Division for Legal Services
Access to Justice

Dialogue

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Issue Highlights

Operation Enduring LAMP:
The ABA's Answer to the Call of Patriotism

by Christo Lassiter and David Holtermann

On November 13, 2001, ABA President Robert Hirshon joined top military lawyers and ABA LAMP Committee Chair David Hague to unveil Operation Enduring LAMP. As Hirshon explained at the presentation in Washington, DC, Operation Enduring LAMP seeks to mobilize civilian bar associations and attorneys interested in providing free legal assistance to military reserve members called up as part of Operation Enduring Freedom, the United State's military response to the terrorist attacks of September 11, 2001. Hirshon and Hague were joined at the presentation by Rear Adm. Donald J. Guter, The Judge Advocate General of the Navy; Major Gen. William A. Moorman, The Judge Advocate General of the Air Force; Daniel Dell'Orto, principal deputy general counsel of the Department of Defense; the chiefs of legal assistance; and Col. Steven Strong, the Department of Defense liaison to the LAMP Committee.

ABA President Robert E. Hirshon speaks during the November 13, 2001 presentation of Operation Enduring LAMP. Looking on are (left to right) David C. Hague, chair of the ABA Standing Committee on Legal Assistance for Military Personnel; Rear Adm. Donald J. Guter, The Judge Advocate General, U.S. Navy; Maj. Gen. William A. Moorman, The Judge Advocate General, U.S. Air Force; Daniel Dell'Orto, Principal Deputy General Counsel, U.S. Department of Defense; and Col. Steven Strong, U.S. Department of Defense liaison to LAMP. Photo—ABA Journal/Rob Crandall

General Moorman spoke of the financial hardships reservists encounter when they are recalled unexpectedly to active duty: "They face a gamut of legal problems when

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Defending Liberty
Pursuing Justice

From the Chair . . .

by David C. Hague
Brigadier General,
U.S. Marine Corps, Retired
Chair of the ABA Standing Committee on Legal Assistance for Military Personnel

America's lawyers have been called upon to do their part in the nation's struggle against those who would harm us. ABA President Robert E. Hirshon, is urging the civilian bar to prepare itself and stand ready to assist Americans who are mobilized for military service and their families who will be left behind. He has committed the ABA and its many resources to a sustained effort in support of the Armed Forces, Operation Enduring LAMP. (Operation Enduring LAMP is described in detail in the article on the front cover of this issue of *Dialogue*.)

If thousands of reservists are rapidly mobilized as occurred during Operations Desert Shield and Desert Storm in 1990-91, the need for legal assistance will overwhelm the capabilities of the military legal community. The scope and urgency of the need for legal assistance from the civilian bar will depend on the size and speed of the call-up. Reservists will require help in getting their legal affairs in order before reporting for active duty. While away from home, many of their families will need someone to turn

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LAMP Spotlight... San Antonio

by Christo Lassiter

The LAMP Committee visited San Antonio for its fall CLE program and committee meeting on November 8 and 9, 2001. Security issues in the aftermath the September 11 attacks required the committee to shift both events away from Lackland Air Force Base to the campus of St. Mary's University School of Law in San Antonio.

Associate Dean David A. Schlueter, the author of casebooks on military justice and the military rules of evidence, welcomed the assembled gathering of nearly 100 military legal assistance and civilian attorneys in attendance on behalf of the St. Mary's University School of Law. LAMP Committee Chair David Hague opened the CLE program with remarks connecting the large military presence in San Antonio, which dates back to the Alamo, with the LAMP Committee's continuing efforts to meet the emerging needs of servicemen and women during a time of alert and active engagement on the terrorism front.

Bryan Spencer, the LAMP Committee's liaison with the Texas State Bar and former member of the LAMP committee, organized the CLE program. His assembly of outstanding and talented speakers provided new and interesting insights on core subjects to the legal assistance area. Speakers and their subjects included Glen Yale and Elizabeth Copeland of the San Antonio law firm of Oppenheimer, Blend, Harrison & Tate, Inc. who spoke on estate planning, tax implications of dissolution, and post dissolution estate planning. Captain James Higdon, U.S.N. (Ret.), lectured on military marriage dissolution, separation pension division and DFAS QDROs. Colonel John Odom, U.S.A.F. made a presentation on The Soldiers and Sailors Civil Relief Act, and the *Cathey* case. Lieutenant Colonel Dan Culver, U.S. Army JAG School, updated those present on the Uniform Services Employment & Re-Employment Rights Act (USERRA), as did Paul Davis of Federal Trade Commission concerning the consumer protection for service members. Finally, Alicia Key, general counsel of the Child Support Division of the Office of the Attorney General addressed paternity and child support issues in Texas.

Lackland Air Force Base

Lackland Air Force Base is the only basic training base in the Air Force. It is also home to several technical training schools and two large language schools, the English Language Center Defense Language Institute and the Inter-American Air Forces Academy. Legal assistance in the Air Force is not provided by specifically designated legal assistance attorneys on a full time basis. Rather, except for general staff and certain other command support legal billets, every Air Force attorney performs legal assistance services. This approach allows Lackland's 23 attorneys (including nine civilian attorneys) to provide assistance for over 11,000 military personnel at the base along with several thousand more dependents and retirees. Legal assistance is most commonly provided in the areas of wills and basic estate planning, domestic relations, consumer affairs, and personal finance and debt relief. That these needs are foremost among legal concerns is a poignant reminder

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From the Chair. . .

by L. David Shear
Chair of the ABA
Commission on IOLTA

As 2002 begins, both a sense of hope and an awareness of ongoing challenge greet IOLTA programs, thanks to the circuit court decisions last fall in the cases involving the Texas and Washington State IOLTA programs.

As is described in more detail elsewhere in this issue *(see article on page 17)*, on October 15, 2001 a three-judge panel of the Fifth Circuit Court of Appeals in New Orleans ruled against the Texas Equal Access to Justice Foundation (TEAJF), finding that its operation is a "taking" without just compensation under the Fifth Amendment. Less than a month later, the Ninth Circuit Court of Appeals ruled against another Fifth Amendment challenge, thereby favoring the IOLTA concept in Washington State.

The Fifth Circuit decision was both disappointing and puzzling for the IOLTA community. It went against established Takings Clause precedent in its application of a *per se* takings analysis (generally limited to cases involving real property) and in its conclusion that a finding that just compensation is due flows directly from a finding that there has been a taking of property. TEAJF has filed for *en banc* rehearing of the

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IOLTA Grantee Spotlight . . .

Community Mediation Services Offers Reconciliation and Hope

by Ann Sides

When a crime is committed, something is broken in the victim, the offender and the community. All three need healing. Through participation in the face-to-face mediation involved in a victim-offender reconciliation program (VORP), a crime victim can find closure and freedom from fear. Through restoration of the victim, an offender may regain his or her standing in the community. The community provides the means (such as funding and volunteers) for repairing the harm, and benefits from the results: increased safety, reduction of recidivism, and peaceful resolution of conflict.

These are the goals of Community Mediation Services (CMS), headquartered in Clinton, Tennessee. CMS has been a grantee of Tennessee's IOLTA program, the Tennessee Bar Foundation, since 1991. CMS serves Anderson County, which contains a diverse population that includes the high tech communities surrounding the Oak Ridge National Laboratory, rural areas, and remote pockets of Appalachia.

CMS began in 1986 as the first victim offender mediation program in Tennessee. Support for the concept came from community representatives and justice system professionals who felt that more was needed to deter crime in Anderson County. CMS still follows the traditional victim/offender reconciliation model, working with juvenile offenders and their victims following property crimes, minor assaults, and other lesser criminal offenses. Seventy percent of the juveniles referred to CMS are first-time offenders.

The VORP process

Juvenile justice officials make most of the referrals to CMS. Participating offenders must admit to the crime, and their participation is usually in addition to court sanctions, not in lieu of them. CMS informs crime victims about the referral, explains the process, and invites—but never coerces—their participation. If the victim agrees to take part in the VORP process, both the victim and offender meet face-to-face with a trained volunteer mediator in the community where the incident occurred.

CMS's 55 volunteer mediators are trained regarding issues specific to victims and offenders, as well as in basic mediation skills. The mediator's task is to facilitate a dialogue between the victim and the offender to find a way to repair the harm resulting from the crime.

The mediator schedules separate meetings with each participant to screen for potential safety issues and to prepare participants for the subsequent mediation. Victims often bring anger and frustration to the meeting. Offenders may be angry as well as confused, rebellious, and sometimes ashamed. Both victims and offenders are normally unfamiliar

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Litigation Update

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becomes what amount of, not whether, just compensation is due."[5] The court made no attempt to quantify the amount of "just compensation" due. Instead, it noted that because the defendants have Eleventh Amendment immunity, only prospective declaratory and injunctive relief was being sought.

The court held that declaratory and injunctive relief was appropriate on two alternative grounds. First, the court found that defendants had conceded that they were "subject to prospective injunctive claims." Alternatively, the court found that the plaintiffs were not required to seek compensation from the State of Texas because, in the court's view, "[I]f the interest earned on client funds were available as just compensation for the client, the very purpose of the program would be thwarted; therefore, it would defy logic, to say the least, to presume the availability of a just compensation remedy."[6]

Judge Jacques Wiener dissented, focusing on the majority's failure to address whether any just compensation was due. He pointed out that the just compensation test was "the crux of the case" and that the majority ignored the district court's factual findings, following a bench trial, that the plaintiffs had suffered no monetary loss as a result of the Texas IOLTA program.

On October 29, 2001, the Texas IOLTA program and the Texas Supreme Court filed a petition for rehearing *en banc*, which stayed the decision. The Texas IOLTA program remains fully operational as it awaits a decision on the petition for rehearing *en banc*.

The Ninth Circuit decision

In a 7-4 decision, an *en banc* panel of the Ninth Circuit Court affirmed the district court's decision upholding the constitutionality of the Washington State IOLTA program under the Fifth Amendment.[7] The *en banc* decision effectively reversed the January 10, 2001 decision of a three-judge panel of the Ninth Circuit, which had held that the Washington IOLTA program engaged in a *per se* taking of client property and remanded the case to the district on the issue of whether any just compensation was due. The November 14, 2001 decision of the *en banc* court found that there was no Fifth Amendment violation and remanded the case to the district court for consideration of the First Amendment claims.

In reaching its decision, the Ninth Circuit provided a comprehensive analysis of all three prongs of the Fifth Amendment test: 1) Is there a property interest? 2) Was the property "taken" by the state? and 3) Is just compensation due? The court found that the *Phillips* decision was controlling as to whether a property interest existed and held that the client had a property interest in the funds generated from the IOLTA account.

Regarding the takings question, the court found that no taking had occurred. In reaching this conclusion, the Ninth Circuit determined that the proper analysis to apply was the regulatory or *ad hoc* takings test, rather than the *per se* takings test. This decision was based, among other factors, upon the fact that prior cases in which the *per se* test was applied involved real property. Given the monetary nature of the property involved, the public nature of the IOLTA program and the highly regulated nature of the banking industry, the court concluded that the *ad hoc* analysis was the better approach.

In applying the *ad hoc* test to the Washington IOLTA program, the court found that there was no direct economic impact on the plaintiffs because no interest would have been earned on their principal, absent the IOLTA program. Similar reasoning was applied to find that there was no loss of any reasonable investment-backed expectation of the plaintiffs. Regarding the character of the government's action, the Ninth Circuit determined that the government did not act unfairly. Rather, as participants in the legal system, the client-plaintiffs were simply required to place their money in IOLTA accounts that generate funds at no cost to them and that expanded access to the legal system from which they benefit.

The court next determined that even if property had been taken, there would be no just compensation due. This finding was based upon a long line of cases holding that just compensation requires placing the property owner in the same position pecuniarily as if the property had not been taken. The issue is not affected by what the state might gain from its use of the property. While recognizing that at most the property owners would have had the right to keep their property from earning interest, the court found the loss of that right had no economic value.

The dissent argued that the *per se* takings analysis should be applied because in its view, the regulatory takings test applies only where the government does not take the property outright, but rather regulates its use. It stated that the three-judge panel deci-

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From the Chair. . .

by James B. McLindon
Chair of the ABA Standing Committee on Lawyer Referral and Information Service

All of us were shocked and saddened by the horrific events of September 11, 2001. Amid the tragedy, many stepped forward to lend assistance. In New York, the legal community was well represented in this effort by, among others, lawyers, bar associations, pro bono programs and lawyer referral programs.

As mind numbing as the dimensions of the tragedy were, the task of assisting the families of the victims in New York was itself nearly overwhelming. Any death presents legal issues for the survivors. The destruction of any business similarly raises such issues for the owner. The multiple legal, financial and social needs of both families and the owners of businesses destroyed or closed following the World Trade Center attacks were indeed immense.

To address these problems, the Association of the Bar the City of New York (ABCNY) recruited an army of over 1000 volunteer attorneys to meet the pressing legal needs of those still stunned by what had befallen them. Almost overnight, ABCNY, together with relevant agencies and charitable organizations, appointed key people in the most

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Criminal Court Panels: The Role of Lawyer Referral

by Linda Katz

Competent representation in criminal court proceedings is essential to the functioning of the criminal justice system, and lawyer referral services can play an important role in ensuring the quality of representation provided. LRIS programs that administer criminal court panels find that there are many benefits to doing so. These benefits are realized by courts, criminal defendants, LRIS panel members, and bar associations (or other LRIS sponsors).

Why establish a criminal court panel?

A primary motivation for establishing criminal court programs is the assistance provided to the courts. In some jurisdictions, courts have approached local bar associations for assistance in establishing such a program. For example, in the early 1970s, the San Francisco courts came under scrutiny for perceived favoritism in appointing attorneys in criminal cases. The courts asked the Bar Association of San Francisco (BASF) to help establish a system whereby screened, qualified attorneys could be made available for appointment, and such appointments could be distributed in an equitable fashion. BASF readily agreed, and the mechanisms already in place in the BASF Lawyer Referral Service for screening attorneys and making referrals on a rotational basis were employed in the service of the criminal courts.

In response to concerns that defendants were being solicited by unqualified attorneys at the courthouse, the Cook County Court contacted the Chicago Bar Association in 1969 to establish a program whereby screened attorneys were made available for hire by defendants, initially in traffic court. This program proved highly successful, and was soon expanded to include the misdemeanor and felony courts. By relying on the LRIS program to provide attorneys for criminal representation, the court avoided the administrative burden, along with the potential for perceived favoritism among the criminal defense bar. In the case of a program like the Chicago Bar Association's Criminal In-Court Lawyer Referral Program, the court can rely on referrals to the "bar attorney," knowing that the attorney has met the standards established by the LRIS program.

An effective criminal court panel is an asset to criminal defendants and, by extension, to the community as a whole. By ensuring high-quality representation and the broad participation of the criminal defense bar, a criminal court program ensures the independence and vitality of criminal defense. The requirement that its members carry malpractice insurance is another important benefit a criminal court program can provide to defendants. By identifying qualified attorneys, the program helps defendants avoid the risk of being represented by inexperienced, unqualified attorneys.

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Dr. Ethics

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else of similar experience would take the case, I think there could be reasons for the committee to consider reducing the fee. One reason might be that there are other attorneys who already have liens on any recovery." Al says you could consider making this a "very rare" exception. But only where there is a real and bona fide reason.

Dr. Ethics

By the way, while we're talking fees, what are LRIS programs doing about hybrid fees? They are becoming more and more common in California. Let's say, for instance, that I agree to charge a client half my hourly rate plus half my contingency. No problem in those jurisdictions that collect the same percentage for both kinds of fees, but it could be a big difference in places like my town of San Francisco, where the fee structures are different (and higher) on contingencies. Those with these kinds of fee structures should pay attention to these increasingly common fees.

Dr. Ethics is otherwise known as Richard Zitrin, director of the Center for Applied Legal Ethics at the University of San Francisco.

The analysis and opinions in this article are those of the author, and do not necessarily represent the views, policy or opinions of the American Bar Association or the ABA Standing Committee on Lawyer Referral and Information Service.

Paving the Way to Public Service: The ABA Commission on Loan Repayment and Forgiveness

by Curtis M. Caton and Judge Frank M. Coffin

Many of today's law graduates are faced with law school debt of $80,000 or more upon graduation. For graduates following the standard 10-year repayment schedule, this results in monthly payments of more than $900 for 10 years following graduation. With the average starting public interest salary at $34,000, these mortgage-size debts bar most graduates from pursuing public interest legal jobs. Among those graduates who do take such positions, many—when faced with major life decisions such as starting a family—are forced to leave after two to three years of employment.

In response to this problem, ABA President Robert E. Hirshon created the Commission on Loan Repayment and Forgiveness in August 2001. The commission's job is to examine and report on the effect upon the legal profession of the increasing educational debt burdening law school graduates. In creating the commission, Hirshon noted that many observers believe that fewer lawyers are drawn to pursue public interest law positions such as in civil legal services or indigent defense immediately following graduation, and that those who do take these jobs cannot afford to remain in them very long. He believes this phenomenon has immediate and long-term consequences that will harm the profession and the public it serves.

Loan repayment assistance programs ("LRAPs") have emerged as a solution for relieving the debt burden of some law graduates. LRAPs provide loan forgiveness, lower interest rates on loans, or postponed payment of law school loans to graduates entering specific types of employment, usually law-related public interest jobs. Most LRAPs contain limits on the amount of income a recipient can earn while participating in such a program. There are various types of LRAPs, administered by law schools, state bar foundations and federal and state governments, providing debt relief to some law graduates. However, the number of these programs has not increased appreciably during the past five years, while the average debt burden on law graduates has more than doubled during the same period of time.

The commission will study the impact of the debt burden problem on the ability of law graduates to pursue and remain in public interest law jobs, and recommend solutions to the ABA and the profession. During the current bar year (ending in August 2002), the commission will focus on promoting LRAPs and guiding ABA efforts to

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From the Chair…

Looking for the latest commentary on legal aid and indigent defense issues from SCLAID Chair L. Jonathan Ross? You will find it on **page 9** of this issue, where Ross has joined with Robert N. Weiner, chair of the ABA Standing Committee on Pro Bono and Public Service, for a column addressing the interaction between legal services programs and pro bono programs.

Loan Repayment

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stimulate more LRAPS and scholarships/fellowships provided by law schools, the federal government, state governments, and other private sources.

The commission is chaired by Curtis M. Caton, a member of the firm of Heller Erhman White & McAuliffe LLP in San Francisco, and Judge Frank M. Coffin of Portland, Maine, a senior judge on the U.S. Court of Appeals for the First Circuit. The ten commission members include leaders in the profession, drawn from the ranks of law school deans and faculty, law students, experienced public service lawyers, legislative experts and others. The liaisons include representatives from many ABA entities as well as external organizations representing various constituencies, including law schools, labor, public interest attorneys, and corporate counsel.

The commission held its first meeting on October 22-23, 2001 in Washington, DC. The meeting

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SPAN Reports on Status of State Access to Justice Partnerships

by Robert Echols

During the past five years, "access to justice" partnerships involving the bar, the courts and legal aid providers have had a profound impact on the civil legal assistance delivery system in the United States. In many states, these efforts have played a major role in securing or increasing state funding for legal assistance, either through direct appropriations or through court fee surcharges or fines. They have promoted the creation of new providers to ensure that the range of civil legal needs in the state is addressed. They have launched major improvements to state court systems, rendering them more "user-friendly" and receptive to self-represented litigants. They have worked toward expanding the level and scope of involvement of private attorneys in providing pro bono services to low-income people.

SPAN, a joint project of the ABA's Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and the National Legal Aid and Defender Association (NLADA), has been providing support for state-level access to justice initiatives since 1996. SPAN serves as an information clearinghouse and works with state leaders to promote the development of new partnerships to expand access to justice.

According to SPAN's most recent report on the status of access to justice structures and initiatives in the 50 states and the District of Columbia, the number of states with formal, institutionalized partnerships is continuing to grow, while virtually every state has some kind of active joint initiative to expand access to justice under way. Key findings of the survey include the following:

- Fourteen states have an access to justice commission or a similar entity—a formal body composed of appointed representatives of the bar, the judiciary, and providers. Some include other stakeholders as well, such as clients, business and labor leaders, and representatives of community agencies and churches. This group includes well-established entities in California, Louisiana, Maine, Maryland, Washington and West Virginia, more recent ones in Arizona, Illinois and Pennsylvania, and brand new ones in Idaho, Missouri, Montana, Texas and Vermont.
- At least four other states have begun to plan for or consider the creation of an access to justice commission—Arkansas, Colorado, Mississippi and Nebraska.
- Seven states have a committee of a state bar or bar association that is charged with a broad access to justice function and that includes representatives of the judiciary, providers and other stakeholders, in addition to bar leaders. This group—Delaware, Georgia, Michigan, Minnesota, Nevada, New Mexico and Oregon—includes some of the most effectively institutionalized access to justice structures in the country.
- Four states—Alaska, Florida, Massachusetts and Utah—have a structure of active committees or other entities dedicated to imple-

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2002 LSC Funding Update

On November 28, 2001, President Bush signed into law the FY2002 appropriations bill for the Departments of Commerce, Justice, State, the Judiciary and Related Agencies ("CJS"). This bill, H.R. 2500 (P.L. 107-77) includes $329.3 million for the Legal Services Corporation, the full amount requested by President Bush and the same amount LSC received in FY01.

LSC's FY2002 appropriation provides $310 million for basic field programs, $2.5 million for the Office of the Inspector General, $12.4 million for management and administration, and $4.4 million for client self-help and information technology.

While LSC did not receive a funding increase for FY2002, this year's appropriation process provided a significant victory: for the first time in six years, LSC's budget was approved without opposition. In previous years, the House Appropriations Committee slashed LSC's funding to $141 million with the funding later restored through a House floor amendment and during House/Senate conference committee negotiations. This year, with President Bush's support, the House Appropriations Committee provided full funding of $329.3 million.

The FY2003 budget process will be underway in early February. For more information on what you can do to help increase LSC's funding for next year, visit the ABA Governmental Affairs Office website at http://www.abanet.org/poladv

—**Julie Strandlie**, ABA Governmental Affairs Office director of grassroots operations and legislative counsel

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