

Dialogue

Issue Highlights

Pro Bono

Low-income Taxpayer Clinics

Tax clinics contribute much more than meets the eye, but the need for services outstrips current funding 3

IOLTA

Minnesota Disability Law Project

Disabled persons' rights to equality and self-determination guide the priorities of this IOLTA grantee 9

Delivery

Would you like cream or sugar with that?

Serving legal counsel alongside coffee, the Legal Grind, Inc. wins the 2001 Louis M. Brown Award 16

LRIS

"The more things change..."

Will your bar association resist efforts to improve your program? Overcoming obstacles on the road to change 22

LAMP

Military legal assistance confronts domestic violence

Military lawyers fighting domestic violence have a growing arsenal of resources 28

Legal Aid

Supreme Court overturns welfare-related restriction

"The Constitution does not permit the Government to confine litigants and their attorneys in this manner," according to the majority opinion . . . 31

AALS Project Provides Forum for Collaborative Thinking and Action

by Dean Hill Rivkin

The Association of American Law Schools (AALS) has launched the Equal Justice Project, a far-reaching effort to mobilize the resources of the nation's law schools to redress the daunting inequities in our legal system. The project, formally titled *Pursuing Equal Justice: Law Schools and the Provision of Legal Services*, is funded by a grant from the Program on Law and Society of the Open Society Institute.

The project was conceived by the immediate past president of the AALS, Professor Elliott Milstein of American University's Washington College of Law. It was born of the conviction—grounded in the diverse experiences of an advisory group composed largely of experienced clinical law teachers—that the legal system is facing a burgeoning crisis of legitimacy. The advisory group agreed that the problem of maldistribution of legal resources was harming what some estimate to be the 45-75 million low and moderate-income people who have legal problems in which interested and competent lawyers might be of benefit.

Members of the advisory group practice in a variety of clinical settings, addressing topics including immigration and asylum, special education, environmental justice and domestic violence. The group saw from their collective experience the systemic failure of the legal system to address meaningfully the needs of the persons enmeshed (or about to be) in it.

In creating the project, the advisory group recognized that the simple deployment of more legal resources would not inevitably correct the underlying problem of inequality. The group also realized that more lawyers and advocates might serve indirectly to legitimate existing conditions of poverty unless careful, strategic thought was given to

**ASSOCIATION OF AMERICAN LAW SCHOOLS
Equal Justice Project**

Goals
The articulated goals of the Equal Justice Project are as follows:

1. To develop models that can be used in different law school settings with various levels of resources to encourage teaching, scholarship, and service activities that support the provision of legal services to underrepresented groups.
2. To stimulate throughout the entire law school - in nonclinical courses, library programs, and pro bono projects, among others - cross-cutting interest in and commitment to the provision of legal services to underserved individuals, groups, and communities.
3. To establish formal relationships between law schools and equal justice communities aimed at promoting on-going support for the provision of legal services to underserved individuals, groups, and communities.
4. To evaluate the effectiveness of the variety of models and approaches that emerge from the Project with the goal of creating sustained commitments to equal justice education, scholarship, and work in law schools on both the national and local levels.
5. To encourage collaboration among law schools and their faculties in addressing the pressing issues and themes that will be considered in the Colloquia.

—from the AALS website

(continued on page 2)

Pro Bono	1
IOLTA	9
Lawyer Referral	17
Legal Assistance for Military Personnel	24
Legal Aid	31



DIALOGUE

Published by the
American Bar Association
DIVISION FOR LEGAL SERVICES

Dialogue is a quarterly magazine serving as an exchange of information on the funding and delivery of legal services, offering timely, relevant and proactive articles, developments and emerging issues from the ABA Standing Committee on Pro Bono and Public Service, Standing Committee on Lawyer Referral and Information Service, Standing Committee on Legal Aid and Indigent Defendants, Standing Committee on Legal Assistance for Military Personnel, and the Commission on IOLTA.

Robert N. Weiner
Chair, ABA Standing Committee on
Pro Bono and Public Service

John E. Busch
Chair, ABA Standing Committee on
Lawyer Referral and Information Service

L. Jonathan Ross
Chair, ABA Standing Committee on
Legal Aid and Indigent Defendants

David C. Hague
Chair, ABA Standing Committee on
Legal Assistance for Military Personnel

L. David Shear
Chair, ABA Commission on IOLTA

Mary K. Ryan
Chair, ABA Standing Committee on
Delivery of Legal Services

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

David Holtermann
Director of Periodicals
ABA Division for Legal Services

Gail Thompson
Division Designer/Webmaster
ABA Division for Legal Services

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

David Holtermann
ABA Division for Legal Services
541 N. Fairbanks Ct.
Chicago, IL 60611
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
541 N. Fairbanks Ct.
Chicago, IL 60611
312/988-5749
fax: 312/988-5483
email: mbruynseels@staff.abanet.org

*The views expressed in Dialogue are those of
the authors and do not necessarily represent
the policies of the American Bar Association.
The contents of this magazine have not been
approved by the ABA House of Delegates and
do not constitute ABA policy.*

The ABA Division for Legal Services encour-
ages reprints of the articles in Dialogue. How-
ever, all rights are reserved and no material
may be reproduced without express
permission of the ABA.

Division for Legal Services' web address:
<http://www.abalegalservices.org/dialogue/>

©2001 American Bar Association ISSN 1092-2164

AALS

(continued from page 1)

understanding the legal, economic and social issues facing low-income and working class people, and to involving them in creating new solutions.

The advisory group also recognized that its composition put it in a unique position to look at the issues of unequal distribution of legal resources both more globally, and more locally. This was important, because the problem of inadequate legal services can be compared to the problem of environmental degradation described in Garrett Hardin's classic article, "The Tragedy of the Commons." Hardin analyzed how the individual actions of the users of the commons, though economically rational, led to the destruction of this common resource. A similar dynamic is operating in the legal system. Lawyers in their individual realms of the system rarely get a chance to engage with others struggling with similar problems facing poor people. The clients of civil legal services lawyers and criminal defense lawyers often have similar interests, but there are only a handful of places where meaningful cooperation between the two groups of lawyers exists. Lawyers in one realm advocate valiantly for reforms in their own system, but no one is looking at overall needs. As a result, rational reform in one subsystem may harm another.

This is a conundrum perfectly suited for both theoretical and grounded academic inquiry. Legal educators are skilled in identifying discrete problems in their areas of specialty and proposing possible solutions. But few have worked systemically on issues such as the delivery of legal ser-

vices, the skills necessary for community lawyering, or the strategies necessary for cross-fertilization among different segments of the public interest bar. This is a challenge that transcends the narrow concerns of particular subject areas and cuts to the heart of a legal system that professes to be democratic, transparent and humane.

Against this background, the Equal Justice Project aspires to highlight examples of the excellent equal justice work that schools and faculty are doing, to develop models for other schools to adopt, and to encourage those in law schools who would like to contribute to issues of equal justice to find their own paths to do so. This is an auspicious time in the evolution of higher education for such an effort. Many universities are grappling with their obligations toward their communities and are developing community partnership centers and other approaches to harness the talent of faculty and students in community-based endeavors. Service learning for students is a pedagogical phenomenon in its infancy. At the law school level, the issue of the pro bono obligations of law faculty is coming to the forefront, just as it has in the legal profession. The multidisciplinary resources of a university can offer a tremendous stock of knowledge and skills to equal justice advocates.

With this in mind, it is logical that the centerpiece of the project is a series of 19 Equal Justice Colloquia convened at law schools across the country. At these colloquia, law school faculty, administrators and students have convened with the broadly defined equal justice community (including public defenders, legal services

(continued on page 4)

From the Chair...



by Robert N. Weiner
Chair of the ABA Standing
Committee on Pro Bono
and Public Service

I recently participated in a consulting visit to a local bar association, a legal services program and a pro bono project. The purpose was to help coordinate their efforts to expand the delivery of pro bono legal services in their community. The visit was sponsored by the Center for Pro Bono's Peer Consulting Project. The Center for Pro Bono is a project of the ABA Committee on Pro Bono and Public Service.

Through the Peer Consulting Project, the center provides the expertise of experienced staff and volunteer consultants on pro bono issues. The project provides advice and assistance, both on the telephone and in person, to pro bono programs, bar associations (state, local, specialty and diversity), legal services offices, state planning groups, in-house corporate legal departments, government attorney offices, judges, and law schools. Central to the project's focus is linking pro bono programs with new partners who can bring additional resources to efforts to provide legal service to the poor. In addition to consulting on strategic and policy issues, the project also provides technical assistance. The topics include the

(continued on page 5)

Tax Clinics: the New Face of Legal Services

by Janet Spragens and Nina E. Olson

Editor's Note: This is the second installment of a two-part article. In the Winter 2001 issue of Dialogue, the authors described the growing need for tax-related legal assistance among many low-income people, and outlined the emergence of low-income taxpayer clinics to meet that need. Here, the authors describe the contributions of low-income taxpayer clinics, but argue that despite these successes, the clinic movement needs greater support, while the systemic problems facing low-income taxpayers must also be confronted.

Low-income taxpayer clinics (LITCs) make a variety of contributions to their clients and to the tax system. First, they have a proven track record of resolving cases on an orderly basis. A principal way in which they do this is simply by serving as fact gatherers, by developing the underlying relevant information necessary for a settlement conference. It is surprising how ineffectual taxpayers often are in doing this on their own, perhaps because they don't know what information is relevant, they are bad record keepers, or they don't have bank accounts and use cash or money orders with no receipts for their transactions. Many do not keep copies of their tax returns. Few clients come in with organized files of cancelled checks, credit card and bank statements, or other business records for easy review.

The clinics have made a specialty out of proving financial transactions through creative and alternative means. For example, the tax clinic at American University, Washington College of Law, successfully challenged the asserted tax on \$10,000 of unreported lottery income won by one of its clients by showing a pattern of regular gambling activity that produced offsetting losses. Even though the taxpayer, a construction worker, had thrown away his losing lottery tickets for the year in question, the student-attorney assigned to the case interviewed and obtained affidavits from employees of the liquor store where the client had established a regular pattern of buying five tickets per day, six days per week, over several years.

In another of the American University clinic's cases, a client was denied the earned income tax credit (EITC) for his daughter under a "tiebreaker rule" in the Internal Revenue Code because his mother, whose address on her tax return was the same mailing address as the taxpayer's, had a higher adjusted gross income (AGI) in that tax year. Under the tiebreaker rule, if two individuals living in the same household are eligible to claim the EITC with respect to the same qualifying child, the one with the higher AGI must claim it. A student-attorney visited the home and showed, using photographs, that the mother was actually living in the equivalent of a separate upstairs apartment with a separate outside entrance and stairway even though the mailing addresses for mother and son were the same. Thus the tiebreaker rule

(continued on page 6)

AALS

(continued from page 2)

attorneys, program directors and funders of legal services) from the particular region, state or city hosting the colloquium to discuss creative avenues of collaboration. The colloquia are not intended to serve as stops for a traveling "road show" for the project, but rather are individual forums developed on site in each location. This lack of a standard template is in fact an asset, as discussions and ideas informed by local concerns and insights will have much greater resonance than information delivered from afar.

The colloquia have witnessed rich discussions involving the provision of both civil and criminal legal services. The discussions have also ranged into issues of critical importance to underserved communities that need attuned legal representation. The colloquia have addressed questions such as: "can law schools experiment with new models of providing legal services?" and "what can law schools do to support students doing public interest work?" Substantive discussions have included topics such as fair housing, racial profiling, capital punishment, family law and community development. Other topics of discussion have included the links between equal justice and civil justice planning, addressing access to justice issues in law school curricula, and using technology to increase access to justice.

The final colloquium will be held at the end of April 2001. The project is tracking the ideas and conclusions flowing out of all of the colloquia, and intends to include them as part of a final report to be published later this year.

History may serve as a prelude to the achievement of the project's goals. The field of domestic violence, virtually nonexistent twenty years ago, shows how academic ferment can lead to enhanced advocacy. The whole story of the rise of this important field is well beyond the scope of this piece, but one can trace the seminal conceptual breakthroughs in this field to the inclusion of domestic violence in law school courses, to the fostering of greater national attention to the issues (where academics joined with activists), to substantially increased funding for free legal representation. Other fields, where problems are equally as deep-seated, could serve as the spark for a continuum from ideas to advocacy.

The Equal Justice Project has focused on the three pillars of legal education: teaching, scholarship and service (though the latter is often devalued). Although the project is still in the middle of its fact-finding, interesting approaches have emerged in each of these areas. In teaching, for example, there are nascent programs in public interest law and lawyering (both domestic and international), new course work in lawyering for communities, cutting-edge courses in law and organizing, access to justice, fair and affordable housing, and human rights, and new clinical courses concentrating on forefront issues of social justice.

Although civil rights, poverty law and clinical scholarship have carved a legitimate place in legal scholarship, there is a vast gap in scholarship on the organizations that compose the legal system. Just as business schools profitably study the institutions of commerce, similar work on the delivery of legal services would

be hugely beneficial, but is long overdue. The pioneering work of the late Professor Gary Bellow of Harvard Law School stands as a beacon for others to follow. Case studies of the interplay in advocacy among litigation, education and organizing are now emerging, especially from clinicians, but much more can be done to illuminate the formidable barriers that equal justice advocates face. Interesting legal scholarship on economic inequality (for example, in the field of property) is a fertile field for growth.

Service by law schools is taking many forms. The AALS Pro Bono Project is assisting law schools in constructing effective, educationally based and community-grounded programs. The Law School Consortium Project has established Community Legal Resource Networks at the law schools at the City University of New York, the University of Maryland, and Northeastern University, creating synergies among law schools, small and solo community practitioners (who shoulder much of the legal work for the working class and poor), and the communities where they work. Innovative technology developed by law school faculty and staff also holds the promise for aiding the delivery of legal services.

These are but a few of the developments that the Equal Justice Project is tracking. Genuine enthusiasm and inspiration have been evident in the presentations and conversations at the colloquia. Please visit the project's website at <http://www.aals.org/equaljustice/index.html> to learn more about the colloquia and the project.

Dean Hill Rivkin is a professor of law at the University of Tennessee College of Law and the director of the AALS Equal Justice Project.

Child Custody Project Names Director

In February, Linda Rio became director of the newly created Child Custody Pro Bono Project. Rio comes to the ABA from the Chicago Bar Association and the Chicago Bar Foundation, where she served as director of community service. She previously worked as an associate at Sidley & Austin in Chicago, and is a graduate of the University of California Los Angeles School of Law.

The Child Custody Pro Bono Project serves as a national resource in child custody by establishing resources, developing standards and creating training materials that will enhance and expand the delivery of legal services to poor and low-

income children involved in custody disputes, and promote permanency for children by providing legal assistance with adoptions. The project is the result of a grant given jointly to the ABA Standing Committee on Pro Bono and Public Service and the ABA Family Law Section by Bill and Melita Grunow in honor of their deceased niece, Ann Liechty, a former pro bono publico award recipient. The project will be operated under the management of the ABA Center for Pro Bono.

For more information about the project, please call Rio at (312)988-5805, or contact her via email at lrio@staff.abanet.org

From the Chair...

(continued from page 3)

operations of pro bono programs (including recruiting, training, fundraising, technology, advice and referral), planning efforts (such as setting priorities, collaborating with other community providers), and identifying new models for delivery of legal services and new resources for meeting legal needs.

For my recent peer consultation visit, the Center for Pro Bono assembled a team to ensure that the necessary expertise was available to help our hosts with the issues they felt were most crucial. As a former bar president, my role was to meet with bar leaders to discuss the importance of the bar association's active support of pro bono initiatives and to share strategies for what these leaders could do to make a difference. Our team also included an experienced pro bono program manager and staff from the center. They were able to address the difficult and detailed questions the local service provid-

ers were confronting. Prior to our departure we were able to offer our hosts some specific preliminary recommendations. The visit will be followed by an extensive report of comprehensive findings and recommendations.

My participation in this consultation brought home to me—more than the thank you letters from bar presidents and others ever have—just how critical a service the Center for Pro Bono provides. The visit, I believe, was enormously valuable for everyone involved. It also concretely demonstrated what we all know conceptually—that legal services are delivered at the local level. A national organization like the ABA can and should set stan-

dards, develop models, and promote best practices, but we must stay in touch with what is happening in each individual program and, indeed, in individual representations. The Peer Consulting Project maintains and nurtures that vital link between our committee and those on the front lines providing legal assistance to those in greatest need.

For general information about the Peer Consulting Project, please visit its Web page at <http://www.abanet.org/legalservices/pbpages/pbpeerconsult.html> To request a consultation please call Cheryl Zalenski at the Center for Pro Bono at (312) 988-5770, or contact her via email at zalenskc@staff.abanet.org

Visit us on the Web

The ABA Standing Committee on Pro Bono and Public Service and its project, the Center for Pro Bono, recently launched an updated Web site at <http://www.abanet.org/legalservices/probono.html> The Web site provides a wealth of information about current trends in pro bono policies and rules, ideas and models for program delivery, volunteer opportunities and many more subjects. The Web site also includes a statewide directory of pro bono programs and listing of local legal services offices.

Tax Clinics

(continued from page 3)

did not apply.

In addition to fact gathering, clinic attorneys also fulfill the important functions of client counseling, reviewing possible courses of action with the client, and negotiating fair settlements with the IRS. Many of the clinics have bilingual staff and have access to translators to aid in their work. The clinics also handle litigation for the client, should the case proceed to trial. Most clinics also do some collections work as well, which may involve filing an "offer-in-compromise," dealing with liens and levies, placing a client in "currently not collectible" status, or otherwise helping the taxpayer get on a payment plan following the audit.

Interestingly, the clinics have value for clients even in cases where the client clearly has made an error. In those cases, and there are many of them, the clinics perform an important "second opinion" service by helping clients evaluate the merits of their cases and understand that in fact they do owe money and that further litigation is just an exercise in building up interest charges. Often, the government attorneys have already told them this, but clients are distrustful of the source of the information and tend not to believe it. Clinic attorneys can explain the law and the adjustments to clients in a way that often results in taxpayers settling cases. In many instances, clients are not protesting the underlying liability but are simply unable to pay the tax. Clinics can then counsel and represent clients in collection matters. The clinics' involvement

in the controversy process thus frequently results in the timely settlement of cases that would otherwise drag on in the system for years.

The benefits of tax clinics extend beyond client service

Beyond immediate client services, however, the very existence of the LITCs provides a direct and very tangible benefit to the tax system as a whole. That is, the clinics are creating a general sense of confidence in the client population that the system is producing fair results across all income classes, not just for the wealthy. Clients who use LITC services by and large have a feeling of empowerment and confidence that they are not battling a large and frightening bureaucracy alone; but rather that there is someone on their side who is professionally competent, who understands the controversy system, and who is representing their interests. Stated otherwise, it makes the clients feel that the system is for them, too.

LITCs at law schools are also turning out better-trained associates, by giving them experiences, while still in law school, that have direct bearing and effect on the development of their professional skills. The clinics teach students interviewing, client counseling, negotiation and other client interactions. They teach them how to read documents, legal papers and financial records. They teach legal writing skills, in the form of memos, letters, stipulations of fact, trial briefs and motions. And they also teach tax procedure in a direct, hands-on manner, using actual cases and documents. LITCs even teach legal ethics. In addition to their casework, the weekly seminar

sessions the academic clinics hold give the students time to reflect on their experiences with other students and with their professors. The result is more sophisticated and better-educated law graduates and a reduced need for employers to train new associates. Further, the entire legal system benefits from new attorneys predisposed to providing pro bono services to the underserved throughout their legal careers.

Finally, LITCs have the salutary effect of making the tax system responsive to the needs of low-income taxpayers as well as more affluent ones. The presence of clinic attorneys raising procedural and substantive issues guarantees that the tax laws of this nation will reflect not only the values or fact scenarios of well-off individuals who can afford to litigate. In short, clinic attorneys "democratize" both case law and tax administration.

Holistic delivery of legal services

A current trend in the delivery of legal services to the poor is to approach poverty law as a comprehensive support system for low-income persons who seek to transcend poverty.

In the nonprofit world, donors and other grantmakers are now evaluating programs on the basis of whether they have improved the targeted beneficiary's life in some way. It is no longer sufficient for a legal aid attorney to successfully represent a client in an eviction case. The attorney must evaluate the client to determine if the housing is adequate and up-to-code, if the client is eligible for a federal housing subsidy, or if the client was unable to pay rent because of

(continued on page 7)

Tax Clinics

(continued from page 6)

other pressing debts, which might in turn lead to a petition in bankruptcy.

The trend toward holistic legal service delivery helps explain why traditional legal aid societies and other legal service providers are now adding “tax” to the more traditional areas of specialty such as landlord/tenant law, Social Security, domestic violence, and welfare benefits, and why so many have applied for funding under the IRS grant program.

Holistic knowledge of tax and other areas of poverty law has also helped traditional legal services lawyers assist their clients in making sense out of the often conflicting requirements and phase-in/phase-out levels of various tax and non-tax income supplement programs. For example, assume a low-income taxpayer receives a \$1,000 raise from an employer. At certain income levels, that salary increase might allow the taxpayer to qualify for a larger earned income tax credit and/or child credit in addition to the benefits of having a larger paycheck. At the same time the taxpayer could, because of the wage increase, lose eligibility for food stamps or Medicaid as a result of income ceilings on those programs. Add to that the increased FICA and Medicare tax that the taxpayer will owe on the additional income and it is often unclear whether the taxpayer’s disposable income is increased or decreased by the raise. Moreover, in other circumstances, the EITC benefit may also be reduced because of a wage increase, thus compounding the “cost” of the raise.

These intersecting consequences are too infrequently understood or addressed in tax legislation. Congressional tax writing committees might do well to take a page out of the legal service lawyers’ book and spend time pondering these holistic considerations when writing tax laws that affect the low-income population.

Much more needs to be done

Despite the short and successful history of the LITC movement, much more needs to be done to support it and to ensure its continuation. A first and immediate issue is that the IRS grant money is quickly running out. With the increase in the number of grant applications, particularly from existing legal services organizations, the IRS has already cautioned that available funding may not be sufficient to cover new grant requests by as early as 2001.¹ The current funding authorization of \$6 million essentially permits each state and the District of Columbia to receive one annual grant of \$100,000 and enables a few more populous areas to receive some additional funds. This is hardly enough. Based on the caseloads of existing clinics, the demand for tax controversy assistance constitutes a virtual tidal wave of need, and far exceeds the supply. Having a working tax clinic in each major city in the country, as well as having coverage for rural areas, is not excessive. In addition, in areas with large English-as-a-second language (ESL) populations, even greater density of supply may be appropriate. Congress should increase the authorization to \$15 million so that particularly vulnerable populations, including rural

and ESL taxpayers, are adequately served by LITCs.

Second, there are many new LITCs—both at law schools and at legal service organizations—that are seeking IRS grants with little or no prior experience in handling tax disputes. While existing LITCs are doing their best to share materials and information with the newer clinics, the older LITCs are busy with their own cases and academic programs. To meet the training, resource and administrative needs of these clinics, plans are currently in the works for a national Low-Income Taxpayer Clinic Resource Center in Richmond, Virginia, administered by The Community Tax Law Project, as a joint venture with the ABA Section of Taxation. But it is unclear whether one training center can serve the needs of the entire country, including both the academic and nonprofit clinics. Part of the tax clinic funding dollars should be made available to organizations that want to undertake training programs for service providers.

Third, as noted above, more tax clinics are needed. Although almost all of the 175 ABA-accredited law schools in the United States today have some sort of live-client clinics, very few—and none of the Ivy League schools—have tax clinics, despite the opportunity for governmental assistance through the grant program. The list includes many of the schools that offer LLM degrees in tax or otherwise have vibrant tax programs. Tax clinics at academic institutions are important public service vehicles but, as noted earlier, they also provide invaluable educational opportunities for building law students’ tax skills that are not

(continued on page 8)

Tax Clinics

(continued from page 7)

otherwise covered in traditional tax curricula. More law schools should consider offering tax clinics.

Fourth, the private bar and the accounting firms need to step up to the plate and become involved in addressing the needs of low-income taxpayers. Some firms, such as Skadden, Arps, Slate, Meagher & Flom, and Miller & Chevalier in Washington, D.C. have encouraged their associates to take on pro bono cases in the tax area, but they are the rare exception. For the most part, the tax community has not involved itself directly in this problem.

Law firms can help in a number of ways: by making large gifts to start-up and existing LITCs that can be used as matching funds for purposes of the IRS grants; by giving special bonuses to new associate hires with tax clinic experience, just as they do to associates with clerkship experience; by sponsoring National Association of Public Interest Law fellows at tax clinics; by directly participating in VITA programs; and by volunteering to handle pro bono cases themselves through direct referrals or through local bar association tax clinic programs.

Perhaps most critical, however, is the need for the professional tax community to affirmatively support and embrace a moratorium on annual tax changes and, over the long term, simplification of the tax laws, particularly the provisions that relate to low-income taxpayers. The effect of year-in/year-out changes in the tax laws, which require taxpayers to master new forms, new schedules, and new instruction booklets with complex, new rules

every year, puts a crushing burden of compliance on everyone, but particularly on low-income taxpayers, who often have limited literacy and educational skills, language disabilities, and other obstacles that make them the least able to absorb change.

Complexity in the rules produces mistakes, even among educated taxpayers, and mistakes then produce intimidating IRS correspondence, audits, and tax deficiencies that low-income taxpayers have no easy ability to pay. Moreover, few members of this community have computers and sophisticated tax software that can guide them through the maze of rules and import data from the previous year.

One of the effects of complexity has been to push many low-income taxpayers to seek "professional" assistance for return preparation. Even if the tax preparer is qualified, and many who serve this community are not, this assistance is costly and can have unforeseen results. For example, one American University tax clinic client, when asked why he had not filed a tax return for a particular year, said he didn't have \$60 to pay a commercial tax preparation service.

Conclusion

Despite their small numbers and meager resources, the LITCs are having a significant impact on the lives of many taxpayers at the lower end of the economic scale, and in turn on the tax system as a whole. Tax clinics help ensure that just results are reached in controversies across all income groups, not just the wealthy. They also help to build confidence in the system (of which we are all a part) by helping taxpayers better understand the complex adminis-

trative and judicial processes for resolving tax disputes as well as the complicated rules of the Internal Revenue Code. Law schools have long recognized low-income taxpayers' needs for tax assistance. Traditional legal service providers now acknowledge that need in their client populations and are working with the LITCs to help meet it. But the LITCs require the help and support of the entire tax practitioner community as well. It is time for that community both to recognize the problems low-income taxpayers have in complying with their tax obligations in the system, and to become part of the solution.

Endnote

¹ Statement by John Gunner, National Director of Education, Walk-in, and Correspondence Improvement Division, IRS, at the ABA Section of Taxation/American University Workshop on Tax Clinics, February 25, 2000.

Janet Spragens is a professor of law at the American University, Washington College of Law, and the director of the law school's Federal Tax Clinic. She is also the executive director of the American Tax Policy Institute and a member of the Council of the ABA Section of Taxation.

Nina E. Olson was recently appointed as the National Taxpayer Advocate of the Internal Revenue Service. She is the founder and former executive director of the Community Tax Law Project and is the last retiring chair of the ABA Section of Taxation Committee on Low Income Taxpayers.

This is adapted from an article originally printed in Tax Notes. Its contents are Copyright 2000 Tax Analysts, and may be reprinted only with the permission of Tax Analysts.

From the Chair...



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

This year began with several important developments in the litigation involving the Texas and Washington IOLTA programs. On February 6, the Fifth Circuit Court of Appeals heard oral arguments regarding the case against the Texas Equal Access to Justice Foundation. On January 10, the Ninth Circuit Court of Appeals issued a decision finding that there was a Fifth Amendment taking of client property by Washington State's IOLTA program, and remanding the case back to the district court to determine whether there is any just compensation due. (Both developments are described in more detail on page 14.)

The Commission will continue to assist the Texas and Washington programs, and it will work to disseminate accurate information about the court decisions and new developments. By filing *amicus curiae* briefs in both the Texas and Washington cases, the ABA has demonstrated its commitment to IOLTA over the years, which support I am confident will continue. The National Association of IOLTA Programs (NAIP) has also played an important role in support of the Texas and Washington programs. Its partnership with the Commission

(continued on page 11)

Grantee Spotlight: The Minnesota Disability Law Center

by Lisa Cohen

On September 14, 2000, Minnesota state officials, advocates and people with disabilities joined together to celebrate the closing of all state regional treatment centers for people with developmental disabilities. Minnesota is one of ten states to have accomplished de-institutionalization from regional treatment centers for people with developmental disabilities. This achievement was the result of work begun by the Minnesota Disability Law Center (MDLC) 29 years ago. MDLC's efforts began with *Welsch v. Likins*, a class action lawsuit filed on behalf of persons with mental retardation in the state's institutions.

In 1972, Patricia Welsch's father came to the Legal Aid Society of Minneapolis for help. Patricia was a young woman with profound mental retardation who had been living at Cambridge State Hospital since age seven. The 800 persons living at Cambridge State Hospital had nothing to do but sit on benches, lie on the floor or pace around. Treatment consisted of administering drugs; habilitation was non-existent. With state hospitals facing budget cutbacks and conditions worsening, *Welsch* was filed in federal court that summer. *Welsch* initially focused on the deplorable conditions at the Cambridge State Hospital for persons with mental retardation. For the next 17 years, the class action sought to improve and modify the institutional system for persons with mental retardation.

The filing of the *Welsch* case was the beginning of what has become the Minnesota Disability Law Center (MDLC). While MDLC provides legal services similar to other legal services organizations, it is a unique legal program in Minnesota. It differs from other legal services programs in Minnesota in that MDLC provides services **statewide**. There is a main office in Minneapolis from which staff directly serve much of southern Minnesota, and there are branch offices in four northern communities. Staff members are frequently present in all parts of the state. In 2000, MDLC represented people in 79 of Minnesota's 87 counties. Forty-one percent of MDLC's clients live in rural areas of the state.

MDLC is designated by the governor as Minnesota's Protection and Advocacy System for individuals with disabilities. While much has improved since 1972, people with disabilities still face huge obstacles in American society:

- One of every five adults with disabilities has not graduated from high school, compared to less than one of ten adults without disabilities.
- In 1997, over one-third of adults with disabilities lived in a household with an annual income of less than \$15,000, compared to only 12 percent of those without disabilities.
- Unemployment rates of working age adults with disabilities have

(continued on page 10)

Spotlight

(continued from page 9)

hovered at the 70 percent level for at least the past 12 years.

As a result, MDLC's mission is *"to advance the dignity, self-determination and equality of individuals with disabilities."*

Accordingly, MDLC works to promote, expand and protect the human and legal rights of persons with disabilities by providing legal representation, legal information, training, and other advocacy services.

"The theme of our work is that whatever we do should lead toward the person with a disability living in the most integrated way—the fullest way—that they want and are able to. All of our work points toward that," states MDLC legal director Pamela Hoopes.

In order to achieve this goal, MDLC represents clients in legal proceedings to ensure that counties and private entities comply with applicable laws affecting clients' rights. If persuasion fails, staff represents clients in administrative hearings and court proceedings.

Each year MDLC also responds to hundreds of inquiries by phone and letter from all over the state with brief legal advice specific to the problems of individuals with disabilities. Advocacy groups, services providers, schools and government officials regularly refer clients to MDLC for advice and assistance.

Unlike other legal services programs, clients seeking legal assistance from MDLC must have legal problems that arise out of their disabilities. Unrelated family law, consumer law or landlord-tenant law problems are referred to other legal aid programs. MDLC addresses issues related to unique problems arising out of the disabili-

ty which involve specialized areas of the law not usually addressed by legal services staff in other programs. For instance, the social service programs for persons with a mental illness or persons with developmental disabilities are often complex programs requiring specialized knowledge of eligibility requirements and the scope of services available.

In addition to providing direct representation and legal advice, MDLC offers assistance by training people with disabilities, their relatives and advocates on their rights regarding services they may be eligible for, as well as how to enforce those rights. In 2000, MDLC staff presented 132 community education events reaching more than 4,500 people with disabilities, family members, advocates, and services providers. The staff also produces written materials including manuals, booklets and handouts that provide a reference for people to use after the training session. In the past year, MDLC has published a series of 42 legal education fact sheets on disability law issues.

MDLC also serves as a technical resource to private attorneys and legal services programs.

Center staff members consult regularly with both public and private sector attorneys. In 2000, MDLC provided technical assistance to more than 400 professionals, including attorneys, social workers, school teachers and administrators, and other service providers.

In another role, MDLC assists advocacy groups, legislators and agency officials in drafting legisla-



MDLC attorney Anne Henry interviews a client.

tion and regulations affecting their client populations. Staff serve on advisory committees and rule-making groups such as the Minnesota Department of Human Services Advisory Council on Mental Health and the Governor's Council on Developmental Disabilities. MDLC staff bring a rare combination of legal expertise and knowledge of state-of-the-art services to these policy level discussions.

MDLC plays a key role in Minnesota's disability community by providing technical assistance to community organizations on major policy issues. For example, the Center has taken the lead in coordinating the efforts of Minnesota's disability community to press the state to develop a plan that would provide people with disabilities services in the most integrated setting, pursuant to the U.S. Supreme Court's holding in *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999). MDLC sponsored a community briefing and planning session and is negotiating with state officials to implement the disability community's recommendations. As part of this effort staff are

(continued on page 11)

From the Chair...

(continued from page 9)

will allow us to continue to foster IOLTA as a viable and enduring source of funding for legal services.

In February, David Burman, lead counsel for Washington's IOLTA program, spoke during the Winter 2001 IOLTA Workshops in San Diego and offered his thoughtful analysis of the Ninth Circuit decision. David remains optimistic that the Washington State program will prevail in court. I am also optimistic that the courts will ultimately uphold the constitutionality of both the Washington and the Texas IOLTA programs. The bedrock principle upon which IOLTA is founded is that clients suffer no loss as a result of the program, and I believe that on careful examination of the facts the courts will recognize this.

The Winter 2001 IOLTA Workshops, presented by the ABA Commission on IOLTA and NAIP, were held against the backdrop of the developments in the Fifth and Ninth Circuit cases. In the wake of these developments, the workshops were an invaluable opportunity for the members of our community to come together, reconnect with our core purpose, and look ahead to the future. Among the many highlights of the workshops were the newer directors' breakfast, and presentations on grantee collaboration, IOLTA program Web sites, and court-based projects to assist *pro se* litigants. The Thursday sessions featured a panel on revenue enhancement and the ever-popular banking breakout sessions. A panel discussion on the future of the legal profession and the impact of changes on IOLTA caused us to envision the different scenarios

that may affect IOLTA programs in the coming years. Finally, the session on enhancing support for legal services and message development prompted us to focus on the core mission underlying IOLTA—ensuring access to justice—that makes the effort and struggle to build IOLTA programs so very important and worthwhile.

I would like to thank everyone who came to San Diego, and especially the workshop speakers and the members of the Joint Commission/NAIP Meetings Committee, who dedicated their time and energy to planning and

presenting the workshops. The level of energy among the panelists and the audience was evident throughout the program, and all indications are that the workshops were very well received.

On a final note, I would like to welcome Zona Hostetler to the Commission. She replaces Michael Phenner, who was unable to continue to serve on the Commission. Zona brings with her a wealth of experience with the District of Columbia's IOLTA program and with the ABA. She is already contributing to the Commission's work and we are happy to have her on board.

Spotlight

(continued from page 10)

working to ensure adequate funding to fill vacancies for personal care attendants, private duty nurses and other community workers who are critical to ensuring the integration of people with disabilities into the community, through negotiation and litigation.

For many years MDLC has been a key player in developing policy for people with disabilities in Minnesota. In a groundbreaking move in the early 1990s, MDLC staff first crafted the Advance Psychiatric Directive and shepherded it through the legislature. The directive marked a new era of independence and self-determination for individuals with mental illness who are involved in managing their own treatment. Currently center staff are actively involved in protecting the rights of individuals with mental illness as the Minnesota commitment bill is being rewritten.

As the Protection and Advo-

"MDLC... serves as a technical resource to private attorneys and legal services programs."

cacy System for Minnesota, MDLC receives a variety of federal grants to protect and advocate for people with disabilities. In addition to federal funds, MDLC receives funding from a variety of local sources including IOLTA, which has given grants to MDLC for 10 years. These IOLTA funds enable the center to serve more people with disabilities and to serve individuals whose disabilities do not qualify them for help under federal grants. These funds are particularly helpful in ensuring that MDLC is a truly statewide organization and maintains a presence in the rural areas of the state.

Lisa Cohen is administrator of the Minnesota Disability Law Center.

Conference on Women, Poverty & the Law Strengthening Collaborations between Poverty Law Advocates and Grantmakers

by Bonnie Allen and Meghan McCleary

Over the past 10 years, the federal government has dramatically cut the safety net that most Americans believe is essential to maintaining a civil society. This has occurred in an era of changing public attitudes toward individual responsibility and compassion for others. A significant number of Americans maintain that people should work harder and be less dependent on governmental “hand-outs.” However, according to polling conducted last year by Belden Russonello & Stewart, a majority of the American public agrees that the government should support access to legal assistance for poor and working poor people.

In the midst of these shifting currents of public opinion, the federal government—through massive cut backs and restrictions—has tied the hands of organizations that provide low-income individuals and communities with the basic legal assistance needed to protect their rights. Women, their families, and senior citizens are most affected by the severe limitations. Many no longer have an adequate safety net to catch them or legal representation to protect them.

Given the attack on funding and the lack of awareness about the need for free legal assistance for low-income communities, the National Legal Aid & Defender Association (NLADA), Women & Philanthropy, the National Association of IOLTA Programs, the Management Information

Exchange, and the Center for Law and Social Policy hosted a forum for grantmakers to discuss the importance of funding legal and policy advocacy for low-income women and girls. The conference, *Women, Poverty & the Law: Making the Connections*, took place in Chicago in September 2000 and drew over 80 participants.

Angela Davis, professor in the History of Consciousness Department at the University of California, Santa Cruz, opened the conference with a riveting discussion of the interlocking forces of racism, sexism and classism that keep women in poverty. Professor Davis presented a poignant critique of the criminal justice system and its treatment of poor women and men. She discussed how women within prisons have the highest rates of poverty of any population nationwide, are more likely to be victims of violence and employment discrimination, and lack educational equity. Catherine

Samuels, Director of the Law and Society Program at the Open Society Institute, then outlined recent changes in law and policy impacting low-income women, including cuts and restrictions on federal funding of the legal services system, the erosion of affirmative action, the welfare-to-work transition, and threats to women’s reproductive freedom. Samuels stressed the need for foundations—now more than ever—to fund a progressive advocacy agenda designed to give poor people and communities the tools they need to overcome poverty.

Break-out sessions during the conference examined specific issues of globalization, violence against women and girls, community economic development, women’s health and reproductive freedom, women in the criminal justice system, and low-wage workers. These sessions also showcased examples of grant-

(continued on page 13)

Suggestions for IOLTA directors seeking to build relationships with other funders:

- Determine which members of your IOLTA program’s board might serve on a local foundation board or might be able to identify foundation trustees they know. Get them to set up a meeting to talk about the need for the philanthropic community to support legal services.
- Contact and participate in your local Regional Association of Grantmakers. There are 28 regional associations across the country that seek to help more than 3,400 local grantmakers practice more effective philanthropy.
- Contact your local women’s foundation or contact the Women’s Funding Network at <http://www.wfnet.org>. Make the connection between legal services issues and women’s issues.
- Contact NLADA or the Project for Equal Justice for communications materials about legal aid.

Conference

(continued from page 12)

funded projects that include innovative legal strategies designed to help women cope with these challenges and take charge of their lives. Additional breakout sessions highlighted capacity-building grants used to develop technological solutions needed to deliver legal services to low-income people, increase the public's awareness of the need for legal advocacy for low-income people, strengthen litigation and policy advocacy at the state level, and foster collaborations between national advocacy organizations and grassroots groups.

John Russonello of Belden Russonello & Stewart presented his firm's research—funded by the Open Society Institute and managed by the Project for the Future of Equal Justice—regarding the public's attitudes toward the availability of and need for civil legal services for low-income people. Russonello reported that nearly 90 percent of the public supports the principle of providing people with legal help, regardless of their ability to pay. Nevertheless, the research also shows that there is little public awareness of the need for and availability of free legal help for low-income people. Unfortunately, this low visibility also exists in the philanthropic community.

In the closing plenary session, a panel of funders discussed the role of philanthropy in supporting systemic change through funding policy and legal advocacy and the need for a much more aggressive funding agenda. Jane Ransom, Director of the Minnesota Women's Foundation and former director of Central Pennsylvania Legal

Services, facilitated a discussion about raising awareness among funders of the need and impact of legal work. The group acknowledged that more outreach is needed to inform funders of the important role of legal advocacy in carrying out their substantive agendas. Several participants also stressed that IOLTA directors can be instrumental in educating funders in their states by participating in local advisory councils and regional affinity groups.

Among the attendees were staff from all levels from the Ford Foundation, the Open Society Institute, the John D. and Catherine T. MacArthur Foundation, the Joyce Foundation, the Wieboldt Foundation, the Rockefeller Foundation, the David and Lucile Packard Foundation, and the George Gund Foundation. Several IOLTA directors also attended. A broad range of public interest advocates participated on panels, including several representatives of legal service organizations.

What's Next?

For future collaborative efforts to be successful, it is imperative that the legal aid community and other poverty law groups connect with colleagues in the grantmaking community. To further this effort, legal aid advocates should strengthen their ties with advocates in the civil rights community and women's community who have existing relationships with grantmakers and who could be essential partners.

Legal aid advocates should strengthen public and private support, including private foundation support. Legal aid advocates also should identify and participate in strategic alliances with other advocacy groups to make sure their voices are heard

in Congress and in the larger equal justice community.

IOLTA directors are particularly well positioned to help make connections between legal aid advocates and private foundation grantmakers. IOLTA directors can engage in peer-to-peer discussions with other funders to educate them about the need for legal advocacy as well as the impact it has on low-income people. The suggestion box that accompanies this article lists several tips for IOLTA directors interested in reaching out to other funders.

To facilitate making these connections, Chicago-based Valerie Denney Communications will produce communications materials for funders that outline:

- who legal aid advocates are and what they do and who they serve;
- why legal advocacy is essential for low-income individuals, families and communities; and
- outcomes of legal advocacy (both systemic and individual cases). NLADA and the Project for the Future of Equal Justice will use these materials to communicate with funders nationally, and they also will distribute them to legal aid providers, IOLTA programs and others to use in communicating with funders at the state and local levels.

For more information or to offer input on this initiative, please contact Bonnie Allen at (202)452-0620x221, b.allen@nlada.org or Meghan McCleary at (202)887-9660, mmcclary@womenphil.org

Bonnie Allen is director of resource development at NLADA.

Meghan McCleary is deputy director of Women & Philanthropy.

Ninth Circuit Issues Ruling in Washington State IOLTA Case

by Bev Groudine

On January 10, 2001, the United States Court of Appeals for the Ninth Circuit issued its ruling in *Washington Legal Foundation v. Legal Foundation of Washington*, 236 F.3d 1097 (9th Cir. 2001). The Court reversed the district court, holding that the interest generated from IOLTA accounts is client property that has been taken by the judicially created IOLTA program. The three-judge panel (Judges Kleinfeld, Trott and Silverman) did not find the Washington IOLTA program to be unconstitutional or enjoin the program from operating. Rather, it remanded the case to the district court to determine the amount of just compensation, if any, due plaintiffs.¹

This case involves First and Fifth Amendment challenges to the application of the Washington



IOLTA rules to limited practice officers (LPOs), who are non-lawyer legal professionals licensed to complete documents associated with real estate closings. The Washington Supreme Court created the IOLTA program in 1984, and it applies to client funds held by lawyers in amounts too small, or held for too short a period of time to generate net interest for clients. In 1995, the Washington Supreme Court

extended the IOLTA rules to funds held by LPOs in trust for clients.

The Washington Legal Foundation filed this action in 1997. On January 30, 1998, the district court ruled that IOLTA interest was not the property of the client and dismissed the suit. The district court rendered its decision several months prior to the United States Supreme Court's ruling in *Phillips v. Washington Legal Foundation*, 524

(continued on page 15)

Texas Case Goes Before Fifth Circuit Court

On February 6, 2001, the Fifth Circuit Court of Appeals in New Orleans heard oral arguments in the ongoing litigation against the Texas IOLTA program. Arguments in the case, *Washington Legal Foundation, et al. v. Texas Equal Access to Justice Foundation, et al.*, were made to a three-judge panel of the court consisting of Judges Jacques Weiner, Jr., Rhesa Barksdale and Emilio Garza. Robert Long of Covington & Burling argued on behalf of the Texas Equal Access to Justice

Foundation, and Charles Fried argued for the plaintiffs.

The case before the Fifth Circuit is on appeal from the January 28, 2000, decision in favor of Texas' IOLTA program by United States District Court Judge James R. Nowlin. In that decision, Judge Nowlin dismissed with prejudice all claims against the Texas Equal Access to Justice Foundation and its chairperson in the remanded case of *Washington Legal Foundation, et al. v. Texas Equal Access to Justice Foundation, et al.*, 86 F.Supp.2d (W.D.Tex.2000).

TJEF and the IOLTA community have benefited from the assistance given by many private attorneys during the course of the Texas IOLTA litigation. They include: Darryl Jordan, David Schenck and Beth Bivans of Hughes & Luce; Rich Johnston and Francine Rosenzweig of Hale & Dorr; Robert Long, Caroline Brown and David Franklin of Covington & Burling; Nory Miller of Jenner & Block; and Alan Morrison of Public Citizen.

Ninth Circuit

(continued from page 14)

U.S. 156 (1998), which held that the interest generated on IOLTA accounts is the property of the owner of the principal.

In ruling that the interest generated by the Washington IOLTA program is property of the client, the Ninth Circuit rejected arguments of the defendants that attempted to distinguish the *Phillips* decision on the ground that Washington law differed from the Texas law at issue in *Phillips*. The Ninth Circuit held that Washington had accepted the common law rule that interest follows property.

The Ninth Circuit then addressed the takings issue and determined that a taking had occurred. In reaching its decision, the court applied a *per se* takings analysis rather than a "regulatory" takings analysis. Historically, the courts have applied the *per se* analysis only to cases involving real property; all

other property has been subject to the regulatory takings analysis. To find a *per se* taking, the court need only find that a physical invasion of property has occurred or a regulation has denied a property owner all economically beneficial or productive use of land.²

However, in a regulatory taking, the court must weigh three factors: the degree of interference with the complainant's investment-backed expectations; the severity of the economic impact on the complainant; and the nature of the government's action.³ The only other court to reach the takings issue in an IOLTA case applied the regulatory takings analysis and found that no taking had occurred.⁴ That case is currently on appeal to the United States Court of Appeals for the Fifth Circuit.

The Ninth Circuit did not rule on whether any just compensation was due plaintiffs, but rather remanded the case to the district court on that issue. In doing so, the Court stated: "...just compen-

sation for the taking may be less than the amount taken, or nothing, depending on the circumstances, so determining the remedy requires a remand." The Ninth Circuit did not address the plaintiffs' First Amendment claims.

On January 31, 2001, the Washington IOLTA program filed a petition for rehearing and rehearing *en banc*, arguing, in part, that the panel erroneously applied the *per se* takings analysis to this case. On February 14, 2001, the Washington Legal Foundation and other appellants were ordered to file a response to the petition by March 5, 2001. The court had not ruled on this petition as *Dialogue* went to press.

In reaction to the Ninth Circuit's decision, L. David Shear, Chair of the ABA Commission on IOLTA stated: "We believe that ultimately the courts will uphold the constitutionality of this vital program, which provides access to our civil justice system for tens of thousands of the most needy members of our society."

Commission Adds New Member



Zona Hostetler of Washington, D.C. joined the ABA Commission on IOLTA at the beginning of 2001. Hostetler brings to the commission a wealth of experience in the ABA and with IOLTA. She is chair of the Fellows of the American Bar Foundation and is chair-elect of the ABA Section of Individual Rights and Responsibilities. She was also a longstanding member of the ABA House of Delegates as representative of the District of Columbia Bar. Hostetler is co-founder of the

District of Columbia Bar Foundation, and has served as secretary of the bar foundation's board since 1978. She helped draft the IOLTA rule for the District of Columbia IOLTA program in 1984. Currently a partner at O'Toole, Rothwell, Nassau & Steinbach, Hostetler also teaches legal ethics at American University's Washington College of Law.

Endnotes

¹ In order to find a violation of the Fifth Amendment Takings Clause, three elements must be proven: 1) there is a protected property interest; 2) the government has "taken" that property; and 3) just compensation for the property is due and has been denied. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 315 (1987).

² *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)

³ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)

⁴ *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 86 F. Supp.2d 624 (W.D.Tex. 2000)

Bev Groudine is counsel to the ABA Commission on IOLTA.

Legal Grind, Inc. is Honored with Brown Award

Santa Monica, California coffeehouse Legal Grind, Inc. received the American Bar Association Louis M. Brown Award for Legal Access at a presentation on February 17, 2001, during the ABA Midyear Meeting in San Diego. The Louis M. Brown Award for Legal Access is sponsored by the ABA Standing Committee on the Delivery of Legal Services, which is dedicated to improving the delivery of legal services to moderate-income people who do not qualify for subsidized legal assistance yet lack the discretionary income to pay for traditional legal services.

Legal Grind was established in 1996 as a neighborhood café providing coffee and legal counsel. Its customers have access to lawyers who volunteer to give legal information on topics such as family law, landlord/tenant matters and workers' compensation. According to its founder, Jeffery Hughes, Legal Grind was established to provide convenient access to legal information in a relaxed atmosphere so that people could have a better understanding of how to resolve their legal issues.

"Legal Grind demonstrates the type of commitment to innovation the legal profession needs to pursue," said Mary K. Ryan, chair of the standing committee. "We recognize the obligation to do more to bring legal services to people. Staffing a coffee house with lawyers who can help people understand their legal issues furthers that obligation in a simple, yet very significant way."

Two legal projects received meritorious recognition in this year's Brown Award competition: the Lawyer Advice Line, operated



Mary K. Ryan, chair of the Standing Committee on the Delivery of Legal Services, is pictured with Jeffery Hughes of Legal Grind, Inc., winner of the 2001 Brown Award. They are flanked by Ken Carson of MyCounsel.com (left) and Kansas Bar Association Director Dennis Harwick (right), representing Kansas Legal Services. MyCounsel.com and Kansas Legal Services received meritorious recognition in the Brown Award competition.

by Kansas Legal Services, and the Internet company MyCounsel.com. The Lawyer Advice Line provides a telephone hotline that gives people access to a lawyer for their questions. The hotline charges callers who do not qualify for legal aid \$3.00 per minute for the information lawyers provide. Although hotlines are not unique, the Lawyer Advice Line is uncommon because it provides fee-based services to those with moderate incomes within the infrastructure that delivers legal services to the poor.

MyCounsel.com uses the power of the Internet to provide extensive information about important legal issues. Topics include those matters most likely to be necessary for middle-income consumers, such as family law, real estate, wills and personal injury. In addition to information, MyCounsel.com provides site visitors with answers to legal questions through the use of its virtual law librarian. For those who then determine that they need the services of a lawyer, MyCounsel.com provides a

directory from its national network of participating lawyers.

The award is named in honor of Louis M. Brown for his 60-year dedication to expanding access to legal services. Brown was the founder and chair of the National Center for Preventive Law and the originator of personal legal check-ups and corporate legal audits.

The Standing Committee on Delivery of Legal Services has produced a booklet describing the projects nominated for the 2001 Brown Award, titled "Profiles of Moderate Income Delivery Programs," which is designed to stimulate improved access to legal information, services and representation. The booklet will be available online at <http://www.abanet.org/legalservices/delivery.html>.

For more information about the Brown Award, see the Standing Committee on Delivery of Legal Services Web site at <http://www.abanet.org/legalservices/delbrown.html> or contact William Hornsby, staff counsel to the committee, at (312)988-5761 or whornsby@staff.abanet.org

From the Chair...



by John Busch

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

Can you define what distinguishes your service from those who may seek to call themselves lawyer referral services solely for personal gain, as opposed to public service? In the past, the public has been plagued by sham services established to enrich the owner or attorney without providing service to the client. These services sold access to zip codes or geographical territories, or referred cases only to themselves, without helping clients find the best solutions to their legal problems.

The ABA Standing Committee on Lawyer Referral and Information Service (LRIS) is drafting a definition of lawyer referral and information service in response to a need highlighted by communications between the LRIS Committee and the ABA Ethics 2000 Commission, which has been evaluating and recommending changes to the ABA Model Rules of Professional Conduct (MRPC). The Ethics 2000 Commission has proposed revisions to Rule 7.2 of the MRPC, which deals with lawyer advertising, including consideration of lawyers who pay referral fees to a lawyer referral service. The LRIS Committee does

(continued on page 18)

New York State Program Wins 2001 Cindy A. Raisch Award

by Colleen Glascott

The New York State Bar Association Lawyer Referral and Information Service (NYSBA LRIS) was awarded the 2001 Cindy A. Raisch Award on February 15. The 2001 award was presented at the National Association of Bar Executives luncheon during the American Bar Association Midyear Meeting in San Diego. The award, established by the ABA Standing Committee on Lawyer Referral and Information Service in 1996, is named for Cindy A. Raisch, an innovator and national leader in the quest to improve the quality of service provided by lawyer referral and information services.

The Raisch Award recognizes "superior lawyer referral and information programs worthy of emulation." The New York program received the award because of its continued commitment to excellence and unique efforts to provide assistance in the wake of disasters. The award also recognizes NYSBA LRIS's leadership role and outreach to local bar lawyer referral services to encourage and assist them with quality-of-service improvements.

The NYSBA LRIS started in 1981 with a basic service that provided names of attorneys. Over the years it has evolved into a much more sophisticated operation. The program has established consumer protections and experience standards which attorneys must meet in order to participate. It has implemented quality control measures to monitor the success of its operation, and provides information to the public through professional public relations methods. It serves its attorney members by finding appropriately matched clients, and serves the public by making referrals to qualified attorneys with experience in the required area of need.

The NYSBA LRIS is in compliance with the ABA Model Rules Governing Lawyer Referral and Information Service, and is therefore an "ABA-approved" lawyer referral service. It has set high standards for its panel members by requiring malpractice insurance and written certification that no disciplinary proceedings are pending, and that the applicant maintains the requisite professional expertise to handle matters competently. Follow-up measures with clients and attorneys have been designed and enhanced over the years to ensure the service maintains a uniformly high standard of excellence.

(continued on page 19)



NYSBA LRIS Director Audrey Osterlitz accepts the 2001 Cindy A. Raisch Award from John Busch, chair of the ABA Standing Committee on LRIS

From the Chair...

(continued from page 17)

not believe that the intent of this proposed change is to endorse lawyers who “buy clients” through payments to an entrepreneur who will supply, for a significant fee, lucrative cases in a particular geographical area. Given that the term “lawyer referral” carries credibility among many consumers, how do we define a legitimate public service LRIS program to which an ethical attorney might properly pay a referral fee?

Whether the entity seeking payment is for-profit or non-profit may seem to indicate whether it is a public service program. However, there are many for-profit lawyer referral entities that make lawyer referrals as a public service, and in compliance with the model rules and ethical constraints. On the other hand, many of the very best state, county or metropolitan bar associations hope their LRIS program will realize a surplus, which can be used to improve the LRIS program or for other public service activities of the bar. A private entity that can do likewise and still perform a public service arguably should be entitled to function without being in violation of the proposed model rules. So what other standards separate the fish from the fowl?

Consider the following criteria, discussed at a recent LRIS Committee meeting:

- **Open panel referrals.**

It goes without saying that an LRIS program that serves the public will seek the widest possible panel of qualified

attorneys for participation. Sham services limit their panel to a favored few attorneys or those willing to pay more than a nominal rate for referral opportunities.

- **Reasonable payment for referrals.**

Referrals are not made without administrative costs and overhead expenses. A nominal



fee or a small percentage of the fee earned on a referred case passes the ethical “smell test.” However, an offer of several thousand dollars for referral to all the cases acquired in a certain zip code is clearly not an ethical approach to lawyer referral, in the opinion of the LRIS Committee.

- **Cases handled by a firm or entity apart from that which makes referrals.**

Clients are entitled to the widest range of attorneys qualified to handle their case. The ethical rules should prohibit the practice of limiting referrals to a lawyer in the firm that acts as the referral entity.

- **Cases referred on a rotational basis.**

To state the obvious, a legitimate referral service does not play favorites. A referral is made on a rotational basis to a panel of approved, qualified attorneys by chance or by pre-established sequence. Attor-

neys who are on LRIS panels are entitled to assurance that there will not be cherry picking by a favored few.

All of the criteria listed seem self-evident. Drafting a definition of lawyer referral services sufficient to incorporate these and other standards is more complex. The LRIS Committee, with input from program directors across the country, proposes the following definition of lawyer referral as a starting point for discussion: “A public service lawyer referral and information service is an individual or entity that operates for the purpose of providing potential clients to qualified lawyers

(whether or not the term “referral” is used) on a sequential basis, with participation open to all lawyers having sufficient experience, at a reasonable cost that does not discourage widespread participation, and which provides a discernible public service based on the needs of the client. A lawyer referral and information service shall not be owned, directly or indirectly, by lawyers receiving 20 percent or more of referrals made, and shall not give referrals from a specific geographic region or subject area to a single lawyer or law firm.”

The public deserves protection from sham services. Those of you who toil out of a commitment motivated by public service are invited to mail or email your comments to Sheree Swetin at American Bar Association, Division for Legal Services, 541 North Fairbanks Court, Chicago, Illinois 60611-3314, sswetin@staff.abanet.org; to John E. Busch at P.O. Box 1819, Elkins, WV 26241, jbusch@buschtalbott.com; or to any Standing Committee member. Let the dialogue begin.

Raisch Award

(continued from page 17)

Beyond the everyday duties of the LRIS, three programs have been created to help the people of New York when disaster strikes. The first program, "Farm Aid," responded to the crisis faced by New York farmers in 1986 when the federal government began a concerted effort to foreclose on farm loans. The NYSBA LRIS asked for volunteers with experience in agricultural and farm law to provide free consultations. In cooperation with the New York State Department of Agriculture and Markets, the program organized seminars to educate farmers. It received the attention of the governor's office, which provided free radio public service announcements, and it was included in the National Association of Bar Executive's "Best Projects of 1986."

The NYSBA LRIS started a second program in 1991 during the *Desert Storm* action. It was part of an NYSBA assistance effort for New York military service personnel and their families affected by

troop deployments to the Persian Gulf. Volunteer LRIS panel attorneys provided free legal advice, and NYSBA staff members volunteered their time to answer telephones during special evening hours set up especially for members of the military and their families.

The third program started by the LRIS provides assistance for weather-related disasters. Floods, ice storms, thunderstorms and tornadoes have occurred in upstate New York on several occasions in recent years, with many counties being declared eligible for state and or federal disaster relief. After each such weather event, the LRIS has put in place a program to provide timely and free legal advice to persons affected by the disasters. The program was designed to be simple and efficient. Volunteers from the LRIS panel are solicited by fax, and a press release announces the assistance. If the volunteers require supplemental materials to enable them to provide adequate information to those referred, the LRIS furnishes

them. The attorneys are asked to provide advice by telephone, for the convenience of the person needing assistance. All services are coordinated with state and federal disaster relief agencies.

John Busch, chair of the ABA Standing Committee on LRIS, noted that, "The efforts of several individuals in particular have been instrumental in the development of a top-notch lawyer referral program. On behalf of the standing committee, I extend my sincere congratulations and thanks to the LRIS director, Audrey Osterlitz; Bill Carroll, NYSBA executive director; John Williamson, NYSBA associate executive director; and Paul Hassett, NYSBA president, and all of the LRIS staff, committee members and panelists that worked so hard to create an exceptional LRIS. The NYSBA program is a model of public service!"

Colleen Glascott is staff assistant to the ABA Standing Committee on Lawyer Referral and Information Service.

Referred Cases Yield Large Fees

The great majority of lawyer referral cases result in \$500 to \$1,000 fees. These are the bread and butter cases of lawyer referral. They pay the rent and operating costs.

But every once in a while, a **big** percentage fee comes along! Two lawyer referral services recently received huge checks.

The Chicago Bar Association celebrated its 60th year in service by receiving the biggest percentage fee in its history. A

long-time panel member settled a personal injury case for \$3.24 million, and personally delivered a check for \$108,000 to Jean Pavela, director of the lawyer referral service.

The Louisville Bar Association in Kentucky also received a substantial percentage fee: \$202,500 from a panel attorney who settled a medical malpractice case referred by the lawyer referral service for over three million dollars! LRS director Vivian Miller says this is the largest per-

centage fee check the program has ever received.

Although lawyer referral service programs are a public service, they are also in the **business** of public service. As stated by the fortunate CBA attorney with the lucrative personal injury case, "The LRS has been a very important part of my practice. Generally, the LRS provides me a higher quality of clients than any other of my referral sources."

Online Challenges To Lawyer Referral Services

by William Hornsby

As Internet access continues to grow, Web sites providing access to lawyers and legal services are flourishing. Beginning about two years ago with an infusion of venture capital estimated to be approximately \$100 million, lawyers and entrepreneurs have teamed to experiment with ways to meet otherwise unmet legal needs. Combining the capacity of technology with a degree of creativity, these "dot-coms" are changing the landscape of the delivery of legal services.

From the practitioner's perspective, lawyer referral is a method of outsourcing the function of getting clients. It is a convenient, cost-efficient way of marketing, joining the law firm's business-getting tools such as the yellow pages, brochures and civic involvement. Lawyers providing personal legal services, such as divorces, bankruptcies and real estate closings, have high volume practices with substantial turnover and limited repeat business. They are dependent on making their availability known to an ever-widening group of potential clients. Online access has the capacity to do this in an unparalleled manner. If done at a reasonable cost, participation with dot-coms may be very attractive to lawyers as an additional method of outsourcing the marketing function.

Currently, online client development is done in some combination of three basic ways, in addition to lawyer referral. Some sites are straightforward online directories. Others are value-added directories, where the site

provides the consumer with information beyond merely the information about available lawyers. Perhaps the most innovative online marketing method involves a bidding system.

Online directories are convenient alternatives to published directories. For those with Internet access, the directories are available 24 hours a day, seven days a week. They are more likely to be current and they can generally provide more information to potential clients at less cost than published alternatives. A typical online directory allows the user to cross-reference the subject of the legal matter with the location of the participating lawyer. For example, someone who needs a lawyer to handle a probate matter in Denver would click on probate and Colorado, yielding a list of names and contact information for those lawyers listed with the online directory under that criteria. For examples of these straightforward online directories, see <http://www.attorneypages.com> and <http://www.attorneyfind.com>

Many online directories include additional value-added dimensions. For example, Lawyer Connect includes criteria for its participating lawyers, giving potential clients some quality assurance. Other sites that include lawyer directories provide viewers with resources to become better informed about their legal matters. For example, MyCounsel.com offers online legal information and access to a "virtual law librarian" to answer specific legal questions in addition

to its directory of participating lawyers. Some sites are not focused directly on the law at all, but include access to a lawyer for the needs that may arise within the subject matter of the site. The Split-Up Divorce Web site provides a wide range of information and resources for those considering or pursuing a divorce. Legal aspects are only part of what is considered. The site's directory enables consumers to access a lawyer, as well as various other professionals such as mediators, therapists, accountants and financial planners. These value-added directories have an increasingly wide assortment of options.

Online directories are an adaptation of, and in some respects, an improvement on the pre-Internet, hardbound volumes. Another form of online client development that has evolved in the past few years adapts a method of finding a lawyer in the business community and applies it to personal legal services. Online bidding sites are similar to RFPs used by corporations and institutions to solicit legal work. This system permits a client who needs a lawyer to provide information about the case and receive bids from lawyers who are interested in representing the client. Use of the Internet as a method of widespread distribution may make bidding a viable alternative to other methods of client development.

Interestingly, the notion of using the Internet to match potential clients with lawyers

(continued on page 21)

Online

(continued from page 20)

willing to provide their representation may have originated in the pro bono setting. The California-based Public Counsel Law Center provides lawyers with the opportunity to volunteer for specific cases by posting brief information about those in need of pro bono representation. Entrepreneurial sites such as Case Match, Attorneys Bid and Legal Match are variations of this theme, offering to match fee-paying clients with participating lawyers.

While the directories and bidding sites involve client development, the Internet also enables lawyers to directly provide some services online. Lawyers are using the Internet to provide legal advice, fill out forms and, in some cases, undertake complete representation. To some degree, this allows the lawyer to

disintermediate the function of client development altogether. The potential client does not need to go to any resource to find a lawyer to undertake a legal matter. Instead, the client goes to the source that actually provides the service. This eliminates the middleman. So, instead of going to a site to find a lawyer to ask a legal question, a consumer can go to Ask-a-lawyer, where the lawyer will answer short questions for \$20. Anyone interested in forming a corporation in Bermuda can go to a specially designed site of a local law firm, Appleby Spurling & Kempe, and complete the process over the Internet. While it is not a substitute for many matters, this type of distance lawyering is finding a role that will also have an impact on all forms of client development, including lawyer referral.

As the experiments continue to explore the use of technology to further client development and

provide legal services, not all methods will succeed. However, changes are certain. Many of these changes will be beneficial to both participating lawyers and potential clients. Consequently, lawyer referral services need to not only be knowledgeable about these developments, they need to conduct their own experiments as they explore new ways of improving the delivery of legal services to the public.

William Hornsby is staff counsel in the ABA Division for Legal Services, providing staff support to the Standing Committee on the Delivery of Legal Services. For more information about the use of technology to deliver legal services, see <http://www.abanet.org/legalservices/deltech.html>

Neither the author nor the ABA endorses any services or online sites referred to in this article. They are mentioned for the purposes of illustration only.

Mark Your Calendars!

The 2001 National Lawyer Referral Workshop will be held October 31 through November 3, 2001 at the Argent Hotel in San Francisco. This year the workshop will feature a full day of programming specifically for California programs on Saturday, November 3, in addition to the normal Saturday morning sessions.

The workshop provides an excellent opportunity to network with colleagues from across the country while enjoying one of America's premier cities. The Argent Hotel has easy access to San Francisco's best neighborhoods for arts, culture, entertainment and shopping. We look forward to seeing you in the Bay Area next fall.

ABA Launches New Web Page to Help Consumers Find Legal Help

The ABA Division for Legal Services has created a new Web site that brings together a number of resources for low and moderate-income people seeking legal help. The Web site explains the various avenues that Internet users can choose in seeking legal help, and provides links to examples of many of the services now available online. Visit the site at <http://www.abanet.org/legalservices/public.html> Watch for details of the formal launch of the site—including a more memorable URL—in the coming months. If you have any comments or suggestions about the new site, please contact Terry Brooks at (312)988-5747 or tjbrooks@staff.abanet.org

Selling Change to Your Bar Association

by Lish Whitson

“It often takes more courage to change one’s opinion than to keep it.”

—Willy Brandt

“The more things change, the more they suck.”

—Butt-head

Let’s say you have some new ideas that will make your lawyer referral service more responsive to consumer needs, will enhance revenue and will make every member of your bar want to join the lawyer referral service panel. Will your committee, panel members, director and officers of the bar association have the courage to try something new, or will they emulate Butt-head?

The answer to both questions is probably “yes.” The people with whom you work want the service to be successful. You can tell them about programs at other services around the country and they will envy their success. However, implementing those programs will mean no longer doing things the way they always have been done. And, as we know, change is hard for most people.

Every bar association has its

own culture and strengths. Every bar also has its own, set way of doing things and its own weaknesses regarding certain issues. For example, when percentage fees were first gaining some acceptance in the 1980s, many LRS programs would not even consider implementing a fee sharing policy until the state bar, the state supreme court or a trial court had ruled that percentage fees were ethical. Once the bar or the court had said such fees are ethical, those programs took the issue to their bar leadership or panel members. However, when some met with initial resistance, they simply stopped trying to get the bar leadership to implement a percentage fee program, even though they could show it would improve the service.

There is a better model for change in your program. It requires a mixture of political savvy, some people of good will at the policy making level and a willingness to stick your neck out. Remember the American Bar Association’s message regarding lawyer referral services: we are in the “business of public service.” If your bar accepts this statement as the mission of an LRS program, you have a platform for change.

Let’s use an example of a programmatic change that many services are struggling with at present. The ABA Model Rules Governing Lawyer Referral and Information Service urge all

bar associations to have experience panels. These panels will help a lawyer referral service distinguish itself from a mere telephone directory by referring clients to attorneys who have the experience to competently handle more complex legal issues. This is a simple concept. Nonetheless, it has met with strong resistance in many bar associations.

What is the policy you want to change and why do you want to change it? You want referrals of complex cases to go to lawyers who have experience in handling that type of complex case. Why? You want to distinguish your service from the yellow pages and from services that sell attorneys referrals by zip code. You want to provide real service and you want to do what you can to make sure the referral is handled competently, not by someone learning on the job. You want to enhance the quality of referrals you get, and you believe that success in high profile cases will lead to better referrals.

You also want less experienced attorneys to get referrals, but that can be accomplished through a general panel for less complex cases and with a mentor program, so less experienced lawyers can work with more experienced lawyers on complex cases. Most attorneys, when asked who they would go to for a complex medical malpractice case or a messy child custody case or a convoluted bankruptcy case, understand that there is a difference in quality between experienced and inexperienced lawyers. They

(continued on page 23)

Do you need help with promoting change in your program? The ABA has a clearinghouse of letters, forms and information from LRIS programs across the country on topics such as marketing, subject matter panels, rules for suspension and discipline, client and attorney follow-up, and fee collection. We can also connect you to other referral service directors who have successfully brought about changes in their programs. For personalized assistance, call or email Sheree Swetin at (312)988-5755, sswetin@staff.abanet.org or Jane Nobsch at (312)988-5754, jnosbisch@staff.abanet.org

Selling Change

(continued from page 22)

would not refer family members to an inexperienced lawyer and they should not expect the LRS program to refer those cases to someone who has not handled a similar case in the past. The areas in which a bar will choose to set up experience panels will differ from community to community.

Now you know what you want to do and why you want to do it. How do you sell it and implement it in your bar association? Part of the answer to that question is timing. If you have a president, a committee chair or an executive director who is opposed to the change, it will not be accepted in most cases. Therefore, you wait. But whether you must wait for a change in leadership or feel you can proceed, you should compile as much information on successful experience panel programs around the country as possible. A story of success supported with concrete examples will help sell the program more quickly than the theoretical virtues of an experience panel program. Take care not to cite successes in bar associations that are demonstrably different from your bar. For example, a rural program should find examples from other rural bars, rather than a metropolitan bar. The ABA can aid you in this.

You now have some examples of other bar associations' successes with experience panels and there are no people presently in the leadership who openly oppose the concept. How do you make the sale? First, you must convince your committee. Normally, unless your committee is comprised entirely of panel

members, this should not be hard. They care about the program or they would not volunteer to serve on an LRS committee.

You will present them with the merits and demerits of a service that does not have experience panels. You will show them the material you have gathered from other successful services. You may even want to have an ABA Program of Assistance and Review (PAR) visit when you initiate this effort so that you can present your committee with the PAR consultants' recommendations on this point.

If your committee agrees that the reasons in favor of experience panels outweigh any objections, you must ask them to assist you in selling the change to the members of your panel. If your panel members resist, it will normally be for one reason—an assumption that the quality and quantity of referrals they will receive will diminish. However, the information you are able to show them from other services may not support this assumption. If the quality of the referrals improves, the quality of the cases coming into the service should at least remain constant, and may improve with the enhanced reputation of the service in the community. The service should also gain a higher profile in the bar. In many instances, attorneys who would not join a traditional LRS panel change their minds when there are experience panels, because they see the potential for quality referrals for a relatively nominal fee.

With the committee and the panel members supporting you, you can now go to the bar leaders and get their endorsement of the concept. If possible, let the

volunteers do the talking. If they are enthused, their leaders will normally go along.

With approval, you must now implement the program. One model is to enlist the aid of the top lawyers practicing in the fields you identify for potential experience panels. For example, you can establish a group comprised of committee members and experienced lawyers from each such field. You can ask them to identify the criteria for those kinds of cases that require an experienced lawyer in that field of law, and what experience qualifies a lawyer to be on that panel. There are examples of panel definitions and criteria from programs all over the country and, again, the ABA can assist you in compiling this information.

When the committee has accepted the panels and the criteria, you should do what you can to get the word out to potential panel members and to the bar generally. You should then give the information to the media and to the community organizations that have traditionally sent consumers to you for referrals. This is a significant improvement to your service which can earn you some publicity. Your LRS program, which has always served the community well, will now serve it twice as well.

Whatever you seek to do to improve your service will involve change. To overcome the resistance of the Butt-heads, you must have a clear vision, a game plan, patience, a compelling story and the cooperation of the volunteers. If you believe and you persevere, it will get done.

Lish Whitson is a PAR consultant and a past chair of the ABA Standing Committee on Lawyer Referral and Information Service.

LAMP Committee Announces Distinguished Service Awards

by Daniel K. Bean

The Standing Committee on Legal Assistance for Military Personnel (LAMP) recently announced the winners of the 2001 LAMP Distinguished Service Award. Established in 1980, the award program is designed to recognize outstanding military legal assistance effort and performance and to promote the quality and effectiveness of the legal assistance programs of the armed forces.

Criteria for the award, which can be presented to either a group or individual, includes exceptional achievement, developing a major legal assistance innovation, and demonstrating superior effort. The LAMP Committee received nominations for 36 outstanding programs and individuals for the 2001 award, and faced the difficult task of limiting the award to the six recipients it can recognize each year.

Task Force Falcon Legal Assistance Office

One of the most impressive nominations was from a unit that provided legal assistance in a hostile combat environment: the Task Force Falcon Legal Assistance Office, Office of the Legal Advisor, Camp Bondsteel, Kosovo. This group of hard-chargers provided legal assistance seven days a week throughout last year. On average over 128 soldiers were assisted every week on a walk-in basis. Remarkably, this legal assistance was provided in the midst of a combat zone

during a United Nations Peace Enforcement Mission.

Additional achievements of the Kosovo program include filing over 1,250 federal and state tax returns, registering 242 soldiers and Department of Defense employees to vote in the 2000 election, and providing over 30 pre-deployment briefings attended by more than 8,000 soldiers. In their "free time," members of this legal assistance command also maintained a legal assistance Web site that provided yet another source of assistance for soldiers with access to the Internet.

HQ Warner Robins Air Logistics Center Legal Office

Although it did not have to dodge any landmines in delivering legal assistance services, HQ Warner Robins Air Logistics Center Legal Office, Robins Air Force Base, Georgia, had a terrific year in 2000. The group's most outstanding achievement was the development of the Air Force's first Expanded Legal Assistance Program (ELAP) in over 20 years. ELAP permits legal assistance offices to represent clients in state court proceedings.

In 1999, Warner Robins sought and received approval from the Air Force Judge Advocate General, Major General William Moorman, USAF, to establish ELAP. The group then created subject matter jurisdictional guidelines for the program, which included adoptions,

paternity actions, guardianships, probate, landlord/tenant and breach-of-contract issues. The group also had the keen foresight to coordinate and educate the local civilian bar on ELAP. As of fall 2000, the program had assisted over 29 clients.

Joint Legal Assistance Office, Marine Corps Base, Camp Pendleton

Taking legal assistance to the client is a major reason why the Joint Legal Assistance Office, Marine Corps Base, Camp Pendleton, California, was selected for a Distinguished Service Award. This unit provided legal assistance services to over 50,000 clients throughout 2000, despite numerous staffing shortages. One of the reasons this group was able to reach out to such a high volume of clients was because of its implementation of computer software. This software database, which required off-duty time to install and perfect, ultimately enabled the unit to save time because it combined multiple office tasks while completing them quicker than ever before.

Responding to specific client needs, the legal assistance office conducted weekly immigration classes that provided information regarding how to fill out immigration paperwork and avoid potential delays in the system. Marine legal assistance attorneys were often out of their respective offices providing on-site estate

(continued on page 27)

From the Chair...



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

Legal assistance attorneys and commanders, this column is for you.

Are you ready to die? More importantly, in terms of your professional responsibility, are those you are duty bound to protect and support ready to die? Will their estates be disposed of as they wish and will their children be cared for when they die? Will someone be able to act in their behalf if they are POWs or incompetent and will they be able to die with dignity if terminally ill or injured rather than be forced to exist on life support?

Commanders, legal assistance attorneys, and others responsible for the welfare of service personnel must ask themselves these questions. Their answer should be: "I have done everything possible to ensure that the service members and service member spouses for whom I am responsible have—at a minimum—up-to-date beneficiary designations for Serviceman's Group Life Insurance (SGLI) and any other life insurance, a will, a living will (advance medical directive), and a durable power of attorney." This is vitally important because you

(continued on page 26)

*LAMP Spotlight...
Lamp Committee
Visits Washington, D.C.*

by Bryan Spencer

The ABA Standing Committee on Legal Assistance for Military Personnel met in Washington, D.C., from January 25 to 27. This was a slight change of pace, in that instead of meeting at a military base, the committee visited the Pentagon, the Supreme Court and the American Bar Association's Washington office. And in lieu of a CLE program, the committee went through a "continuing political education" program.

The committee meeting began with a high-level gathering hosted by MG Walter Huffman, the Army TJAG, and attended by other senior service JAGs along with LAMP Committee Chair BG David Hague and Sheree Swetin, the committee's staff director. The parties discussed the mission of the committee, the relationship between the committee and the services, and what the committee could do to further assist legal assistance officers.

Later, Bob Evans, associate executive director of the ABA Governmental Affairs Office (GAO), along with Mond Kumbula-Fraser, ABA legislative counsel and GAO liaison to the LAMP Committee, explained how the GAO works to promote ABA policy in Congress. In the last session of Congress, GAO lobbying efforts built support for the ultimate passage of the LAMP Committee's initiative for a standard Department of Defense (DoD) will execution procedure, eliminating the need to tailor each military will execution to the requirements of a specific state. That initiative began as a resolution passed by the ABA House of Delegates. Contacts with members of Congress by Evans, Kumbula-Fraser and Hague helped clarify misconceptions about the initiative and garnered support.

The ABA legislative liaison group will be back this spring to urge support for the tax bill, again introduced by Sen. John McCain (R-AZ), to provide relief for military personnel from the two of five years requirement for waiver of capital gains upon sale of a home. Any reader who has personal contact with any member of Congress and who would like to support this initiative should contact Sheree Swetin at (312)988-5755.

Bette Garlow, staff director of the ABA Commission on Domestic Violence spoke to LAMP about the goals of her commission in combating domestic violence. She outlined training programs provided across the country and described materials produced by the commission, including a special coloring book for children affected by domestic violence. Legal assistance staff interested in further information on this subject or training can contact Garlow's office at (202)662-8637. COL David Anderson, USMC is the LAMP Committee's liaison to the Commission on Domestic Violence.

The committee's meeting was highlighted by the presentations by Chris Paul, from Sen. McCain's office, and Jack Pollard, from the office of Rep. Ike Skelton (D-MO). A number of issues were discussed with

(continued on page 26)

LAMP Spotlight...

(continued from page 25)

these Congressional staffers, the GAO staff members and the committee, including the continuing need to educate the changing congressional membership and staff on legal assistance and other military issues; Congress' focus on family services and quality of life issues; and how the ABA and LAMP can further the goal of providing better legal assistance to the military members, retirees, and their families.

The committee was treated

to a tour of the Supreme Court by Clerk of the Supreme Court, Major General William Suter, USA Retired, a former judge advocate officer and LAMP committee member. Seeing and hearing about the inner workings of the Court was very enlightening and entertaining.

In its regular business session the committee heard updates from the Department of Defense liaison, the chiefs of each service legal assistance program, and the JAG schools. Also discussed were topics such as:

- increasing the visibility of legal assistance

- the committee's Web site project
- a legal assistance poster reflecting average civilian charges for handling routine legal assistance client problems
- the status of ELAP programs
- multijurisdictional practice and its effect on legal assistance providers
- the committee's first distance learning project which will cover the DL wills program
- voting on the six LAMP Distinguished Service Award winners.

Many thanks to all who helped make this meeting so productive.

From the Chair...

(continued from page 25)

can be certain that some of your soldiers, sailors, airmen, Marines, and their spouses will die on your watch.

Active duty service members—privates and seamen to generals and admirals—die every day, sometimes en masse as a result of training accidents or terrorist acts. They often die individually in automobile wrecks, workplace mishaps, foul play, and other totally unexpected events. Only the terminally ill, suicidal and aged die expectedly. Death is a surprise to everyone else, even those engaged in combat.

Individual legal needs vary but some are universal. The single, first-term enlisted person or officer needs less legal support than the married mid-career service member. Everyone, however, should have a living will that clearly expresses his or her desires regarding medical care if in a terminal or vegetative state. Furthermore, all married personnel should have wills. Those with

children should have wills with testamentary trusts that identify guardians for their children and trustees who will ensure their children are financially supported until they reach their majority. Finally, just about everyone should have some form of a durable power of attorney.

Whatever a service member's grade, years of service, or marital status, large sums of money pass on his or her death. Their estates range from \$250,000 (the usual amount paid on death by SGLI, as of April 1, 2001) to multiple millions from real estate, personal property, investments, insurance, inherited wealth, and other sources. No matter the size of estate or complexity of personal circumstances (single or, for example, thrice married with a blended family and multiple support obligations), everyone needs to plan for disability or death. In the civilian world, such planning is an individual concern, but in the military the individual and institution share responsibility for legal preparedness just as they do for combat and occupational training and medical,

dental and physical fitness.

Leadership failure is the only way to describe a soldier, sailor, airman or Marine being legally unprepared for lengthy separation from family, disabling injury, or death. In such cases a commander and entire chain of command have been derelict. Additionally, the responsible staff judge advocate and the service legal community have failed in their mission.

Legal preparedness is a readiness issue—readiness for deployment, for war—and a significant quality of life concern. Command-sponsored preventive law and legal assistance programs must effectively reach every adult in the military family: every enlisted person, every officer and every spouse. They must each be interviewed in a confidential setting by a legal assistance provider to determine their need for a will, a living will, a durable power of attorney and other legal services. Only then will commanders have fully discharged their duties, the legal community fulfilled its mission, and the armed forces achieved a true state of readiness.

Awards

(continued from page 24)

planning advice to deploying units. This legal assistance group pumped out close to 9,000 wills and power of attorney documents last year for deploying units. In the aggregate, the office completed 34,448 wills and power of attorney documents.

The Marines also implemented a program to address child support problems. The unit coordinated with representatives from the San Diego district attorney's office and set up a program where an assistant district attorney visited the base every week. The district attorney was empowered to negotiate with service members regarding the amount of the support payments to be made to the county.

Finally, the Camp Pendleton office provided a legal assistance briefing to every new Marine arriving on base. The briefing consisted of information on local sales practices, insurance scams, and matters of concern.

Coast Guard Maintenance & Logistics Command Pacific Legal Assistance Program

The Coast Guard Maintenance & Logistics Command Pacific Legal Assistance Program was yet another outstanding and deserving winner of a LAMP award. With the closure of virtually all of the Department of Defense commands in the San Francisco/Oakland area, this legal assistance office inherited the responsibility for assisting a population of more than 8,300 active duty members and approximately 80,000 retirees.

In order to accomplish this daunting mission, the Coast Guard entered into an innovative



Office of the Staff Judge Advocate, Warner-Robins Air Logistics Center, Robins AFB, Georgia

Memorandum of Understanding with the Navy so that Naval Reserve attorneys could fulfill their drilling requirements at the Coast Guard facility. This has facilitated assistance to many clients with both basic legal assistance and tax filing needs. Given the limited amount of resources when compared to the tremendous demand, the Bay Area legal assistance unit concentrated a large majority of its practice on preventive law measures. Pre-deployment, retirement and legal counseling was provided to more than 4,000 active duty and reserve members. Beyond preventive law briefings the unit also had success in obtaining favorable results for its clients. In one case the command was responsible for one member receiving a \$20,000 judgment in a civil case and another member receiving \$4,300 in a consumer matter. The electronic tax services provided by the office generated over \$400,000 in refunds for its clients.

Naval Legal Service Office Southwest

Naval Legal Service Office Southwest (NLSO SW) also won

an award. With offices in San Diego, Port Hueneme and Lemoore, California, NLSO Southwest provided legal assistance to over 100 commands, 56 warships, 35 air squadrons, and six submarines.

One notable achievement included the Port Hueneme Branch Office's pre-mobilization legal assistance to over 220 reservists in one 24-hour period. Services provided ranged from wills and powers of attorney, and also included consumer affair issues.

To counter an alarming increase in illegal consumer practices in the area, NLSO SW has developed innovative methods and liaisons with civilian agency personnel to fight in support of consumer rights. As a result 25 automobile contracts were rescinded saving clients over \$350,000; 30 unsecured consumer contracts were rescinded saving clients over \$35,000; 120 wrongfully withheld security deposits were recovered grossing almost \$100,000; and four default judgments were withdrawn and dismissed due to Soldiers' and Sailors' Civil Relief Act violations.

Walk-in same day services

(continued on page 28)

The Armed Forces Attack Domestic Violence

by David Anderson

Domestic violence is incompatible with military service and contrary to the United States Armed Forces' core values. It detracts from readiness, military performance and unit morale. Within the military, over 12,000 incidents of domestic violence between spouses were substantiated in fiscal year 1999. The Department of Defense (DoD) seeks to prevent such abuse and protect spouses and children from domestic violence. It does so through a variety of programs and resources. In this area, the

legal assistance practitioner should be familiar with the important remedies within the military.

Family Advocacy Program

Each branch of military service operates a family advocacy program (FAP) intended to prevent spouse and child abuse, protect and provide safety for victims, and encourage commanders to hold offenders accountable for their behavior and provide them with rehabilitation when appropriate. A multifaceted and multidisciplinary

program, FAP provides a coordinated community response to family violence. FAP offers support, education and services to assist the victims of domestic violence, the offender, and others impacted by the violence. FAP programs and services include victim advocacy services, safety planning, domestic violence awareness and prevention programs, counseling, respite care, support groups, and classes in stress management, anger control, and financial planning. Victim advo-

(continued on page 29)

Awards

(continued from page 27)

were also provided in the form of almost 6,000 powers of attorney and 9,000 notarizations, which translated to combined client savings of approximately \$390,000. The NLSO SW ELAP also achieved successful court and pre-trial resolutions for all of its clients. ELAP continued to provide valuable legal leverage in negotiations with opposing parties and saved its clients thousands of dollars.

Paul Davis

The lone individual award winner was Paul Davis, a senior attorney at the Federal Trade Commission (FTC). He led an FTC investigation of an alleged door-to-door magazine sale scam directed at military members and their lawful depen-

dents. These companies would initially contact the military member via telephone and then send a representative to the military member's home to collect the signature in person. This process was apparently an attempt to circumvent the FTC's Telemarketing Sales Rule and the Cooling-Off Rule. By sharing this information with the armed forces, Davis enabled the military to warn its soldiers, sailors, airmen and marines of this magazine sale scam.

Davis also participated in numerous videoconferences aimed at military attorneys on various consumer issues and taught at both the Army Judge Advocate General's School and the Naval Justice School. He also planned and conducted a training conference for military attorneys held at Naval Air Station Pensacola. Finally, Davis has

helped military attorneys to have access to the FTC's Consumer Sentinel Web site and receive non-public FTC law enforcement information on consumer fraud issues. This permitted military attorneys to investigate whether their particular client was one of many victims from specific business scams. It also served to enlarge the FTC's database of consumer victims.

The LAMP Committee is proud to present the 2001 Distinguished Service Award to these recipients and congratulates them for their outstanding work. For additional information about any of the projects or initiatives of the award winners, please contact Sheree Swetin at sswetin@staff.abanet.org for details.

Daniel K. Bean is a member of the ABA Standing Committee on Legal Assistance for Military Personnel.

Violence

(continued from page 28)

cates are employed within FAP to give support to and speak for the abused individual. More information about the FAP in each branch of service is available online.¹

Military Protective Orders

A military commander is specifically authorized to issue a military protective order (comparable to a civil protection order) to ensure the safety and security of persons within the command and to protect other individuals from persons within the command. Military protective orders issued to service members may include direction to refrain from contacting certain persons, to remain away from certain specified areas, to refrain from doing certain activities, and to provide financial support for family members. They are administrative in nature and not punitive. If the circumstances require immediate action, these orders may be issued *ex parte*. For any order over 10 days in duration, however, the alleged offender has an opportunity to be heard and to respond to the abuse allegations. Installation commanders may issue orders to civilians commensurate with the commander's authority to maintain security and control over the activities of employees, residents, and guests on the installation.

Transitional Compensation Program

The transitional compensation program for abused family members is a Congressionally authorized program that provides support payments, access to commissary and exchange benefits, and health care benefits

to family members of service members who are separated by court-martial or administratively from active duty because of domestic violence. 10 U.S.C. § 1059. Such payments and benefits are designed to help family members establish a life apart from the abusive service member. Eligibility for the program begins on the date that the abuser's court-martial sentence is approved or the administrative separation is initiated. Payments to family members are approved for a minimum of 12 months, but cannot exceed 36 months. The current monthly rate is \$881 for spouses, \$222 for each eligible child and \$373 for a dependent child only. These payments are based on current dependency and indemnity compensation rates. If the spouse receiving entitlements remarries or resides in the home of the former service member, payments will terminate.

Lautenberg Amendment

In 1996, the Lautenberg Amendment to the Gun Control Act of 1968 made it illegal for a person convicted of a misdemeanor crime of domestic violence to possess firearms or ammunition, however old the conviction may be. 18 U.S.C. § 922(g)(9). No exception exists for service members who carry military-issued firearms in the performance of their official duties. As a result, DoD policy prohibits domestic violence misdemeanants from possessing military or personal firearms (with the exception of major military weapon systems and crew-served weapons). Commanders have been directed to determine which service members have Lautenberg Amendment-qualifying convictions (summary courts-martial

and non-judicial punishments are excluded), assign them to duties where they do not carry weapons, administratively separate them from the service if necessary, and avoid sending them on overseas deployments. A commander actually commits a felony if he knows or has reasonable cause to believe that a service member under his or her command has a misdemeanor conviction for domestic violence and he or she allows that service member to be issued a weapon for training. 18 U.S.C. § 922(d)(9). Ironically, a government exception does exist to allow persons convicted of any type of felony, including domestic violence, to carry weapons in an official capacity. 18 U.S.C. § 925.

Offender Accountability

For service members accused of committing domestic violence, commanders may seek to process them for administrative separation for misconduct or attempt to punish them by court-martial or non-judicial punishment. Offenses under the Uniform Code of Military Justice that may apply to domestic violence situations include the violation of an order (such as a military protective order), breach of the peace, provoking words and gestures, murder, rape, assault and battery, and aggravated assault. In 1995, the offense of rape in the military was made gender neutral and the spousal exception was removed. Commanders may also consider suspending punishment or separation contingent upon an offender's successful completion of treatment and rehabilitation.

Violence Against Women Act

The Violence Against Women Act

(continued on page 30)

Violence

(continued from page 29)

of 1994 (P.L. 103-322) and the Violence Against Women Act of 2000 (P.L. 106-386) enable alien spouses and children, who have suffered abuse at the hands of U.S. citizen or permanent alien resident spouses, to self-petition to obtain permanent resident status and remain in the United States. 8 U.S.C. § 1154. The purpose behind the authorization for self-petitioning was to remove federal immigration law and procedures as a weapon that a U.S. citizen or permanent resident alien spouse could use to hurt their victims. For the alien, the petition must show that the marriage was entered into in good faith, and during the marriage,

the alien (or child of the alien) has been battered by or subjected to extreme cruelty by the alien's spouse. 8 C.F.R. §204.2.

Task Force In Progress

In March 2000, the Secretary of Defense appointed a congressionally mandated Defense Task Force on Domestic Violence comprised of 12 civilian and 12 military members. This task force will conduct a three-year comprehensive study of all aspects of domestic violence in the military, and within one year, it will submit a long-term, strategic plan on ways that the DoD may more effectively address matters relating to domestic violence in the military. The task force's Web site is <http://www.dtic.mil/domesticviolence/index.htm> Further information

on domestic violence programs and resources is available from the ABA Commission on Domestic Violence's Web site, <http://www.abanet.org/domviol/home.html>

Endnote

¹ Navy:

<http://www.persnet.navy.mil/pers66/fap.htm>

Air Force:

<http://www.airforcefap.org/fap/menu.asp>

<http://sg-www.satx.disa.mil/moasgof/index.htm>

Army:

<http://child.cornell.edu/army/fap.html>

David Anderson, Col. USMC, is a member of the ABA Standing Committee on Legal Assistance for Military Personnel.

President Bush Seeks 2002 Funding for LSC at Same Level as 2001

The Bush Administration's FY 2002 budget includes \$329 million for the Legal Services Corporation (LSC). This would continue funding for LSC at the same level as in the current year. The original FY 2001 amount of \$330 million was reduced by an across-the-board cut of .22 percent, or \$726,000. The President's budget proposal includes the following description of the LSC:

"Since its creation in 1974, LSC has provided grants to local organizations that provide civil legal advice to low-income clients across the country. These grants account for approximately half of the operating budgets of these organizations. LSC-funded programs serve every State and county in the Nation. The 2002 Budget provides funding at the 2001 enacted level of \$329 million. Ninety-seven percent of these funds will be distributed to grant recipients across the country. The most common types of cases

handled by grant recipients are related to family law, domestic violence, housing, employment, Government services, and consumer matters. Two-thirds of their clients are women, many of whom have young children. LSC's clients are as diverse as the Nation, encompassing all racial and ethnic groups of all ages. LSC-funded programs do not handle criminal cases, nor do they accept fee-generating cases. In 1996, Congress passed a series of new restrictions on the activities of programs receiving Federal funds. These limitations provide that LSC-funded programs may not challenge welfare reform, represent non-documented persons, request attorneys' fees, litigate on behalf of prisoners, or bring class action lawsuits."

Further information on President Bush's FY 2002 budget request is available at: <http://www.gpo.gov/usbudget/index.html>

From the Chair...



by Norman Lefstein
Chair, Indigent Defense
Subcommittee
ABA Standing Committee on
Legal Aid and Indigent Defendants

Last year's media spotlight on issues such as racial bias in the application of the death penalty and indigent defendants represented by "sleeping lawyers" focused unprecedented attention on our nation's broken indigent defense systems. L. Jonathan Ross, chair of the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), has graciously offered me the column for this issue of *Dialogue* to share with you SCLAID's efforts to help fix these broken systems.

SCLAID's Indigent Defense Subcommittee is involved in three ongoing programs to bring about systemic improvements in indigent defense: the Bar Information Program, the State Commissions Project, and the ABA Gideon Initiative. In addition, SCLAID is engaged in several other projects to promote awareness of indigent defense issues within the organized bar and to the public as a whole. These activities are described below:

Bar Information Program—Since 1983, SCLAID has operated its Bar Information Program (BIP) as the

(continued on page 32)

Supreme Court Overturns Restriction on Welfare-related Advocacy

by Linda Perle

On February 28, the U.S. Supreme Court ruled in the case of *Legal Services Corporation v. Velazquez*, No. 99-603. In a 5-4 decision, the Court affirmed the Second Circuit's opinion in the case and invalidated the Legal Services Corporation (LSC) Appropriations Act provision permitting representation in individual welfare cases only when they do not involve a challenge to existing law. The Court found that the provision violated the First Amendment because it represented unlawful viewpoint-based discrimination. The majority opinion was authored by Justice Kennedy, who was joined by Justices Stevens, Souter, Ginsburg and Breyer. Justice Scalia wrote the dissent, joined by Chief Justice Rehnquist and Justices O'Connor and Thomas.

The *Velazquez* case had challenged many of the restrictions imposed on LSC recipients by Congress as part of the 1996 appropriations process. The Court of Appeals for the Second Circuit rejected the plaintiffs' challenges to most of the restrictions, but enjoined enforcement by LSC of the proviso to the welfare reform restriction that limited representation in individual welfare cases that seek to obtain, preserve or increase welfare benefits to those that did not involve statutory or constitutional challenges to existing law.¹ The Court of Appeals determined that this provision constituted impermissible viewpoint discrimination that violated the First Amendment to the U.S. Constitution, finding that it "clearly seeks to discourage challenges to the status quo." This ruling was only applicable to LSC programs in the Second Circuit.

The Supreme Court agreed with the Court of Appeals and affirmed its decision invalidating the provision that prohibited individual challenges to existing welfare law. The Court's decision does not strike down the restriction on welfare reform lobbying, rulemaking or litigation, but does permit challenges to the legality or constitutionality of welfare laws or regulations when they are brought in the context of an individual's case against a welfare agency.

The Supreme Court declined to address the issue of severability, in effect confirming the Second Circuit's conclusion that it was permissible to strike down the provision, while leaving intact the statute's general restrictions on lobbying, rulemaking and litigation on welfare reform, but permitting unrestricted individual representation in welfare cases.

The Supreme Court distinguished the *Velazquez* case from *Rust v. Sullivan*, 500 U.S. 173, upon which LSC relied. In *Rust* the Supreme Court had upheld regulations prohibiting doctors funded under the program from counseling patients with regard to abortion. The Court in the *Velazquez* decision noted that the abortion counseling activities at issue in *Rust* involved limitations on speech funded to convey a government message, which Congress has wide latitude to restrict. In contrast,

(continued on page 33)

From the Chair...

(continued from page 31)

only national source of technical assistance for establishing and improving state indigent defense systems. Through a contract with The Spangenberg Group, BIP offers on-site consultation, research, and access to an extensive library of materials to bar leaders, state legislators, and others interested in improving their state indigent defense systems. BIP and the rest of SCLAID's indigent defense activities are overseen by the BIP Advisory Group, which consists of members of SCLAID's indigent defense subcommittee, liaisons from ABA sections and divisions, and representatives from other indigent defense organizations and programs.

During the past year, BIP has provided information and on-site technical assistance in 20 states: California, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Montana, New Hampshire, New York, North Dakota, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. BIP also has worked closely with the U.S. Department of Justice in supporting former Attorney General Janet Reno's efforts to improve the indigent defense component of a balanced system of justice.

State Commissions Project—The State Commissions Project is a cooperative agreement between SCLAID and the Bureau of Justice Assistance of the Justice Department to provide enhanced technical assistance to state commissions formed to improve indigent defense systems. Currently in its second year, the State Commis-

sions Project has contracted with The Spangenberg Group to provide the necessary expertise in Alabama, Georgia, Illinois, Nevada, North Carolina, Oregon, Texas, and Vermont. The State Commissions Project has been particularly successful in helping to establish North Carolina's new statewide indigent defense program.

ABA Gideon Initiative—With funding from the Open Society Institute, SCLAID has developed and will administer a new grant program, called the ABA Gideon Initiative, to provide one-year catalyst grants in selected states to foster systemic improvements in indigent defense. To date, the Oversight Committee for the ABA Gideon Initiative has invited applications from organizations in Arizona, Louisiana, Michigan, Mississippi, Virginia, and Washington. The Oversight Committee plans to make final funding decisions later this year.

Bar Activation—One of SCLAID's most important goals in the indigent defense area is to inform the organized bar about indigent defense issues and engage the participation of the bar in working toward systemic improvements. Toward that end, SCLAID is in the process of designing an annual newsletter focusing on indigent defense trends and developments. This newsletter will be sent to bar leaders and other interested persons at the beginning of each bar year.

SCLAID is also producing a compendium containing the principal ABA resolutions relating to systemic indigent defense issues. These resolutions will be made available on the SCLAID Web site (<http://www.abanet.org/legal-services/sclaid.html>) in downloadable format. SCLAID

is also in the process of drafting a proposed ABA resolution regarding "best practices" standards for public defense delivery systems, which will enable the quick assessment of a public defense delivery system and clear communication of its needs to policy makers. Lastly, SCLAID will urge the Conference of Chief Justices to recommend that jurisdictions adopt indigent defense standards based on national models and link funding to compliance with those standards.

ABA Death Penalty Guidelines—In conjunction with the ABA Death Penalty Representation Project, SCLAID is revising the ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases in order to bring them up to date.

Proposed Collaborative Data Collection—Since last fall, SCLAID representatives have met with representatives from the National Legal Aid and Defender Association, the National Association of Criminal Defense Attorneys, The Spangenberg Group, and other national organizations to discuss coordinating support for local indigent defense systems. Currently, SCLAID is considering a joint effort with these organizations to collect national indigent defense data on an annual basis.

SCLAID's work on the indigent defense front could not be accomplished without the tireless efforts of the members of SCLAID and the BIP Advisory Group. I would like to acknowledge these individuals for their hard work toward fulfilling the constitutional guarantee of quality legal representation for indigent criminal defendants.

Nominees Sought for LSC Board of Directors

by Julie Clark

President Bush has the opportunity to nominate an entirely new Board of Directors for the Legal Services Corporation (LSC), as the terms of all the current board members have expired. All those interested in an effective LSC are

invited to suggest people who might be nominated to serve on the LSC Board so that a list of qualified candidates can be shared with the Bush Administration.

The current board members are permitted to serve until their

successors are confirmed, and they have all agreed to do so. It is likely that new nominations will not be made for several months and a new board will not be confirmed until the end of this year, or even later.

(continued on page 34)

Restriction

(continued from page 31)

Velazquez involved a subsidized program to facilitate private speech by LSC attorneys on behalf of their clients in their claims against the government in welfare cases. The Court determined that the provision limiting welfare representation to cases where existing law was not challenged impermissibly imposed viewpoint based discrimination that violated the First Amendment, and distorted the legal system by limiting the arguments that legal services lawyers can make and altering the traditional role of attorneys as advocates for their client's interest. "By seeking to prohibit the analysis of certain legal issues and truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of judicial power."

The Court also acknowledged that indigent clients generally have no alternative channels for expression of the views prohibited by the provision at issue. If legal services attorneys are forced to limit their advocacy on behalf of their clients or to withdraw from

representation if it is necessary to challenge the constitutionality of an existing welfare statute or legality of an existing welfare regulation, eligible clients are often left without alternative advocacy. "The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest."

In his strongly worded dissent, Justice Scalia rejected the reasoning and conclusions of the majority, and derided its decision not to address the issue of whether the invalidated provision can be severed from the remaining section of the appropriations act. The dissent argued that *Velazquez* is indistinguishable from *Rust*, and denigrates the holdings of the majority on a wide variety of issues. Justice Scalia concluded his discussion of the majority opinion by making "...a point that is embarrassingly simple. The LSC subsidy neither prevents

anyone from speaking nor coerces anyone to change speech, and is indistinguishable in all relevant respects from the subsidy upheld in *Rust v. Sullivan*.... There is no legitimate basis for declaring 504(a)(16) facially unconstitutional."

Justice Scalia also concluded that the Court abused its discretion by ignoring the issue of severability, stating that the Court had an obligation to address the issue even though the parties did not brief it. In Justice Scalia's view, without the restriction on cases that challenge existing law, Congress would not have included the proviso that permits LSC attorneys to bring welfare cases for individuals.

Endnote

¹ On March 5, 2001 the Supreme Court denied certiorari in *Velazquez v. Legal Services Corporation*, No. 99-604, the companion case to *Legal Services Corporation v. Velazquez*. The Court's decision not to hear the case leaves standing the other challenged restrictions on LSC recipients.

Linda Perle is a senior staff attorney at the Center for Law and Social Policy in Washington, D.C. This article was prepared for the National Legal Aid and Defender Association *Update* and is printed here with the permission of NLADA.

Nominees Sought

(continued from page 33)

Section 1004(a) of the Legal Services Corporation Act states that the President shall nominate a board of directors of the Corporation consisting of 11 voting members, no more than six of whom shall be of the same political party. A majority must be lawyers, none can be full-time employees of the United States, and the board must include eligible clients and must be "generally representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public." The Senate must confirm nominees to the board.

During his campaign, President Bush made the following statement about the LSC Board in the *ABA Journal*:

"I believe we can strengthen the trust between American taxpayers and the LSC by appointing board members committed to LSC's original mission of assisting poor families. I would ensure that my appointees to the LSC are committed to this mission by nominating individuals who have a history of working to address the legal needs of poor families and who can be counted on to ensure that the LSC remains focused on its mission."

Once the President has chosen the nominees, the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) will evaluate their qualifications. They will request interviews with the nominees and provide a report to the Senate Health, Education, Labor and Pensions Committee, which considers nominations to the LSC board. SCLAID will evaluate candidates in light of

criteria included in a 1989 ABA House of Delegates resolution:

"All persons considered for nomination should be free of all conflict, or the appearance of such conflict, with the existence and function of the Corporation or the representation of poor persons in legal matters so that they may act and may be perceived to act with objectivity and fairness.

All nominees should support and demonstrate a high order of commitment to the continued existence and effective operation of the Legal Services Corporation."

The LSC Board nominees must be approved by the Senate Health, Education, Labor and Pensions Committee. Sen. Jim Jeffords (R-VT) is the chair of the committee and Sen. Ted Kennedy (D-MA) is the ranking member. The criteria the committee will be applying come directly from the Senate Committee Report on the LSC Act discussing its advice and consent role:

"The Committee expects that, in exercising its advice and consent function, the Senate will want to review the nominations on the basis of the following primary criteria: (1) a Board membership which is adequately representative of the organized bar, legal education, legal services attorneys, the client community, and organizations involved in the development of legal assistance for the poor; (2) the selection of persons who are committed to the Corporation's freedom from political control; and (3) the assurance that the Board members understand and are fully committed to the role of legal assistance attorneys and support the underlying principle of this legislation that it is in

the national interest that the poor have full access under law to comprehensive and effective legal services."

Those interested in this process are asked to:

- Identify individuals in your community who would meet the above criteria for nomination to the LSC Board.
- Contact these individuals to inquire about their interest in serving on the LSC Board.
- Ask them to use their own political contacts to advance their candidacies for nomination directly with the Bush Administration, since people with their own base of political support are much more likely to be seriously considered than those who come to the process solely from a list generated by interest groups.
- Send NLADA a copy of the individual's resume and a short explanation of why you are referring the person to us.

NLADA will compile a list of all names forwarded to it and will share them with other organizations interested in an effective LSC. NLADA will then ensure that these names are transmitted to the appropriate persons within the Bush Administration. Our primary purpose in seeking information about potential nominees is to ensure that new LSC Board members meet the above criteria espoused by the ABA and Congress.

Please direct the above information to Julie Clark, director of Government Relations and Support, NLADA, 1625 K. St. NW, Washington, DC 20007, (202)452-0620 ext. 227, j.clark@nlada.org

Julie Clark is NLADA director of Government Relations and Support.

ABA Adopts Resolution Protecting Confidentiality of Client Information

A number of state and local bar associations, concerned about efforts of the Legal Services Corporation Office of Inspector General to obtain confidential client information, joined together to offer a resolution in the ABA House of Delegates on the topic at the 2001

ABA Midyear Meeting in February. The resolution was adopted as Resolution 8A. Set forth below, it opposes access by funding sources to client information that is protected by the attorney-client privilege or the ethical protections of confidentiality. While an ABA

House of Delegates resolution is merely advisory, this resolution's broad base of co-sponsors and adoption by the ABA House without any opposition sends a strong signal of bar concern over practices that are inconsistent with attorneys' ethical obligations to their clients.

**STATE BAR OF GEORGIA
ATLANTA BAR ASSOCIATION
NEW HAMPSHIRE BAR ASSOCIATION
BAR ASSOCIATION OF SAN FRANCISCO
MASSACHUSETTS BAR ASSOCIATION
AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON
LEGAL AID AND INDIGENT DEFENDANTS**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association urges that reporting and auditing requests by funding sources for programs providing legal services to the poor should be reasonable, should be limited to information which the funding source will actually review and for which it has a reasonable use and should be focused on the particular needs of the funding source to avoid putting unreasonable administrative burdens on the recipient.

FURTHER RESOLVED, that, subject to applicable law, a funding source should have access to records which are in the possession, custody and control of a recipient, which are properly within the scope of its review and which pertain to (1) the use of the funds provided by the funding source, and (2) a determination of compliance by the recipient with the terms and conditions of the grant or contract and with other applicable law which the funding source has the responsibility to enforce.

FURTHER RESOLVED, that a funding source should not have access to records which contain information protected by the attorney-client privilege, or by ethical provisions prohibiting the disclosure of confidential information obtained from a client, or by statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the funding source.

FURTHER RESOLVED, that neither a funding source nor a recipient of funds should be permitted to require that a client waive the protections against the disclosure of confidential information as a condition of representation.

FURTHER RESOLVED, that a funding source should not seek to examine the work product of an attorney, paralegal, or other professional employed by the recipient of funds which is not otherwise publicly available.

FURTHER RESOLVED, that a recipient should be permitted to delete protected information from a record, if feasible, in order for the funding source to examine it and records from which privileged or confidential information cannot be reasonably removed should not be disclosed to the funding source.

Conference of Chief Justices Resolves to Promote Equal Justice

At its mid-year meeting in January, the Conference of Chief Justices adopted Resolution 23, *Leadership to Promote Equal Justice*, encouraging

members to enter into partnerships in their respective states to remove impediments to the justice system, develop plans to establish or increase

public funding for civil legal assistance, and expand support for self-represented litigants. The full text of the resolution is set out below.

CONFERENCE OF CHIEF JUSTICES RESOLUTION 23 LEADERSHIP TO PROMOTE EQUAL JUSTICE

WHEREAS, equal justice for all is fundamental to our system of government; and

WHEREAS, this promise of equal justice under law is not realized for individuals and families who have no meaningful access to the justice system; and

WHEREAS, this de facto denial of equal justice has an adverse impact on these individuals, families, and society as a whole, and works to erode public trust and confidence in our system of justice; and

WHEREAS, the Judicial Branch, in our constitutional structure, shoulders primary leadership responsibility to preserve and protect equal justice and take action necessary to ensure access to the justice system for those who face impediments they are unable to surmount on their own; and

WHEREAS, the Conference of Chief Justices has, by resolution, provided leadership in improving the administration of justice by encouraging pro bono services in civil matters, supporting the Interest on Lawyers Trust Account Program, and supporting the continued funding of the Legal Services Corporation;

NOW, THEREFORE, BE IT RESOLVED that the Conference acknowledges that judicial leadership and commitment are essential to ensuring equal access to the justice system and to the achievement through nationwide effort of equal justice for all and encourages individual members in their respective states to establish partnerships with state and local bar organizations, legal service providers, and others to:

1. Remove impediments to access to the justice system, including physical, economic, psychological and language barriers; and
2. Develop viable and effective plans, to establish or increase public funding and support for civil legal services for individuals and families who have no meaningful access to the justice system; and
3. Expand the types of assistance available to self-represented litigants, including exploring the role of non-attorneys.

American Bar Association
Division for Legal Services
541 North Fairbanks Court
Chicago, IL 60611-3314

Non-Profit
US Postage
PAID
St. Joseph, MI
Permit 468