

## A Fresh Look at Our System for Providing Civil Legal Assistance

By John M. Greacen

Jeanne Charn, director of the Bellow-Sacks Access to Civil Legal Services Project, and Richard Zorza, a technology, nonprofit, and justice consultant, have released a new report, *Civil Legal Assistance for All Americans*.<sup>1</sup> The report draws on the ideas of Philip Heymann (professor, Harvard Law School) and Project Fellows Michael Hertz (founder, ProBonoNet), Bonnie Hough (California Center for Families, Children, and the Courts), and Wayne Moore (AARP legal assistance). All six of these individuals are known for clear thinking and innovative approaches to long-standing problems. The report lives up to their reputations, bringing together a number of suggestions for realizing the goal of universal access to justice for low- and moderate-income Americans, yet minimizing the additional resources needed to attain these goals.

The report begins by recognizing that the access-to-justice agenda is stalled—that forty years after the creation of the Legal Services Corporation (LSC), civil legal services remain beyond the reach of most low- and middle-income citizens. Federal

funding for the LSC is stagnant. Although some states provide additional resources for civil legal services, it is not conceivable that public funds and private charities, including lawyer pro bono programs, will begin to reach the goal of civil legal services for all—that is, as long as this goal is based on the model of full legal representation for all legal issues facing lower-income Americans.

The authors begin by suggesting that planners scale back the goal and focus only on “civil legal advice and assistance equivalent to what a person of reasonable means would purchase to secure legal benefits and entitlements or to protect and enhance relationships, assets and income.” This means limiting the definition of “unmet legal needs” to serious issues affecting homes, livelihood, health, and families, as opposed to the more usual approach, which includes every legal issue or problem in “legal needs” studies.

Their next suggestion is that available public resources be devoted to a variety of ways of meeting low- and moderate-income citizens’ legal needs; they argue that full legal representation is not required to meet most legal services needs. Citizens equipped with knowledge of their legal rights and available remedies can represent their own interests on many legal matters. Following the theme that John McKay championed as president of the LSC, they have constructed a pyramid of services to address the legal needs of persons of limited means, arguing that services at the base of the pyramid suffice for a great many legal issues and

that those at the very top are needed only infrequently.<sup>2</sup> They also note that the pyramid aligns the services by unit cost, with the least expensive at the bottom and the most expensive at the top. Their proposals all spring from this basic premise—that the legal needs of most lower-income Americans can be met by providing services below the apex of the pyramid. In this scheme, one highly effective attorney can leverage a lot of services from much less experienced advocates, including recent law school graduates, paralegals, and law students.

Charn and Zorza recognize that for the lower levels of the pyramid to suffice, courts must make it possible for citizens to pursue and defend lawsuits without having a lawyer present with them in the courtroom. Self-represented litigants are now a permanent feature of general as well as limited jurisdiction courts. The judicial branch in many, but not all, states is responding by providing services and changing court processes to enable pro se litigants to participate satisfactorily in court processes, in contested as well as uncontested matters.

One of the report’s most interesting suggestions is that future publicly supported civil legal services initiate a “copayment” from clients for services other than information, advice, and referral, following the current model for medical and dental services and drug prescriptions. The authors do not suggest specific amounts for such copayments, but do note that the fees might be structured on a sliding scale related to income, with a waiver available for the lowest income clients or particular

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case types such as domestic violence. They contend that copayments, and out-of-pocket expenses of litigation, are appropriate and affordable costs for many clients of their proposed expanded system, that these funds will increase the funding available to provide civil legal services, and that charging minimal fees will give clients a stronger stake in the services they receive and the quality of those services. One might also argue that a copayment, like a court filing fee, might also serve as an initial test of the seriousness of a client's concern about a legal problem, and of the client's commitment to pursuing its resolution.

The report's authors urge that this pyramid of services be provided through a "complex mixed-model delivery system." The system would have these characteristics:

- Multiple providers would be engaged in delivering the variety of services contained in the pyramid.
- Users would enter the system through "gateways" that would match their desires and needs with appropriate providers.
- Litigants would always have a choice of service providers; existing legal services "monopolies" would be a thing of the past.
- The private bar would be heavily involved in service delivery. The authors cite the most recent ABA legal needs study for the proposition that the private bar represents *three times* as many low-income citizens as the nation's entire legal services structure—including private as well as public programs. The bar would participate in a variety of ways:
  - Paralegals and other non-lawyers would also participate in the delivery of some services—but would not provide full legal representation.
  - Law school clinics and law school programs to train lawyers to provide services to

low- and middle-income citizens would also be involved in service delivery.

- Technology, including but not limited to service delivery through the Internet, would be an important part of the mixed-model delivery system; AARP legal services programs have made extensive use of technology to support service providers with quick access to information and forms.

How might this transformation of legal services as we know it come about? The authors call for a "grand bargain" among six key stakeholders: state courts, the private bar, existing staffed providers, law schools, funders, and consumers of legal services. They believe that all stakeholders will come to see that a broader, mixed-model delivery system would be in their own best interests, as well as in the best interests of citizens of low and modest means. In particular, the authors believe that in-depth engagement with the private bar and service provision to moderate-income as well as indigent Americans are crucial to changing the political dynamics of support for legal services funding. They also suggest that state Access to Justice Commissions are the appropriate vehicle for receiving and distributing public funds within a state to implement the new model.

The report also calls for instituting a number of other practices to ensure that available resources are most effectively used: stringent cost controls, accountability and performance measurement, and an associated program of research to assess the strengths and weaknesses of various components of the model.

The authors do not say that the goal of universal access—even under their reduced definition—can be met with presently available resources. But they do say that we could do a lot more with what we already have, and that we are unlikely to get additional support—from public or charitable sources—without

demonstrating greater effectiveness for what we do. Absent from the report is any discussion of a "civil Gideon" remedy—a court-declared right to counsel at public expense for indigent persons involved in civil as well as criminal litigation. The authors apparently believe that the same political dynamics that have capped civil legal services funding have placed limitations on the practicability of comprehensive increases in public funding by judicial mandate, when the focus is exclusively on providing full legal representation. Rather, the authors emphasize that a full-access system should "guarantee all Americans access to civil legal advice and assistance. This must mean that poor Americans have access to lawyers when legal representation is essential to successfully pursue civil claims or to defend against civil lawsuits brought by other parties."<sup>3</sup>

Indiana already has a statutory "civil Gideon" remedy, which the courts have interpreted in the above fashion. The statute authorizes a judge to appoint counsel for a party in any civil case when the court finds that the party "does not have sufficient means to prosecute or defend the action" and that "exceptional circumstances" exist to assign an attorney to defend or prosecute the cause.<sup>4</sup> The factors that a court may consider in making this decision include (1) the likelihood of the applicant's prevailing on the merits of his or her claim or defense, and (2) the applicant's ability to investigate and present his or her claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.

Indiana's Second District Court of Appeals has held that self-representation constitutes "sufficient means to prosecute or defend" dissolution-of-marriage cases.<sup>5</sup>

The Charn-Zorza report makes an important contribution to our thinking about the delivery of legal services to low- and middle-income Americans. It draws together a number of ideas and

experiences that have been discussed and debated within the legal services community over the past decade, and combines them into a bold vision for a very different model for delivering civil legal services to the poor. It remains for a state with strong and far-sighted judicial, bar, legal services, law school, and funding-entity leadership to attempt to apply the vision within its jurisdiction.

For state court judges, the report represents a strong statement about the phenomenon of increasing numbers of self-represented litigants appearing in the courts. Many judges view that development with dismay, believing that persons without legal training are not competent to represent themselves except in the most simple, uncontested matters. These judges continue to hope that resources will be found to provide all litigants with full legal representation.

The Charn/Zorza report publicly recognizes the reality that full legal

representation for every poor person's legal matter will never happen. Further, it recognizes that informed and assisted self-representation is a major avenue for providing access to legal remedies for low- and middle-income Americans. Access to the legal system will not come through publicly funded representation, and it will not come through the bar at current hourly billing and retainer levels.

Self-representation is a beneficial, not detrimental, development for the courts—not because it makes the lives of judges and court staffs easier, but rather because the courts have the largest stake in ensuring that all citizens have access to justice. Only by building a system in which self-help services meet the needs of many is it realistic to expect that resources can be made available to provide full representation for the cases in which it is essential.

A number of state court leaders have long held this view. It is time for all

state judges and court administrators to adopt the same attitude—accommodating the needs of self-represented litigants in their courtrooms and ensuring that their courts provide needed staff support and assistance.

## Endnotes

1. The report was developed under the auspices of the Harvard Law School Bellow-Sacks Access to Civil Legal Services Project, established in memory of legal services pioneer Gary Bellow and access-to-justice supporter Albert Sacks. The full text of the report is available online at <http://www.bellowsacks.org>.

2. The authors are quick to concede that we do not have the empirical evidence needed to show that appropriate services to poor and modest means litigants actually take the shape of a pyramid.

3. Charn and Zorza, *Civil Legal Assistance for All Americans*, at 11.

4. IND. CODE IC 34-10-1-2. Attorneys appointed under the statute are entitled to compensation paid from the court's budget.

5. *Sabo v. Sabo*, 812 N.E.2d 238, 245 (Ind. App. 2d Dist. 2004).