

Dialogue

Inside this Issue

LRIS

"...[Y]our LRIS program will survive and prosper only if you look first to the needs of your customers and take the steps necessary to satisfy them."

From the Chair 3

Other Highlights

LAMP

From the Chair

The ABA and other organizations are focusing on the special burdens carried by children of deployed service members 7

Delivery

From the Chair

The Delivery Committee will build on its accomplishments in promoting supportive policies and innovations for expanding access to moderate-income people 12

Pro Bono

Pro Bono Profile

A past recipient of the ABA Pro Bono Publico Award, Merck & Co., Inc. was a leader in developing an in-house corporate pro bono program 13

IOLTA

Interest Rate Comparability

The second article on comparability looks at the important considerations that underlie planning for and implementing a rate comparability provision 17

SCLAID

From the Chair

Outlining the plans and priorities of the Standing Committee on Legal Aid and Indigent Defendants . . 23

National Lawyer Referral Workshop: Looking to the Future

by Joan Andersen

The 2006 National Lawyer Referral Workshop emphasized positioning lawyer referral services to meet the challenge of competition on the Internet, maximizing service while minimizing cost, and running a shop where it is appealing to work. Held in Albuquerque, New Mexico in mid-October, the workshop also featured important sessions on serving deaf and hard-of-hearing clients and marketing to the Hispanic community. More than 100 attendees absorbed the expertise of both long-term LRIS administrators and outside experts, ate tasty Southwestern fare, and enjoyed Albuquerque during its world-famous balloon fiesta.

Competing on the Internet

Five break-out sessions focused on helping programs build their Internet presence. Carrie Lee of the ABA outlined the basics of building a Web site for LRIS programs currently without one, from selecting a domain name to finding a hosting service to actually assembling the site. She provided insights regarding site organization and the pros and cons of hiring a Web designer. In a second session, Lee offered tips on making Web sites more user-friendly. Her advice included knowing your audience, providing a map that lets users direct their course through the site, maintaining navigation on each page, and keeping the text short and easy to read, with a purpose for every page. In addition, she said the consistency of appearance and standard layouts with well-balanced pages are important.

Eric White of the Bar Association of San Francisco presented a session

(continued on page 2)



The 2006 National Lawyer Referral Workshop coincided with the Albuquerque International Balloon Fiesta. The workshop focused on helping LRIS programs position themselves to meet challenges including Internet-based competition and imperatives to maximize service while minimizing costs.

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Mark Schickman
Chair, ABA Standing Committee on Pro Bono and Public Service

Ron Abernethy
Chair, ABA Standing Committee on Lawyer Referral and Information Service

Deborah G. Hankinson
Chair, ABA Standing Committee on Legal Aid and Indigent Defendants

Gen Earl E. Anderson, USMC (Ret.)
Chair, ABA Standing Committee on Legal Assistance for Military Personnel

Jonathan D. Asher
Joanne M. Garvey
Co-Chairs, ABA Commission on IOLTA

M. Catherine Richardson
Chair, ABA Standing Committee on Delivery of Legal Services

.....
Terry Brooks
Director, ABA Division for Legal Services

David Holtermann
Editor, ABA Division for Legal Services

Gail Thompson
Division Designer
ABA Division for Legal Services

.....
Comments, suggestions and proposed articles should be directed to:

David Holtermann
ABA Division for Legal Services
321 N. Clark Street
Chicago, IL 60610-4714
312/988-5744
fax: 312/988-5483
email: holtermd@staff.abanet.org

Address changes and subscription inquiries should be directed to:

Margie Bruynseels
ABA Division for Legal Services
321 N. Clark Street
Chicago, IL 60610-4714
312/988-5749
fax: 312/988-5483
email: mbruynseels@staff.abanet.org

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email: copyright@abanet.org

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Lawyer Referral Workshop

(continued from page 1)

to help programs with Web sites become more sophisticated in making them more visible to search engines. Effective techniques include making navigation easier with hierarchies of information and ensuring that the entire site is visible to a search engine. A site index can give search engines a link to every page in the site, but using JavaScript, image maps, and frames presents obstacles. The most important elements of site optimizations are links and text, so programs should avoid non-law-related links and include all relevant terms in the text. Using a text alternative to Word, Excel, and PDF documents is important so the page can be indexed by the search engines.

Internet presence can be maximized by creating a pay-per-click campaign. Ken Matejka of the Bar Association of San Francisco LRIS (do you get the feeling they're on top of this Internet thing?) presented two sessions on this topic: An introductory session on setting up a campaign, and another on optimizing an existing campaign. Using Google is recommended because it gets 49.4 percent of the searches, while the next largest engine, Yahoo, gets only 23 percent. Matejka outlined three major steps in building Google ads. First, assemble the content by selecting keywords, building landing pages, and writing the ads. Second, set up your campaigns by creating an account, deciding whether they should have a local or national scope, and disabling content network and search partners. Finally, monitor your campaigns (Google provides reports on your performance) and adjust your

bids so that you can obtain your desired position. Matejka suggests that you may want to bid higher initially to establish a good click-through rate. Of course, before you do all this you do need to create a budget and determine your daily expense limit.

In another session, Matejka presented "advanced" Google, with a more complex analysis of how to increase your "quality score." It included discussion of landing pages with substantial and unique content, privacy policy, and site maps, plus advice on how to manage your bids. Matejka also assessed the usefulness of other Google offerings.

Expanding LRIS marketing

The ending plenary featured Felipe Korzenny, director of the Center for Hispanic Marketing Communication and a communications professor at Florida State University. Korzenny spoke about marketing to the Hispanic community, and made several unexpected points. Since children in Hispanic households often speak English the best, marketing should use youthful terms. About 65 percent of the children have some Internet access. Bilingual marketing is better than exclusively Spanish language marketing, as Hispanic people often watch or listen to media about equally in both languages, while in print media English is more often utilized.

Korzenny also observed that cultural sensitivity is important, and ads must give the impression that the LRIS program cares about the community. For immigrants there is often distrust of the legal system because of abusive experiences in their original countries, so LRIS programs must build confidence at the grassroots level.

(continued on page 4)

From the Chair...



by Ron Abernethy
Chair of the ABA Standing
Committee on Lawyer Referral
and Information Service

In a recent article, *New York Times* columnist Thomas Friedman wrote, "The Stone Age didn't end because we ran out of stones." Al Charne, executive director of the Legal Referral Service, sponsored by the Association of the Bar of the City of New York and the New York County Lawyers Association, believes this quote is relevant to the LRIS community in an era of rapid change.

Charne's point is that LRIS programs are not going to disappear for lack of moderate-income consumers in need of legal assistance. LRIS programs will, however, become relics of the past if more client-oriented and user friendly ways to deliver legal services replace them.

Lawyer referral services operating in compliance with the ABA Model Supreme Court Rules Governing Lawyer Referral & Information Service will remain an excellent resource for obtaining legal, or in some cases non-legal, assistance. Because lawyers participating in such services are screened for competence through the utilization of subject matter or experience panels and all carry malpractice insurance, the lawyer referral service is, and will always be, one of the best ways to find the

right lawyer. The ABA LRIS slogan: "The Right Call for the Right Lawyer" is true. At the same time, it is a promise to those who call.

Why might lawyer referral programs find themselves in danger of joining the Stone Age as a relic of the past? While we might rail against the marketing tactics of our competitors, wringing our hands and continuing with "business as usual" isn't the answer. To put it simply, LRIS, like previous ages, industries and businesses, will find the world passing it by unless it learns to adapt. In that sense, each LRIS has two choices: adapt or die. To be sure, the death may be slow and prolonged and involve many years on life-support from the sponsoring organization. But ultimately, any service that fails to respond to its customers' needs is doomed.

There is a tendency to think that if things do not change, they stay the same. But that isn't entirely true. History shows that unless things change, they tend to get worse.

As we in the LRIS world focus our thinking on how we might adapt to meet changing customer needs, we should start by asking a simple question: Why does our LRIS handle referrals the way it currently does?

At the recent National Lawyer Referral Workshop in Albuquerque, we discussed this question and refined it further. Why do we assign cases on a strictly rotational basis and only give one name to a caller? Is this a practice that benefits the lawyers or one that benefits the customers? To be sure, a lawyer is unlikely to participate in a service that is unable to guarantee the same access to clients enjoyed by other panel members. But single-name referrals are not the only way a service could address that concern. As

long as the lawyer's name is given to prospective customers the same number of times as the name of someone else, the assignment process would be equal.

There is very intriguing evidence coming from one lawyer referral service that meticulously tracks referrals and referral practices suggesting that giving callers multiple names as part of the initial referral results in statistically higher client retention rates than when only one name is given. There may be other ways to satisfy consumers' preference for choice and panel members' need to be treated equitably that should be explored.

Similarly, what's wrong with providing callers with background information regarding the panel members to whom they are being referred? First, providing this information would likely make the client feel more comfortable, knowing that the lawyer really is qualified to handle their particular legal question or matter. Second—and important in our effort to keep lawyer referral service and Stone Age out of the same sentence—the client would be a part of the process and more likely to actually retain the lawyer.

The point is that your LRIS program will survive and prosper only if you look first to the needs of your customers and take the steps necessary to satisfy them. Perhaps, since cost is always a consumer concern, we should begin discussing the value, if any, in providing general fee information to clients.

By adapting and by revisiting all of our operations, we will undoubtedly find opportunities to better serve our customers that are relatively easy to implement. If we fail to look, those opportunities will evaporate, along with our client base.

The Stone Age did not end

(continued on page 4)

From the Chair...

(continued from page 3)

suddenly. Some societies embraced the new technologies of the Bronze Age and moved forward, while others remained mired in the familiar Stone Age ways of doing

things and fell further and further behind competing civilizations.

The lesson is clear. The Internet Age has brought more legal information to the fingertips of consumers. Lawyers are finding new ways to market themselves online, individually and through commercial referral networks. LRIS

programs must embrace new ideas and technologies or become irrelevant. In the competition to serve moderate-income legal consumers, we must discard the old methods that are holding us back and reach out to consumers where they are now and where they are going to be in the future.

Lawyer Referral Workshop

(continued from page 2)

Hispanic communities are very family oriented, and you might recognize this in your marketing material. Don't just translate from English to Spanish, but present an understanding of the culture.

In addition to the plenary, there was a break-out session on three different programs in Orange County, San Francisco, and Houston that have conducted outreach to their local Hispanic communities. Carole Conn of the Bar Association of San Francisco LRIS reported that her program has worked with Hispanic media for a long time, and has even been asked to comment about its services on a local Spanish language news station. Janet Diaz of the Houston Lawyer Referral, Inc. presented a wealth of material on the planning and implementation process her program conducted to increase its services to Hispanic communities in Hous-



ton. It is using Yellow Pages ads, bookmarks, brochures, news releases, TV, radio, Web materials, newspaper ads, and works with members of the Hispanic and Mexican-American bar associations to spread the word.

Al Charne, executive director of New York's Legal Referral Service, and LRIS Committee Counsel Jane Nosbisch led a break-out session on improving referrals from corporations and large law firms. Suggestions included placing

information about the LRIS in bar association flyers, notices, and publications, organizing lunch meetings with members of large firms, and providing information for corporations to send to staff and counsel. Also, bar board members could speak with managing partners about the LRIS program. Similar efforts can be made with the public sector, unions, colleges and universities, and local chambers of commerce.

Happy campers

Each year the workshop presents a number of sessions that can help the in-office operations of the LRIS programs. This year's program featured two sessions by Jeff Toister of Toister Performance

(continued on page 5)

Mark your calendars now! The 2007 National Lawyer Referral Workshop will be held October 17-20, 2007, at the Astor Crowne Plaza in the French Quarter in New Orleans.



Lawyer Referral Workshop

(continued from page 4)

Solutions on good supervision and mitigating employee burnout. Toister provided many practical, common-sense suggestions to improve the functioning of an office. (See the sidebar on this page for Toister's advice on keeping seasoned employees motivated.)

A session presented by Wanda Sitzer, an interaction coach, on keeping LRIS callers on track showed how guiding the conversation can make callers happier and lessen stress on the interviewer. She offered practical suggestions about how to ask questions and show empathy without escalating the emotions of an upset caller.

Up-to-date telephone technology was addressed in a session featuring Tim Boller of Bollcom Inc. Boller explained how the convergence of voice and data technology can improve functionality. Although technology is not direct interaction in the office, improving functionality can make day-to-day operations easier and everybody happier.

Serving deaf clients

Jennifer Pesek, staff attorney at the California Center for Law and the Deaf worked with Carol Woods, director of the Bar Association of San Francisco LRIS, and Alex Macdonald, director of Program Development for the Cleveland Bar Association, to outline the obligations of attorneys and LRIS programs to deaf clients. A recent Department of Justice complaint gave a good picture of the requirements of the Americans with Disabilities Act. The client, who had a hearing impairment, used sign language with some lip

Tips for Motivating Long-Term Employees

Consultant Jeff Toister of Toister Performance Solutions presented two sessions on managing employees during the 2006 National Lawyer Referral Workshop. Here are some of his tips on motivating long-term employees.

Experienced employees give their supervisors peace of mind that their responsibilities will be well covered. They do their jobs well and typically work under minimal supervision. A hidden danger with these employees is that we come to expect they will stay forever and can be blindsided by a sudden departure or decrease in performance.

Below are a few tips to help your seasoned people stay motivated and remain on your team:

- **Build and maintain community.** We join companies but we leave people. Foster teamwork and community through fun contests, potluck luncheons, and other activities.
- **Never assume they'll stay forever.** Ask your veteran people about their goals and aspirations. Don't be afraid to ask what's kept them in their job for so long.
- **(A little) change is good.** Offer your people new responsibilities or unique projects from time to time to provide a change of pace.
- **Recognize service time.** The days of the gold watch are gone, but a hand-written thank you card to mark an employment anniversary can have a big impact.
- **Don't take them for granted.** Sincerely thank your team for its contributions on a regular basis.

reading to communicate. The attorney was representing her in a divorce. The allegations were that the attorney's failure to employ a certified interpreter made it difficult for her to understand everything and also cost her more because it took longer and the attorney charged for that extra time. The case emphasized that family members were not acceptable to use as interpreters.

In the settlement, the attorney agreed that he cannot charge his client for the cost of providing qualified sign language interpreters for the client. He also was to compensate the client for the extra costs and to forego the amounts he claimed were due from the client.

Conclusion

The 2006 National Lawyer Referral Workshop lived up to the high standard established by previous editions by offering a wide-ranging and topical set of sessions designed to help LRIS programs improve current operations and face future challenges. The materials were very complete, and if you weren't able to attend this year's workshop, contact Jane Nosbisch at jnosbisch@staff.abanet.org, to order a workshop book. Please plan to attend the 2007 workshop from October 17-20 in New Orleans.

Joan Andersen is director of the King County Bar Association LRIS in Seattle.

Returning Veterans to Work

by Jennifer S. Walther

More than 500,000 members of the National Guard and reserves have been mobilized since President Bush declared a national emergency following September 11, 2001.¹ As those serving in the military complete their tours of duty, they will be returning to civilian life and seeking employment. Given the large mobilization and anticipated return of veterans, the challenge of reemploying veterans may become a widespread issue for employers. Some veterans may have incurred a disability during the military service, requiring employers to pay special attention to obligations to accommodate the disability and help the employee to become qualified for the job.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) provides employees with employment and reemployment rights after service in the U.S. Armed Forces, the National Guard, or the reserves.² Effective in January 2006, the United States Department of Labor (DOL) for the first time issued final regulations implementing USERRA.³ These regulations explain in detail the obligations for reemploying veterans, including those who become disabled as a result of the military service. These reemployment rights apply whether the service is voluntary or involuntary. Individual states may also have legislation relating to reemployment rights, and the employer must apply the provisions of state or federal law that are more favorable to the employee. USERRA applies to all employers, even those with only

Effective in January 2006, the United States Department of Labor (DOL) for the first time issued final regulations implementing USERRA.

one employee. Also, according to the DOL, supervisors are liable under USERRA.

Employees engaged in military service have three types of protection under USERRA:

- 1) protection from discrimination and retaliation
- 2) reemployment rights, including rights for disabled veterans
- 3) protection of employment benefits.

An employer may have an affirmative defense to a discrimination claim if the employer can prove that it would have taken the same action even absent the military service. An employer may have affirmative defenses to a claim of failure to reemploy, if the employer can show that circumstances have so changed since the employee left employment to enter military service that reemployment is impossible or unreasonable, that reemployment would cause the employer undue hardship, or that the pre-service position was temporary.

Discrimination and retaliation protection

USERRA specifies that an employer cannot discriminate against an employee or applicant for employment because of service in the uniformed services. One court has found that USERRA's discrimination protections extend to

claims for harassment, provided the employer's conduct was sufficiently pervasive to alter the employee's conditions of employment and create an abusive working environment.⁴

USERRA prohibits retaliation if the individual exercises a right under the law, takes action to enforce a right (such as filing a complaint), testifies in an enforcement proceeding, or assists or participates in an investigation.

Burden of proof

Under USERRA, the employee bears the burden to prove discrimination or retaliation. The standard is whether the military service was a "motivating factor" in the employer's action.

The employer has an affirmative defense to a claim of discrimination or retaliation by proving that it would have taken the same action even absent the military service. For example, a veteran lost his USERRA claim against his former employer when the veteran's hours were reduced and he was ultimately terminated, because he could not prove that his military service was a motivating factor in the employer's decisions.⁵ The employer, a formal wear business, proved that it would have reduced the employee's hours even absent his military leave because prom season was over and business was slow. It also proved that the termination decision was based on the employee's confrontation with his supervisor, not his military service.

Reemployment rights

Provided the employee meets

(continued on page 8)

From the Chair...



by Gen Earl E. Anderson, USMC (Ret.)
Chair of the ABA Standing
Committee on Legal Assistance
for Military Personnel

This nation's current overseas conflicts are unique in the degree to which our fighting force is comprised of fathers and mothers for whom answering the call to service has meant leaving their children. A significant, if hard-to-quantify, cost of this nation's commitments in Iraq and Afghanistan has been borne bravely by those children of deployed service members.

We all recognize that the sudden removal of a parent to a war zone can be tough on kids, some more than others. Extended or multiple deployments increase the challenges at home. For children, the strain can show up in academic performance, in conduct within and outside the home, and in their overall sense of well-being.

A number of organizations have comprehensive programs in place to support these children and their at-home parents. They include, to mention a few, several programs under the Defense Department's Office of Community and Family Policy, the family and youth services offices of each of the armed services, the National Military Family Association, the Military Child Education Coalition, the Armed Services YMCA, the Boys and Girls Clubs of America, and

Our Military Kids, Inc.

These programs work to create "safe zones" in schools where structured programming keeps children's minds off family worries and war, to train educators and coaches to support these children effectively, to make counseling available where appropriate, and to reach out to at-home parents to help them meet financial, child-care and other challenges raised by the deployment of a spouse. As one example of a good idea well executed, the National Military Family Association has created a free summer camp program that to date has served more than 5,000 military children and teenagers. The camps help children and youth commiserate with others in the same boat while temporarily giving at-home parents a respite from their child-care duties. Among other benefits, these programs can help to straighten out teens who might be prone to bad behavior when a parent goes to war.

Like operational military budgets, however, public and private resources to support families experiencing deployment or re-deployment have been stretched thin. According to a recent study by the NMFA, the strain on families affected by deployments has become measurably greater in recent years, while the energies of many volunteers who stepped up to assist those families have been overtaxed.

Lawmakers at all levels might look to whether they can ease this mounting burden by adopting practical protections for these families. Congress, for example, could take up in earnest the pros and cons of extending employee leave rights to grand-parents and other non-parent caregivers who are thrust into the role of child-

raiser when a parent is deployed. At the state level, the fact that some states have pro-actively amended public school residency requirements to accommodate children in these families begs the question of why other states have not followed suit.

Looking out for the interests of this special constituency is everybody's responsibility. The ABA Commission on Youth at Risk has been appointed by ABA President Karen Mathis to examine ways that lawyers, the legal system and other professionals can better identify and assist at-risk youth—primarily young people ages 13 through 19. The Commission will address, among many subjects of interest: ways to enhance the juvenile justice system, for example by giving teenagers a stronger voice in proceedings that affect them; reforming the legal system's handling of "status offenses"; and better ways to support teens facing difficulties at home.

Efforts are already under way to ensure that the special challenges facing children and youth in military communities are fully represented in the important work of the Commission. It is my hope and expectation that we in the civilian and military communities who are committed to the children of the military will do our utmost to fully inform the Commission on the challenges facing youngsters whose parents have been deployed.

Toward that end, and as a first step, a Youth at Risk Roundtable with a special emphasis on children in military communities was held on November 16 at Fort Sam Houston, Texas, in conjunction with LAMP Committee events. Our collective efforts will help enable the Commission to make policy recommendations designed to make a difference in these young people's lives.

Returning to Work

(continued from page 7)

the following eligibility criteria, the employee is entitled to reemployment.

The employee must give advance notice to the employer of the need for leave, except in cases of military necessity. The U.S. Department of Defense recommends that notice should be given at least 30 days in advance of the leave. It is doubtful, however, that an employer could deny reemployment if less notice was given. Permission to leave is not required, nor is the employee required to accommodate the employer's needs concerning the timing, frequency or duration of the leave.

The employee may perform military service for a cumulative period of up to five years with each employer and retain reemployment rights with that employer. The cumulative period means that the employee can go in and out of military service several times, as long as the total time served while working for one employer does not exceed five years. Absent limited exceptions to the five-year limit, the employee will not retain reemployment rights after the five years of service. The employee must not have a disqualifying discharge from military service, such as a dishonorable discharge.

The employee is entitled to reemployment if he or she timely returns to work or applies for work. If the employee's military service was for less than 31 days, the employee must report to work no later than the next day following release from service (including reasonable travel time to get home plus an eight-hour rest period). If the employee's military service was more than 30 days but less

than 181 days, the employee must submit an application for reemployment within 14 days of discharge from service. If the employee's military service was for more than 180 days, the employee must submit an application for reemployment within 90 days of discharge. If the employee is in the hospital for military service-related injuries, the deadline for reporting to work can be extended for a period of up to two years after the end of service, but the employee must submit an application for reemployment on recovering from the injury within that two-year period of time. The employer must reemploy the employee "promptly," which means within two weeks, absent unusual circumstances.

The employee's application for reemployment can be written or verbal, but because the law does not require a particular format, the employer cannot require a written application. The employee can give the application to the employer or to someone who has "apparent responsibility" to accept such applications. The employer should identify a specific named supervisor or manager, or a specific position, such as a human resources manager, who has responsibility to accept applications to avoid a claim that the employee applied to someone he or she mistakenly believed had actual responsibility. If the veteran does not contact the specific person that the employer has designated to receive the application for reemployment, the veteran will be found to have failed to apply for his job.⁶

Upon employer request, the employee must submit documentation showing the timing and duration of military service and the conditions of discharge, so that the employer can determine whether

the employee satisfies the conditions for reemployment. The employer cannot delay reemployment, however, if such documents do not exist or are not readily available.

If the employee does not report to or apply for work within the time frames noted above, the employee becomes subject to the employer's conduct rules regarding an absence from scheduled work. Thus, an employer's no call/no show policy can be applied to the veteran's failure to report to work on time after discharge.

An employee whose military service lasted for more than 30 days but less than 181 days cannot be discharged, except for cause, within 180 days after return to work. An employee whose military service lasted for more than 180 days cannot be discharged, except for cause, within one year after reemployment. This restriction alters the normal at-will employment relationship existing in many states, which allows employers to terminate employees without cause. Under USERRA, cause may be based on the employee's conduct or for "other legitimate nondiscriminatory reasons." If cause is for the employee's conduct, the employee must have had notice, express or implied, that the conduct would constitute cause for discharge. Other legitimate nondiscriminatory reasons are identified as job elimination and layoff. It is not clear under USERRA whether these two reasons are the only legitimate reasons, or whether they are simply examples.

The reemployment position

The employer must return the employee to a position that reflects with reasonable certainty the pay, benefits, seniority, and other job

(continued on page 9)

Returning to Work

(continued from page 8)

perquisites that the employee would have attained if not for the military service. This position is known as the “escalator position.” Employers are required to allow absent military reservists to make up any opportunities for lost overtime or training missed while on duty,⁷ and will be liable if the employee is reinstated with diminished job duties.⁸ Reemployment rights do not entitle an employee to be placed in a better position than if he or she had remained employed.

The employee must be qualified for the reemployment position, meaning the employee is able to perform the job’s essential functions. The employer must make reasonable efforts to help the employee become qualified. This is a similar concept to the reasonable accommodation requirement under the Americans with Disabilities Act (ADA),⁹ and courts may borrow from the ADA to interpret the requirements of USERRA. Courts have found the following employer actions to be reasonable under the ADA: modifying work schedules;¹⁰ reallocating job responsibilities;¹¹ providing training;¹² and providing career counseling.¹³ An employer is not required to hire a full-time assistant,¹⁴ to create a new position,¹⁵ or to allow the employee to work at home.¹⁶ Thus, an employer returning a veteran to work may have to modify a job or provide training if doing so would allow the veteran to perform the job’s essential functions.

An employer does not have the right to delay or deny reemployment because the employer filled the service member’s pre-service

position and no comparable position is vacant, or because a hiring freeze is in effect.

Disabled employees

A disabled veteran is entitled to be returned to the escalator position to the same extent as any other individual. If the employee has a disability incurred in, or aggravated during, the period of military service, the employer must make reasonable efforts under USERRA to accommodate that disability and to help the employee become qualified to perform the duties of the reemployment position. Reasonable efforts mean actions that do not place an undue hardship on the employer. Employer actions constituting reasonable accommodations are described above. (The undue hardship defense is described more fully below).

The disabled employee will be qualified for the position if he or she has the ability to perform the essential tasks of the position. An inability to perform one or more non-essential tasks of a position does not make the employee unqualified. A determination of whether the tasks are essential will include an evaluation of such factors as the employer’s judgment, written job descriptions, time on the job performing the function, the consequences of the employee not performing the function, terms of a collective bargaining agreement, and the work experience of past or current incumbents in the job or similar jobs.

If the employee is not qualified for the escalator position because of a disability after the employer’s reasonable efforts to accommodate the disability and to help the employee to become qualified, the employer must reemploy the disabled employee first in

a position that is equivalent in seniority, status, and pay to the escalator position, or if none, then in a position that is the nearest approximation to the equivalent position. For example, a returning disabled veteran who was unqualified to perform his former job as a brakeman due to shrapnel wounds, was entitled to be placed in a clerical position at equivalent seniority, status, and pay, even though the new position was different from his pre-service position.¹⁷ The employer must also make reasonable efforts to help the employee become qualified for one of these alternative positions.

Unlike the ADA, under USERRA a veteran’s disability does not need to be permanent to trigger the employer’s obligation for reasonable accommodation. For example, if a person breaks a leg during annual training, the employer may have an obligation to make reasonable efforts to accommodate the broken leg, or to place the person in another position, until the leg has healed.

The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position. The employer bears the burden to prove that the employee is not qualified for reemployment.¹⁸

These obligations under USERRA are in addition to the requirements of the ADA, which requires the employer to accommodate the veteran’s disability to allow him or her to work. Just how much assistance the employer is required to give the disabled veteran under USERRA to help him or her become qualified for the appropriate reemployment position remains to be addressed by

(continued on page 10)

Returning to Work

(continued from page 9)

the courts. It is likely, however, that courts will follow the ADA by requiring employer actions such as those described above to address the needs of disabled veterans. Employers covered by the Family and Medical Leave Act (FMLA) also need to comply with the FMLA and provide the veteran time off work for a serious health condition.

Employers' affirmative defenses

An employer can assert several affirmative defenses to a claim for reemployment, but the employer must prove that the defense is applicable. The employer can attempt to show that circumstances have changed since the employee's leave of absence began so as to make reemployment impossible or unreasonable. For example, to establish this defense, an employer may have to show that it was necessary to reduce the workforce or discontinue some particular department or activity. The employer cannot deny the veteran reemployment simply because the employer would have to displace an employee who had filled the position during the veteran's absence.¹⁹

The employer can assert that assisting the employee to become qualified for the position would pose an undue hardship. To prove undue hardship, the employer must show significant difficulty or expense, when considered in light of the cost of the action needed to help the veteran to qualify for the position and the employer's size and overall financial resources. The undue hardship defense has been used under the ADA, and courts may borrow from the ADA

to further define the parameters of this defense under USERRA. For example, courts have found undue hardship under the ADA when an employer had to hire another employee to assist the disabled employee,²⁰ but not when an employer had to deviate from its own policy to transfer the employee to another position for which the employee was qualified.²¹ The ADA cases illustrate that employers attempting to assert an undue hardship defense under USERRA should be prepared to establish an action's excessive expense, not merely its inconvenience.

An employer also can attempt to prove as an affirmative defense that the employee's original position was for only a brief, nonrecurrent period, and that the employee had no reasonable expectation of continued employment.

Benefits

Upon reemployment, the employee is entitled to the seniority and the seniority-based benefits that the employee would have had if the employment had not been interrupted by the military service. For example, an employee is entitled under the FMLA to the amount of leave for which he or she would have been eligible had he or she not taken military leave. The employee is not entitled to any benefit to which he or she would not otherwise be entitled if he or she had remained employed. An employer cannot require an employee on military leave to use earned vacation or other paid time off benefits during the period of the leave.

The employee also is entitled to receive all benefits not determined by seniority that the employer provides to other employees who are on a leave of absence. USERRA provides that vacation accrual generally is considered a

nonseniority benefit that must be provided to an employee only if it is provided to other employees on a leave of absence. Demonstrating the importance of complying with this provision, the U.S. Department of Justice recently filed a class action lawsuit against American Airlines for violation of USERRA, alleging that the airline reduced the employment benefits (including vacation accrual) of pilots who had taken military leave while not reducing the same benefits for pilots who had taken comparable types of nonmilitary leave.²²

The employee is entitled to continuation of health insurance benefits during the military service. Under USERRA, the continuation coverage lasts for the lesser of 24 months from the date of the employee's absence for military service, or the date when the employee is required to return to work.

USERRA requires an employer to adopt reasonable requirements for the selection of continuation coverage. USERRA allows, but does not require, an employer to use procedures governed by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).²³ It may be administratively more efficient for an employer to use its preexisting COBRA procedures. Further, employers who use COBRA-compliant rules regarding the employee's election of and payment for continuation coverage can specify a shorter period of time within which the employee must make his or her election and payment than if the employer does not use the COBRA rules.

The employee is entitled to protection of his or her pension plan benefits. Military service is not considered to be a break in employment for purposes of participation, vesting, and accrual of benefits in a pension plan. The

(continued on page 11)

Returning to Work

(continued from page 10)

employer is required to fund the pension plan to provide benefits that are attributable to the employee's military service, but the employer is not required to make its contribution until the employee is reemployed. For plans to which the employee is not required or permitted to contribute, the employer has the later of 90 days after the employee's return to work or the normal contribution date to make the contribution. If the employee is enrolled in a contributory plan and does not make contributions during the military service, he or she is allowed (but not required) to make up missed contributions during a period beginning with the date of reemployment and continuing for up to three times the length of the military service, not to exceed five years. If the employee does not contribute, he or she is not entitled to any employer match. Employer contributions that are contingent on the employee's make-up contributions must be made according to the plan's requirements for employer matching contributions.

Notice

All employers are required to give all employees notice of their rights under USERRA. The notice, which may be posted, handed to employees, emailed to them, delivered with paychecks, or otherwise provided to them as long as all employees are assured access, is available at www.dol.gov/vets/programs/userra/poster.htm.

Enforcement

For a violation of USERRA, an employee may make complaints to the DOL. The DOL will investigate

and attempt to resolve the complaint. If a violation is found, the employee can recover amounts that were lost as a result of the violation, such as lost wages and benefits, and seek reinstatement, without any penalty to or punishment of the employer.

The employee also may file a private legal action in a federal district court. In addition to the remedies available administratively, if the violation is found to be willful, the court may double the damage award. Courts, borrowing from the definition of "willful" under the Age Discrimination in Employment Act,²⁴ have construed willful to mean that the employer has engaged in conduct with the knowledge that the conduct is prohibited or with reckless disregard of the fact that the conduct is prohibited.²⁵ The court, however, may not award punitive damages.

Conclusion

An employee returning from military service has the right to reemployment with his or her pre-service employer, providing the employee satisfies the eligibility criteria. If the military veteran incurred a disability during service, that disabled employee has the same rights to reemployment, as well as rights to accommodation of the disability. The returning employee also has the right to seniority and other benefits to which the employee would have been entitled had the employee not been on the military leave. The employer may have a defense to a failure to reemploy a veteran if circumstances have so changed that to comply would be impossible or unreasonable or would cause the employer an undue hardship. Employers need to be aware of the various provisions for reemployment and disability

accommodation when an employee returns from military service to ensure compliance and to avoid liability.

Jennifer S. Walther is a shareholder at Mawicke & Goisman, S.C. in Milwaukee. A version of this article originally appeared in the July 2006 issue of the *Wisconsin Lawyer*.

Endnotes

- ¹ Department of Labor supplementary information to 20 C.F.R. pt. 1002
- ² 38 U.S.C. 4301, *et seq.*
- ³ 20 C.F.R. pt. 1002.
- ⁴ *Vickers v. City of Memphis*, 368 F. Supp. 2d (W.D. Tenn. 2005).
- ⁵ *Clune v. Desmond's Formal Wear Inc.*, No. 2:01-CV-606, 2003 WL 21796388 (N.D. Ind. Feb. 4, 2003) (unpublished disposition).
- ⁶ *McGuire v. United Parcel Serv.*, 152 F.3d 673 (7th Cir. 1998).
- ⁷ *Rogers v. City of San Antonio*, 211 F. Supp. 2d 829 (W.D. Tex. 2002).
- ⁸ *Duarte v. Agilent Techs. Inc.*, 366 F. Supp. 2d 1039 (D.C. Colo. 2005).
- ⁹ 42 U.S.C. §§ 12101-12213.
- ¹⁰ *Norman v. University of Pittsburgh*, No. Civ. A. 00-1655, 2002 WL 32194730 (W.D. Pa. Sept. 17, 2002).
- ¹¹ *Id.*
- ¹² *Schmidt v. Methodist Hosp.*, 89 F.3d 342 (7th Cir. 1996).
- ¹³ *Robinson v. Neodata Servs.*, 94 F.3d 499 (8th Cir. 1996).
- ¹⁴ *Henry v. Unified Sch. Dist. #503*, 328 F.Supp. 2d 1130 (D. Kan. 2004).
- ¹⁵ *Office of the Architect v. Office of Compliance*, 361 F.3d 633 (Fed. Cir. 2004).
- ¹⁶ *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995).
- ¹⁷ *Armstrong v. Baker*, 394 F. Supp. 1380 (N.D. W. Va. 1975).
- ¹⁸ *McCoy v. Olin Mathieson Chemical Corp.*, 360 F. Supp. 1336 (S.D. Ill. 1973).
- ¹⁹ *Nichols v. Department of Veterans Affairs*, 11 F.3d 160 (Fed. Cir. 1993).
- ²⁰ *Bryant v. Caritas Norwood Hosp.*, 345 F. Supp. 2d 155 (D. Mass. 2004).
- ²¹ *Office of the Architect*, 361 F.3d 633.
- ²² *Woodall, McMahon & Madison v. American Airlines*, No. 3-06CV-0072M (N.D. Tex. Jan. 12, 2006).
- ²³ 26 U.S.C. 4980B.
- ²⁴ 29 U.S.C. 621, *et seq.*
- ²⁵ *Duarte*, 366 F. Supp. 2d 1039.

From the Chair...



by *M. Catherine Richardson*
Chair of the ABA Standing Committee
on the Delivery of Legal Services

If you have read this column in the past, the first thing you will notice is that I am not Lora Livingston. After five years of service on the committee and three as chair, Lora has rotated off of the committee. We congratulate her on her appointment to the Standing Committee on Legal Aid and Indigent Defendants. Lora provided key leadership for this committee and was instrumental in the development and advancement of its agenda.

During her tenure, the Delivery Committee advanced innovative models for the delivery of legal services through publications and several presentations to sections, bar associations, law schools and other interested organizations. Lora was an evangelist for innovation when speaking in front of bar presidents, state access to justice commission chairs, technology-based practitioners or other judges. She also served as steward for the Delivery Committee's Louis M. Brown Award for Legal Access, taking every opportunity to extol the benefits of the models advanced by the annual award recipients.

During her tenure, the committee provided national leadership on policy issues involving pro se representation and unbundled

legal services. The committee focused on the collection of resources and development of an online technical assistance through the development of its Pro Se/Unbundling Resource Center (at www.abalegalservices.org/delivery/delunbund.html). The committee developed a white paper to guide decision makers through issues that reintroduce practitioners to pro se litigants in ways that expand affordable access to legal services and enable lawyers in the marketplace to earn a living through that representation. The paper has served as a blueprint for states that are exploring the opportunities of expanded access. (It is online at www.abalegalservices.org/downloads/delivery/prosewhitepaperfeb2005.pdf).

During Lora's tenure, the committee brought together experts on the delivery of legal services from a wide variety of perspectives and hosted two Visionaries' Forums, one on the East Coast and one on the West Coast. These forums explored cutting-edge developments and the future of legal services for those of moderate income.

The committee also examined a wide range of policy issues as they developed and provided comments to the proponents and drafters of ABA resolutions, frequently invoking the voice of moderate income consumers for the first time within the issues.

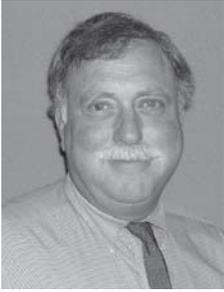
With all due credit to each member of the committee, I think they would all agree that Lora has been a true force in the success of each of these accomplishments. I look forward to the challenge of stepping into this position. I thank ABA President Karen J. Mathis for the opportunity to do so. After

three years as a member of the Board of Governors, it will be a refreshing change to address the agenda of this committee.

As significant as the recent accomplishments have been, much remains to be done. As President Clinton recently said at the Global Initiatives Summit, if you successfully do everything you can think of to make the world a better place, there will still be much left to do. I look forward to working with the Delivery Committee to identify and work with innovative models that provide legal services on a win-win basis for both the lawyers providing those services and the clients who benefit from them. I look forward to further analysis of policies—rules of ethics and procedure—that can be amended in ways that better utilize practitioners who provide unbundled services and technology-based assistance. I look forward to maintaining and enhancing our outreach efforts, increasing the sensitivity to the legal needs of those with moderate income and expanding the reach of legal services to them.

As we pursue these goals, I want to thank, in addition to Lora, the other members of the committee who concluded their service: Adrienne Byers, Marvin Dang and Ron Staudt. Each gave their time, energy, insights and talents selflessly throughout the past three years. Each will now play a valuable role on the committee's Advisory Council. I welcome our new members, Michael Marin, Keith McLennan and Debbie Segal, along with our special advisor, Jeanne Charn. I'm sure we all look forward to joining the continuing committee members in our service to the committee and the ABA.

From the Chair...



by Mark I. Schickman
Chair of the ABA Standing Committee
on Pro Bono and Public Service

Among the many important resolutions passed by the ABA House of Delegates over the years are those regarding equal access to the justice system. The House added to this total when it passed several new pro bono resolutions during the 2006 Annual Meeting in August. Among those resolutions was a much-needed call for law practices, judges and law schools to make organic institutional changes to help lawyers address the serious, persistent gap between the legal needs of Americans of limited means and the services available to them.

The resolutions call for law practices—larger law firms, corporate law departments, government attorney offices, and solo and small firms—to “adopt effective strategies...and ...policies and procedures to support” pro bono and public service work. Every part of the legal system—from law practices of all sizes and types, to organized bars of every kind, to the courts and law schools—are challenged to devote themselves to this goal.

The sponsors of these resolutions, including the ABA Standing Committee on Pro Bono and Public Service (under the sage leadership

(continued on page 14)

Merck: Achieving Pro Bono Excellence

In 1999, Merck & Co., Inc. received the Pro Bono Publico Award from the ABA Standing Committee on Pro Bono and Public Service for its strong commitment to pro bono and for being a leader in developing an in-house corporate pro bono program. Since that time Merck has continued to expand its pro bono program, acted as a model for other corporations interested in developing a pro bono program, and won a number of awards for its program. In 2004, for example, Merck was named Corporate Volunteer of the Year by the Pro Bono Partnership and Volunteer Lawyers for Justice. It also was recognized by the New Jersey State Bar Association. To learn more about how Merck has maintained a strong pro bono culture over the past seven years, Dialogue interviewed Mark Daniel, patent counsel of Merck. He was joined by his administrative associate, Carolyn Coyne.

Dialogue: Tell us about the history of pro bono at your company.

Mark Daniel: The Merck Pro Bono Program began in 1994 at our Rahway, New Jersey location. A partnership was forged with Legal Services of New Jersey and Central Jersey Legal Services, and we volunteered to take on family law and bankruptcy cases. To ensure that the attorneys had the expertise to handle these cases, training was provided by the legal services organizations. Central Jersey Legal Services screened cases for the Merck attorneys and provided office space for client meetings. The first year of the program we handled nine cases. Since the Rahway attorneys had such a positive experience taking these cases, attorneys at Merck sites in Whitehouse Station and Montvale, New Jersey and Upper Gwynedd, Pennsylvania, joined the program. Each site was led by an in-house attorney who volunteered to act as that site’s pro bono coordinator. They partnered with local legal services organizations in providing pro bono legal services.

Because of the success of this expansion and the interest of our attorneys in doing different types of pro bono work, cases involving guardianship, landlord tenant, domestic violence, special education and immigration were added to the program. In 2003, attorneys, paralegals and administrative associates began to assist at legal services sites by providing intake support to walk-in clients seeking legal counsel. In 2004, Merck’s pro bono program partnered with the Pro Bono Partnership to begin handling pro bono transactional work for nonprofit organizations.

It is pretty astounding how much we have grown. We currently have over 50 percent of our attorneys and a large number of our support staff involved in Merck’s pro bono program. At our Rahway site alone we have handled over 200 cases.

Dialogue: What is Merck’s vision for pro bono within the company and for the larger legal community?

Daniel: Pro Bono is an integral part of Merck’s culture. We look at pro bono as a way to give back to the community and as part of our professional responsibility. We also want to encourage other corporate legal departments to consider starting a pro bono program of their own. To this

(continued on page 14)

From the Chair...

(continued from page 13)

of its immediate past chair, L. Jonathan Ross), understood that policy for policy's sake is not enough. Thus, the resolutions contain specific procedural steps and policy guidelines that can be adopted and implemented in law practices, the judiciary and law firms. These recommended strategies provide a good initial checklist to use in evaluating an organization's existing pro bono efforts. But if we are to effectively address the legal problems of the poor, we'll need to add new strategies to our existing bag of tricks. Though the legal profession is second to none in the free delivery of its professional services, the demands of legal practice are too often at odds with that commitment to serve the neediest in our communities.

From my perspective as someone who has been involved in access to justice initiatives throughout most of his career, I am convinced that leadership at all levels of the profession must stand up and be heard on these issues. In California, for example, Chief Justice Ronald George modeled the best practice when he stood

alongside the leaders of California's state and local bars and challenged all lawyers in the state to devote at least 50 hours per year to pro bono work. In the law practice setting, many firms have demonstrated outstanding pro bono commitment, while others have not. The difference usually comes down to whether the firm's leadership has a personal commitment to pro bono and understands its benefits to the firm. They say that all politics are local. The same is true of pro bono and legal assistance to the poor: It happens because the courts and lawyers and law schools on your block work to make it happen.

There are nationwide resources to help these local efforts. The ABA Pro Bono Committee and its Center for Pro Bono have been charged with the responsibility of implementing the recently adopted resolutions. Working groups have been appointed to identify strategies for reaching out to each of the communities addressed by the resolutions. These strategies will include developing tools and resources that can be of assistance. We stand ready to act as a resource and clearinghouse toward the goal of helping you become a pro bono leader in your community. Infor-

mation about the existing resources of the Pro Bono Committee and its Center for Pro Bono can be found at www.abaprobono.org. I strongly encourage you to visit the site and to stay tuned for further developments as the Committee continues its important work.

The Pro Bono Committee exists not only to help the underprivileged who are in need of legal services, but also to make it easier for America's lawyers to engage in that effort. Job satisfaction, personal self worth, status in the community, client expectation, broadened experience: There are many reported reasons **why** we engage in pro bono and public service efforts, and they are all good. Whatever the reason, the Committee stands ready to assist.

There is no greater calling for lawyers than to use the skills to which we have exclusive license to better the lives of those less fortunate than us. It is a great challenge to be a pro bono leader, but we are working hard to make sure you have great weapons at your disposal to meet that challenge. If we will it, it is no dream.

Visit www.abaprobono.org to learn more about the pro bono resolutions approved in August by the ABA House of Delegates.

Merck Profile

(continued from page 13)

end, we have sponsored conferences where we have invited corporate counsel to visit Merck to become educated about its program—how we have structured our programs and how satisfying the work can be. We have also consulted independently with

companies that have been interested in setting up or expanding their pro bono programs.

Dialogue: From a policy standpoint, how is pro bono handled in the company? Do you have a set number of hours that an attorney must work per year? Do you allow a certain amount of an attorney's work product to be pro bono?

Daniel: We have different pro bono

opportunities available to attorneys at each site, depending on attorney interest and community need. Pro bono at Merck is totally voluntary and we do not have a formal pro bono policy. We encourage attorneys to partner together to handle pro bono case demands. Although we do not have billable hours, our attorneys work long hours, and we give them the

(continued on page 15)

Merck Profile

(continued from page 14)

flexibility to work on their pro bono cases when necessary. We are aware that there are times when lawyers will have to represent clients during the work day.

Dialogue: What specifically does the company do to encourage pro bono activity and to maintain long-term participation?

Daniel: We make it easy for our attorneys and support staff to stay involved. We are constantly developing new programs and trying to find interesting cases for our staff. We are also fortunate as we have had two general counsels over the past 13 years who have actively supported pro bono.

It is also important to mention the emphasis we place on training our attorneys for these cases. We provide training for attorneys at Merck's corporate offices or through Legal Services of New Jersey. Legal Services of New Jersey has also provided us training materials, court forms, and sample pleadings. We also have many of these training sessions on video for new attorneys to use. In addition, we encourage our attorneys to travel to legal services offices to obtain training and CLE credit as needed.

Dialogue: How is pro bono managed and overseen in your company?

Daniel: Each site has a volunteer pro bono coordinator. These coordinators meet on a regular basis to discuss the program. Logistically, the process works as follows: the cases are faxed to the coordinators by the legal services office for review. A notice is then sent via email to Merck attorneys

in the program to make them aware of the new cases. Attorneys will volunteer to take these cases and contact the clients to schedule a meeting at the legal services office. The strong partnership that we have with legal services was instrumental to the success of this program.

The pro bono program acts as a "firm within a firm" because we provide a separate phone line for pro bono calls with voice mail and a special fax line. We also have a separate post office box for incoming mail and have pro bono letterhead for external correspondence. In addition, each case that is accepted from legal services is assigned a case number and a file is opened with a corresponding docket sheet, to keep a log of all correspondence. We have a special pro bono account number to charge expenses, and our employees are covered by the local legal services malpractice insurance.

Dialogue: What advice would you give to other corporations wanting to get involved in pro bono?

Daniel: Start small, do not become overly ambitious, and make sure senior management is supportive. Hopefully, these corporations will have general counsels who have done pro bono or are supportive of it. I would also advise companies to bear in mind that a program evolves over years, not days or months. In our experience, corporate pro bono programs that attempt to grow too fast have struggled. There needs to be proper training arranged for attorneys and support staff. It is no different than running a small law firm.

Dialogue: What obstacles have you faced in doing pro bono work? How have you handled these obstacles?

Daniel: The biggest challenge we have faced is managing our time. We have found that the more experience we gain in a legal area of practice, the more efficient we become in handling these types of cases.

Dialogue: What benefits has the company realized as a result of doing pro bono?

Daniel: Our program has helped those in need in the communities where we work. We believe that we have made a difference in these communities and, more importantly, we have provided legal services to those who would have otherwise gone without. Our lawyers and support staff also have become better advocates, and have enhanced their skills by doing pro bono work. Also, they have become better leaders and have developed an appreciation for pro bono work and a connectedness to the community. As Carolyn (Coyne) once said, "My involvement in the pro bono program has proved to be not only a rewarding and interesting experience, but has added a renewed empathy in me for others less fortunate in our society."

Dialogue: How do you send a message to young lawyers that doing pro bono work is important?

Daniel: The most important thing is to lead by example. If young attorneys see their managers actively involved in pro bono they are more likely to get involved and stay involved.

At Merck, we are very fortunate to have Kenneth C. Frazier, our senior vice president and general counsel, who has provided pro bono legal services by handling death row cases. In addition, he is very supportive of Merck's pro

(continued on page 16)

Save the Date: 2007 Equal Justice Conference

Are you a pro bono and legal services program staff member, judge, bar leader, corporate counsel, court administrator, private lawyer, paralegal or law student who is interested in equal access to justice? Plan now to join hundreds of your colleagues in attending the 2007 Equal Justice Conference in Denver from March 22 to 24.

The Equal Justice Conference brings together all components of the legal community to discuss equal justice issues as they relate to the delivery of legal services to the poor and low-income individuals in need of legal assistance. The 2007 conference theme is *Justice in a Changing, Diverse World: Preserving the Rule of Law through Inclusive, High-Quality Legal Services to the Disadvantaged*. Conference programming—over 80 workshops in all—will examine ways the private bar and the legal services community have come together to make a difference for a broad range of clients who have nowhere else to turn to gain effective, quality access to the legal system. There will be a particular focus on strategies for improving delivery of services to those clients.

The Equal Justice Conference is the largest event of its kind in the United States, attracting more than 950 attendees in 2006. Take these steps to include the 2007 conference in your plans for next year:

- Mark the date: March 22 to 24, 2007
- Remember the location: the Hyatt Regency Denver at Colorado Convention Center
- Visit us online and join the conference email list: www.equaljusticeconference.org



Hyatt Regency Denver at Colorado Convention Center



Seeking Nominations for the 2007 Pro Bono Publico Award

The ABA Standing Committee on Pro Bono and Public Service will present five awards to individual lawyers and institutions in the legal profession that have demonstrated outstanding commitment to volunteer legal services for the poor and disadvantaged.

Please nominate a colleague or law firm for the 2007 ABA Pro Bono Publico Award. We particularly encourage nominations of

lawyers of color and women lawyers. The deadline for nominations is February 9, 2007. The awards will be presented during the ABA Annual Meeting on August 13, 2007 in San Francisco. Visit www.abaprobono.org for information about past recipients, nomination guidelines, and a nomination form or contact Tamaara Mason-Piquion at 312-988-5756 if you have further questions.

Merck Profile

(continued from page 15)

bono program by allowing our attorneys and support staff to provide pro bono legal assistance.

We are very proud of our lawyers and support staff for providing pro bono legal services for those in need.

Thanks

The ABA/NLADA Equal Justice Conference would like to thank the Philadelphia Bar Association and the entire host committee of the 2006 Equal Justice Conference for their generous contribution to the Justice Travel Scholarship program. The scholarship program provides individuals who could not otherwise afford it with an opportunity to attend the conference. For more information about the Equal Justice Conference and the scholarship program, please visit www.equaljusticeconference.org.

From the Chair. . .



by Joanne M. Garvey
Chair of the ABA Commission
on IOLTA

Readers of this column know that I often direct attention toward the IOLTA Workshops held during the ABA Midyear and Annual Meetings. There is good reason for this. The workshops are the only opportunity for the vast majority of IOLTA program directors, trustees and staff to gather in person to learn and trade information about IOLTA. Another reason is the consistent high quality of the workshops. Repeatedly, they have been the most energized, dynamic events I have attended during my tenure on the Commission.

The Summer 2006 IOLTA Workshops were no exception. The attendees arrived in Honolulu ready to focus and work during the two days of programming. The Joint Meetings Committee developed an excellent agenda that included several issues of peak interest for IOLTA programs. Among these topics was quality in legal services, aptly treated in a session that addressed the new ABA Standards for the Provision of Civil Legal Aid and the Legal Services Corporation's Performance Criteria. Another session, Strategic Approaches to Using Increased Income, wrestled with the dilemma facing the many

(continued on page 18)

Planning and Implementing an Interest Rate Comparability Requirement

by Jane E. Curran

Dialogue is pleased to present the second of two articles on IOLTA interest rate comparability requirements. The first, printed in the Summer 2006 issue, covered the basic definitions and concepts underlying comparability as it has been adopted in a growing number of states. This article focuses on planning for and implementing a comparability requirement added to the rule or legislation governing the operation of a state's IOLTA program.

The first article in this series described changes to IOLTA rules or legislation termed "interest rate/dividend comparability requirements." Under those changes, banks that choose to offer IOLTA accounts to their lawyer and law firm customers are required to pay interest rates or dividends on IOLTA accounts comparable to what the bank pays to its own non-IOLTA customers. But, the requirement applies only if banks already offer such higher rates, and then only on IOLTA accounts that meet the same minimum balance or other qualifications. Even then, banks do not have to take steps to set up IOLTA accounts as the higher rate products; most simply choose to pay the applicable rate on the existing IOLTA account.¹

Comparability is not a one-size-fits-all approach to increasing IOLTA revenue. A number of IOLTA programs continue to benefit from successful collaborations and negotiations with banks that have resulted in higher rates paid on IOLTA accounts. Comparability may not be a good fit for IOLTA in those situations. But it does offer advantages in states where rates on IOLTA accounts linger well below those paid to comparable customers.

This article describes the key aspects of planning for and implementing an IOLTA comparability requirement, including collaboration with key stakeholders, implementation strategies, communications (including notice to banks and lawyers), and establishing time frames for bank compliance. Some of these issues will be addressed as they relate to the specific provisions of comparability requirements adopted by various IOLTA programs.

Collaboration

It goes without saying that consultation with key leaders of the organized bar, grantees and other IOLTA and legal services supporters should take place when seeking beneficial changes to IOLTA rules or legislation. For interest rate comparability, expanding that consultation to key leaders in the banking community only makes sense.

When some IOLTA programs began planning to seek a comparability requirement, they collaborated with key banking leaders before the requirement was approved by the court or legislature. For others,

(continued on page 18)

From the Chair...

(continued from page 17)

programs that have seen IOLTA revenues spike during the past 12 to 18 months. While increased revenue is unquestionably good news, it also generates opportunities, questions, and some amount of creative tension for organizations that are striving to provide the best stewardship of the new funds. Both sessions provided invaluable opportunities for attendees to gain insight, hear different perspectives, and discuss effective ways to address these developments.

Another timely topic was disaster preparedness. One year after Hurricane Katrina, this session focused on how an IOLTA program can prepare to lead and support the legal services community's response to disaster while handling the disruption of its own operations. This well-received session provided useful background for the Commission's visit to New Orleans in early November for its first meeting of the bar year. That meeting featured a visit with representatives of the Louisiana Bar Foundation to learn more about its efforts to continue IOLTA operations while helping to rebuild

Louisiana's legal services network.

Of course, revenue enhancement was part of the Summer IOLTA Workshops program as well. The attendance of the session on comparability requirements demonstrated that this topic has caught the attention of virtually every IOLTA program. The program provided excellent information, and included an engaging question and answer session. The interest of so many in comparability and the possibility of expansion to more states are very encouraging developments.

What was also apparent is that the recent focus on comparability represents a significant change for IOLTA: in how IOLTA programs conduct business, in how others perceive IOLTA, and in how IOLTA programs perceive themselves. Leaving aside the specifics of this change, I think it is important for the IOLTA community to recognize that a transformation is in motion. As in any case, this change is one that produces both anticipation and apprehension about the end results.

What is important for the IOLTA community is to continue to embrace the values underlying the IOLTA Workshops: the focus on issues of common interest, the exchange of observations and ideas aimed at improving IOLTA,

and the dialogue that is so important to working together. I look forward to resuming the dialogue during the Winter 2007 IOLTA Workshops on February 8 and 9 in Miami. I am confident that the Joint Meetings Committee is preparing another program of timely and inspiring sessions, and further opportunities for discussion. I hope to see you there.

* * * * *

In this issue we welcome two newcomers to the Commission on IOLTA (see profiles on page 22.) Jon Asher has joined me as co-chair of the Commission this year, and brings with him a lifetime of experience in legal services and many years as a fixture in the IOLTA Community. I am delighted by the opportunity to serve with Jon, and I look forward to his contributions this year. I am also pleased that Gloria Wilson Shelton from Maryland—a state with a rich tradition of IOLTA leadership—has joined the Commission as well. I would be remiss if I did not acknowledge the departure of Margo Nichols, who left the Commission at the end of her three-year term in August. Margo is an IOLTA "lifer" and an exceptionally hard-working member of the Commission. We will miss her.

Comparability

(continued from page 17)

it made more sense to make personal contact with bank leaders after approval of the change, but as the first step of the implementation process.

In Florida, for example, the Florida Bankers Association commented on the draft proposed comparability requirement as part of the process for amending Florida's IOTA rule. In doing so, the association suggested language that made clear that, in determining the highest rate or

dividend available in compliance with the comparability requirement, bankers could continue to consider factors they generally take into consideration when setting rates for individual customers. These include the overall profitability of an account to the

(continued on page 19)

Comparability

(continued from page 18)

bank, for example. That language made sense to The Florida Bar Foundation, but it further modified the draft rule to provide that the factors considered by a bank could not include that the account was an IOLTA account. In essence, an IOLTA account that qualifies for a higher rate based on balance or other qualifications set by the bank for its non-IOLTA customers could not be paid a lower rate simply because it is an IOLTA account. That further language made sense to the Florida Bankers Association.

In Massachusetts, the Massachusetts IOLTA Committee notified banks in the state before the proposed IOLTA guidelines were approved by the state's high court. In response, the Massachusetts Bankers Association asked to meet with the Massachusetts IOLTA Committee to discuss the proposal. That meeting resulted in some revisions to the proposed guidelines. Following the court's approval of the revised guidelines, the bankers association arranged a telephone training seminar involving the Massachusetts IOLTA Committee to introduce the revised guidelines. A large percentage of active IOLTA banks in Massachusetts participated in the call.

Collaboration and personal contact with bank leaders is fundamental to successfully implementing a comparability requirement. Bankers need assurance about what a comparability requirement is and is not. (It doesn't require banks to create new products for IOLTA, for example.) And, bankers want information about how vital increased IOLTA income is to addressing unmet civil legal needs and improving

Alternative ways to comply

Some of the more recently enacted comparability requirements provide banks with something akin to a cafeteria approach to compliance. One possible method of complying is referred to as a "benchmark" provision. Under a benchmark provision, banks can comply by paying a specified percentage of the prevailing Federal Funds Rate which has been set to approximate the comparable rate. Another method allows a bank to satisfy the comparability requirement by agreeing with the IOLTA program to pay a rate (again, calculated to approximate the comparable rate) for a specified time period such as 12 months. These options are still based on the underlying principles of comparability—fairness in getting rates that are like those provided to a bank's own similarly-situated non-IOLTA customers.

(Note: Where a program's rule allows for a benchmark rate, it needs to be clear to banks whether the identified percentage is gross or net of service charges and fees which the IOLTA program permits to be deducted from IOLTA account interest.)

the lives of low-income individuals and families in the communities they serve.

Implementation strategy

The complexity, staff time, cost, and time frames to implement a comparability requirement are directly tied to what banks need to do to comply. So, in turn, is the implementation strategy. The simpler compliance is for the banks, the simpler and less expensive it is for the IOLTA program (including staff time). Likewise, the time frame needed for bank compliance is shorter as well.

Provisions that allow for benchmark rates or negotiated comparable rates (see the sidebar on this page on alternative ways to comply) are the simplest and least expensive to implement in terms of staff time, direct costs, and how quickly banks can be expected to comply. Concerns that these provisions may leave money on the table (by generating a lesser yield) may be offset by cost savings

in time and money for banks and for IOLTA programs of a simpler implementation process.

Earlier comparability requirements provide a single approach to compliance, but allow two ways to achieve it. Banks may use an actual higher rate product for the IOLTA account or, as most banks do, simply pay that higher rate on the existing IOLTA account.² Either way, banks are required to pay the highest interest rate or dividend generally available at the bank to its non-IOLTA customers when IOLTA accounts meet the same minimum balance or other qualifications, if any. To determine compliance, these IOLTA programs need reliable data from the bank or from an independent source to verify what rates a bank is paying on comparable accounts held by non-IOLTA customers.

Under this model, initial implementation and ongoing monitoring of bank compliance is more staff intensive, and costly

(continued on page 20)

Comparability

(continued from page 19)

in terms of use of outside consultants (generally needed most during the initial stages of implementation), and requires the acquisition of independent data to verify bank interest rates. However, this model may result in rates that most closely track each bank's actual comparability and generate greater additional IOLTA income.

So, when IOLTA programs consider which provisions to include in an interest rate/dividend comparability requirement, the complexity, speed and cost of implementation need to be weighed against additional income to be gained.

Therefore, before drafting the requirement and planning for its implementation, IOLTA programs should address a number of matters, including:

- Ensuring that they have accurate data on the number and size of IOLTA accounts at each bank
- Documenting current IOLTA account interest rates and service charges and fees at each bank
- Determining whether the remittance data currently required from banks is sufficient to monitor compliance with a comparability requirement
- Deciding how frequently banks are required to raise rates on qualifying IOLTA accounts when they increase interest rates paid to comparable non-IOLTA customers
- Selecting a key financial indicator such as the Federal Funds Rate to trigger an assessment of whether rates paid under the comparability requirement should be rising³

- Last, but in no way least, defining "compliance" under the provisions of the comparability requirement. In states without benchmark provisions (such as a percentage of the prevailing Federal Funds Rate) or an interest rate agreed upon by the IOLTA program and a bank for a specified time period, there is a gray area in determining bank compliance. That's because banks include a number of factors beyond the account balance when setting rates for individual customers. As a result, even independent data about interest rates paid non-IOLTA customers won't always provide a definitive answer to questions about bank compliance. Assessing each bank's approach in light of all relevant factors is required.

Staging

While implementation of an interest-rate comparability requirement must eventually cover all banks, it may be difficult to undertake regarding all banks at once. Implementation can be conducted in stages, starting with the five or 10 banks holding the largest amount of IOLTA-eligible funds. Those banks generally also have the greatest number of high-balance IOLTA accounts—those with average balances of \$100,000 or more. It is these accounts which generally will qualify for the higher, comparable interest rates. But, a comparability requirement also can apply to smaller accounts if a bank offers tiered-rate checking based on balance size.

Notice

Who should be given formal notice of implementation of a comparability requirement, and when?

Audiences to consider providing notice include:

- Banks (that's a given)
- Lawyers and law firms
- Lawyer regulation staff
- Law office management advisory staff attached to the state bar or lawyer disciplinary agencies⁴

Providing notice and information about the comparability requirement to every bank at the start of implementation is the surest way to avoid a cascade of frantic calls evidencing misunderstanding of the nature of the comparability requirement. This is the case even if actual implementation will be staged based on the IOLTA account balances. The communication providing notice should, of course, clearly advise banks of what is expected of them and when. Communications should go to the chief operating officers of the banks with a copy to any contact person the IOLTA programs routinely deal with on remittance and reporting matters. The communication package should include information about how IOLTA income benefits the community.

In contrast, providing notice or information to individual lawyers and law firms isn't necessarily a given. While lawyers may be presumed to know of changes in ethics provisions affecting them, the comparability requirement is designed so that the resulting work is performed primarily by the IOLTA program and also by the banks. Some IOLTA programs have published information on their Web sites explaining that the program is working first with banks to assure smooth implementation and that no action will be required of most lawyers. Under

(continued on page 21)

Comparability

(continued from page 20)

comparability requirements containing benchmark provisions, there is nothing for the lawyers or law firms to do if banks chose to comply in this manner. Even under comparability requirements without benchmark provisions, most banks have chosen to pay the comparable interest rate directly on the qualifying IOLTA checking accounts rather than require lawyers to go through the steps of establishing the higher rate product as the IOLTA account.

If banks choose to comply by actually establishing qualifying IOLTA accounts in REPOs or government money market funds, IOLTA programs will need to contact the affected lawyers and law firms at that time. The IOLTA program should obtain the necessary forms from the bank (generally a sweep agreement and investment selection form). The communication to the lawyers and law firms should advise the IOLTA account signatories that they are required to execute the forms because their bank has decided to comply with the comparability requirement in this manner.⁵

Whether or not lawyers and law firms are given general notice that a comparability requirement has been approved and is being implemented, the IOLTA program should proceed with placing articles in state or local bar newsletters and other communications forums to describe comparability and its benefits to legal services funding and other charitable programs supported by IOLTA.

Establishing a timeframe for compliance

As with the implementation

Getting help

The Commission on IOLTA/National Association of IOLTA Programs Joint Technical Assistance Committee and the Banking/Revenue Enhancement Committee have provided significant assistance regarding comparability to a number of states. To tap into these resources and the collective knowledge and experience of the IOLTA community, please contact:

- Commission Counsel Bev Groudine, 312-988-5771 or bgroudine@staff.abanet.org
- Assistant Counsel David Holtermann, 312-988-5744 or holtermd@staff.abanet.org

strategy, the simpler the compliance provisions are, the quicker banks can be asked to respond and demonstrate their compliance. Even then, however, 90 days from the effective date of the requirement is probably the minimum timeframe. And, flexibility is paramount. Dennis Burnette, a member of the ABA Commission on IOLTA and a Georgia community banker, advised The Florida Bar Foundation that in dealing with banks, it should operate from the assumption that banks want to comply. That's good advice. Nevertheless, implementation will take longer than you like and will involve more telephone calls, meetings and emails than you expect. A good measure of humor, flexibility and assistance to banks will help assure successful implementation. After all, IOLTA programs themselves weren't implemented overnight.

Recognition

IOLTA programs, their grantees, and especially the low-income individuals and families whose civil legal needs have gone unmet, have struggled with the negative impact of reduced IOLTA revenue

over the years. This fact has been especially frustrating when interest rates on IOLTA accounts were only a fraction of those paid to comparable non-IOLTA customers. But, banks were doing what they should do: making money for their shareholders. Comparability requirements now place qualifying IOLTA accounts in a more near-market position. Offering individual thanks and public recognition for those banks that do a good job of implementation is warranted and will reap rewards. While comparability requirements essentially are about revenue and fairness, good will counts!

Conclusion

There is much more to planning for and implementing a comparability requirement, but there is no need to reinvent the wheel. Operating guidelines; manuals; notice letters to banks, lawyers and law firms; and analysis models all are available. Assistance for individual IOLTA programs can be accessed through the joint committees of the ABA Commission on IOLTA and the National Association of IOLTA Programs. In short,

(continued on page 22)

Comparability

(continued from page 21)

there are many resources to assist programs in pursuing comparability and IOLTA programs should not hesitate to tap into them.

Jane E. Curran is executive director of The Florida Bar Foundation and is a member of the ABA Commission on IOLTA.

Endnotes

¹ This rate is discounted for the bank's loss of the sweep fee income.

² As noted in the first article of this series, an interest rate comparability requirement must permit IOLTA eligible funds to be held in higher-paying products such as daily bank repurchase agreements (REPOs) and government money market funds.

³ With the exception of comparability requirements expressly tied to a percentage of the Federal Funds Rate, it is important to note that not every move in the Federal Funds Rate will result in banks increasing or decreasing rates paid to non-IOLTA customers and, therefore, comparable interest rates on qualifying IOLTA accounts. Furthermore, the Federal Funds Rate is only one factor in how banks set interest rates. Nonetheless, analyzing the

relative relationship between the Federal Funds Rate and a bank's REPO rates (for example) over a specified time period can help identify when to gather updated interest rate information from a bank for compliance monitoring.

⁴ Lawyers or law firms might contact regulatory and law practice management staff with questions about the comparability requirement or to confirm its existence.

⁵ This communication would need to provide information and documents to assure lawyers and law firms that they are permitted to have IOLTA accounts in such products as set out in their jurisdiction's IOLTA rule or legislation.

IOLTA News and Notes

Jonathan D. Asher and **Gloria Wilson Shelton** have joined the ABA Commission on IOLTA for the 2006-2007 bar year. Asher will serve as co-chair of the Commission alongside Joanne Garvey.

Asher is executive director of Colorado Legal Services. Previously, he was the long-serving executive director of the Legal Aid Society of Metropolitan Denver before it merged with other LSC-funded agencies in the state to form Colorado Legal Services in 1999. Asher sits on the board of the Colorado Lawyers Trust Account Foundation (COLTAF) and the Legal Aid Foundation of Colorado. An active member of the ABA, he most recently served on Immediate Past ABA President Michael S. Greco's Task Force on Access to Justice. He also is a former member of the Standing



Jon Asher

Committee on Legal Aid and Indigent Defendants, and the Standing Committee on the Delivery of Legal Services. Asher has been recognized for his work numerous times, and is a past recipient of COLTAF's Bruce

T. Buell Award for outstanding leadership in furtherance of the goals of Colorado's IOLTA program.

Shelton is principal counsel of the Courts and Judicial Affairs Division of the Office of the Attorney General of Maryland. In that capacity she serves as the chief legal advisor to Maryland's judicial branch. Shelton is an adjunct professor of law at the University of Maryland School of Law. Earlier in her career Shelton was a judicial clerk for a member of Maryland's high court, worked in private practice, and served in various counsel positions for local government departments before joining the Office of the Attorney General.

An active member of the ABA and state and local bar associations, Shelton currently serves as chair of the ABA Judicial Division's Standing Committee on Minorities in the Judiciary, and is chair-elect of the Judicial Division's Lawyers Conference. She is past president of the Alliance of Black Women Attorneys of Maryland.



Gloria Wilson Shelton

From the Chair...



by Deborah G. Hankinson
Chair of the ABA Standing
Committee on Legal Aid and
Indigent Defendants

I am honored that ABA President Karen J. Mathis appointed me to chair the Standing Committee on Legal Aid and Indigent Defendants (SCLAID). I look forward to working with a committee of dedicated and experienced members, and with bar and legal aid leaders nationwide in seeking to strengthen and expand the system for providing legal services for the poor.

We will have a number of priorities for the work of the Committee this year. We plan to devote ourselves to establishing the new Resource Center for Access to Justice Initiatives. The ABA Board of Governors authorized the creation of this new ABA service this year.

The Committee will also focus on:

- Publication, implementation and utilization of the newly revised *Standards for Provision of Civil Legal Aid*, approved by the ABA House of Delegates last August
- Support for an effective and adequately funded Legal Services Corporation
- Establishment of a civil right to counsel
- Expansion of loan repayment assistance for legal aid lawyers and public defenders

In the area of indigent defense, the Committee will:

- Sponsor the third annual Summit on Indigent Defense for bar and defender leaders in February 2007
- Continue to provide technical assistance and state and national research on indigent defense
- Seek to establish additional state commissions on indigent defense
- Explore opportunities for caseload reform in light of a new ABA ethics opinion on defender overload

In pursuing these objectives, SCLAID is joined by four new members bringing diverse experience in the organized bar and legal services matters:

Judge Lora Livingston began her legal career as a Reginald Heber Smith fellow in a legal services program before moving into private practice in Austin, Texas and later to a position as judge of the 261st District Court of Texas. She has served on the board of the Texas IOLTA program, has been a member of the Texas Bar's Access to Justice Commission, chaired the ABA Standing Committee on the Delivery of Legal Services, and served on the ABA Commission on IOLTA.

Neil McBride is general counsel for the Legal Aid Society of Middle Tennessee and the Cumberland and is managing attorney of its Oak Ridge office. Neil has held a variety of public service positions, including service as a staff attorney with Ralph Nader. In the early 1970s Neil was instrumental in creating new legal services programs serving the poor in Tennessee's Appalachian coalfields and other rural communities. He is an adjunct professor at the

University of Tennessee College of Law, a Fellow of the Tennessee Bar Foundation, a member of the board of directors of the Tennessee Alliance for Legal Services and an elected member of the Tennessee Bar Association's House of Delegates.

Martín Montes is assistant general counsel in Wal-Mart Stores, Inc.'s International Legal Division. He previously served as Wal-Mart's director of Corporate Responsibility, as assistant general counsel for SAM'S CLUB Operations, as a senior associate at a national law firm, and as a judicial law clerk for a U.S. federal district judge. He has been an active member of the Hispanic National Bar Association, and has been very active as a volunteer with the Mexican-American Legal Defense and Educational Fund.

Beverly J. Quail is a partner in the Denver office of Ballard, Spahr, Andrews & Ingersoll, LLP. She concentrates her practice on all aspects of real estate matters with an emphasis on financing and development. She has served as chair of the ABA Section of Real Property, Probate and Trust, and as a chair, officer or member of numerous Colorado state and national organizations of real estate lawyers. She also has been active in public service endeavors, including service on the board of the Colorado Lawyers Trust Account Foundation.

SCLAID will have a number of experienced bar, defender and legal aid leaders among its members among its continuing members. I am grateful for the past contributions of Jean Faria, Judge Karla Gray, Norman Lefstein, Judge Juanita Bing Newton, Mary Ryan, and Thomas Smegal, and I look forward to continuing to work with them.

ABA Resource Center for Access to Justice Initiatives

The ABA has established a new Resource Center for Access to Justice Initiatives, to provide support to state bar, judicial and legal aid leaders and others engaged in efforts to expand access to civil justice in their states. Creation of the Resource Center was recommended by the Presidential Task Force on Access to Civil Justice appointed by Immediate Past ABA President Michael S. Greco.

The Resource Center, which is supervised and managed by the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), combines and expands two previously existing projects:

- The Access to Justice Support Project, which has provided technical assistance, informational materials, training and expert guidance to bench, bar and legal services leaders relating to state access-to-justice structures and initiatives.
- The Project to Expand Resources for Legal Services (PERLS), which provides technical assistance, research assistance, informational materials,

training and expert guidance to bench, bar and legal aid leaders to help them increase resources for civil legal assistance.

The Resource Center serves as a central clearing-house for collecting, cataloging, and disseminating information and data from every state concerning access to justice and resource development initiatives. It provides an online resource library, regular reports and updates, and technical assistance. The Resource Center will also organize the annual national meeting of state Access to Justice chairs, as well as regional meetings and other events.

For additional information, visit the Resource Center online at www.abalegalservices.org/sclaid/atjresourcecenter or contact: State Support Director Bob Echols, echols@suscom-maine.net (for information about state access to justice programs) or Resource Development/PERLS Director Meredith McBurney, meredithmcburney@msn.com (for information on fundraising and resource development for civil legal aid).

American Bar Association
Division for Legal Services
321 North Clark Street
Chicago, IL 60610-4714

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