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Pro Bono Articles



From the Chair.

by Hon. Judith Billings

Chair, Standing Committee on Pro Bono and Public Service

The Standing Committee on Pro Bono and Public Service has been working with the National Bar Association (NBA), the bar association for African American lawyers and judges, to assist it in expanding its members' pro bono efforts. I have had the honor of attending the NBA's last two annual meetings.

For years, the Pro Bono Committee has proclaimed its commitment to working with diversity, specialty, state and local bar associations on the development and expansion of pro bono initiatives. The relationship between the ABA and the state and local bars around the country is very strong, partly because of the work of the National Conference of Bar Presidents and the National Association of Bar Executives. The Pro Bono Committee has been very successful in helping to develop and providing support for pro bono programs and policies at the state and local bar level. Its connections to and relationships with diversity and specialty bar associations, however, have not been so clear or institutionalized.

After some less than successful efforts to reach out to the diversity bar community, the Pro Bono Committee stepped back and reassessed its approach. It became clear that the Committee was too disconnected from these groups to have any real chance of being seen as a useful source of information, guidance and support for their pro bono efforts. We did not understand their structure or their needs.

During the past year, the Pro Bono Committee has taken a vastly different approach to promoting pro bono within the diversity bar association community. Working from the national and local perspectives, Committee volunteers and staff have spent much time getting to know these important constituent groups. By attending diversity bar meetings, involving diversity bar leaders in the Pro Bono Committee's activities, sharing information at Committee meetings and implementing a range of other strategies, the Pro Bono Committee has taken some critically important steps forward in its outreach efforts.

In addition to the NBA's last two annual meetings, I have attended the Hispanic National Bar Association's (NHBA) annual meeting. The Committee also was represented at the National Asian Pacific American Bar Association annual meeting and the Minority Council Demonstration Project (MCDP) in October. The Committee sponsored a workshop on pro bono partnerships at the MCDP spring meeting, and staff have met with Chicago Muslim Bar Association representatives. In addition, the Pro Bono Committee has sponsored a diversity bar roundtable workshop at each of the past two ABA Pro Bono Conferences and has set up a diversity bar bulletin board on its web site at <http://www.abanet.org/legalservices/probono/>

In all of these instances, the Committee provided diversity bar association leaders with information about pro bono opportunities and the resources available through the Center for Pro Bono. We also learned about what these bar associations have been doing in the pro bono arena and shared with them thoughts about particular policy and program strategies that they might find useful in expanding their pro bono work.

This past April, I met with the NBA's Executive Committee to urge it to adopt an aspirational pro bono goal for the organization and to implement the infrastructure needed to achieve this goal. In response, the NBA recently agreed to:

- adopt a pro bono goal for all members
- establish a permanent standing committee on pro bono matters
- appoint a liaison to the ABA Standing Committee on Pro Bono and Public Service.

The HNBA previously embraced these same three important steps. Most importantly, the NBA recently appointed a liaison to the Pro Bono Committee who will attend our meetings regularly and serve as a critical link between the two organizations. Similarly, for the past year, a representative from the HNBA has served on the Center for Pro Bono Council.

Support of pro bono from the national diversity bar association leadership is critical. It sets the tone for the local affiliate membership and for the profession at large. Even more important is its openness with the Pro Bono Committee, sharing information about its pro bono involvement, its organizational structures, and the issues and needs confronting its members. Every time that I have interacted with diversity bar associations, I have been impressed with their energy for and commitment to pro bono and public service. The Pro Bono Committee looks forward to very productive partnerships with diversity bars.

Faith in Action: A Panel Interview - Part I

by Greg McConnell

This year's Pro Bono Conference in Asheville featured a program entitled "Faith In Action: Pro Bono Work as a Practice of Faith." During this program, an ecumenical panel of experienced pro bono and legal services attorneys led a discussion exploring the connection between faith and involvement in public interest law. The panelists were Ashley Wiltshire, Jr., Executive Director of the Legal Aid Society of Middle Tennessee; Ellen Hemley, Director of Training and Development, Massachusetts Law Reform Institute; Kareem Irfan, Chief Information Technology Counsel, Square D Corporation; and Terry Wiley, Assistant District Attorney, Alameda County District Attorney's Office.

The audience feedback from the panel indicated a keen interest in continuing the dialogue that was initiated at the Conference and the desire to further examine the connection between faith and pro bono. In response to this message, the Center for Pro Bono interviewed the panelists to learn more about them, their thoughts on the connection between faith and pro bono or legal action, and their ideas on how that connection may be a resource for pro bono programs. The following is Part I of a summary of those interviews. Part II will appear in the Fall 1998 issue of Dialogue.

GM: Before we begin, can you give a brief overview of your religious background and pro bono or legal services involvement?

Ashley: While a seminary student at Union Theological Seminary in New York, I spent time in southwest Georgia during the summer of 1966 as part of the Student Interracial Ministry. There I lived with an African-American family. I worked in a Head Start program, and with African-American peanut farmers who did not get a fair crop allotment from the U.S. Dept. of Agriculture. We also were involved with Koinonia Farms, which Clarence Jordan started.

This experience was important to me in bringing together my thinking on the issues of faith, justice and the law. There were several law students who also were working in the area that same summer. They impressed me by what they were doing to improve the social condition of the residents of that area. What they were doing was concrete. They were working with an African-American lawyer named C.B. King on civil rights issues. They were effective at bringing about change and realized tangible results. Working with them and the peanut farmers forced me to read the federal regulations for the first time to understand how the federal government was determining the farmers' allotment. Here, I began to see law as a tool for social justice.

Subsequently, I went back to seminary and then overseas to teach in Thailand at a Baptist mission. There, I read the international edition of Time Magazine and was moved by the stories about lawyers at California Rural Legal Assistance and their work on behalf of migrant workers. This showed me that there may be some place where I could actually do this work and planted the idea of law school.

While in Thailand I also gained an appreciation for the value of American political system. From the viewpoint of 6th grade civics, I could see the contrast between the way law functions here versus how it functions elsewhere. I remember once speaking to a young student about how the American system was designed to include checks and balances and a disbursement of power. He was amazed to learn that our government functioned in this way because it was such a foreign concept to him. I gained an appreciation for the fact that here we have potential to right wrong. This isn't available everywhere. I wanted to be part of that system, even if it meant challenging that system.

Kareem: I am a Muslim, that is I practice the teachings of Islam. While I do not have any formal religious education, I have devoted a fair amount of time to the study of holy scripture, the Quran, the Holy Book of Islam, the revealed communication from G-d and his prophet Muhammed. I am fortunate that I grew up in a family that followed fundamental religious precepts, and I have made an effort to continue that belief system.

Since the time I immigrated to the United States in 1982 from India to complete my advanced education in electrical engineering and later the law, I have made an effort to continue my religious activities and have stayed involved with various Chicago mosques and Islamic organizations. From almost the start of my U.S. residency, I have had the opportunity to assist such organizations on a variety of issues including public relations, educational programs and publications. And, as I became more involved in Islam, it became more apparent to me that community activity and involvement is fundamental to Islamic practice. You simply cannot practice religion on your own. You must participate with fellow human beings and work for the benefit of all.

When I began working in a law firm, I began to realize that I could bring a tremendous benefit to the Muslim community because of my legal background. At that time, you must realize, there were very few Muslim attorneys, in fact, at one point I knew of only one other in intellectual property law, my area of expertise. So, from my discussions and my participation in activities, I experienced the benefits that the lawyer's skills are to a group of people and to their efforts to gain a voice and to assist specific individuals. In addition to technical skills needed to resolve legal problems, the lawyer brings the advantage of being a critical, organized thinker, able to articulate ideas and beliefs.

Ellen: As someone involved in social change work from a relatively early age, legal services lawyers were role models for me - demonstrating what could be done within the system to protect individuals' rights and to advocate broadly for legal and policy changes on behalf of people on the margins of our society. Essentially, I went to law school to become a legal services lawyer and never considered any other forum for my legal work. As a law student I interned with legal services programs in Kentucky and Massachusetts and have worked in legal services

continually since graduating from law school in 1981. Since 1984, I have worked at the Massachusetts Law Reform Institute as Director of Training and Development. Two years ago, I started my own consulting practice and now work part-time as a consultant to non-profits, legal services programs, and other law-related organizations across the country.

In my religious life, I am an active member of a Jewish Reconstructionist synagogue. Reconstructionism, one of the several denominations within the Jewish community, is characterized by an egalitarian and participatory form of religious practice.

GM: What is it about your faith tradition that draws you to legal services/pro bono work?

Ashley: I think of the words of the prophets and the story of Jesus. I think of the words of Amos that Martin Luther King quoted over and over again "Let justice roll down like waters, and righteousness like an ever flowing stream." (Amos 5:24) I also think of Micah's demanding inquiry: "What does the Lord require of thee, but to do justly, and to love Mercy, and to walk humbly with thy G-d?" (Micah 6:8)

An important part of the formation of my thinking on this issue was the prophetic tradition, as interpreted to me in seminary by Samuel Terrien. His teaching was a motivating factor in my getting involved in legal services.

Kareem: You must understand that Islam is a way of life--not a religion in the strict sense of the word. It is a value system that prescribes how you live every aspect of your life based on divine commandments and guidance. There is no dichotomy between the secular and the religious. All aspects flow from divine beliefs to create one seamless, whole life. The commandments of G-d in addition to the dictates and collective teachings of the prophets, including Abraham, Jesus and Muhammed, influence all aspects of daily life.

With that in mind, ethical values, teachings and commandments (and, in my case, my Islamic values) necessarily apply to your day, a big piece of which is work. Our religion teaches us that we must seek out people in need and provide them our assistance. This flows from the fact that everything we have been given is a gift from G-d and we will be held accountable for how we use it. Given our professional qualifications, then, we must use those skills to benefit the community. That is a logical step. Pro bono work is an essential element of my life. If I were a doctor or a journalist the same would be true. I would give medical pro bono or journalistic pro bono.

Ellen: One of our fundamental experiences as Jews is based on our understanding of the Exodus story in which our ancestors were enslaved and struggled to become free. I am told by a rabbi friend of mine that there are thirty-six times in Torah in which we are instructed to "not oppress a stranger because you were strangers in the land of Egypt." This memory of our own oppression

serves as a foundation for our sense of duty and responsibility toward others who continue to be oppressed.

In coming to understand the connection between my experience as a Jew and my commitment to social change work, I have been greatly influenced by the work of Abraham Joshua Heschel who was a prominent Jewish theologian and scholar raised in the Hasidic community in Poland. As a survivor of the Holocaust, Rabbi Heschel went on to play a prominent role in the civil rights and anti-war movements in the country and was a role model for activists from all religious persuasions. As I prepared for this panel, I was very interested to read Ashley's [Wiltshire, Jr.] article in the Texas Tech Law Review Symposium where he mentions Heschel as a strong influence in his life.

Heschel's teachings have been enormously powerful for me and have given me a language for expressing many deeply held feelings and beliefs that I could not previously articulate. For example, Heschel wrote a book about the prophets which he described as a force that compelled him to leave the library and take to the streets where the prophets spoke. And what did the prophets speak about? The poor, the orphan, the stranger, about the effects of indifference and economic exploitation.

Heschel's emphasis on the connection between faith and action can be summarized by his comments after he participated in a voting rights march in Selma in 1963, when he said, "I felt my legs were praying." Prayer and activism, for Heschel, are one. Heschel also describes the essence of being religious as giving "voice to the silent agony." For me, legal services work is just that: we use our tools as lawyers and advocates to give voice to the often silent agony of our clients.

GM: What were some of the themes developed during the panel discussion that struck you as interesting/new/divergent from your previous concepts of faith in action?

Ashley: I was greatly impressed with the articulation of each panelist regarding the basis of their faith and how that translated into action. Though we came from different places and faiths, in each case it pointed toward a sense of responsibility, and responding to that which has been given to us in faith and using that to act out our faith. This idea was the constant across the board.

Kareem: Nothing really struck me as new or divergent from an intellectual viewpoint. In fact, my previously-held notions of the commonality of multiple faiths were reinforced! From an emotional viewpoint, I was greatly and pleasantly surprised by the commonality of belief among almost all persons there that you have to give back to society without expecting something in return. I was struck by the reinforcement of those ideals when I thought that the forum may have been restrictive. I knew from my comparative studies of religions that we all share many of the same

fundamental values, but it was reassuring to hear that expressed and to experience the feel of that belief instead of acknowledging it from a strictly intellectual view. Everyone supported that wholeheartedly.

Before attending the conference, I could not have imagined people applauding my statements about the commonality of beliefs, that afterward people would shake my hand and hug me. But that happened. The grasping of this notion of commonality struck a resonant chord with me. Not being from this community [the legal services/pro bono community] I somewhat expected a crowd that may have been skeptical of religion and religious affiliation, or merely curious. In my subconscious, I knew that this should not be, but I was uncertain.

Ellen: One issue that came up that I had never thought about was a concern about pro bono attorneys who might impose their own religious beliefs, for example, regarding family or abortion issues, on a legal services client. The concern was that if we appeal to people through their religious affiliations we might not be able to control what they do once they are interacting with our clients.

GM: What was the response of the audience to this discussion? Why do you think that was?

Ashley: The audience was engaged in the ideas presented. I was impressed with how quickly the audience moved from a general discussion to particular issues of practice. In particular, I was struck by the audience's concern with the problems of the religious worker who evangelizes in the office. By this I mean staff members proselytizing other staff members and, also, staff members talking with clients on a faith level.

This is problematic because it can be divisive in an office situation. The audience acknowledged this and struggled with questions like where to draw the line with religious behavior? How do you articulate what a person should say on the job?

Where clients are concerned, the matter should be examined from a power aspect, and much of the scrutiny should be on who is vulnerable in that situation. We cannot take advantage of our clients or in any way impose our beliefs on them.

Kareem: I think that there is a distinct and unfulfilled need in the legal community, and the greater community at large, to refocus people on religious aspects of their lives. For too long we have focused on separating secular and religious values. I realize that some of this is Constitutionally based and cannot be undone. However, this concept doesn't work practically and only serves to hamper people in addressing some of mankind's most basic, inherent and deep-seated needs. I think that in the panel, we laid our hands on some exposed nerve, and that's what drew people out so openly.

Ellen: Proselytizing was a concern that was raised, particularly by those from southern states. We did not come to ready answers, but merely raised it as a concern.

GM: Do you have any ideas/recommendations how individuals or organizations can incorporate principles of faith into working models for their programs?

Ashley: My strong feeling is that you cannot do it explicitly. It has to be done implicitly. Because religion is so loaded and such a passionate matter, it cannot be an explicit part of what we do in legal services. That said, I do believe that we do what we do because of our religion. You just cannot say that as part of an attorney/client relationship. The practice of law must be religionless Christianity. We must practice in a religionless way.

Kareem: We can extract from all major religions to draw upon universal principles of community involvement that are acceptable to almost everybody, such as fairness, justice, family and service to others. From these we should distill key teachings and come up with a common platform of religious beliefs and values that can be applied to daily work life. This will apply particularly to pro bono as we will get more lawyers involved if we can convince them that regardless of their particular religious affiliation, they must and can step outside of their own life and assist others by signing onto pro bono work, without any conflict with personal religious beliefs or values. The idea of this framework is to break down barriers and build upon common ground.

I am trying to do this within the Muslim community. Some of the younger Muslim lawyers are focusing on succeeding in their law firms and in their careers. Of course this is to be expected and even encouraged. However, in doing so, they may become less concerned with some of the particular aspects of Muslim teaching, for example, praying five times a day. To that end I do not condemn them for what they do with their time. But, I do ask them how do we get on a common ground? What are they doing about the central facets of Islam? What are they doing to share with their community? In this way I encourage them to get involved in charitable work and pro bono. It's working, too.

Ellen: While I don't have examples from within the legal services community, I have done some work with a group called the Jewish Community Relations Council that integrates faith-based values of justice and social change with concrete work within the community. Through their program "Tikkun Ha'ir" (to repair the city), they work with synagogue social action committees in two spheres: (1) they engage in Jewish study to help synagogue members understand the roots of social action within Jewish text and tradition; and (2) they help members develop partnerships with selected urban agencies. Traditionally, synagogues and other Jewish organizations have been strong financial supporters of social service organizations but this project goes beyond merely giving money and encourages members to share their time and expertise as well. This model could be used effectively as a tool for recruiting pro bono attorneys.

Note: The ABA Center for Pro Bono is interested in learning more information about pro bono programs or projects that involve religious institutions or organizations as active partners or participants. If you know of any such efforts and would like to share that information, please contact Greg McConnell at 312/988-5775 (988-5483 fax) or mconneg@staff.abanet.org

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Humanity and Involvement are the Hallmarks of the 1998 ABA Pro Bono Publico Award Recipients

The recipients of the 1998 ABA Pro Bono Publico Awards are: The Legal Division of The Federal Home Loan Mortgage Corporation, *Freddie Mac*, McLean, Virginia.; the law firm of Wilmer, Cutler & Pickering, Washington, D.C.; Norlen Drossel, Berkeley, California; V. Ann Liechty, Billings, Montana; and Vance Salter, Miami, Florida.

The ABA established the Pro Bono Publico Awards in 1984 to recognize lawyers, law firms and corporate law departments for extraordinarily noteworthy contributions in extending legal services to the poor and disadvantaged. The ABA Standing Committee on Pro Bono and Public Service presents the Awards annually.

The 1998 Awards will be presented at a luncheon on August 3, 1998, during the ABA Annual Meeting in Toronto. Judge Richard S. Arnold of the U.S. Court of Appeals for the Eighth Circuit will speak at that event.

"This year's winners embody the spirit of public service that must characterize the legal profession," said ABA President Jerome J. Shestack. "The recipients have given freely of their time and talent to help improve the quality of thousands of lives--be it in their own backyards or worldwide. They have helped solve wide-ranging social ills, or touched and made better the lives of the smallest and the most defenseless among us. Our profession is proud of their accomplishments and grateful for their example."

The Legal Division of the Federal Home Loan Mortgage Corporation, *Freddie Mac*, in McLean, Va., was nominated by Legal Services of Northern Virginia (LSNV), which provides free legal services to the needy and sick in Northern Virginia.

Members of the *Freddie Mac* Legal Division participated in corporate-sponsored projects involving schools and community organizations, but they were not content to stop there. In 1991 they formed a pro bono partnership with LSNV, and "what followed was a success story," according to officials at LSNV.

Freddie Mac's legal staff performed intake, represented clients, litigated cases, staffed clinics, provided outreach, helped publish community education brochures, assisted LSNV staff with

computer training and donated computers. In addition, it hosted volunteer recognition events, assisted LSNV clients in their job searches, hired unemployed clients, gave internships to minority law students, invited LSNV staff to special events, offered conferences and training facilities, assisted state-wide in the pro bono effort, networked with corporate counsel groups, and "buoyed the spirits of the LSNV staff." LSNV said that what *Freddie Mac* provided was far beyond simple volunteering. It got involved.

Perhaps the most poignant illustration of the commitment to enhance the human dignity of others that *Freddie Mac's* people displayed was the help that *Freddie Mac* lawyer Jim Nagel gave to a disabled LSNV client. Nagel arranged for a pro bono contractor to build a ramp so that the client "no longer would need to crawl on his hands and knees in front of his family and children to reach his upper floor condo."

"**Wilmer, Cutler & Pickering** is an example of what one firm can accomplish when it makes a substantial commitment of time to pro bono work," said Utah Appellate Court Judge Judith Billings, Chair of the ABA Standing Committee on Pro Bono and Public Service. "This firm has championed the cause of the disadvantaged worldwide. It has made a significant, positive difference in people's lives."

Through its pro bono work, the firm has:

- Established the Lawyers' for Children America, D.C., to address the legal needs that neglected and abused children confront. Eighteen firms now participate in the project.
 - Established the South African Legal Services and Legal Education Project in 1979 to support the Legal Resources Centre (LRC) in South Africa, which was created to challenge apartheid.
 - Successfully pursued several discrimination cases and has represented plaintiffs in a number of major class action law suits against federal agencies for employment discrimination.
- In addition to past accomplishments, this year, the firm's pro bono work included:
- Filing an amicus brief with the United States Supreme Court on behalf of the American Association of Retired Persons in *Phillips v. Washington Legal Foundation*. The brief urged the Court to reverse the Fifth Circuit ruling that clients have a property interest in the revenues that the Texas IOLTA program generates.
 - Representing a number of disability discrimination cases and reaching a landmark settlement that requires a national fast-food chain to renovate its restaurants to make them wheelchair-accessible.
 - Representing numerous individuals in custody, landlord/tenant, Social Security and other matters.
 - Representing People for the American Way, the Pennsylvania Institute for Community Action and the Virginia League of Women Voters in federal actions in Pennsylvania and Virginia to require state implementation of the National Voter Registration Act, known as "Motor Voter Registration."

In 1996, the *American Lawyer* named Wilmer, Cutler & Pickering second in the nation for pro bono work. The firm never has ranked lower than fifth since the magazine established the survey in 1990. The firm also has received awards for its pro bono work from several groups, including the ABA Section of Litigation, the International Human Rights Law Group, The South African Legal Services and Legal Education Project, and the Washington Lawyers' Committee for Civil Rights and Urban Affairs.

A former social worker, **Norlen Drossel** of Berkeley, California, was nominated by the Volunteer Legal Services Corp. (VLSC) of Oakland, Calif., for providing at least 50 pro bono hours annually to VLSC for the past eight years. The nomination also cited Drossel's successful settlement of some of its most difficult cases, those that other VLSC lawyers had turned down.

In one matter, for example, a senior citizen died without a will. The surviving family members wanted to evict the deceased's same-sex life partner of 30 years from the home because they did not approve of the relationship. Other lawyers had refused the case because of the threat of violence. Drossel, however, mediated the case, and the frail, elderly survivor of the relationship remains in the home as the owner.

In another matter, Drossel settled the case of a terminally ill, blind amputee who had been named the beneficiary of a trust, but whose trustee, a relative, refused to make payment. The circumstances of the case involved intense family conflict, which again prompted other volunteers to decline the case. Drossel successfully handled the situation, getting the client all of the money due to her and having another trustee appointed.

Not content just to take on the difficult cases, Drossel has suggested other programs for VLSC. For example, when she noticed an increased need for legal representation of indigent breast cancer patients who needed help with drafting wills and other legal issues, she convinced VLSC to expand its program to include these cases routinely.

Drossel began her career as a social worker in the Alameda County Welfare Department and then moved to the Social Services Agency, Child Welfare, where she specialized in serving abused or molested children.

In 1997, Drossel volunteered 105.30 hours in representing VLSC clients and was awarded the Wiley E. Manuel Award for pro bono services.

Today she continues her interest in children's issues as a board member of both the Child Assault Prevention group and the Donald P. McCullum Youth Court, Inc. She also has been active in several legal and bar associations.

V. Ann Liechty, a Montana lawyer, was nominated by the Montana Pro Bono Project, with letters of support from numerous Montana lawyers, five of Montana's state court judges, a Ninth Circuit U.S. Court of Appeals judge, a client, social workers and children's advocates. They commended

her for tirelessly devoting her pro bono efforts to the unmet legal needs of Montana's children. Liechty is estimated to have donated a minimum of 250 pro bono hours a year, in addition to practicing law.

"Ann never has declined to accept a case from the Pro Bono Project," said Judy Williams, project director, who said Liechty called her to volunteer her services on behalf of children 11 years ago.

"These cases are among the most difficult family law matters, involving issues like sexual abuse, child abuse and neglect and domestic violence," said Williams.

"They are not for the faint of heart or weak of stomach, and few volunteer lawyers are eager to assume the burdens of such matters," said Williams.

In her letter of nomination, Williams said as Liechty's reputation grew as a children's advocate, "she began receiving calls from judges and others seeking representation for children. To my knowledge, she has never declined any request for her assistance on behalf of a child."

In 1992, Liechty received the State of Montana Pro Bono Award, in part for her work as a guardian for three young boys whose father was accused of sexually abusing them. She canceled a family vacation to devote at least 500 pro bono hours to the case and its three-week trial. Astonishingly, it was not the only pro bono case that she was handling at the time.

Liechty has trained other lawyers in child representation, sharing the forms that she has developed during her work. In addition, she has donated thousands of hours to help families in adoptions.

"She always represents her clients with the skill of a lawyer and the compassion of a mother. Ann represents the best of the legal profession," wrote U.S. Circuit Court Judge Sidney R. Thomas.

Vance Salter, a Miami lawyer and civil litigator in the areas of banking and real estate finance, was nominated by two groups: the "Put Something Back" Pro Bono Project of the Dade County Bar Association for his work with Legal Services of Greater Miami, Inc. (LSGM), and The Florida Bar.

In making the nomination, the Dade County Bar Association noted his work with the LSGM where he has logged at least 1,245 hours of service counseling that organization, and an additional 2,110 hours helping LSGM clients. All of this is in addition to the pro bono work that he has performed for other needy clients in Miami.

Salter has been a member of the LSGM Board of Directors and its Executive Committee since 1988. In 1995, he launched LSGM's "Campaign for Justice" program, which has raised \$815,000 to purchase the Miami building that LSGM has been leasing. The purchase will free funds, which will allow LSGM to hire more lawyers to represent the poor.

In nominating Salter, the "Put Something Back" project said that it was not only his dedication to helping the needy and the LSGM operation, but also his personal involvement with its clients that reflect his humanity. In one instance cited, a pro bono client, who had serious medical and cognitive problems, actually lived with the Salter family for 10 weeks during a particularly difficult period of the client's life.

In another instance, when he discovered that the Haitian woman cleaning his law offices faced deportation proceedings, Salter successfully represented her pro bono.

Salter also successfully represented 37 clients when their landlord evicted them during the housing shortage that Hurricane Andrew created. After the clients lost their belongings in the eviction, and despite the sale of the building and a bankruptcy action, Salter recovered compensation in a complicated legal battle.

Salter is known in the Miami community as someone who is "motivated by a strong sense of compassion for others who are suffering and derives great personal satisfaction from lessening other's burdens. Vance Salter is a modest man, whose charity is most often anonymous," according to his nomination.

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. ♦ 2001 American Bar Association

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Legal Aid Articles



From the Chair.

by Doreen Dodson

Chair, Standing Committee on Legal Aid and Indigent Defendants

LSC Funding

On April 1, 1998, I had the honor to testify before the House Appropriations Subcommittee on Commerce, Justice and State, the Judiciary and Related Agencies on behalf of the American Bar Association regarding funding for the Legal Services Corporation (LSC). I relayed the ABA position that the subcommittee should restore LSC funding to its FY 1995 pre-sequestration level of \$415 million, and not less than \$340 million, the amount that the Corporation and the Administration requested. The ABA believes that a return to this funding level is justified for a number of reasons, including:

- LSC has implemented sweeping changes as mandated by the 104th and 105th Congresses to address various Congressional concerns.
- New leadership at the Corporation should be given the chance, and adequate funding, to demonstrate that the program is making good faith efforts to address the legal needs of the poor within Congressional strictures.
- Even with LSC's current funding, additional funding from a variety of sources including IOLTA (Interest on Lawyers' Trust Account) programs, and the enormous contribution of pro bono or volunteer services, only 20 percent of the legal needs of the poor are being met.

Subcommittee Chairman Harold Rogers commented, following my testimony, that "it is audacious for the ABA to come in here to request \$415 million." He said that private attorneys today are not doing as much as he did when he practiced law by providing a greater amount of free legal services to the poor. He stated, "If we had lawyers today who had a sense of the profession, they would represent poor people without a fee." Unfortunately, he did not give me an opportunity to respond to his remarks.

Shortly thereafter, I wrote to Chairman Rogers on behalf of the ABA, stating that we believe the organized bar has long recognized its responsibility, as principal steward of the justice system, to

ensure the legal needs of the poor are met. The private bar alone, however, cannot fulfill the national responsibility of providing equal access to justice for all Americans.

We are very proud that the legal profession leads all others in the contribution of free professional services. Since my testimony, recently released 1996 statistics show that more than 222,872 lawyers across the country participate in organized pro bono programs and give enormous amounts of free legal services to the poor every year. This figure compares to 153,789 lawyers participating in organized programs in 1995. We expect organized pro bono participation to continue to increase. In addition, countless numbers of lawyers provide services in their communities outside these formal programs.

Lawyers also contribute significant amounts of money to support legal services for the poor-- through their participation in bar association-supported IOLTA programs, through private bar campaigns and through many other mechanisms.

We believe that the federal contribution of LSC funding leverages an enormous amount of human and financial resources to help meet the legal needs of the poor. But without the core federal support, which funds client intake and referral systems, helps train lawyers in private practice to handle pro bono cases in areas of law outside their usual expertise, and stimulates the contribution of other funding, non-LSC resources would be less abundant and utilized less effectively. In many instances, they simply would not exist.

Can private resources be increased? Of course. Can they replace federal dollars? No. Surveys in most states demonstrate that about 20 percent of the poor's legal needs are being met. In Chairman Rogers' home state of Kentucky, a 1993 survey conducted by the University of Louisville Center for Urban and Economic Research showed that 68 percent of the poor's legal needs are not being met. Yet Kentucky lawyers already generously contribute to pro bono legal services.

The Legal Services Corporation is the federal government's contribution to a national public-private partnership aimed at fulfilling the first enumerated purpose of our government in the Preamble of the United States Constitution: "to establish justice." Without adequate funding for the LSC, the principle of a just society will remain merely an illusion for many Americans.

State Planning

Over the last six to 12 months, bar and legal services leaders in many states have initiated new efforts to study and suggest improvements for the system for delivering legal services to the poor. The LSC's requirement that each of its grantees submit a report by October 1, 1998 examining what steps should be taken in their states to further develop a comprehensive, integrated statewide delivery system has given further impetus to these efforts.

We believe that the organized bar, and individual private lawyers, can make critical contributions to this state planning process by:

- assisting in finding new ways that private lawyers can participate in the delivery of legal services to the poor
- developing new funding sources to supplement LSC funding
- working to expand the system to include programs that can offer poor clients services beyond those permitted for LSC grantees
- assisting in guiding various components/delivery models toward a more integrated system.

We continue to make technical assistance on state planning available to all through the State Planning Assistance Network (SPAN). A new edition of the *SPAN Update* will be available in August 1998, compiling up-to-date information on state planning activities and developments in each jurisdiction. I hope that our efforts will help you to participate in the planning efforts underway in your state and that you will let me know if there are other ways in which the Standing Committee on Legal Aid and Indigent Defendants can assist your state's efforts to provide equal justice for all.

ABA and NLADA Announce 1998 Harrison Tweed Award Recipients

The ABA and the National Legal Aid and Defender Association have announced that 1998 Harrison Tweed Award will be conferred upon the State Bar of Michigan; the Forsyth County, North Carolina Bar Association; and the Dallas, Texas Bar Association.

Named for an outstanding leader in the promotion of free legal services to the poor, the Harrison Tweed Award was created in 1956 to recognize the extraordinary achievements of state and local bar associations that develop or significantly expand projects or programs to increase access to civil legal service to poor persons or criminal defense services to indigents.

State Bar of Michigan

The State Bar of Michigan has made a broad, institutional commitment to pursuing equal access to justice as a major organizational goal. It has allocated very significant financial and staff resources to support a wide range of activities in pursuit of that goal.

The State Bar joined, in 1995, with Michigan legal services programs and the Michigan State Bar Foundation to begin a thorough "state planning" process to develop the *Michigan Plan*, a road map for modifying Michigan structures and systems for continuing to meet the legal needs of the poor following federal cutbacks and restrictions.

The *Plan* called for the creation of an Access to Justice for All Task Force comprised of bar officers, representatives of the Michigan State Bar Foundation and legal services programs. The Task Force promptly launched impressive initiatives to:

- assist legal services providers in obtaining and utilizing technology to the fullest extent so as to serve even more poor clients,
- explore innovations in service delivery, self-help and client education, and
- expand pro bono systems to take on important legal work that Legal Services Corporation-funded programs are prohibited from doing.

In addition, the State Bar, through the Task Force, has established an extremely ambitious statewide development campaign for access to justice, seeking to dramatically increase the resources available statewide to support legal services for the poor.

To provide a strong signal regarding the importance of this bar effort, the State Bar of Michigan created a new Access to Justice Department, lead by a senior management-level Associate Executive Director for Access to Justice. To assure that the Task Force's efforts would have necessary staff support and that the development campaign would be successful, the State Bar allocated substantial resources to create ten new professional and support positions within that department.

By working closely with Michigan legal services programs and the Michigan State Bar Foundation, the State Bar of Michigan has put in place an exemplary, broad-based and ambitious program to address the challenges to providing equal justice for all within the state's borders. It has made equal access to justice the bar's top priority, committing significant funding, a sizable department of professional staff, and the time and expertise of its executive director and an array of top leaders in a comprehensive set of programs to improve legal services for Michigan's poor.

Forsyth County Bar Association (NC)

The Forsyth County Bar Association collaborated with the Legal Aid Society of Northwest North Carolina and the Wake Forest University School of Law to launch an innovative program: The Domestic Violence Advocacy Center (DVAC). The Center involves lawyers, law students and undergraduate students who work together to provide swift service to victims of domestic violence. The program is structured to use the skills and time of each type of participant in the most efficient manner. Students perform initial intake and counseling. Volunteer lawyers obtain a preliminary protective order and work with law students to prepare for and represent the client at the hearing ten days later. The case is then transferred to the Legal Aid Society for any necessary follow up.

By joining several strategic partners in a carefully structured program, the Forsyth County Bar Association has vastly increased the number of clients assisted and has improved the success rates in obtaining protective orders. Before the program was instituted, judges--faced with

incomplete or inadequate information at hearings--were reluctant to award custody or exclusive possession of the home in domestic violence cases. Without those remedies, about two-thirds of the battered spouses returned to live in abusive homes. Following the implementation of this program, battered spouses in Forsyth County have become much more likely to separate from their batterers and to begin life anew. In fact, in 1997, the success rate was 75 percent.

The bar played a key role in creating the DVAC program. Each of the last three presidents has fully participated, donating time and expertise to assist program clients. The bar has actively recruited its members' participation in this and other pro bono programs. In 1997 it achieved an overall participation rate in its pro bono activities of 63 percent of the eligible bar membership. By its creative efforts in program design, and with the impressive commitment of its members, the Forsyth County Bar has significantly improved equal access to justice for the poor in the Winston- Salem area.

Dallas Bar Association (TX)

The Dallas Bar Association joined with Legal Services of North Texas on January 1, 1997 to launch an innovative, jointly-funded and staffed program to expand equal access to justice in the Dallas area.

The "Dallas Volunteer Attorney Program" (DVAP) was born out of the Dallas Bar's and Legal Services' mutual recognition that there was an overwhelming need to increase the availability of legal services to the poor in North Texas. With that need in mind, the Bar hosted a series of brainstorming sessions between the two organizations, seeking ways to work together more effectively to avoid overlap and competition for financial and volunteer resources.

Ultimately, these discussions lead the two organizations to enter into an alliance that combined their formerly separate volunteer attorney programs into a new program drawing upon the unique strengths of each sponsor. Unlike many other joint efforts where either the bar or the legal services provider serves only as a nominal co-sponsor of a program that the other party actually operates, the DVAP is a true partnership or joint venture. It is the responsibility of both the Bar and Legal Services.

The new alliance is working very well. During its first year of operation, the program has served an impressive number of clients, offering advice and brief service, representation and litigation services. In addition to direct advice and representation, the DVAP has continued to offer four specialized clinics, implemented a new SSI for Kids Project and offered new training programs in law firms. At the same time, the Dallas Bar Association joined with Legal Services of Northern Texas to undertake a fundraising "Campaign for Equal Access," which produced gifts to support DVAP in excess of \$200,000.

By finding a way to bridge institutional boundaries and begin a new and effective joint venture, while at the same time continuing a high level of volunteer participation in and financial support for legal services by its membership, the Dallas Bar Association has demonstrated an exceptional commitment to expanding equal access to justice in North Texas.

ABA Donates Computers to Louisiana and Wisconsin Legal Services Programs

Legal service providers in Louisiana and Wisconsin are among the first groups to receive a shipment of computers from the American Bar Association. This nationwide project places donated computers from law firms that are upgrading their systems with legal service offices may have inadequate or no computer systems.

The ABA has shipped 11 computers to Southeast Louisiana Legal Services in Hammond and six computers to Southwest Louisiana Legal Services in Lake Charles. In addition, Legal Action of Wisconsin, Inc., in Milwaukee, received 21 computers.

Legal service groups provide representation in non-criminal actions to those who cannot afford to be represented by a lawyer.

The donation program is a project of three ABA entities: the Standing Committee on Legal Aid and Indigent Defendants, the Section of Litigation and the Section of Business Law. The project collects working computers that law firms are replacing and donates them to legal services providers. The Open Society Institute of New York will provide the funding for the administration of the project, called the "Technology Exchange Project."

Firms are asked to donate equipment that is in good working order and that is capable of using Windows 3.11. The Technology Exchange Project will match donors with needy legal aid programs, and will assist in arranging the packing and delivery of donated equipment.

The ABA will donate about 400 of its used computers during the next two years after it begins an upgrade process this spring. The computers being shipped to Wisconsin are part of the ABA donation.

If a firm does not have equipment to donate but wishes to participate in the project, it can volunteer the time of its information services staff to serve as technical support for legal services programs. The project will maintain a clearinghouse listing firms willing to offer either telephone or occasional on-site technical support.

Firms wishing to participate or seeking information should contact the project coordinator: Meredith McBurney, ABA Technology Exchange Project, 1459 Clayton, Denver, Colo. 80206, phone: 303/329-8091, fax: 303/329-0362, e-mail: MM8091@aol.com.

Corel Corporation Joins in ABA Technology Exchange Program

The Corel Corporation, makers of WordPerfect Suite software, has agreed to contribute software to accompany used computers donated through the ABA's "Technology Exchange Project for Legal Services." Corel's generous donation will include software with a retail value of \$100,000. Recipients of donated computers will be able to choose between WordPerfect 7 for Windows 3.1, WordPerfect 7 Suite Legal Edition for Windows 3.1 and WordPerfect 8 Suite Legal Edition for Windows 95/98.

Corel WordPerfect 7 is the Windows 3.1 version of the most widely-used word processor in the legal community. WordPerfect Suite 7 Legal Edition includes the word processor, the Quattro Pro spreadsheet, the Paradox database, the Presentations package and a number of legal-specific enhancements including document assembly software, a dictionary with legal terms and abbreviations and other features. Corel WordPerfect Suite 8 Legal Edition contains the most recent version these applications. It is a Windows 95 office suite that includes 32-bit versions of the applications offered in the version 7 suite, but adds Dragon NaturallySpeaking™ voice-recognition software as well as special forms for pleadings and other legal documents.

Corel will contribute 400 copies of the software, to be distributed to recipients of computers donated through the Technology Exchange Project.

Doreen Dodson, Chair of the Standing Committee on Legal Aid and Indigent Defendants -- which asked Corel to join in this effort -- said, "We are very grateful to the Corel Corporation for the generous support it is demonstrating for the legal services community through this donation. We believe that Corel's software, combined with the hardware we will be distributing, will help many local legal aid and pro bono programs to serve their clients more effectively."

House Subcommittee Would Cut LSC's Funding in Half for FY 99

by Julie Strandlie

More than two months behind in its work for passing a budget for FY 99, Congress is beginning to make some progress toward passing a budget resolution and enacting appropriations bills for FY 99. The week of June 22, 1998 both the House and Senate finally began to address funding for the Legal Services Corporation (LSC) for FY 99.

On June 24, 1998, the House Appropriations Subcommittee on Commerce, Justice, State (CJS) marked up its spending bill and approved only \$141 million for LSC for FY 99. The full House Appropriations Committee is expected to mark up the bill on July 15. On June 25, 1998, the Senate Appropriations Committee marked up its version of the CJS bill. The Committee followed

the Senate Subcommittee's recommendation and approved \$300 million for LSC, a 6 percent increase over FY 98 funding.

LSC's current appropriation is \$283 million. For FY 99, the Administration and the Corporation have requested \$340 million. Earlier this year, both the Corporation's leadership and Doreen Dodson, chair of the ABA's Standing Committee on Legal Aid and Indigent Defendants, testified before the House Appropriations Subcommittee on Commerce, Justice, State (CJS) and urged Congress to fund LSC at no less than \$340 million. On June 22, 1998, ABA President Jerome J. Shestack wrote the chair of the House and Senate CJS Appropriations Subcommittees and reiterated the importance of funding LSC at this level.

LSC enjoys bipartisan support in Congress. A vocal minority, backed by the House Leadership, however, continues to attempt to eliminate LSC. LSC's supporters are working with Congressional leaders to restore funding to \$283 million. The ABA encourages you to work with your boards of directors and local bar leaders to communicate with your Congressional representatives to demonstrate the importance of local legal services programs and advocate for increased funding for LSC. If you would like more information on the status of funding for LSC and the ABA's LSC grassroots advocacy program, please contact Julie Strandlie at 202/662-1764.

Julie Strandlie is the new Director of ABA Grassroots Operations. Originally from Wisconsin via Florida, Julie moved to D.C. after graduating from the University of Florida with a degree in political science. Over the past 15 years, she worked on Capitol Hill and for large and smaller law firms, concentrating on legislative advocacy. While at the law firm Patton Boggs & Blow, Julie attended Georgetown University Law Center, graduating in 1991. Most recently, she had a law practice while serving as Washington Representative for the University of Florida.

LSC Restrictions Upheld in *Legal Aid Society of Hawaii v. LSC*

Editor's note: This article is reprinted with permission from the May 21, 1998, edition of the Project Advisory Group Update, Volume XXI, No. 9.

In May, a three judge panel of the U.S. Court of Appeals for the Ninth Circuit unanimously affirmed a lower court's ruling that Legal Services Corporation (LSC) regulations restricting use of non-LSC funds do not violate the First Amendment rights of free speech and association.

In January 1997, five legal services programs, a client group, private funders and two individual legal services attorneys filed suit in the U.S. District Court for the District of Hawaii (*Legal Aid Society of Hawaii, et al. v. Legal Services Corporation*, Civil Action No. 97-00032 ACK) ("LASH"). The LASH case challenged the application of Congressionally-imposed restrictions and the LSC regulations implementing those restrictions on the recipients' non-LSC funds. On February 14, 1997, the District Court granted, in part, the plaintiffs' motion for a preliminary injunction. The

District Court's order enjoined LSC from enforcing certain of the restrictions with respect to the recipient's use of non-LSC funds, holding that these restrictions implicated the plaintiffs' First Amendment rights and that the plaintiffs had a fair likelihood of succeeding on the merits when the case went to trial. (*LASH v. LSC*, 961 F. Supp. 1402 (D. HI. 1997)).

The District Court's opinion relied heavily on its analysis of the Corporation's regulations and policies in light of the standards announced in the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), upholding HHS regulations that required an organization receiving Title X family planning funds to physically and financially separate out the project supported by those funds from the organization's abortion related activities. The Supreme Court held that the Title X regulations provided recipients with adequate alternative avenues for the expression of First amendment rights. In contrast, the court in the LASH case found that LSC's regulations were overly restrictive and provided no adequate alternative means for the plaintiff recipients to exercise their First Amendment rights.

In an effort both to meet the Constitutional concerns expressed by the judge in LASH and to preserve the statutory framework constructed by the Congress, LSC revised Part 1610 and the interrelated organizations policy. The new Part 1610 permitted recipients to transfer non-LSC funds to outside entities without regard to the restrictions, so long as the recipient and the other entity met a set of "program integrity" standards that were modeled on the HHS standards approved by the Supreme Court in *Rust*. The new rule also abandoned the interrelated organizations policy, permitting a recipient to create an affiliated entity, with the same or overlapping board of directors as the recipient, that was permitted to engage in restricted activity as long as the relationship between the recipient and the affiliate met the program integrity standards.

Subsequent to the adoption of the revised Part 1610, both the plaintiffs and the defendants filed motions for summary judgment, which the court heard on July 28, 1997. On August 1, 1997, the court issued a new opinion which denied the plaintiffs' motion for summary judgement, granted LSC's motion for summary judgement and dissolved the preliminary injunction. (*LASH v. LSC*, 981 F. Supp. 1288 (D. HI. 1997)). The plaintiffs appealed the denial of their summary judgement motion to the Ninth Circuit, which heard the case on March 13, 1998.

On May 18, 1998, a three judge panel of the U.S. Court of Appeals for the Ninth Circuit unanimously affirmed the ruling of the U.S. District Court in Hawaii, holding that under the current version of Part 1610 of the LSC regulations, the application of the LSC restrictions to a recipient's non-LSC funds does not, on its face, violate the plaintiffs' First Amendment rights of free speech and association. Retired Supreme Court Justice Byron White, sitting by designation, wrote the opinion for the panel.

Justice White's opinion rejected the plaintiff's arguments that the LSC "program integrity rules" in Part 1610 could be distinguished from the Title X rules upheld by the Supreme Court in *Rust v. Sullivan*, upon which they were modeled. Plaintiffs had argued that the LSC rules were flawed

because they applied to the entire recipient, rather than to merely a program of a recipient as was true under *Rust*, but Justice White rejected the distinction, concluding that the difference was only one of terminology, not of substance. Plaintiffs had also argued that the rules should fail because they required a recipient to set up a separate legal entity to engage in restricted work, rather than merely separating out a program run by the same recipient, which was permissible under the rules tested in *Rust*. However, Justice White held that this requirement did not impose an unconstitutional burden on the exercise of the plaintiffs' First Amendment rights.

Justice White also rejected plaintiffs' argument that the restrictions are subject to heightened Constitutional scrutiny because LSC is a program designed to encourage private speech, unlike Title X programs which are established to transmit specific information. Instead, the opinion held that, like Title X, the LSC program is designed to provide limited professional services to indigent clients, not to create a forum for the free expression of ideas. Since the case was brought as a facial challenge to the restrictions, Justice White refused to speculate on whether there might be situations where LSC might apply the rules in a manner that could raise new Constitutional questions.

The opinion addressed the equal protection and due process arguments that the plaintiffs had raised in their appeal by finding that the client organization which was a plaintiff had no standing to raise those issues on behalf of its members, because there was nothing in the record to suggest that any individual member of the organization had been injured by the restrictions and had standing.

On a related matter, on March 20, 1998, the Second Circuit heard arguments in the appeal of the *Velazquez v. LSC* case. Velazquez was a class action brought in the Eastern District of New York against the Legal Services Corporation by a former client of Legal Services of New York (LSNY), along with several client groups, a former LSC recipient, several former and current LSNY attorneys and a number of state and local legislative officials broadly challenging the LSC restrictions. On December 22, 1997, the District Court denied the plaintiffs' motion for a preliminary injunction, concluding that the plaintiffs had failed to establish that their constitutional challenge was likely to succeed on the merits. To date, the Court of Appeals for the Second Circuit has not issued any ruling in the Velazquez case.

SCLAID News & Notes

Statewide, State-Funded Indigent Defense System in Mississippi

Editor's note: This is an edited version of an article that first appeared in The Spangenberg Report, Vol. IV, Issue 2. For more information about The Spangenberg Report call 617/969-3820.

On April 21, 1998, the Governor of Mississippi signed into law the Mississippi Statewide Public Defender Act of 1998. The new law calls for the creation of a statewide commission on indigent

defense, the position of Executive Director and the office of District Defender in all circuit districts to provide Mississippi with a statewide, state-funded system that provides representation to indigent defendants in all proceedings of felony cases.

This is the fifth consecutive year in which a bill calling for a statewide public defender system has been introduced in the Mississippi legislature. With passage of the Mississippi Statewide Public Defender Act of 1998, the number of states that provide no funds for indigent defense services drops to just three: Idaho, Pennsylvania and South Dakota.

Previously, counties in the state provide all funds for indigent defense. Each county selected its own type of indigent defense delivery system, and as a cost containment strategy, most used a part-time contract public defender model. Under this system, the county contracted with private attorneys to provide representation to an unlimited, and often an unrealistically high, number of indigent defendants each year, often without investigatory, expert witness or support staff assistance.

The Public Defender Act replaces this system with a full-time, statewide, state-funded felony case public defender system that is modeled on Mississippi's existing District Attorney system. Counties may elect to supplement the system's funds to assume their continuing responsibility to provide counsel to indigents in misdemeanor and juvenile delinquency cases.

The Commission's primary responsibilities will be to appoint an Executive Director of the Statewide Public Defender System and to establish, implement and enforce policies and standards for a comprehensive and effective public defender system throughout the state of Mississippi.

NAPIL Announces an Expanded Fellowship Program for Public Service Lawyers

The National Association for Public Interest Law (NAPIL) has announced that financier/philanthropist George Soros is providing a multimillion-dollar matching grant to encourage law firms and corporations to provide underserved communities with greater access to legal representation. The Open Society Institute, Soros' benevolent foundation, and its Program on Law and Society, is making the grant.

NAPIL reports that more than 75 law firms and corporations nationwide already have responded to the challenge by agreeing to co-fund public service fellowships. Major law firm sponsors include Cravath, Swaine & Moore; Sullivan & Cromwell; Arnold & Porter; Simpson Thacher & Bartlett; Davis Polk & Wardwell; Latham & Watkins; and Wilson; Sonsini, Goodrich & Rosati. Major corporate sponsors include Ford Motor Co., AT&T and Mobil.

NAPIL has developed the nation's largest legal fellowship program, putting scores of public service lawyers to work on behalf of an increasing number of Americans in need of legal assistance. With this new initiative, NAPIL's Equal Justice fellowship program, which supported 14

new fellowships for law graduates last year, will fund 70 Fellows across the United States in 1998.

Each two-year fellowship provides salary, full loan repayment assistance, a national training program, and support and assistance from NAPIL. Over the next two years, these Equal Justice Fellows will build on the initial successes of earlier Fellows to create effective strategies to meet some of the nation's greatest challenges, including homelessness, access to health care, domestic violence, community development, discrimination in housing and employment, and children's health and welfare issues.

"According to ABA studies, there are millions of people who lack access to any legal representation even when they face legal problems associated with the most basic necessities-- food, housing, health care, education, protection of their children," said ABA President-Elect Philip Anderson at a press briefing announcing the expanded program. Mr. Anderson went on to say, "The greatest issues of our time are the dignity of humanity, the search for justice, and how a civilized society in the closing days of the 20th Century defines the former and pursues the latter. By this matching grant and similar initiatives, Mr. Soros is promoting a compassionate definition of human dignity and ensuring a vigorous pursuit of justice for those who may have little else in this life. Those who will benefit can maintain their dignity and may taste the fruit of justice, and for that, we are profoundly grateful."

For more information about this program, contact NAPIL at 202/466-3686.

New York Updates

Legal Services Funding Crisis

In a surprise move, New York Governor George Pataki vetoed \$750 million in general revenue appropriations, including approximately \$7 million for the provision of civil legal services to the poor in New York. Many groups, including the New York State Bar Association, have been forcefully advocating for the restoration of the legal services funding, but so far to no avail.

\$40 Million Fund for Civil Legal Services Recommended

A blue-ribbon group of business leaders and lawyers has issued a report in New York calling for creation of a special \$40 million fund to support provision of legal services for the poor in the state. New York Chief Judge Judith S. Kaye appointed the panel, the Legal Services Project, late last year to "determine how society can best support legal services."

The report states, "We are unanimous in the view that the provision of civil legal services for poor persons is a fundamental obligation of government which should, if necessary, be satisfied through allocation of general state revenues."

The report goes on, however, to consider a variety of methods to generate funds without burdening general revenues. It proposes the creation of an "Access to Justice Fund," and

concludes that "The State should fund the Access to Justice Fund through a dedicated revenue stream of \$40 million from the State Abandoned Property Fund. A modernization of the 55-year-old Abandoned Property Law...should result in substantial new revenues flowing to the Abandoned Property Fund."

Specific changes to the Abandoned Property Law are recommended to:

- enlarge the types of property that escheat to this fund
- shorten the time before abandoned property is paid into the fund
- strengthen the enforcement of the law.

The report suggests that if the Abandoned Property Fund is inadequate to raise the necessary money needed for civil legal services, the General Fund should provide the balance. A special revenue fund generated through filing fees to support court facilities often generates surpluses that are by law paid into state general revenues.

As a first alternative to the abandoned property approach, the report suggests transferring those surpluses into the Access to Justice Fund. As a last resort if those approaches fail to produce sufficient revenue, a majority of the members of the Legal Services Project suggest that funds may be generated through imposition of a motion fee, or through increases in either the Housing Court filing fees or the attorney registration fee.

Judge Kaye has endorsed the Project's core proposal. It is expected that the Assembly will incorporate the proposal into a bill to provide legal services funding, to be considered at an upcoming session of the legislature.

For further information or to receive a copy of the report, contact Tony Cassino, Director, New York State Bar Association Department of Pro Bono Affairs at 518/487-5640.

SCLAID Proposes New ABA Policy on Indigent Defense Standards

Through its efforts to improve state systems for providing defender services to indigent persons accused of crimes, the Committee has found that the quality of many indigent defense systems has been greatly improved through enforcement of locally-adopted and adapted minimum standards and guidelines for operation of state and local indigent defense systems. Standards help to assure that defendants' constitutional rights are respected, reduce the likelihood of error in proceedings, diminish the number of appeals and ultimately enhance the efficiency and effectiveness of the criminal justice process.

Standards and guidelines pertaining to attorney eligibility, caseloads, conflict of interest, indigency screening, attorney performance and administration of indigent defense systems have been adopted in a number of jurisdictions by state and local legislation; state supreme court rule; national, state and local public defender organizations; indigent defense commissions and other entities. These standards and guidelines were adapted to local conditions but were greatly

influenced by standards and guidelines developed over the past quarter century--mainly by the American Bar Association.

Because standards have been such an important tool for improving or establishing high-quality systems, the Committee will seek adoption of ABA policy encouraging use of standards. A policy proposal has been filed for consideration by the ABA's policy-making House of Delegates at the ABA Annual Meeting in August 1998. The policy recommendation urges jurisdictions to adopt standards for indigent defense systems, using widely-available models to prepare such standards. The recommendation also urges courts, state, territorial and local bar associations to support the development and adoption of such standards, and suggests that funding for indigent defense systems be awarded contingent upon compliance with such standards. For further information, contact Terry Brooks at 312/988-5747 or by e-mail: tjbrooks@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. ♦ 2001 American Bar Association ISSN 1092-2164

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Interest on Lawyers' Trust Account Articles



From the Chair.

by Herbert S. Garten

Chair, Commission on IOLTA

In the immortal words of Yogi Berra, "It ain't over 'til it's over!"

As most of our readers have heard already, the U.S. Supreme Court issued its decision in *Phillips, et al. v. Washington Legal Foundation, et al* on June 15, 1998. A deeply divided Court rendered a 5-4 opinion, authored by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy and Thomas, finding that, under Texas law, interest earned on client funds held in IOLTA accounts is the client's private property.

Similar to the Fifth Circuit Court of Appeals decision that it reviewed, the U.S. Supreme Court addressed only the property interest prong of a Fifth Amendment Taking Clause analysis. There was unanimity among the Justices, however, that in order to prove a violation of the Fifth Amendment Taking Clause three questions must be answered in the affirmative: 1) Is there property? 2) Has the government taken that property? and 3) Is there just compensation due for the taking of the property? The majority left for a later day the issues of whether Texas has "taken" client property, or whether respondents are due "just compensation." The case has been remanded to the Fifth Circuit Court of Appeals to make those determinations.

A dissenting opinion, written by Justice Souter and joined by Justices Stevens, Breyer and Ginsburg argued that to consider only one of the three issues implicated by the Fifth Amendment Takings Clause puts undue emphasis on that issue. The dissenters stated, "if it should turn out that within the meaning of the Fifth Amendment, the IOLTA scheme had not taken the property recognized [in the Court's ruling], or if it should turn out that 'just compensation' for any taking was zero, then there would be no practical consequence for the purposes of the Fifth Amendment in recognizing a client's property right in the interest in the first place; any such recognition would be an inconsequential abstraction."

During oral argument, Justice O'Connor, a member of the majority in this case, made a statement that is cause for optimism for the future. At the end of the Petitioner's argument, Justice O'Connor said, "The court below found there's a property interest, a cognizable property

interest here. It didn't go on and determine whether there had been a taking. . . Well, I guess it's possible that there might be a property interest, but nonetheless it might turn out at the end of the day there's no taking. No damages, no loss, no taking."

It has been our contention from the beginning that clients experience no financial loss when their attorney properly places their short term or nominal funds in an IOLTA account. We believe, as a result, the Court's ruling regarding property interest ultimately will be, in Justice Souter's words, "an inconsequential abstraction."

That said, where does this decision leave us now?

It will be several years before the courts resolve the remaining issues in this case. As for the present, the U.S. Supreme Court did not find the Texas IOLTA program to be in violation of the Fifth Amendment, and it did not enjoin the operation of the Texas or any other IOLTA program. As a result, the IOLTA rules in every state and the District of Columbia remain in effect. While the ABA cannot provide legal advice, it is the Commission on IOLTA's position that lawyers and banks should continue to adhere to the IOLTA rule in their state and that IOLTA programs should continue to collect interest on IOLTA accounts and disburse grants as before.

The American Bar Association, through its Commission on IOLTA and other entities, remains available to assist state and local bar associations and state IOLTA programs, their officers and staff as they analyze and react to the *Phillips* decision. As ABA President Jerome Shestack stated: "We are confident that, ultimately, the courts will uphold the constitutionality of this vital resource for the public good. We will continue to work to preserve this program, which provides tens of thousands of the most needy members of our society access to our civil justice system to enforce their rights and resolve their grievances."

U.S. Supreme Court Remands IOLTA Case

by Ken Elkins

On June 15, 1998, the U.S. Supreme Court rendered its opinion in the Texas IOLTA case, *Phillips, et al. v. Washington Legal Foundation, et al.* Chief Justice Rehnquist authored the 5-4 majority opinion, which Justices O'Connor, Scalia, Kennedy and Thomas joined. The Court ruled that Texas law observes the "interest follows principal" doctrine, and, as a result, interest earned on client funds held in an IOLTA account is client property. The majority opinion expressed no view as to whether Texas has "taken" client property, or whether any "just compensation" is due the respondents. It remanded those issues to the Fifth Circuit Court of Appeals for consideration. The petitioners' argued that no property interest is implicated in this case because the only client funds that may properly be placed in an IOLTA account are those that cannot earn net interest for the client. The Court disagreed. It ruled that a physical item does not lose its status as

"property" simply because it lacks a positive economic or market value. Property, the Chief Justice wrote, also consists of "the group of rights that the so-called owner exercises in his or her dominion of the physical thing, such as the right to possess, use and dispose of it." Although the interest income at issue in this case may have no economically realizable value to its owner, the Court ruled that possession, control, and disposition nonetheless are valuable rights intrinsic to property.

Justice Breyer wrote a dissent that Justices Stevens, Souter and Ginsburg joined. He agreed with the petitioners that no property interest is implicated in this case.

Justice Souter authored a dissent joined by Justices Stevens, Ginsburg and Breyer. It asserts that the Court either should have decided all three Takings Clause issues together (i.e., is there property, has the state taken the property, and is just compensation due as a result of the taking?) or returned the case to the Fifth Circuit Court of Appeals to do the same. Justice Souter wrote that this approach would reduce the risk of placing undue emphasis on the existence of a generalized property right that may turn out to be an entirely theoretical matter, especially when, in his estimation, the respondents will have a difficult time prevailing on the other two issues.

To find a "taking," the court must consider:

1. the nature of the government's action,
2. the economic impact of that action, and
3. the degree of any interference with the property owner's reasonable, investment-backed expectations. See *Penn Central Transp. Co. v. New York City*, 438 US 104 (1978).

As Justice Souter observed, in this case:

1. there is no physical occupation or seizure of tangible property,
2. there is no apparent economic impact, since the client would have no net interest to go in his or her pocket (IOLTA or no IOLTA), and
3. the facts present neither anything resembling an investment nor any apparent basis for the client to reasonably expect to obtain net interest.

Even if the Court were to find that a taking had occurred, Justice Souter argued, it is hard to imagine how the respondents could successfully assert that they are due "just compensation."

The ultimate resolution of the remaining Taking Clause issues will take several years. In the mean time, the U.S. Supreme Court neither found the Texas IOLTA program to be unconstitutional, nor it did order the Texas or any other IOLTA program to stop operating. As a result, the IOLTA rules in every state and the District of Columbia remain in effect.

Today, IOLTA programs operate in all 50 states and the District of Columbia. Twenty- seven are comprehensive, 21 are opt-out and three are voluntary. State legislatures authorized the IOLTA

rules in five states, while 46 states (including D.C.) have rules authorized by order of the highest court in the jurisdiction. In 1996, IOLTA revenues were approximately \$110.5 million nationally. Since 1981, IOLTA revenues have exceeded \$1 billion, the vast majority of which have gone to programs that provide indigent civil legal services and related purposes.

IOLTA is a critical part of an indigent civil legal services delivery system that has evolved in the United States over the past two decades. State IOLTA programs make grants in support of equal access to justice through the provision of direct legal services, the provision of pro bono services, improvements in the administration of justice and law related education. Many IOLTA grantees help to resolve the everyday legal problems that families confront, including stopping family violence (see story on page 3), preventing illegal evictions and providing support for debt counseling clinics.

The American Bar Association remains convinced of IOLTA's constitutionality and of the sound public policy that has encouraged its growth. In response to the Supreme Court's June 15, 1998 Phillips decision, ABA President Jerome Shestack stated: "We are confident that, ultimately, the courts will uphold the constitutionality of this vital resource for the public good. We will continue to work to preserve this program, which provides tens of thousands of the most needy members of our society access to our civil justice system to enforce their rights and resolve their grievances."

Ken Elkins is the Assistant Staff Counsel for the ABA Commission on IOLTA.

Phillips v. Washington Legal Foundation

Frequently-Asked Questions and Answers About the U.S. Supreme Court Ruling

Q. Did the United States Supreme Court rule that the Texas IOLTA program is unconstitutional?

A. No.

The Court only ruled that, under Texas law, "the interest income generated by funds held in IOLTA accounts is the private property of the owner of the principal." The Court expressly did not rule on whether the funds have been "taken" by the State or whether just compensation is due. In order to prevail under the Fifth Amendment Takings Clause, there must be a finding that there is private property, that the property has been "taken," and that some compensation is due the property owner. The Court ruled only on the first issue and remanded the other two issues to the lower court for determination.

Q. Is the Texas IOLTA program still operational?

A. Yes.

The Court did not enjoin operation of the Texas program or any other IOLTA program. Instead, it remanded the case to the lower court to determine if there has been a taking and if any just compensation is due.

Q.Does this opinion affect other state IOLTA programs?

A. No.

At this point, the Court's decision does not affect other IOLTA programs. The Court only ruled that under Texas law, clients have a property interest in the interest generated from IOLTA accounts. It did not rule on the constitutionality of the Texas program or any other IOLTA program.

Q. Should lawyers continue to participate in IOLTA programs?

A. Yes.

The IOLTA rules that exist in every state remain in effect. It is also important to remember that lawyers' compliance with these rules and their continued participation in the program help to provide equal access to justice, as the monies generated from IOLTA accounts fund programs that provide direct legal services to the poor, pro bono legal services, improvements in the administration of justice and law related education.

Prepared by the ABA Commission on IOLTA - June 1998

Grantee Spotlight. . .

Nevada's Washoe County CASA Program

by Mary Herzik

Established in 1977, the Court Appointed Special Advocate (CASA) program is a nationwide movement of community volunteers who speak for abused and neglected children in court.

CASA founder Judge David Soukup of Seattle, Washington explains the development of the volunteer Guardian ad litem concept in personal terms: "As a judge, I had to make tough decisions: to take a child from the only home that he's ever known, or leave him someplace where he might be abused. I needed someone who could tell me what was best for that child-- from the child's perspective."

From this beginning, a national child advocacy movement was born. Today, nearly 128,000 volunteers in more than 640 CASA programs nationwide are "speaking up" for children in the courts.

Washoe County's CASA program started in 1982 under the leadership of Judge Charles M. McGee. The Reno Junior League provided initial support for the project, and six members became Washoe County's first CASA volunteers. Today, the program has 150 volunteers handling more than 200 new cases referred from Family Court each year. A professional staff of five oversees the program.

Grants from the Nevada Law Foundation's IOLTA program provide funds to contract the services of a program attorney. In 1997, the IOLTA program supported a model of child representation that uses a CASA/Attorney team for representing a child's "best interests."

The increasing complexity of legal issues that volunteers face in their casework, coupled with a need to draft motions and other legal documents on the child's behalf goes beyond the resources of a trained volunteer. National studies have shown the CASA/Attorney model to be particularly effective. In fact, a recent Oregon Task Force on Juvenile Justice endorsed this model noting, "the best advocacy for abused and neglected children can be provided by an attorney and lay volunteer who work cooperatively. An effective statewide, coordinated system for the appointment of advocates should be patterned on this team model." (*Achieving Our Mission--A Management Guide for CASA Program*, National CASA, Appendix, p. 21).

So what exactly does CASA do? The following case is typical.

There are three children in the King family: Ray (7), Dawn (6) and Marie (3)(these names have been changed for purposes of this article). The Washoe County Department of Social Services removed the King children from their home in April 1993 after discovering severe bruising on their bodies. In addition, the King home had no food or electrical power.

At the time, Ms. King was moving from home to home and from job to job. When she finally achieved some stability, the children returned home. A CASA continued to monitor the case, however, and he noticed bruising on the children during a home visit in December 1993. He discovered that mom had allowed her abusive boyfriend to move into the home, thinking that the Washoe County Department of Social Services "wasn't looking."

Once again, the children were removed from the home, and the case was transferred to the State of Nevada, Division of Child and Family Services (DCFS) in February 1994. DCFS's objective was to pursue long-term foster care services and to find a permanent home for the King children. The CASA remained on the case.

Ms. King agreed to relinquish her parental rights to the children if their maternal grandparents living in New Mexico could adopt them and if she could have pictures of the children periodically.

In February 1994, an Interstate Compact for the Placement of Children (ICPC) commenced to facilitate the placement of the King children. In May 1994, the children were placed with the maternal grandparents. Currently, the children are available for adoption, and the maternal grandparents are the designated adoptive parents. All three children sadly are "special needs" children and have serious behavioral, emotional and physical problems associated with parental abuse.

Unfortunately, because of communication problems between DCFS (Nevada) and New Mexico, the adoption process has been stalled temporarily. In addition, a conflict with New Mexico's special-needs documentation and assessments (psychiatric, educational and developmental) has resulted in a request for further evaluation at the grandparents' expense. This too has contributed to the temporary stall in the process.

So where does CASA fit into this picture? The CASA volunteer, Randy, has been actively involved in this case since day one. He knows all of the players involved on a personal level. Other than the maternal grandparents, Randy knows the King children better than anyone. He has dealt with Ms. King, the children's father, the procession of social workers and therapists.

Randy was instrumental in facilitating the children's placement with the grandparents in New Mexico, which is the only stable home they have known. He also coordinated the services to meet the children's special needs both in Nevada and New Mexico, and Randy has been a persistent advocate for these children caught between the bureaucracies of two states.

While both New Mexico and Nevada have thousands of children in the system, Randy has only three: Ray, Dawn and Marie King. Foster care, ICPCs and adoptions will happen, but a CASA volunteer can make sure that they happen in a manner that is in the children's best interest.

The CASA volunteer becomes the glue that holds our fragmented social services efforts together. Randy has participated in numerous phone calls, case staffings and court hearings all meant to speed up the process and to ensure that the King children are the focus of everyone's efforts. After all, everyone agrees that the grandparents should adopt the King children, and if a CASA is willing to spend the time and energy to ensure that this adoption becomes a reality, everybody wins--especially the children.

As this case illustrates, CASA volunteers sometimes are the only consistent figure in an overloaded social services system. CASAs have only one or two cases, while a social worker may have 40 or more. CASAs have time to build relationships with the children, care providers and others working closely with them. The end result is reducing the length of time of out-of-home placements, achieving permanency and minimizing placement changes along the way.

The Washoe County CASA Program is indebted to the Nevada Law Foundation for its grants to the program over the past decade. As stated above, through IOLTA grants, the program contracts

with a local attorney who provides invaluable legal support to the CASA volunteers, ensuring recommendations that CASAs make are sound and considered. As a result, the Washoe County CASA program is growing both in the numbers of volunteers and in its commitment to children's advocacy.

Mary Herzik is the CASA Executive Director of the Washoe County CASA Program in Reno, Nevada. The program is affiliated with the 2nd Judicial District Court, Family Division.

IOLTA News & Notes

New Executive Director in New Jersey

Veteran Executive Director of the IOLTA Fund of the Bar of New Jersey, Ruth Birkhead, has retired after almost a decade at that position. Ellen D. Ferrise has been named the new Executive Director. Ferrise started Ferrise & Company in 1996 to provide advice about financial strategies, credit and cash management to small and mid-sized companies. In 1997, she served as a loan consultant reviewing loans and loan portfolios, lending practices and credit administration for several small banks. Ferrise also facilitated the evaluation of multiple proposals for complex cash management services as a banking consultant to a New Jersey university. In a third project, the New Jersey Department of Labor hired Ferrise to lead and coordinate certain aspects of a local plant closing as part of their "Response Team" program.

Ferrise's extensive banking experience also includes a stint as a commercial lender, where she examined the financial statements of hundreds of small companies. Her expertise in financial evaluations and credit analysis helped many companies obtain appropriate financing in the short term and "credit readiness" for the long term.

After five years at Chemical Bank (now Chase Bank) and nine years at Barclays Bank of New York (now part of Bank of New York), she joined CoreStates Bank in 1991 where she managed its middle-market lending activities in the northern New Jersey region. Responsible for client relationships and business development, Ferrise has met and worked with many entrepreneurial, closely-held and family-owned businesses in the New Jersey/New York market.

You can reach Ellen Ferrise by e-mail: eferrise@worldnet.att.net or by phone: 732/247- 8222.

Briefing Schedule Set in Washington State

The Ninth Circuit Court of Appeals has set a briefing schedule in the Washington State IOLTA litigation, *Washington Legal Foundation, et. al. v. Legal Foundation of Washington, et al.* Appellants' brief is due on or before July 29, 1998, and Appellees' brief is due on or before August 28, 1998. Appellants may file a reply brief within 14 days of service of Appellees' brief.

Amicus curiae briefs are due within the time allowed the party whose position the brief will support.

Although this lawsuit is slightly different from those that the Washington Legal Foundation filed against the Texas and Massachusetts IOLTA programs, the underlying issues remain the same. As in Texas and Massachusetts, the plaintiffs alleged an unconstitutional taking of property in violation of the Fifth Amendment to the U.S. Constitution. In addition, the plaintiffs argued that their rights to free speech and association under the First Amendment were violated because their funds finance activities that they do not support.

This case is different than the other two, however, in that it focuses on Limited Practice Officers. LPOs are professionals whom the Washington Supreme Court license to practice law. They are called LPOs or Certified Closing Officers and are licensed solely to complete real estate closing documents. Escrow firms, title companies, mortgage companies, banks and law firms employ LPOs, and the Washington Supreme Court mandated their participation in the state's IOLTA program on December 9, 1995. The mandate was the result of the Washington State Bar Association Legal Aid Committee's protracted effort that lasted for more than two years.

In addition, the issue in this case is slightly different than the Texas and Massachusetts cases in that the plaintiffs here receive benefits from the client funds held in trust. The benefits come in the form of extensive services, including computer hardware and software and on-going technical assistance.

Sweep Accounts Come to Illinois

The Illinois Supreme Court approved an amendment to Rule 1.15(d)(1) of the Illinois Rules of Professional Conduct (the "IOLTA rule") to allow the use of "sweep" accounts for IOLTA. The amendment became effective on April 1, 1998.

With the new rule, Illinois joins Arizona, Connecticut, Florida, Massachusetts and New Hampshire as states that allow attorneys and law firms with high-balance pooled client trust accounts to use sweep accounts and earn a higher rate of return for IOLTA.

"We think that sweeps will give us a boost," said Ruth Ann Schmitt, Executive Director of the Lawyers Trust Fund of Illinois. Noting that the average interest rate on IOLTA accounts in Illinois is 1.87 percent, she added, "sweeps will allow us to earn significantly higher rates on some of our bigger accounts, and hopefully, they will help to change the overall interest rate climate."

The Lawyers Trust Fund's staff is working with financial institutions to develop appropriate sweep products.

For more information about Illinois' sweep account program, or to obtain a copy of the rule language, call Ruth Ann Schmitt at 312/372-5906 (e-mail: raschmitt@lwf.org).

Maryland Legislature Enacts New Legal Services Funding

The Maryland General Assembly has enacted legislation creating a surcharge on civil filing fees to help fund civil legal service to low-income persons. Governor Parris Glendening signed the bill into law on May 21, 1998. The Maryland Legal Service Corporation (MLSC), the state's IOLTA program, will administer the new funding, which is projected to be at approximately \$3 million annually.

MLSC Executive Director Bob Rhudy said, "The third time is a charm. We had an excellent lead sponsor in State Senator Leo Green, Vice Chair of the Senate Judicial Proceedings Committee, and an outstanding coalition of statewide supporters. Despite some very real opposition, we were able to prevail."

This was the third consecutive year that the Maryland General Assembly considered the legal services filing fee surcharge legislation. The bill was the Maryland State Bar Association's highest legislative priority this session. Maryland Chief Judge Robert Bell, Attorney General Joseph Curran, the Maryland Coalition of Civil Justice (the state's legal services planning group), Legal Aid Bureau (the LSC grantee), Maryland Trial Lawyers, other legal services programs, state aging and human services agencies, domestic violence centers, labor and religious organizations, and other social services programs all strongly supported the bill.

The statute establishes a \$10 surcharge on civil cases in the circuit court (Maryland's court of general jurisdiction) and a \$2 surcharge in state district court actions. As a result of the new legislation, MLSC's funding will be collected in a special fund of the Maryland Office of the Courts and appropriated annually by the Maryland General Assembly. For further information, contact Robert J. Rhudy at the Maryland Legal Services Corporation, 15 Charles Plaza, Suite 102, Baltimore, MD 21201, 410/576-9494, or by e-mail at mlsc@erols.com

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Summer 1998 - Volume 2, Number 3

Lawyer Referral Articles



From the Chair.

by Denis Murphy

Chair, Standing Committee on Lawyer Referral and Information Service

My term on the ABA Standing Committee for Lawyer Referral and Information Service comes to an end August 1998, and, as a result, this will be my last chair's column.

I will, however, remain connected to the committee as a PAR Consultant. After my tenure as chair, the committee's work will move forward with new leadership, new committee appointments, the same goals and the same brilliant work by our ABA staff.

When I was appointed to the committee, Cindy Raisch was its chair and Mike Franck was a member. Both have since died of cancer, and I am lucky to have known them. Their leadership skills were superb and their commitment to public service was inspirational. Their outgoing personalities made me feel immediately welcome when I was the new kid on the committee six years ago. Over the years the committee has been my ABA family. Cindy Raisch and then Lish Whitson, chairs before me, set the tone.

We knew each others' practices, family stories, the health of each others' parents, each others' hopes and dreams, and we met each others' children or at least knew about them. Most importantly, from meeting to meeting, here was a group of people brought together almost randomly (or so it seemed) who really cared about each other. These were people for whom friendships mattered; people who asked about you and really wanted to know the answer.

The committee appointment is not, however, as random as it first would appear. Each year the ABA President-elect asks the chair and staff for recommendations. Terms of appointment are for no longer than three years. A committee chair may serve up to three years at the pleasure of the ABA President. We have a nine-member committee plus the chair, with a third of the committee moving off each year.

Committee members must be members of the ABA, of course. That means that the appointee must be a lawyer. We have, over the years, sought suggestions for appointments from committee members and LRIS directors, and I suspect that, to the extent that our suggestions

have been honored, they have made all the difference. The fact is that the committee make-up is, by and large, a reflection of its constituency. We, in turn, can count on the LRIS directors to know lawyers in the communities that they serve. In this process, we have the LRIS directors to thank for the recommendations that they have made.

Of course Sheree Swetin, Staff Director of the ABA Standing Committee on Lawyer Referral and Information Service, plays a role in this process. She reminds us to balance our recommendations for appointment between program directors and local committee members, and to maintain equal geographic representation.

And while I am passing out accolades, let me say that Sheree also has done a wonderful job in recruiting and nurturing other staff. Jane Nosbisch is a gem. My fear is that her talents will go rewarded, and she will move on to other endeavors within the ABA. Thank you to all committee staff past and present.

Finally, there are the PAR Consultants. Many are former committee members. All are committed to lawyer referral. They contribute the ideas and establish the standard of professionalism that make the committee's work so rewarding.

A lot has happened in the six years that I have been on the committee. In 1993, on our motion, the ABA House of Delegates adopted the model rules for the operation of an LRIS. Soon thereafter, the committee adopted the logo and slogan program and began the process of reviewing LRIS applications from around the country for use of the logo and slogan, which we often refer to as the "slogo" program. Over thirty services are approved to use the logo, certifying that the service meets ABA standards and can represent itself as "The Right Call For The Right Lawyer." We have trademarked the slogan.

We began a national marketing program on a shoestring budget with some remarkable national media successes. Our Media Guide has been an instant success. The committee has aggressively spread the gospel of the "business of public service," and increasingly, local services have adopted a percentage of the fee earned as part of their fee structure, which has increased many programs' economic viability. Our workshops have attracted the top leaders of the bar as keynote speakers. We established a List Serve for LRIS. The List Serve too has enjoyed immediate success. The ABA website dealing with LRIS is one of the most popular sites at the ABA.

During the last six years we have completed over 125 PAR visits. Through the leadership of the PAR subcommittee chairs, Sheldon Warren and Ron Abernethy, we have conducted annual training sessions for our PAR consultants, and we have released new brochures on how to start or operate an LRIS. We are moving to change a provision of the bankruptcy code so that LRIS panel members can pay a percentage of the fee awarded without fear that they are violating the Bankruptcy Act. We can boast that five states now enforce the model rules, or at least some of

their provisions, but even more importantly, many state and local lawyer referral programs have adopted these model rules voluntarily.

Over the last six years, I have seen the lawyer referral service community grow and have observed that, like family, members of the LRIS community have been drawn together even more closely.

I am happy to have been a part of that.

LRIS Marketing:

Doing it on a Shoestring with the Help of the ABA's Marketing Plan

by Shelley Carthen Watson

Every bar executive knows the value of a lawyer referral and information service. The challenge is to get word of that value to the public without breaking your budget. Fortunately, the ABA Standing Committee on Lawyer Referral and Information Service has made the task easier.

With the help of the ABA Media Relations and Public Affairs Division and the National Association of Bar Executives Public Relations Section, the Committee has created an LRIS public relations and marketing guide that provides you with all the ideas and materials that you need. All that you have to do is follow through and customize the materials to fit your program. From fill-in-the-blank press releases, public service announcements, sample ads, logos, and camera-ready art, the Guide contains everything that you need to get your LRIS publicized in an effective, yet cost-efficient manner.

Finding the Right Message: What is Lawyer Referral Anyway?

The thought of creating an identity and message for a promotional campaign conjures up visions of consultants, focus groups, pitch meetings, time and money. As an ABA-approved LRIS, however, our work was done already. The ABA has a national slogan and logo for lawyer referral programs: "Lawyer Referral--The Right Call for the Right Lawyer." The slogan and logo are camera-ready and all we had to do was customize them.

Media Relations: No Consultants Needed

Not every bar association has the luxury of having an in-house media or public relations consultant to market their LRIS. There are ways, however, in which you can utilize your staff to let the media, and hopefully the public, know about lawyer referral.

- Press Releases. The ABA has created prototype press releases that target general legal services, buying a home, and small businesses. Simply add your association name and mail.

- Public Service Announcements (PSAs). Can't afford to produce your own PSAs? Just customize the ABA's PSAs and distribute the scripts to your local radio stations. They can read them over the air or provide their own voice-over talent. All it costs is a few phone calls and postage.
- Lead Sheets. No one is immune from the frustration of trying to interest local media in lawyer referral. The use of lead sheets (ideas that can "lead" into another longer story) can interest editors in reading more about lawyer referral. The ABA has created lead sheets on topics such as "Debt Soars--Who Ya Gonna Call" and "Usually 'Civil' to Our Neighbors--Beware of Long Sidewalks." All can be customized to your lawyer referral service and give editors short items that can easily be written into newspapers and magazines.

Advertising: The Yellow Pages and Beyond

Advertisements

- When it comes to advertising, our bar association's referral service, like most LRISs, use the Yellow Pages or newspaper ads that can put a big dent in any budget. The cost of ad placement is bad enough, but the ad itself also needs to be created. Never fear, the ABA has camera-ready art on disk for ads. Just customize the art to include you association name, logo and phone number, and you're on your way.

Brochures

- The time and cost of designing and printing brochures is nothing to sneeze at. You can reduce it by half, however, because an LRIS brochure, already on disk, is available. It contains all of the information that your public needs. You can tweak it to fit your LRIS or use as is. All that's missing is your name on the back.

The Sky's the Limit

In addition to all above, the guide contains a wealth of resources, all of which are already tried and tested for you. If you decide to go all out and launch a full marketing campaign, the guide has sample campaign plans for every budget. Use all or some of them according to your needs. Information on how to work with community groups to identify the best way to reach the public about lawyer referral also is included, from sample letters to ideas about joint projects. For those bar associations with limited resources (or champagne tastes and beer budgets), the LRIS Public Relations and Marketing Guide is a great way to get your campaign off the ground.

For copies of the Guide, contact Sheree Swetin, Staff Director of the ABA Standing Committee on Lawyer Referral and Information Service by phone at 312/988-5755 or by e-mail at sswetin@staff.abanet.org

Shelley Carthen Watson is Executive Director of the Hennipen County Bar Association.

Ask Dr. Ethics

Screening Without Practicing Law

by Richard A. Zitrin

Dear Dr. Ethics:

For years, our panel members have wanted us to screen out more callers who really don't have cases. Recently, our bar board told us that they also want us to do more screening, so that people without legal cases who still have legal problems get sent to the right public service agency instead of getting a dead-end call with a lawyer. The board even gave us some more money to hire another part-time interviewer. But how can we screen callers without practicing law?

The other day a caller said she had been in a car accident in 1991. That's seven years ago, and our statute of limitations is only two years. But how can we tell her she has no case? We're not attorneys. Still, when we tried to refer her, five lawyers in a row didn't even want to talk to her. How can we screen without practicing law?

--*Screamin' About Screenin'*

Dear Loud One:

Scream no more. Your problem is perhaps the most common ethical issue facing LRISs across the country. More services are doing more and more screening, which both provides a public service to callers and gives more desirable referrals to panel attorneys. But screening often means walking a tightrope between practicing law and giving practical advice for those calling in for help.

Each state has different regulations about the unauthorized practice of law. If your interviewers are careful and carefully trained, however, they can avoid the pitfalls in most states.

First comes good training. Local panel attorneys are great sources to explain the basics of whether a caller might possibly have a case. Remember, the test should be whether there's the reasonable possibility of a case. If you can, get your panel lawyers to write up a brief "crib sheet" for each major subject matter area. You might also consider sending interviewers to a state or ABA workshop that includes a session on this issue. We've done several at ABA LRIS Committee's annual workshops over the years.

Second, if interviewers say anything that's even arguably a recommendation or advice, they must make it crystal clear that they are not lawyers. Third, the interviewers also must make it clear that they are not actually giving the advice. Rather they must stress that the information comes from what they have been told (or have seen in writing) from their panel attorneys. Finally, if the caller is insistent on seeing a lawyer rather than going to Small Claims Court, the Tenants' Rights Clinic, or another agency, do your best to get that caller an appointment with an attorney. If

possible, explain to the lawyer where he or she might refer the caller next. It is possible that the caller needs to hear it from someone with a J.D. degree on the wall.

What about the woman with the seven-year-old auto accident? Never tell her that she has no case or that the statute of limitations has passed. For one thing, it would cross the line into practicing law. For another, as in most walks of life, there's no such animal as a sure thing. The statute of limitations, for example, can be "tolled" (i.e., the clock stops ticking) for various reasons in many states.

But if you have training or a "crib sheet" from your panel lawyers, and if you first develop a track record of trying to refer these callers, only to find no lawyers will take them, then Dr. Ethics is reasonably comfortable if your interviewer says, "Our experience has been that we cannot refer this type of case to our panel lawyers when it is seven years old. Our panel attorneys tell us that the statute of limitations has passed, because more than two years has gone by. This doesn't mean for sure you don't have a case, but it does mean there's a good chance that I may not be able to find a lawyer willing to talk with you about it."

This speech is informational, and in Dr. Ethics' opinion, does it not qualify as practicing law in any way. When it comes to screening protocols that provide legal information, don't set them up without further conversations with your panel attorneys, your LRIS committee, and in many cases, your board. Dr. Ethics believes that the day-in, day-out work of an LRIS interviewer who screens cases requires giving callers practical advice that helps them achieve the goal of resolving their legal-related issue.

Dr. Ethics also believes that this balanced, practical approach can be done without falling off the "practicing law" tightrope. But unfortunately, Dr. Ethics can't provide safety nets. After all, there are 48 states out there in which he's not licensed to practice. Not to mention the District of Columbia!

In conclusion, screening cases is good. It provides a service to the consumer and better cases for panel lawyers. It gets callers who have legal issues that don't require a lawyer to people who can help, without burdening busy panel attorneys with referrals that don't result in cases. The more the interviewer does beyond simply setting up an appointment between caller and lawyer, however, the more careful the discussion has to be, and the more training, experience, and thought should go into the content of what the interviewer says and--just as important--how the interviewer says it.

Please send your questions to Dr. Ethics, ABA Standing Committee on Lawyer Referral and Information Service, 321 N. Clark Street, Chicago, IL 60610-4714.

The views expressed in this article are those of the author and should not be deemed the policies or position of the American Bar Association.

Is Your LRIS Liable?

by Sheree Swetin

Are lawyer referral programs liable for the referrals they make? Can a referral client successfully sue an LRIS for negligent referral? Legal malpractice? What is the bar's liability to the client if the attorney's insurance is canceled? Lawyer referral programs must consider several types of professional liability that could result from their daily activities.

Negligent Referrals

Many professional groups refer clients to their members. Negligent referral liability can arise when the lawyer referral service promises or implies that certain standards or criteria exist when in fact, they do not. A lawyer referral program also can be negligent by inaccurately communicating panel attorney qualifications, or by not verifying that attorneys meet the criteria promised to the client. Liability also can exist when the LRIS indicates to the public that the program offers a higher standard of referral, when it in fact does little or nothing to ensure quality referrals.

Legal Malpractice

On rare occasions, lawyer referral programs have been sued for legal malpractice. In such instances, the client often names the LRIS, with the panel member, as an additional defendant, especially if the plaintiff needs a deep pocket because the panel member has insufficient insurance limits.

This is a difficult claim to pursue, because most lawyer referral programs do not establish a lawyer/client relationship or provide legal advice, which are elements of a legal malpractice claim. If your program provides legal advice through lawyer-interviewers or through call-in hotlines, you should look into adding, to your bar's errors and omissions policy, legal malpractice protection for volunteers.

Vicarious Liability

Finally, the lawyer referral program can be found to be vicariously liable for legal malpractice claims if its panel members fail to keep their insurance policies in force. Most lawyer referral programs promote the fact that all of their panel members carry legal malpractice insurance.

Is the lawyer referral service liable for malpractice damages if the panel member cancels his or her insurance or fails to make premium payments? At least one program in California has paid money to settle such a claim. Even if the program is not liable for legal malpractice damages, do we have an obligation to notify clients if the panel member drops insurance coverage?

Unfortunately, the law is not clear on the answer to this question.

Claims Against LRIS Programs

Only four claims against lawyer referral programs have been reported to the ABA in the past fifteen years. All were dismissed prior to trial. In the complaint filed against the Chicago Bar Association, the plaintiff alleged that the bar was negligent and breached its duty of reasonable care because the referred lawyer was not an expert in the specific area of law and did not have adequate malpractice insurance. The plaintiff argued:

- the LRIS was liable for negligent representation under the "voluntary undertaking" doctrine
- the LRIS was liable as a referring lawyer under the rules of professional conduct.

The court, however, granted the Chicago Bar Association's motion to dismiss. It ruled that the lawyer referral service could not be held liable for the legal malpractice that the referral attorney committed. In addition, the court held that the lawyer referral service is not a "lawyer" and was not subject to the rules of professional conduct that govern the division of fees and professional responsibilities between lawyers. According to the court, "the mere taking of a referral fee as a referring agency rather than as a referring lawyer will not suffice to make [the referral service] an insurer or otherwise vicariously accountable for the actions of the attorney to whom the matter is referred."

While this decision does not govern courts in other jurisdictions, it may well prove persuasive and may well indicate what another court would decide if faced with a similar case.

Precautions

Lawyer referral programs can take simple precautions to reduce their chances of being successfully sued for negligent referral or malpractice. First, consumers expect more from a bar-sponsored lawyer referral service than they do when looking for an attorney in the yellow pages. Indeed, LRISs pride themselves on providing a public service, and as a result, they must establish some sort of panel qualifications to meet the public's expectations.

Second, a program should not imply panel member standards or criteria that it does not verify. If you say "experienced," then verify experience. If you say "has malpractice insurance," then verify coverage.

Third, consider adding a statement to your attorney referral form that states *"All lawyer referral members must have in force a malpractice insurance policy with minimum limits of \$_____ to accept referrals. You must notify us immediately upon receipt of this referral if your malpractice insurance has lapsed so that we may refer the client to another LRS member."*

Finally, establish rules for reviewing client complaints and removing panel members who do not meet the service's standards. Do not allow today's client complaints to turn into tomorrow's liability claims.

Liability claims against lawyer referral programs are always a threat, even though they are, thankfully, few and far between. Lawyer referral directors should be aware of the potential for liability, and they must clearly and honestly communicate to clients the services that the LRIS and its panel members provide. Ultimately, these common-sense precautions will protect the LRIS, the sponsoring bar, and most importantly, the client.

Sheree Swetin is the Staff Director of the ABA Standing Committee on Lawyers' Professional Liability and the Standing Committee on Lawyer Referral and Information Service. If you would like a copy of the Chicago Bar Association decision reported in this article, contact Sheree Swetin at 312/988-5755, or by e-mail at sswetin@staff.abanet.org

LRIS Plan Amendments

by James F. Dwyer

Established in March 1981, the New York State Bar Association's Lawyer Referral and Information Service (NYSBA LRIS) was the state bar's attempt to help the public find attorneys in counties where no local bar association-sponsored lawyer referral service existed. From its beginning, the NYSBA LRIS operated to cooperate with, but not to duplicate, local services. In fact, its plan specifically stated:

The Service shall cooperate with and assist local and regional lawyer referral services. **The Service shall not make referrals to lawyers in any geographic area of the state where an operating lawyer referral service exists; in such cases referrals will be made directly to the existing referral service.** [emphasis added]

As the NYSBA LRIS grew, its operations improved. Malpractice insurance, for example, became a condition of panel membership in 1982. The panel application became more detailed, with a certification and agreement for the attorney to sign. Quality control measures, such as follow-up with attorneys and clients, were initiated. Staff attended annual ABA workshops in order to improve and to establish a network of contacts with other lawyer referral providers. The program instituted subject matter panels in three substantive areas in 1996, with the Committee on Lawyer Referral Service members reviewing and ruling on each application.

As the number of consumers contacting local bar-sponsored programs grew, the NYSBA LRIS Committee became increasingly concerned about their ability to provide quality referrals. In some instances a local bar officer was responsible, during his or her term, for an LRIS that had no offices. Sometimes the local bar officer responsible for making referrals happened to be the only medical malpractice attorney in the county, a situation that could make meaningful referrals impossible in that area. In at least one situation, the local bar officer making the referrals also was an assistant district attorney. Consumers, as a result, were unable to obtain referrals in that county for a criminal defense attorney due to ethical constraints on the assistant district attorney.

In addition, many programs had restricted hours and limited panels, both of which created difficulties in terms of public access.

In March 1996, the ABA approved the NYSBA LRIS as in compliance with the ABA Model LRIS Rules. The LRIS, in the meantime, was making increasing referrals to local bar services as a result of its advertising, initial handling and screening of each inquiry. Under the then existing NYSBA LRIS plan, all that a local bar had to do to receive a referral was to have an "existing referral service."

This approach, however, raised two concerns. First, consumers were responding to the NYSBA LRIS advertising and likely assumed that the referred lawyer would meet NYSBA LRIS qualifications, regardless of whether a local service actually made the referral. The NYSBA LRIS, however, had in place no standard by which to assess the quality of the local service and the manner in which it operated.

Second, there were potential federal antitrust implications in the NYSBA LRIS plan. By abstaining from operating the service in the same area of the state as a local service, it arguably gave the appearance of not competing with the service, when in fact its intent simply was not to duplicate existing, effective services.

After discussing the problems of referrals to local programs, the NYSBA LRIS Committee proposed amendments to the NYSBA LRIS plan that would allow the NYSBA LRIS to operate in counties where the local service was not in substantial compliance with the ABA model rules on lawyer referral. If the NYSBA established general standards and criteria that the local bar service must meet, the anti-trust problem would be addressed and the public would be better assured of a quality service.

Initially, the Committee drafted the amendment in anticipation of cooperative support from the affected local bars. It, however, withdrew that version, and, after much study and review, it substituted the following language:

The Service shall not make referrals to lawyers in any geographic area of the state where (an operating) a **comparable** lawyer referral service exists; in such cases referrals will be made directly to the existing referral service. *(To the extent practicable, the)* **A comparable (S) service (will) shall be (operated in accordance) defined as one that, to the extent practicable, substantially complies** with the American Bar Association *(Standards and Practices)* **Model Rules** For a Lawyer Referral Service. **A determination that a local or regional lawyer referral service is not comparable shall be made by the NYSBA Executive Committee upon recommendation of the Committee on Lawyer Referral Service.**

The primary purpose in proposing the amendment, which the New York State Bar House of Delegates approved in January 1998, was to provide a better public service, not to interfere in local bar association affairs or to serve as an evaluator of local bar association programs.

In its advertising, the NYSBA LRIS represents to the public that it is "the right call for the right lawyer," and that it has the ABA stamp of approval. It operates as a public service and strives to make the best possible referral for a person who needs an attorney. Since the NYSBA LRIS refers to local operations one third of the calls that this publicity generates, it needs to be sure that the clients themselves receive quality referrals.

The NYSBA LRIS desires to work with local programs to assist them in improving their operations and perhaps in obtaining ABA approval. While the NYSBA LRIS has not yet made a negative determination regarding any local service in the state, if it does so at some point, it will be with the primary purpose of providing a better public service.

James F. Dwyer is a member of the ABA Standing Committee on Lawyer Referral and Information Service.

LRIS News

Nominations Sought for 1998 Cindy A. Raisch Award

The ABA Standing Committee on Lawyer Referral and Information Service is seeking nominations for the 1998 Cindy A. Raisch Award. The award recognizes the enhancement of public service-oriented lawyer referral and information programs that provide access for moderate income consumers across the country. The nominee should be any individual, group or organization demonstrating exceptional achievement(s) or for providing superior service to or support of a public service-oriented lawyer referral and information program.

Information on the award will be mailed to all lawyer referral program directors and to bar association directors in August. Submissions are due in early December and the Award will be presented at a luncheon of the National Association of Bar Executives during the 1999 ABA Midyear Meeting. For more information, contact Jane Nosbisch, ABA LRIS Assistant Staff Director, 312/988-5754, e-mail: jnosbisch@staff.abanet.org

LRIS Workshop Convenes

The 1998 LRIS Workshop will be held in Portland, Oregon on October 14-17 at the historic Benson Hotel. New to the workshop this year are specialized tracks for bar leaders, experienced LRIS program managers, and a fundamentals track. Topics for bar leaders and experienced program managers include: developing an LRIS business plan, developing a proactive board and committee, promoting the LRIS within the legal community, and ethics discussions.

The fundamentals track will include discussions on follow-up procedures, marketing within a limited budget, and staff training procedures. Plenary sessions include a "hot topics" forum on emerging technologies, brief service delivery mechanisms in the legal marketplace, and the art and science of building "virtual relationships" through e-mail and web sites.

For more information contact Jane Nosbisch, ABA LRIS Assistant Staff Director, 312/988-5754, e-mail: jnosbisch@staff.abanet.org

Free Advice and Counsel at Your Fingertips

Have you ever wanted to be able to consult with someone quickly about an LRIS management issue? In its first six months of operation, the ABA's LRIS List Serve has covered topics such as: the applicability of certain federal statutes in the remittance of initial consultation fees, "best practices" concerning record retention, the viability of liability waivers, and the effectiveness of marketing through community fairs and public radio sponsorships.

What do some of your colleagues think of the LRIS List Serve?

"The LRIS List Serve is like having a team of experts at my disposal, in one room, discussing issues of concern. I can enter the discussion if time permits; if not, I can save the conversations for perusal later." *Audrey Osterlitz, New York State Bar Association LRIS*

"I have particularly enjoyed the List Serve, and the opportunity it provides to discuss issues of concern in our referral services. Discussion is very practical rather than just 'general theory.' It's great! There also is a sense of camaraderie that develops with regular contact..." *Duane Stanley, Hennepin County Bar Association LRS*

"The List Serve is an enormously helpful tool...As issues come up we now can share the knowledge, ideas, and resources of bar associations across the country." *Allen Charne, Association of the Bar of the City of New York LRIS*

All that you need to join the free LRIS List Serve is an e-mail address! The List Serve is a discussion group for LRIS program managers and all people interested in lawyer referral programs. It's quick and easy to join. Just send an e-mail to Jane Nosbisch, ABA LRIS Assistant Director, at jnosbisch@staff.abanet.org indicating your LRIS program affiliation. It's as simple as that!

Congratulations. . .

To Ron Abernethy, the recipient of the San Joaquin County Bar Association 1998 Law Day Award. Ron received this award in recognition of his public service contributions in his professional career and his work on behalf of the bar association. Ron's leadership has influenced the way lawyer referral programs operate both locally and nationally. He is a strong supporter of quality standards, experience requirements and peer review of panel members and has been instrumental in developing national policy and drafting model court rules for implementation at the state and local level.

Ron also focuses his efforts on education and training for local public defenders and county officials. He has served on the Board of Directors of the Center for Positive Prevention Alternatives, the San Joaquin County Citizens Jail Advisory Committee and the San Joaquin

County Pretrial Services Advisory Board. He has been active in the local bar for more than twenty years.

Congratulations, Ron, we are proud to have you as a member of the lawyer referral community!

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. ♦ 2001 American Bar Association ISSN 1092-2164

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Legal Assistance for Military Personnel Articles



From the Chair.

by Leonard L. Loeb

Chair, Standing Committee on Legal Assistance for Military Personnel

Only in times of crisis do you truly understand the meaning of support.

The ABA Standing Committee on Legal Assistance for Military Personnel was successful recently in forestalling a directive that it be sunsetted immediately. The information that the Committee was to be defunded came to us through the ABA's annual budget development process; not as a result of the qualitative assessment that every ABA entity undergoes every four years.

Thankfully, the respective Judge Advocates General of each of the armed forces immediately sent outstanding letters of support. These along with many other letters of support, including those from the North Carolina State Bar Committee on Legal Assistance to Military Personnel, the ABA General Practice, Solo and Small Firm Section and the ABA Standing Committee on Delivery of Legal Services, flowed in very quickly. All of the support that we received was most heartening. Particularly important to the Committee was the support of its ABA Board of Governors Liaison John F. McCarthy, Jr.

Based on all of this momentum, we decided to proceed with contesting the budget decision. We sought and were granted a hearing in front of the ABA Board of Governors' Program and Planning Committee. LAMP Committee member Kevin P. Flood, Director of NLSO S.E. at Jacksonville Naval Air Station, and I spoke with the Board at great length about the issues that LAMP addresses, the fundamental quality of life services provided through military legal assistance, and the necessity for the ABA to maintain its focus on these issues.

If good results can come from a bad beginning, that meeting was one of those instances. It was an excellent opportunity to inform key ABA leadership about the dedication and largely unsung work that legal assistance officers and the ABA provide daily to U.S. military personnel. We have received word that the ABA LAMP Committee can, in fact, continue to do its work.

I thank all of you who provided your tangible support in this process!

Offices in the Spotlight

Legal Assistance at Andrews Air Force Base, Maryland and Fort Belvoir, Virginia

by Bryan S. Spencer (Ret.)

The Standing Committee on Legal Assistance for Military Personnel spent April 23-24 in the Greater Washington, D.C. area providing an eight hour continuing legal education (CLE) program for east coast legal assistance officers and visiting the legal assistance offices at Andrews Air Force Base and Fort Belvoir. The CLE program included sessions on family law, legal ethics and legal assistance, lemon law/Magnuson-Moss warranty practice and estate planning.

The Committee uses the CLE programs to improve the skills of legal assistance officers who may not have had the opportunity to return to a two-week course at their service law school. In addition, the Committee looks for exceptional techniques from each individual base or fort legal assistance program for possible replication in other legal assistance offices.

Andrews Air Force Base

The Committee first visited the legal assistance office at Andrews Air Force Base, which is the "Home of the 89th Airlift Wing ." That sounds innocent enough until you realize that this is the command that provides military airlift support to the president, senior civilian government officials and senior officials from the Defense Department and the three services. In other words, this is the home of "Air Force One!"

According to Colonel Vic Donovan, 89th Airlift Wing Staff Judge Advocate, the Andrews legal assistance program concentrates on two themes:

- customer service, and
- blending legal assistance with preventive law efforts.

In the customer service area, the key components are the availability of services and perceived overall quality. The office provides notary services and walk-in, same day power of attorney preparation during each duty day from 0800-1500 hours. It limits legal assistance to general advice, letters for the client, descriptions of small claim court procedures, referrals to the civilian bar or other agencies and preparation of wills.

For appointments, according to former legal assistance officer Capt. Bryan Bonner, the legal assistance officers take a rather interesting three-prong approach. First, unit sergeants or commanders can arrange a same-day appointment for any unit member who has a legal problem that is significant enough to interfere with his or her duties. Second, the office has a morning-long, walk-in legal assistance clinic every Tuesday for active duty members and their dependents. Third, the office makes available, on an equal basis, an appointment system to active duty members, their dependents or retired military personnel residing in the Washington, D.C. area.

To measure the quality of services, the office distributes customer critiques that use a grading system in five areas of customer satisfaction. The base commanding general is briefed monthly on the survey results.

Preventive law is another important element of the Andrews legal assistance program. Staff Sergeant Gerald Anderson, an office paralegal, created the Andrews Legal Assistance Home Page, which has become a critical public relations tool for the office. Capt. Kathleen Reder, the legal assistance officer, and Capt. Bonner added to the page office materials on consumer affairs and other preventive law topics, newspaper articles on various legal assistance subjects and commonly-encountered problems. (See www.andrews.af.mil/89aw/jag/home.htm to visit the web page.) In addition, Capt. Reder's article "Used Car Warranties: Buyer Beware" appeared in the base newspaper during the week of our visit.

The legal assistance officers are excited about the Internet's potential. All attorneys who provide legal assistance, for example, routinely use the Internet for conducting legal research in a fraction of the time previously required. All are in accord that as far as disseminating legal information electronically, they have, in the words of the old Carpenters' song, "only just begun."

In addition, the office conducts preventive law briefings to unit and spouse groups. Commanders' spouses get a special preventive law briefing, because experience has shown that the briefings can have a very positive impact on the military spouses unit by helping to prevent legal and financial problems for unit members and their families before they occur.

Fort Belvoir

The second legal assistance office that the LAMP Committee visited was at Fort Belvoir. This Army post is the major legal services installation in the Washington, D.C. area. Because of its location, it is the center of medical, commissary, exchange and other services for the pentagon and many other major military organizations. In fact, there are over 100 tenant commands but no troop units at Fort Belvoir. Steven Chucala, Chief of Client Services, briefed the Committee on the unique problems of a legal assistance operation at a post that serves senior officer and NCO military personnel in addition to thousands of military family members and retirees in the area.

The Fort Belvoir Legal Assistance Office has three full time civilian attorneys, all of whom have several years of legal experience. Paralegal specialists and receptionists provide direct support to the attorneys and screen prospective clients to ensure that they have legal issues that require an attorney. The office assists clients with emergencies, powers of attorney and notarizations on a walk-in basis. It sees all other clients on an appointment basis. Chucala's office uses a 45-minute or one-hour appointment schedule.

Every effort is made to provide clients with solutions to their legal issues, including written requests for their signature on a report of survey, consumer affairs problems, disability

reconsiderations or reclaims to the Board for Correction of Military Records. Experience has shown that the clients do not have the expertise or skills to prepare legal documents necessary to resolve their problems. These services prevent the pro se client from, after receiving legal advice, coming back several times for clarification or next-step assistance.

Legal services at Fort Belvoir also include the full range of assistance, such as preparing documents for the client's signature, pro se petitions for adoption, petitions for change of names, preparation of separation/property settlement agreements, wills with testamentary trusts, small estate affidavits and the normal general practitioner range of legal services. In addition, the legal assistance officers provide handouts to clients to insure that they have some guidance to which they can refer after leaving the office, whether or not the officer prepared written documents for their signatures.

Dewitt Army Community Hospital is the major in-patient facility in northern Virginia. Legal assistance officers from Fort Belvoir provide bedside legal services to patients there. The services include the preparation of advance directives and wills.

Mr. Chucala's office also conducts an ongoing preventive law program. It includes speaking to military organizations at retiree activity days, providing widow and widower functions, and furnishing articles on legal assistance topics for the post newspaper. These newspaper articles are made into legal assistance handouts, furnished to clients in the office and included in welcome packages sent to incoming personnel and their families.

Among the many legal actions that the Belvoir legal assistance office pioneered was the first military electronic tax filing service in the Washington, D.C. area. Established in 1987, this service results in millions of dollars every year in tax refunds for active duty and retired personnel in all services.

Because of its reputation, the Belvoir legal assistance office is able to make telephone appointments for clients with local probate court clerks to get guidance and forms in simple probate matters. This arrangement conserves scarce legal assistance resources. Mr. Chucala has worked closely with local county taxing authorities and has assisted in the preparation of the county-issued brochure, "Tax Obligations of Military Personnel Living in Fairfax County." Both the local taxing and military legal authorities agree that the brochure provides an accurate reflection of the law in this complex and sensitive area.

The trust and respect that the Fort Belvoir's legal assistance program has earned was recognized during Operation Desert Shield and Desert Storm. The local bar association offered Mr. Chucala the services of 21 local law firms that volunteered to handle overflow military legal assistance clients on a pro bono basis.

Clearly, the Fort Belvoir legal assistance office is a capital law office for military personnel in the nation's capitol area.

Bryan S. Spencer (Ret.) is a member of the ABA Standing Committee on Lawyer Referral and Information Service.

The Taxpayer Relief Act of 1997 - How Will It Affect Military Personnel?

by LCDR George F. Reilly

Part I of this series, which appeared in the Fall 1997 issue of *Dialogue*, considered the provisions of the Taxpayer Relief Act of 1997 [TRA '97] relating to the child tax credit and educational incentives. Part II discussed the significant changes relating to expanded IRAs and capital gains in the Winter 1998 issue of *Dialogue*. Part III, which appeared in the Spring 1998 issue of *Dialogue*, considered changes relating to the sale of a principal residence. This final installment focuses on the sale of a rental property and provisions on estate taxes.

Sale of a Rental Property

The new section 121 of the Taxpayer Relief Act of 1997 has dramatically changed the calculus of home ownership vs. renting and the retention of a house upon a PCS move. If you have a capital gain potential and can sell your house, there are tax advantages for doing so. If you elect to retain your house as a rental property after you move, whether the decision is fiscally based (e.g., soft market) or personal (e.g., "we're coming back!"), you have to consider both the short term and long term tax consequences.

A rental property is one of the few true tax shelters left for the average taxpayer. The price that you might pay for near term tax advantages (from losses, depreciation, business expenses, mortgage interest, etc.) might be a completely taxable sale in the out years if you fail to sell within the five year period when you had owned and used the home for two years (or lesser qualifying pro rata amount).

What then do you tell the unhappy client who has been renting out his former principal residence for too long to qualify for the two of five exclusion? If a client faces a capital loss, then he or she is okay with this house as an investment property as discussed above. In the more likely event that he or she is looking at a large taxable gain, the decision matrix is a bit more complicated.

There are three basic options:

- move back into the house for a period of time to qualify for the minimum tax-exclusion ratio, using the $X/24 * \$500,000$ or $\$250,000$ formula, and then sell the house;

- sell the house and pay the tax at the new lower rates (but factoring in the new depreciation separately at 25 percent); or
- be tax-creative and engage in a section 1031 like-kind exchange of investment property. The section 1031 exchange is also called a "Starker" exchange, which is named after the case that defined the practice. Essentially what you are doing is exchanging one form of investment real estate for another. The law permits dissimilar transactions to be considered "like-kind." So a person can exchange an investment farm for an apartment building or an apartment building for a beach house. There are a lot of rules and specifics contained in section 1031 exchanges, and they require sophisticated tax and/or real estate professionals. They can, however, save clients a lot of money in the long run.

An example: A rental property that does not qualify for the two of five rule has greatly appreciated. Your client is facing a \$100,000 fully taxable gain. He does not wish to return to the house for a day, let alone a year. He is retiring in his present location. What he can do is work a Starker exchange for an investment property near his present home, or even a house in a vacation resort. He then can sell his present residence when he can qualify for the exclusion, move into the investment property, stay there for two years, and take a full \$500,000 exclusion. Lots of gain, no tax. What a deal!

These are sophisticated transactions that must comply strictly with the statute and regulations. But as you can see, they have the potential to pay great dividends for a client. If your client has a situation like this, encourage him or her to speak to a real estate lawyer or commercial real estate agent. Although there are up front costs and professional fees, the tax savings down the line are dramatic.

The bottom line on rental property: the client must consider tax and personal considerations in deciding whether to retain or sell a house at a PCS move. If the client is unlikely to return within a few years, a sale or a plan to rent, then sell within the qualifying period, offers the greatest tax benefit. As noted at the outset, this is a big ticket area for legal assistance providers. Anticipate a lot of questions!

Estate and Gift Tax Issues

"We have long had death and taxes as the two standards of inevitability. But there are those who believe that death is the preferable of the two. 'At least,' as one man said, 'there's one advantage about death; it doesn't get worse every time Congress meets.'"

--*Erwin N. Griswold*

Death and Taxes

An age-old axiom to be sure, but one that has taken on a new light in the wake of TRA '97. Congress has taken on the subject that many have dubbed "death taxes," otherwise known as

estate taxes. This seems to be the epitome [or nadir?] of taxation: taxing even those who have left this existence. Estate taxation is enough to make a taxpayer's blood pressure rise (perhaps hastening the coming of the taxman?) and an estate planner's mortgage to vanish. Despite a great sound and fury about the need to end estate taxation (always called "death taxes" by opponents) in the Tax Act then brewing in Congress, what emerged was merely a phased-in increase of the unified credit amount over 10 years.

The what credit? Well, actually the unified credit no longer is a good name. Now it is considered to be the "applicable exemption amount." Uh-oh. Not only is this tax jargon, but estate planning jargon layered on top! I'll back up and give you a quick and greatly simplified primer on estate and gift taxation.

Many of you have a dim recollection that you can give away \$10,000 a year without taxation. What this is all about is the ability to give a gift to any number of people each year in an amount not to exceed \$10,000 per person. Theoretically, if you were so inclined, you could take a phone book and start with A and end with Z, giving \$10,000 gifts to each person. The next year you could do the same. If you are married, your spouse could consent to an equivalent gift and you could give jointly up to \$20,000 to each lucky person.

What if your benevolence gets the best of you and you exceed these limits? If you should give more than the \$10,000 or \$20,000 to one person, a gift tax is owed. Now comes the kicker. You do not have to pay the gift tax right away since each of us has a lifetime credit equivalency (now exemption amount) of \$600,000 [in 1997]. You can continue to give excess amounts of gifts without taxation until you reach the credit equivalency amount. Then you start paying taxes. And as both gift and estate taxes are linked or "unified," the starting tax rate after \$600,000 is an eye-opening 37 percent!

Why do I say "credit equivalency amount?" This number is worked backwards from the tax owed to the equivalent amount of the gift or estate value. For example, although we talk about the \$600,000 credit, what we actually mean is that the tax owed on \$600,000, or \$192,800, is credited against the tax owed. If you are below that amount, you pay nothing. If you are higher than \$192,800, you pay the difference and, as stated earlier, the rates start at 37 percent.

If we do not use up any of our transfer tax credit, (gift and estate taxes are considered "transfer taxes" as they apply upon the transfer of property) then we die with our estates having the ability to take advantage of the full credit to avoid or minimize taxation. (There are certain deductions and credits which add to this simplistic equation but bear with me.) The Taxpayer Relief Act did not eliminate the estate tax, nor did it lower the rate of taxation. Instead it eases up the credit equivalency amount (now called the applicable exemption amount) to \$1 million in 2006. The phase-in looks like this:

For Decedents Dying and Gifts Made In:	Effective Exemption:
1998	\$625,000
1999	650,000
2000-2001	675,000
2002-2003	700,000
2004	850,000
2005	950,000
2006 and after	1,000,000

What this means is that we in the legal assistance field are still in the estate planning business. Our clients are not immune from estate taxation issues at the exemption amounts listed above. And even though a \$1 million dollar taxable net worth seems pie in the sky to most of us, it doesn't take much except some real estate, insurance, and solid investments to get us in that ballpark. A mighty fine park to be in if I do say so myself!

Of more pressing concern is the fact that, over the years, we have written huge numbers of wills using the \$600,000 unified credit amount. Where this presents a problem is if we structured a trust or trusts (marital deduction trust; credit shelter or A/B trusts) using a fixed dollar amount rather than a formula. If the client's intent was to maximize use of the unified credit and we used a dollar amount, that amount is fixed until the will is revised. A properly drafted formula clause will permit maximum use of the applicable exemption amount. While obviously we cannot notify holders of all of the wills potentially affected, this is a good point to advertise for our legal assistance clients. In addition, although DL Wills has not yet been updated to reflect these changes, it is still workable since it gives trust options for estates "in excess of" \$600,000.

One more thing on gifts. The gift tax annual exclusion amount of \$10,000 has remained the same for 25 years. Congress now has provided for an inflation adjustment. This is of limited value right now since the upward adjustments can only be made in \$1,000 increments, meaning that the first adjustment requires an increase in the Consumer Price Index of 10 percent. It may be many years before we see an upward adjustment.

Conclusion

As you have seen from this series is that the Taxpayer Relief Act of 1997 has dramatically changed the tax picture for many of our clients. The various credits that reduce taxation dollar for dollar, the deduction for student loan interest, the reduction on capital gains, and the tax-free

sale of a home all benefit service members. Our job as legal assistance attorneys, particularly those running tax programs, is to ensure that our clients do not miss out on these significant tax benefits due to ignorance. Get the word out!

Does the far reaching nature of TRA '97 mean that Congress is through tinkering with the tax code for a while? It doesn't seem that way. A number of proponents of a flat tax system are making noise again, as are those who somehow want to streamline the tax code and the IRS, without going to a flat tax system. Then there are those who want a national sales tax rather than an income tax. Who knows what the future holds for taxpayers? But in the meantime, let's make sure that we take advantage of the law as currently written.

The views, analyses, interpretations and opinions expressed in this article are those of the author and should not be deemed views or opinions of the American Bar Association or the ABA Standing Committee on Legal Assistance for Military Personnel.

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