeals or questions of statutory interpretation. Constitutional challenges, I suspect, will be few. The heyday of equal protection is over, procedural due process has gone from the absolutism of *Goldberg v. Kelly*⁷ to the relativism of *Mathews v. Eldridge*,⁸ and I frankly do not see a new era of positive, affirmative, constitutionally based rights opening up, no matter who gets appointed to the Supreme Court.

To illustrate this point, I did a quick and dirty search through the D.C. Circuit's files of the last decade, which turned up 14 appeals involving poverty issues. Except for the almost ritualistic invocation of procedural due process in benefits cases, all 14 cases challenged an administrative agency's actions, asking either whether the regulations under attack represented a reasonable reading of the statute, or whether the Secretary was interpreting her own regulations reasonably. Two of the 14 had sizeable standing issues. And incidentally, if you like to keep

score, the poverty groups got some degree of relief in seven cases; in the other half they lost totally.

Looking first at jurisdictional requirements, please don't overlook Article III standing. Standing requirements have become incredibly complicated and stiff during the past decade. Recent Supreme Court decisions make it difficult, if not impossible, to challenge broad national programs, as opposed to individual actions or decisions. Groups that appeared before an agency will not

necessarily be allowed to appeal the agency's decision to the federal courts unless they show concrete injury, directly traceable to the agency action and redressable by the court. One of the poverty

cases I looked at was thrown out altogether because the plaintiffs had not shown any causation between the publication of a report that underestimated the numbers of homeless and any harm that might result to the homeless.

Still, I am continually surprised at how casually public interest groups take standing — it is as if they thought we were still in the old days of *SCRAP*.⁹ We are not. The more documentation you can produce up front on how specifically your clients are affected by the action under attack, the more likely you are to stave off a motion to dismiss. Remember, too, that judges can and do raise standing *sua sponte* even when the government does not.

There are other judicially made doctrines posing potential barriers up front, like our circuit's "heightened pleading" standard for Section 1983 actions — you must plead very specific facts about unconstitutional motives initially to withstand a defense of governmental immunity; you cannot get discovery first. Many, many Section 1983 suits have foundered on that rock in our circuit. Watch out for these hazards.

The appearance of standard administrative law issues in poverty guise is perhaps even more prevalent. Poverty law, in fact, is largely a subset of administrative law. Poverty lawyers must deal first with the way in which governmental policy is generated and implemented by statute, regulation, and agency adjudication, and second with the degree to which courts can review agency actions and insist that agencies conform to statutory or constitutional norms. Those tassel-loafed, pin-striped

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⁷ *Goldberg v. Kelly*, 453 U.S. 422 (1982) (Clearinghouse No. 1799).

⁸ *Mathews v. Eldridge*, 424 U.S. 319 (1976) (Clearinghouse No. 11,466).

⁹ *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

industry lawyers and those assured young government lawyers from the Department of Justice, Department of Labor, Federal Communications Commission, etc., are all making use of the same body of intricate, sometimes arcane law that will be your stock in trade when you come to our court. I am sure you are their equals, and that you will find in them some unconventional allies.

One of the most important doctrines of administrative law, that of deference to agency expertise, makes or breaks many an administrative law challenge. This doctrine has been with us for a long time, but until around 1984 courts still thought they had a fair amount of leeway in construing statutes. Then the Supreme Court came down hard on us in a case from the D.C. Circuit called *Chevron v. Natural Resources Defense Council*.¹⁰

Chevron says that an agency to whom Congress has delegated the administration of a statute will be given overwhelming deference in its interpretation of a statute, unless Congress has spoken clearly to the precise issue raised in the court. "Overwhelming," by the way, is my word, not the Supreme Court's, but I do think that's what it amounts to. This means that, unless the court finds that the agency's interpretation flouts the congressional intent — as expressed in the statute — the agency's interpretation wins, even if it is not the most plausible or natural one. As a result, agencies win most statutory battles.

Now when you were at odds with agency interpretations, *Chevron* was the enemy. In fact, in three of the fourteen poverty cases I mentioned, *Chevron* deference was determinative of the outcome — against your clients. But it behooves you now to think of how *Chevron* may benefit you, if the agency is on your side. It means that the courts, whatever their complexion, would have to do an about-face on their own doctrine to overturn an agency that is not clearly flouting Congress's will. This means that more — if not most — of your battles can be fought and won at the agency level in the future, and, moreover, it will be easier to preserve your victory in the courts.

Remember that *Chevron* will also help you when you are suing state or local governments for not abiding by federal requirements, if the feds are on your side. Thus, even if the face of the federal courts does not change immediately, the legal atmosphere in which the courts operate may. The Justice Department and other agencies

may not argue the same positions or interpretations to us, or pass the same objectionable regulations. Thus, it is at the agency level that you must work the hardest to win your cases — to make the government become the advocate and the protector of the poor and hapless once again.

There is another doctrine — again court-created — that has proved a formidable obstacle to poverty and other public interest advocates in the past — the so-called *Heckler v. Chaney*¹¹ doctrine. It says that agency enforcement actions are presumptively unreviewable, because an agency's decision to enforce a law is analogous to a prosecutor's decision to bring or not to bring charges. Such decisions are traditionally unreviewable, involve questions of resource allocation, and are not normally

governed by statutory criteria, so there is no "law to apply" in reviewing it — or so the theory goes. In one of this circuit's poverty cases, this doctrine was raised as an

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obstacle to our review of the closing of a homeless shelter. Judge Spottswood Robinson and I found that the doctrine didn't apply, but Judge Bork wrote a vigorous dissent saying it did. In another case, the *Chaney* doctrine was the partial basis for holding that a homeless organization could not require HHS to monitor state compliance with its own federally funded emergency assistance plans. In still a third, then-Judge Scalia wrote separately to say that a challenge to the Department of Labor's formula for allocating training funds was unreviewable under *Heckler*. Here again, the courts have broadened the scope of the nonreviewability doctrine in the last decade; in another they might constrict it. Of course, congressional inaction also contributes to the flourishing of the nonreviewability doctrine. Where Congress wants enforcement actions to be reviewable, it can say so definitively and it can include statutory criteria for agency enforcement. So you may need both to know and navigate around reviewability doctrines in the court, and to work to change them in Congress.

Those are my brief suggestions for making the most of the opportunities that present themselves to you. In closing, let me say a few — I hope neutral — but cautionary words about the federal bench. It will change over the next several years, but not immediately. Of the entire federal judiciary, 70 percent of the district judges and two out of three appellate judges were

¹⁰ *Chevron v. Natural Resources Defense Council*, 567 U.S. 837 (1984).

¹¹ *Heckler v. Chaney*, 470 U.S. 821 (1985).

appointed by Presidents Reagan and Bush. In all 13 circuit courts, these recent appointees have a clear majority. Many of those appointments are fine and compassionate judges, make no mistake, but the tilt of the present federal bench — more on the appellate than on the district court level — is definitely a conservative one, not given to expansive interpretations of the Constitution or of statutes, at least on behalf of your constituency. It could be years before the pendulum will swing in a more liberal direction in many circuits, including our own. At the same time, many doctrines and areas of law that have been turned around dramatically in the last decade will probably take just as long to turn back again, even if one assumes they should. The rock of *stare decisis* to which so many of you — and us — tried to cling during this tumultuous period that just passed will now protect that recent law as well.

In these rebuilding years, your advocacy skills will be called upon to build upon and integrate the past decade's law and to turn it to your advantage, to smooth some of its rough edges, to define its limits, and to suggest some modest changes of direction. Advancing your clients' causes may draw you ever more into what once seemed like arcane legal fights over the use of legislative history to construe statutes (if Congress is sympathetic to you,

you may want to ensure that its intent is fully probed on the basis of all available sources), over the meaning of "arbitrary and capricious," or over the requirements of standing or the scope of nonreviewability doctrines. You will have to become part of and make smart use of the alternative dispute resolution programs that will increase in number and importance in federal courts in the coming years.

Withal, it is a time of transition, a good time. You are on the side of history; the political branches of the government may listen more carefully to your pleas on behalf of the ignored and cast-out segments of our society, especially if your positions are legally sound and fit into an economically and sociologically sound program for uplifting the nation as a whole. The Don Quixotes were wonderful in their time, but now we need the Moseses who can lead their flock to the Promised Land, where they can live and flourish among the rest of us. I think your task in these coming years is harder, more exhilarating, and, yes, more important for the future of legal services than ours was back in the 1960s. Sometimes — but only sometimes — I wish I were young again.

Thank you for letting me share this time of hope and glory (maybe) with you today. □

► This material was posted in electronic form in the LegalAid/Net forum, on the HandsNet information and communications network, on March 18, 1993.

Correction

Section 115: Notice of Limitations Period Under ADEA. In the article *The Civil Rights Act of 1991: A Section-by-Section Analysis* appearing in the February 1992 issue of the CLEARINGHOUSE REVIEW, the limitations period in which to file a charge with the EEOC under the ADEA was mistakenly reported as two years, on page 1325, the last sentence of "Section 115: Notice of Limitations Period Under ADEA." The limitations period in which to file a charge with the EEOC remains at 180 days. We regret the error.