Shifting 'the burden from one foot to the other'

By Vesselin Mitev

Lawyers' work, it is often said, is an empire of words. A comma can hang a man, goes the maxim, oft-illustrated by the grammar school tagline of the difference between: "Let's eat Grandma" and Let's eat, Grandma." Words, commas, semi-colons, all these things matter and arranging them in the right order is what lawyers, generally, spend their lives doing, whether it is an opening or oral argument, cross-examination, or drafting a letter or an agreement.

Some foundational documents give our craft its keystone: the words of the statutes, for example, which are then given a shading, if you will, or the appearance of becoming more than two-dimensional, by dint of persuasive argument or by there interpretation of there meaning by trial level and appellate courts.

In contrast, a trend of so-called "trigger" words has appeared, most often associated with college campus-bred projections of a worldview not clearly shaped by world experience and the simple proposition that we live at the intersection of two indefatigable entities: the law of unintended consequences and the second law of thermodynamics, which states that entropy increases over time (layman's version is that things fall apart and we are moving forward into a gradual decline into disorder).

Some of these trigger words are shortcuts for actual analysis or the hard work that comes with actual, thoughtful considerations: e.g., saying the "best interests of the children" is sometimes shorthand for a conclusion wrapped in a trigger word; these words become entities unto themselves to the point they become almost like revered bishops, immune to challenge or question alike.

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Indigent legal services are another such series of trigger words. We can all agree that finding quality representation for those who cannot afford it is a cornerstone of our Constitution. Last year, as part of a settlement to a lawsuit brought by the New York Civil Liberties Union, the state agreed to spend millions more to provide counsel to indigent persons in five counties, including Suffolk County.

The thorny crux of the lawsuit is familiar to everyone who has spent even one day at a court complex: a) overworked, spread-thin lawyers, handling dozens of cases each day without any resources to fully service them; b) different, oftentimes *ad hoc* requirements, sometimes differing courtroom to courtroom, on who is eligible to be appointed a lawyer; c) clients, who, once appointed a lawyer, expect the lawyer to service them as if they were paying clients with vast resources: driving a Mercedes for the Kia price.

If signed by Gov. Cuomo, a bill pending in the state legislature would essentially apply, via the Office of Indigent Legal Services, certain criteria and procedures to determine who is eligible for legal representation, with a specific example of exactly what this means set forth in SCBA President John Calcagni's update on the matter (in the January Suffolk Lawyer); to recapitulate, then: a criminal defendant in a four-person household with $60,250.00 in take-home (net) pay would be presumptively eligible for assigned counsel (i.e., someone earning approximately $100,000.00 per year would likely be eligible for a free lawyer)!

This, coupled with an apparent absence of any safeguards to ensure those seeking free lawyers are telling the truth about their financial status, e.g., no requirement for an applicant to swear to the truth of their claimed income and no penalty for falsifying one's financial status, exposes, via the law of unintended consequences, the system to wholesale, craven fraud.

Social policy reforms such as the one articulated by this bill, as always, tend to fall hardest on the middle class. This change will not affect the lawyers working in white-shoe firms; nor will it affect the lawyers who are exclusively appointed and/or otherwise work for Legal Aid and similar organizations.

Instead, the lawyers who have firms ranging from solos to five to ten people, who depend on "meat and potato" cases in the misdemeanor courts and Family Court disputes to pay the bills and keep the lights on, will likely suffer the greatest hit. To be sure, it is unlikely that any person making $100,000.00, given the option of a free lawyer, would opt to pay for one, for the simple reason that people confuse the concepts of cost, price and value as interchangeable.

In sum, in the absence of articulable criteria and a requirement that those seeking free counsel are indeed held liable to, at least, their claims of indigency, a wholesale reform of indigent legal services is a trigger concept: it sounds great in sound-bites and draped across self-congratulatory award dinners, but in reality, shifts the burden from one foot to the other (taxpayers are still the primary source of funds for this) and shoots one more arrow into the corpse of the "small law firm as a business model" method of practicing law.

Of course, a more cogent approach to this dilemma would be to allocate state funds to increase the rates at which appointed lawyers are paid, not just to increase the financial ceiling for a person seeking free representation. In the broadest of brushstrokes, if practitioners were guaranteed a "salary" of $100,000.00 per year in appointed cases, it is likely that many more practitioners would opt to dedicate their practice to servicing only appointed cases, rather than an amalgam of private clients and appointments. This would reduce the caseload problem and would likely improve the quality of representation of indigent clients. But "Indigent Attorney Services" just doesn't have the same ring to it.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.