

CIVIL JUSTICE
AN AGENDA FOR THE
1 9 9 0s

Report of the American Bar Association
National Conference on Access to Justice
in the 1990s

NEW ORLEANS, LOUISIANA
JUNE 9-11, 1989

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Legal Services and the Public and Tulane Law School*

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PREFACE

The greatest challenge facing the American legal profession today is transforming the promise of equal justice into a reality. Reflecting this challenge, Goal II of the American Bar Association is "to promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition." This goal recognizes that full enjoyment of the rights and benefits of our society requires effective participation in our justice system and that effective participation requires the availability of legal services.

The ABA's Consortium on Legal Services and the Public is an umbrella organization of twelve ABA committees dedicated to the delivery of legal services to low- and moderate-income persons. In order to further the goal of equal justice for all, the Consortium--along with Tulane Law School--planned and sponsored the Conference on Access to Justice in the 1990s. The purpose of the conference was to bring together persons with special interest and expertise in the provision of legal services to low- and moderate-income persons to engage in an exchange of information and innovative ideas with an ultimate goal of arriving at a draft action plan for the 1990s.

This report summarizes the discussions and recommendations of the conferees. Along with the papers at the conference and the pilot legal needs surveys conducted in preparation for the conference, it is slated for wide distribution. The Consortium is broadly disseminating the report to encourage vigorous review and debate and to heighten awareness of access to justice issues. We sincerely hope that interested persons will provide the Consortium with their suggestions and views. We intend the end result of this process to be an agenda for the 1990s that enjoys widespread support from the legal profession. The Consortium will then use its efforts to implement the plan through the ABA and in cooperation with a broad coalition of interested groups and individuals.

The Consortium calls on all interested persons to join with it to achieve the goal of access to justice in the 1990s.

Brooksley Born, *Chairperson*
Consortium on Legal Services and the Public
of the American Bar Association
August, 1987 to August, 1990

ACKNOWLEDGMENTS

This report and the conference upon which it is based would not have been possible without the assistance of many ABA members, staff and other persons with expertise in the delivery of legal services.

The Subcommittee was ably assisted in selecting topics for discussion at the conference by all the members of and liaisons to the Consortium on Legal Services and the Public and members of the constituent entities of the Consortium.

The conference focus was sharpened through the advice of the Tulane faculty advisory committee. Dean John Kramer was particularly helpful in this regard and in identifying conference speakers and participants. He and his staff were also essential in bringing the conference to fruition by providing university facilities conducive to thoughtful deliberations. A warm welcome was extended to the conferees through several informal social gatherings arranged and funded by Tulane Law School.

A particular debt of gratitude is owed to those who contributed original papers for the conference and who spoke at the conference. None of them received compensation for the time and effort they devoted to preparing materials and remarks that provided an essential base of knowledge and challenging ideas for future directions.

Each working group at the conference was aided by a discussion facilitator, a reporter designated to summarize the group's deliberations for the closing assembly and a scribe assigned to record the discussions. We extend a heartfelt thanks to these individuals.

A conference is not possible without conferees. Those who attended this conference did so at their own expense, spent many hours prior to the conference reading the background papers and considering the concepts set forth, brought an incredible depth and diversity of expertise to conference deliberations and contributed many more hours of time to attending conference sessions. The Consortium is indebted to each and every person who took the time to attend and who devoted the necessary effort to make the conference productive.

The conference reporter, Esther Lardent, performed a truly superhuman task in bringing together this event. She provided invaluable advice and assistance at all stages of conference planning, presentation and follow up. The conference would not have been possible without her advice on conference topics, structure and participants, her assistance in selecting and obtaining commitments from authors and speakers and her careful editing suggestions on conference papers. This report itself is the product of countless hours of Esther's patient and meticulous review of audio tapes of the conference sessions, followed by writing that carefully and accurately synthesizes the many voices and views heard during the conference.

A similar debt of gratitude is owed to the staff of the ABA Division for Legal Services. The need for the first national gathering in over ten years to discuss legal services delivery issues was first identified by the staff. Potential conference topics and structure were developed in close consultation with knowledgeable staff. The efforts of Terry Brooks, director of the ABA Division for Legal Services and counsel to the Consortium, merit special mention. He marshalled the contributions of other staff, suggested and researched topics for discussion, coordinated planning meetings and all arrangements for the events, contributed careful editorial guidance to this report and was responsible for the production of this publication. The conference team included Patricia Wagner, who arranged the production of conference materials, Debra Baxter, who coordinated conference invitations and

gathered biographical and other information, and Ingrid McCabe who worked diligently to arrange meeting and lodging facilities. Other Division staff who contributed to the conference included Dennis Kaufman, James Podgers, Alec Schwartz, Lynn Sterman and Sheree Swetin. Their combined efforts to produce a conference that ultimately unfolded flawlessly were truly heroic.

This report is being printed as a public service under the auspices of The Southwestern Legal Foundation, an international center for continuing legal education located on the campus of the University of Texas at Dallas. The Consortium gratefully acknowledges this generous contribution and the efforts of Foundation President J. David Ellwanger in facilitating it. We also wish to thank Johnston Printing Company of Dallas, Texas for its assistance, through the Foundation, in the publication of this report.

Conference Planning Subcommittee,
Consortium on Legal Services and the Public
June, 1991

INTRODUCTION

On June 9-11, 1989 in New Orleans, Louisiana, the American Bar Association's Consortium on Legal Services and the Public, together with the Tulane University School of Law, sponsored a National Conference on Access to Justice in the 1990s. The Conference was a natural outgrowth of the work of the Consortium, which serves within the American Bar Association (ABA) as the forum for issues relating to the delivery of legal services to low- and moderate-income persons. Some have characterized the Consortium as the "consumer conscience" of the Association. Through the Consortium, the American Bar Association sponsored similar national conferences on legal services delivery in 1977 and 1979. Those meetings provided the impetus in the 1980s for the development and implementation of new and creative means to provide low- and moderate-income persons with access to the justice system. The 1989 conference provided the opportunity to consider what was achieved in the 1980s and what remains to be accomplished as we enter the 1990s.

Changes of the 1980s

The past decade has seen significant changes in the legal environment, in the lives of low- and moderate-income persons, and in the legal institutions that serve these persons. In 1979, the federally-funded Legal Services Corporation (LSC) was approaching the high point of its funding. At that time, the LSC served as a funding conduit as well as a catalyst for research on substantive poverty law issues. The LSC actively encouraged its grantees to pioneer imaginative new approaches to delivering services and disseminated information on those experiments that proved particularly successful. In the 1980s, however, federal funding for legal services was drastically reduced. Under the leadership of a new administration and board of directors, the LSC repeatedly sought to limit the funding and the scope of its grantees' work. By the end of the decade, the LSC was no longer a force for innovation, growth and enhanced effectiveness. During the 1980s the incidence of poverty reached its highest levels since the 1960s, and changes in the economic environment and in major legislation affecting low-income persons created both new legal problems and rights for poor people and their advocates. Legal services programs had to grapple with these new legal issues, together with an increased demand for services, reduced resources, and the absence of national leadership from the LSC.

The 1980s also brought notable changes in the lives of moderate-income persons. Although the average per capita income increased, many average Americans found that spiraling costs put many items long considered basic needs - family home, quality education and adequate health care - out of reach. Legal costs, spurred by investment in technology, inflation, and dramatically higher salaries, also soared. While experimentation with legal advertising increased and creative new methodologies - alternative dispute resolution mechanisms such as mediation and court-annexed arbitration, lawyer referral and information services, nationwide clinics, and telephone access prepaid plans - that promised more affordable resolution of common problems expanded substantially, many local clinics failed to thrive and full-service prepaid plans grew more slowly than predicted. Despite the innovations of the 1980s, legal services seemed no more affordable or accessible to many moderate-income persons at the end of the decade than at its beginning.

Capturing a Broad Perspective

In planning for the conference, the Consortium did not attempt *a priori* to limit or define the concepts of access or justice. Instead, the 1989 conference was designed to serve as a forum in which experts with widely diverse backgrounds could debate the current status of access to legal services, exchange ideas, information, and solutions in a field where information and experts are all too often pigeonholed and isolated; and, most notably, begin to develop an action agenda for the future - an

agenda built upon but not limited by past experience.

To insure a mix of experience and specialties, attendance at the conference was by invitation only. Invitees included:

- leaders of the American Bar Association;
- ABA representatives with expertise in the delivery of legal services;
- state, local and minority bar leaders;
- academicians;
- experts from other disciplines;
- representatives of private foundations;
- legal services program directors and clients;
- leaders of national legal services organizations;
- representatives of the public interest bar;
- consumer groups;
- lay advocates;
- representatives of organizations serving moderate-income clients, including clinics and prepaid programs;
- experts in the use of alternative dispute resolution procedures;
- judges;
- members of Congress and their staffs;
- private attorneys with personal legal services practices;
- individuals with expertise in indigent criminal defense issues; and
- legal services experts from other nations.

In keeping with its goals, the design of the conference, with an emphasis on small group discussions and limited, topical plenary sessions, was developed to promote discussion and brainstorming. To ensure that every invitee arrived at the conference with some understanding of all the topics to be addressed, the conference papers - prepared by experts in various fields - were distributed to participants in advance of the conference. The papers offered basic information about the current status of a particular issue or delivery system, identified key issues and provided an analysis of potential future trends. The conference papers have been published as *Civil Justice: An Agenda for the 1990s-Papers of the Conference on Access to Justice in the 1990s* [1991] which is available from the American Bar Association Order Fulfillment Department.

Constructing a Contemporary Information Base

In its early preparation for the conference, the Consortium's planning committee discovered that there was a lack of current, comprehensive data on the public's need for legal services and on the patterns of utilization of lawyers and other providers of legal assistance. The most recent available data had been compiled in 1974 and analyzed in the 1977 American Bar Foundation report, *The Legal Needs of the Public*. To satisfy the critical need for more current information, the Consortium commissioned two modest pilot studies on civil legal needs and the utilization of the legal system, one focusing on low-income households (i.e., households with income below 125% of the federal poverty guidelines) and the other addressing the general public. (The surveys have been published together as *Two Nationwide Surveys: Pilot Assessments of the Unmet Legal Needs of the Poor and of the Public Generally* [1989], which is available from the American Bar Association Order Fulfillment Department.)

The pilot national survey of the civil legal needs of the poor, conducted by the Spangenberg Group, gathered data through a statistically significant random national telephone sampling of low-income households. Respondents were asked whether they had encountered any of 34 civil legal problems in the past year and whether they obtained legal help for each problem encountered. Based on the responses of 500 households, the study projected that in 1987 low-income households received legal assistance for approximately 4.9 million problems but received no assistance for an additional 19 million problems.

The second survey, conducted by Barbara Curran of the American Bar Foundation, was designed in part to provide comparisons with the 1977 American Bar Foundation study. The February 1989 study consisted of a separate random national telephone survey of 1500 individuals selected to reflect the U.S. adult population living in households. The study focused on the incidence of selected personal, civil legal problems among adults at all income levels and the use of legal service providers and other mechanisms in resolving such problems. Respondents were asked about the incidence of four specific personal civil legal needs (home purchases, wills, divorces, consumer problems) and the related use of legal services.

The survey findings with respect to low-income persons are notable and troubling. The survey conducted by the Spangenberg Group revealed that approximately 80% of the legal problems of the poor go unaddressed. Predictably, the survey results for more affluent citizens reflect a higher utilization of lawyers. Nonetheless, the Curran study indicates that during the three year period cited in the survey, an appreciable number of Americans at all income levels with common civil legal needs did not obtain legal assistance. Those who considered using an attorney but did not seek such assistance cited a variety of barriers including cost, uncertainty about the value of legal intervention and lack of knowledge about how to find a competent attorney. The studies underscore the anecdotal evidence identified by conference participants: the systems now in place to help low- and moderate-income persons find legal help are inadequate. The study findings provided an empirical basis for the concern which prompted the decision to sponsor the conference - the clear sense that for poor and moderate-income Americans the promise of equal access to justice was illusory. The task of the conference was to acknowledge these shortcomings and to point the way to sensible, workable and comprehensive mechanisms for improving access to our justice system.

CONFERENCE PROCEEDINGS

From the outset, the Conference on Access to Justice in the 1990s was intended to be open-minded in its agenda and wide-ranging in its search for solutions. Conference deliberations included a wide variety of issues and approaches, ranging from broadbased societal considerations to narrowly focused incremental improvements in existing delivery systems. The resulting report reflects the diversity of the proceedings. It is an amalgam of policy changes, strategies for reform, new initiatives, mid-course corrections, and cautious experimentation. The conference properly recognized that both fine-tuning of existing systems and sweeping changes are called for. In light of the complexity and richness of the discussions at the conference, no attempt was made to reduce the conference deliberations to a vote or to establish rigid priorities. The findings outlined below constitute those issues, policies, or strategies which engendered support from a majority of conference participants. It is fair to say that no single item was universally embraced by all participants. In virtually every instance, significant reservations were expressed. However, with respect to a number of critical issues, an overall consensus of the conference emerged.

CONFERENCE DELIBERATIONS

BASIC CONCEPTS AND PRINCIPLES

On Defining Access to Justice

For both low- and moderate-income persons, the concepts of access to justice and delivery of legal services should not be viewed as synonymous with access to an attorney, access to judicial process, or individual representation. For both groups, a broad range of strategies, services, providers and fora should be available.

On the Need for a "Civil Gideon"

In those instances in which representation is essential, a strong consensus emerged at the conference in support of the need for a "civil Gideon," the establishment of a right to counsel at public expense in civil matters for indigent persons. A statement of principle drafted for the conference states, in part, that "[E]qual justice under law, guaranteed by our system of government, is a fundamental premise of our society. In this society the individual having access to a trained advocate and counselor enjoys an advantage in dealing with others who do not. Society has a duty to see that no individual, because of economic circumstance, is disadvantaged by lack of access to such assistance. This is an obligation of the entire society." As noted in a paper distributed to the conferees, the United States stands alone among major Western civilizations in failing to identify the right to counsel in civil matters as a fundamental and enforceable right.

Despite the broad consensus with regard to the establishment of a civil Gideon, participants identified a series of caveats and concerns which must be addressed. One clear pitfall is the experience with respect to indigent criminal defense, in which the mandate for counsel, when coupled with inadequate funding, has often led to overburdened advocates and inadequate systems that provide only the illusion of effective representation. Implementation of a broad-based right to counsel would require some agreement on the thorny issue of identifying essential legal assistance, a process which some participants feared would result in a narrow, functional right which left no room for strategic or controversial issues and approaches. Conference participants also identified the daunting administrative complexities in integrating a civil Gideon with existing delivery systems for poor persons. The conference did not decisively address these difficult definitional issues, although there was support for a general theory premised on the notion of providing an even playing field: a system of justice that provides the poorest and least powerful with the same range of legal assistance currently available to the most powerful and wealthiest segments of our society.

There was no consensus on the most effective method to implement a broad-based entitlement to counsel. In light of the national climate and current budgetary constraints, some felt that establishment of a civil Gideon through legislation was politically infeasible. Others, citing a series of unfavorable court decisions on the right to counsel, predicted that establishing a right to counsel through litigation was equally unlikely. It was noted, however, that in the criminal defense area the concept of a broad-based right to counsel was preceded by a number of opinions which identified a limited right to counsel in matters of great complexity where a significant right was at stake. Some conferees suggested that an analogous, finite and incremental approach should be tested for civil representation.

In acknowledging these serious impediments, the conferees recognized that implementation of a civil Gideon concept is a long term goal. Nonetheless, it was felt that the organized bar should begin now to build support and develop strategies for establishing the concept. As one person asked, "We are deeply troubled by the closing down of emergency rooms to poor people with medical crises. Why

should we tolerate the inability to provide even the most critical legal services to those same people?" Suggested first steps included the adoption of an ABA policy favoring a civil Gideon, research and analysis of the experience of other nations which do provide some basic legal services to low-income persons, and an evaluation of strategies which could be employed at the state and federal levels to initiate at least selective implementation of the concept.

On State-Level Planning

The conferees recommended that each state, perhaps under the leadership of its supreme court, should undertake a process of analysis, discussion and planning analogous to the Consortium's conference and future planning process." It was suggested that the American Bar Association could serve as a catalyst and resource for the states, encouraging major changes and improvements in those aspects of the delivery system which can most effectively be implemented at the state level.

On a Comprehensive National Legal Needs Study

In general, participants strongly supported the need for a comprehensive national study of legal needs and of patterns of utilization of legal services by low- and moderate-income persons. A sophisticated national survey - one which accurately reflects the complexity of legal needs and the level of intervention necessary to resolve those needs -is essential to developing sound policies and resource allocation principles, as well as to planning and reevaluating the current delivery systems for low-and moderate-income clients.

This effort is not without its difficulties and limitations. The concept of legal need or legal problem is an elusive one. As rights expand, for example, new legal needs are identified. Representation in welfare fair hearings would not have been recognized as a legal need until due process rights for welfare recipients were established. Particularly in the area of legal services for the poor, the concept of critical legal rights is not simply the sum of individual legal problems, recognized or unrecognized. Despite these difficulties, there was strong support for an effective analysis of legal needs.

The survey conducted for the conference by the Spangenberg Group contained the surprising conclusion that two out of three low-income persons who received assistance with their legal problem did not obtain that assistance from a legal services program. Conference participants strongly urged that a national legal needs survey investigate the sources and nature of such assistance.

On Responsible Experimentation and the Exchange of Ideas

Discussions at the conference revealed a wealth of information and experience regarding the delivery of services to low- and moderate-income persons. Without an effective central repository for that information both its usefulness and the capacity for the exchange of ideas and effective strategies across economic and delivery systems lines are diminished. Participants also cited the current lack of experimentation and research as a major impediment to innovation. As one participant noted, "responsible research [in the area of legal services for the poor] came to a halt" in the 1980s due to resource limitations and the LSC's politicization of experimentation.

With respect to the provision of legal services to persons of moderate means, there appears to be very little cross-fertilization and communication across delivery system lines. Lawyer referral services, for example, may benefit from what prepaid access plans have discovered about telephone advice and referral, but current structures do not promote regular communication of this type of information. This may, in part, be a result of the American Bar Association's current structure with various aspects of moderate-income delivery distributed among numerous committees and some sections. Efforts should be made to increase opportunities for substantive interaction among these

entities.

It was the sense of the conference that the ABA Consortium on Legal Services and the Public should enhance its clearinghouse role to serve as a catalyst for innovation and responsible experimentation across income and specialized delivery lines. A suggested first step toward that goal is the creation of a Consortium publication which focuses broadly on access and delivery issues and which is made available to a wide range of interested persons and groups.

On the Crisis in the Criminal Justice System

The Access to Justice Conference was not designed to address the problems plaguing the criminal justice system or congestion and delay in the courts, but conferees nonetheless found these problems permeating other discussions. The inability of the justice system to effectively address even a small percentage of serious crime cases, the impact of heightened drug enforcement efforts on an already overwhelmed justice system, and the delays experienced by civil litigants as the result of these and other pressures on our courts significantly impede access to justice in civil matters. This crisis not only paralyzes the justice system; it reinforces the public's perception that justice in America is not even-handed, speedy or effective. Acknowledging this issue as beyond the scope of the conference, participants nonetheless strongly recommended that the American Bar Association undertake as one of its highest priorities a concerted effort to address this crisis in the criminal justice system.

ENTRY INTO THE JUSTICE SYSTEM

On the Need for Public Education

Conferees identified a number of barriers that discourage effective use of the legal system by low- and moderate-income persons. Chief among them was lack of information about the legal system, the potential benefits of legal intervention, the cost and impact of representation, and the options available for the provision of advice and assistance. Psychological barriers, included distrust and fear of lawyers and concerns about the efficacy of the justice system, are also prevalent. Participants encouraged the development of educational programs and an assessment of the feasibility of institutional advertising by the bar to provide consumer information and to address fears and concerns about the legal system. While most participants did not identify this effort as a high priority, particularly with respect to low-income clients, it was felt to be important in light of the Conference's other recommendations to broaden the range of legal providers, solutions and fora available to consumers. As one participant put it, "the model of consumer choice in the absence of consumer information is a model of disaster."

On the Need for an Effective Entry Point

One of the Conference's major areas of focus was the process by which low- and moderate-income persons identify a problem as having a legal component, entering the legal system, and having their problem diagnosed and referred for appropriate action. At present, the organized bar and other groups expend considerable resources in initial contact with persons who believe that they have a legal problem. Conferees generally perceived those resources as less than optimally developed and allocated. It was the consensus of the Conference that there is a need for a more effective entry point into the system for low- and moderate-income clients.

On Early Substantive Intervention

According to statistics reported in the papers prepared for the conference, between 60 and 80 percent of requests for legal assistance result in referral, advice or brief service. However, it was noted that the expeditious resolution of such a high percentage of inquiries may not be uniformly appropriate. In legal services programs for the poor, brief service or advice may be provided because resources do not permit more extensive representation rather than because limited intervention is the optimal

disposition of a particular inquiry. In agencies that provide services to or channel inquiries from persons of moderate means, the high rate of resolution through brief service may reflect a failure to accurately diagnose the complexities of the issue or may be a result of economic factors.

Despite these concerns, it appears that a significant proportion of problems presented by low- and moderate-income persons can and should be properly resolved at the initial point of entry. Currently, in many instances that point of entry is staffed by the least experienced and substantively knowledgeable personnel in an agency or program. The goal at present is often to screen out cases at the entry point, rather than to attempt to resolve issues, anticipating that substantive assistance will be provided later in the process. As one of the conference papers pointed out, this leads in some instances to the anomalous situation in which organizations spend more resources in turning away applicants for services than in providing assistance. The costs of these practices - in consumer dissatisfaction, inefficiency, and lost opportunities - is unacceptable. A strong consensus emerged at the Conference that systems should be put in place to provide substantive assistance at an earlier stage than is presently available.

To effectively implement such systems, conferees supported intake and referral models which are staffed by well-trained, substantively knowledgeable people who have the time and the expertise to resolve legal problems on the spot with advice, a telephone call, limited research or a letter when appropriate, a number of participants cited the model used in many law firms in which more senior attorneys - regardless of whether they will ultimately provide substantive services to a client - conduct the initial client interviews and appropriately refer each client within the firm. As one conference attendee put it, "it is illogical to make receptionists the major deliverers of legal diagnosis [to low- and moderate-income persons] in this nation."

While the volume of requests for assistance and the far more limited resources in offices serving low- and moderate-income clients may call into question the replicability of the law firm model, there are indications that intake systems providing early substantive intervention to those of limited means can be effective. The toll-free legal services "hotline" for older persons developed by the American Association of Retired Persons was cited as a model. Staffed by contract attorneys whose advice and brief service are reviewed by a supervising attorney, this service resolves a large percentage of inquiries during the initial telephone call or after some brief service. Callers whose problems cannot be readily resolved are referred to additional help based on sophisticated referral information. The staff follows up on selected referrals to determine whether they proved satisfactory. The development of an access system which specializes in brief service and referral, whether it is established as a free-standing service or as a component of another organization, will free delivery programs to focus their resources on the task of providing more extensive assistance, such as client representation in court or at an administrative hearing in matters which require that level of intervention.

On Diagnostic Protocols

The effective and cost-efficient operation of hotlines and similar access systems requires the development of diagnostic protocols for routine problems that identify the range of legal options and the range of providers appropriate for the caller's problem. Depending on the nature of a divorce, for example, callers might be given brief advice concerning the feasibility of the action, as well as information about private counsel, *pro se* programs and mediation options.

On Interdisciplinary Referral Systems

Conference participants also supported the concept of linking programs which perform legally oriented intake, diagnosis, and referral with those of other disciplines and with other referral networks; thereby creating a solution-driven system which responds comprehensively to consumer

needs. An interdisciplinary approach would remove some of the psychological barriers that now inhibit effective use of the legal system. In addition, since many problems experienced by low-income and moderate-income persons have non-legal dimensions, interdisciplinary intake programs would provide more comprehensive assistance to clients. To the extent that current ethical standards discourage an interdisciplinary approach, conference participants urged a careful review of those standards to permit effective partnerships.

On Lawyer Referral Services

Conference participants agreed that some existing intermediaries that serve as points of entry to the legal system - including bar-sponsored lawyer referral services that do not provide substantive screening before referral - are not functioning well. The American Bar Foundation study prepared for the conference suggests that only one percent of people who consulted a lawyer on a civil matter found that lawyer through a lawyer referral service. Given the overall number of lawyer referral services nationwide, their low rates of referral to lawyers bears close examination.

Conferees generally agreed that in many cases lawyer referral services are being asked to undertake a point-of-entry role that, by virtue of their structure and staffing, they cannot properly fulfill. Conferees suggested that some lawyer referral services might be enhanced to include substantive intervention capacity. Such expansion requires considerable restructuring, including the addition of substantively knowledgeable staff, diagnostic protocols, and the establishment of close ties to consumer groups. Over the past decade, the approach in operating structures for lawyer referral services has changed to include a public service component, staffed by knowledgeable and trained staff, which offers an enhanced capacity to screen, refer, and assist callers as appropriate. These structures - known as lawyer referral and information services - have demonstrably improved service to the public and reduced no-show rates. Since that expansion may not always be feasible, a number of lawyer referral services might elect a more limited capacity, specializing in helping people find an appropriate lawyer, once the need for a lawyer has been determined. To successfully undertake this role, in light of the conference's discussion of barriers to the use of attorneys, lawyer referral services should upgrade their operations, offering the consumer greater choice in attorney selection, providing significantly more information about attorneys, their fees and their levels of experience, and ensuring the competence of attorneys provided through the service. For services focusing on this more limited role, it was anticipated that the numbers of inquiries would diminish, but that the calls would be more appropriate to their function of helping consumers to select attorneys in an informed manner.

DELIVERY OF LEGAL SERVICES

On the Legal Services Corporation

Conference participants strongly endorsed the current federally funded delivery system for low-income persons. That system continues to be fundamentally sound, despite years of adversity and woefully inadequate resources. Most notably, the present system encourages the development of highly effective strategic responses to poverty law problems, an efficient and cost-effective approach to preserving the legal rights of poor persons.

Conferees decried the current politicization of the Legal Services Corporation and condemned existing practices and policies which inhibit the ability of programs to effectively serve their clients. Singled out for concern were the over-regulation of legal services programs, particularly limitations on the use of private funds and restrictions on the scope of program clients and advocacy activities. The paperwork burden imposed on programs was also criticized.

On Delivering Legal Services to Non-Indigent Persons

With respect to intake systems that enable consumers to effectively access the justice system, conferees supported the evolution of more effective models that cut across income lines. With respect to delivery of more comprehensive services, however, conference participants saw distinctly different public policy considerations applying to the poor and to persons of moderate means. Average Americans with some resources certainly experience difficulty in finding and affording legal assistance. For these persons, however, solutions should focus on strengthening the private market for legal services, increased education and information for consumers and the removal of barriers to innovations which could provide a broad range of more affordable services. For our poorest citizens, expanding options and lowering cost will not put legal assistance within their reach. For those who cannot avail themselves of essential legal services without depriving themselves and their families of the necessities of life, government must, as a matter of public policy, intervene to provide that assistance. Although conference participants believed that providers of legal services to low- and moderate-income persons had much in common and much to learn from each other with respect to techniques, delivery systems and strategies, as a policy matter, they saw these two delivery systems as distinct.

This distinction, however, was tempered by a recognition that a substantial number of persons with incomes somewhat in excess of the federal poverty guidelines are also presently unable to secure legal services in the marketplace. The Conference supported the encouragement of a wider range of fee plans by private attorneys which would take into account the resource levels of potential clients. Despite some concerns, conference participants also favored some limited, measured experimentation with provision of services by legal services programs to the marginally indigent on a sliding fee scale. A number of conferees feared that already inadequate program resources would be diverted to clients who could pay something. Others felt that the addition of a group of clients with a potentially greater voice in public debate would yield more favorable resolution of issues important in the lives of poorer Americans. Some participants suggested that the focus, even for the marginally poor, should be on those substantive issues where there is common ground with persons with incomes under the federal poverty guidelines - e.g., disability programs, special education, and health services in rural areas.

On Expanding Private Sector Delivery of Personal Legal Services

Conferees noted that there should be no dearth of services available to moderate-income people. Many of the nation's lawyers are in sole practice or small firms - precisely the type of practice which should be appropriate for the provision of personal legal services. As of 1985, there were approximately 225,00 sole practitioners in the United States, with another 103,000 persons in firms of five and under. The Curran study's findings suggest that there exists a significant untapped paying market for personal legal services. Studies of small firms and sole practitioners have shown that these lawyers at times have unused capacity available. Some conferees suggested a study to determine why there appears to be no market for this under-utilized attorney time, despite the number of under-served moderate-income clients. Conference participants suggested that the profession in general does not value personal legal services, and, accordingly, that there had been little effort made to teach attorneys how to attract moderate-income clients and provide basic services in a cost-effective manner. They encouraged training and research to develop streamlined and economical methods for handling relatively routine matters, so that modest cases and moderate-income consumers are not priced out of the marketplace.

On Involvement by Non. Attorneys

The conference strongly supported the relaxation of current barriers to the involvement of non-attorneys in the provision of legal assistance and called for careful experimentation with lay advocacy programs to determine whether and how such representation will increase access to the legal system. Representation by non-lawyers should be a function of the client's problem rather than

the client's income level. As one put it, "everyone is allowed to shop at Filene's basement." Indeed, since legal services programs for the poor have pioneered the use of non-attorneys, the greatest expansion of their use would be among people of moderate or greater means.

Conference participants observed that in many states functional tasks previously reserved for lawyers are now being undertaken by other professionals or trained advocates, including tax preparers, accountants, real estate brokers, and independent paralegals. Beyond acknowledging that some law-related matters simply appear to be of little interest to most attorneys in private practice, the conferees also agreed with one participant's remark that "there are some tasks for which a legal education is neither necessary nor sufficient." Finally, some conferees believed that some people with legal problems might be more willing to consult a non-lawyer.

In light of the conference's recommendations that skilled experts, typically attorneys, be used in point-of-entry screening (see "On Early Substantive Intervention," above), some participants envisioned that reshaping both access and delivery systems could produce a *different* role, rather than a reduced role, for lawyers. Attorneys would be much more actively involved at the point of entry into the legal system to ensure expert diagnosis of problems, while the selection of an appropriate service provider from among a broad range of options would be determined by the nature of the problem and the client's preference.

Despite strong support for eliminating barriers to assistance by non-attorneys, conferees raised a number of concerns regarding the efficacy of their role. Some conferees suggested that with almost half the nation's 750,000 lawyers in small firms or sole practice, tapping the existing network of trained, regulated lawyers is preferable to establishing a second cadre of service providers. Other conferees objected that the involvement of non-attorneys could not be reliably projected to improve access or lower costs. They argued that a properly trained and regulated lay advocate, with appropriate technology, malpractice insurance and certification costs, could not charge fees markedly lower than those of attorneys in smaller firms. Some participants also voiced concerns about quality and quality control, while others argued that permitting representation by a non-attorney when the other party was represented by counsel creates an imbalance which in effect results in second class justice.

On the Regulation of Non-Attorneys

Conferees supported further analysis and experimentation to seek answers to a threshold issue where there was no consensus: whether there should be regulation of non-attorney legal services providers, and, if so, what the nature of the regulatory authority should be. Recommendations at the conference ranged from simple disclosure that the individual was not an attorney, with the selection left to client choice, to a system of certification, mandated training, regulation and oversight. Conferees were also unable to come to any resolution on either the nature of the problems or the types of activities which a non-attorney could undertake as effectively as a lawyer.

On Expanding Prepaid Legal Services for Moderate-Income Persons

Conferees cited prepaid legal services plans as an effective vehicle for the provision of legal services to persons of moderate means. They urged Congress to permanently enact Section 120 of the Internal Revenue Code, which provides favored treatment for employer-funded prepaid plans, and also supported steps to encourage attorney participation in prepaid panels. Conferees also identified several issues for further analysis and research. Some participants expressed concern about the lack of quality control mechanisms in prepaid plans. Others were concerned that the proliferation in access plans, rather than full service plans, reflected financial considerations of profitability rather than informed client choice, and questioned whether access plans meet clients needs.

On the Need for Alternatives to Representation

Conference participants discussed a variety of alternatives to representation, including alternative dispute resolution, de-legalization of certain legal matters, and *pro se* and self-help efforts. In general, conferees believed that while these mechanisms could not and should not be seen as substitutes for representation, they did offer viable options in appropriate cases.

On Alternative Dispute Resolution Mechanisms

In general, the conference supported increased use of alternative dispute resolution mechanisms in appropriate matters involving low- and moderate-income persons. They urged law schools and continuing legal education providers to incorporate courses on dispute resolution into the core curriculum.

Participants strongly favored the informed use of ADR mechanisms by persons of moderate means. Conference participants did note that the greatest growth in the alternative dispute resolution field in recent years appears to be in two areas: use of non-judicial mechanisms by major corporations who find the court system too slow, expensive and unwieldy, and participation in court-annexed arbitration. They recommended further study on the use of ADR by moderate-income persons, with emphasis on the reasons for the apparent under-utilization of voluntary mediation programs.

Participants more cautiously recommended some experimental collaboration between dispute resolution programs and legal services offices to determine the most effective use of mediation and other ADR mechanisms for low-income persons and to assess the extent to which these mechanisms meaningfully expand access to justice for poor persons. While funding for legal services to the poor must not be diverted for this purpose, there should be thoughtful analysis of dispute resolution's usefulness in situations characterized by significant disparities in the parties' respective information, power, resources and influence and research into whether processes exist which can effectively compensate for these disparities. Participants noted that the use of mediation to resolve larger public policy disputes offers particular promise in light of recent changes in poverty law, such as the development of welfare to work programs, where legal services clients and their advocates can make a significant contribution to the development and implementation of policy.

On the Role of the Law Schools in the Delivery of Legal Services

Conferees agreed that law schools could not be a major provider of services to low- and moderate-income clients, but did support law school clinical programs and other efforts which provide training about and exposure to poverty law issues. It was felt that law schools could be most effective in their capacities as educators and centers of research, both in providing more information about non-traditional dispute resolution methods and by undertaking research on substantive poverty law issues and delivery techniques.

Conference participants expressed a strong interest in experimenting with the medical training model as a means of involving law students in poverty law practice despite the obvious resource problems raised by this alternative. It was suggested, for example, that the third year of law school could become an internship year, to be spent at a legal services or public interest law program, under the supervision of that program's attorneys.

On Law School Support for Legal Services to Low- and Moderate-Income Persons

The conference identified law schools as an important factor in the socialization of law students and encouraged their efforts to inculcate the value of pro bono service. It was also felt that the law schools in the past had contributed to the profession's devaluation of a personal legal services practice and that the schools, as part of their socialization role, should encourage students to enter such a practice.

On Expanding De-Legalization

Conference attendees strongly supported the de-legalization of relatively routine matters in which there is no strong state interest. At present, highly routine cases, such as uncontested divorce and the administration of small estates still require complex court processes in many states. The transaction costs of these matters could be reduced considerably by removing them from the jurisdiction of the court and providing simple procedures for their administrative resolution. Conferees encouraged the American Bar Association to work with state bars and legislatures to identify those areas that need not be resolved in the adversarial court system and to support legislation to remove them from the judicial process. For matters which still must proceed through the courts, conferees supported simplification of procedures so that transaction costs and delay could be reduced.

DEVELOPMENT OF RESOURCES

On Public Funding for Legal Services to the Poor

In keeping with the conferee's support for a civil Gideon there was a strong consensus that government at all levels has an obligation to adequately fund legal services for the poor. Many participants felt that efforts to increase government funding, particularly at the federal level, will succeed only if they are pursued in the context of a clear, finite, measurable and achievable goal. One approach suggested by conferees would focus on those areas of legal need for which legal representation is essential, developing a concrete formula for funding services to address those needs. Another innovative approach which surfaced was the notion of a matching or challenge partnership program, in which the organized bar would request a doubled federal appropriation for legal services to the poor in return for its commitment to double the support provided by the profession.

On Additional Approaches to the Funding of Legal Services

The 1980s saw substantial innovation in the development of additional public sources of funding for civil legal services to the poor. Conference participants identified a number of fruitful funding theories which have been adopted in a few jurisdictions as well as promising, but wholly untried approaches. These include:

- legal services-dedicated general revenue allocations can be sought at the state and local level;
- comprehensive IOLTA programs, now implemented in 22 states, can be developed in the remaining jurisdictions;
- programs can be put in place which result in net cost-savings to the states through representation of clients. Examples include state-funded programs to support representation of Supplemental Security Income and Social Security claimants, which save states the cost of providing financial assistance to these claimants, and funds for the representation of tenants facing eviction in areas where there is a court-ordered obligation to provide shelter to homeless persons and the city must bear the high cost of homelessness;
- user fees--costs paid by those who benefit from or use the justice system--might be adopted. This concept includes programs already in place, such as filing fee surcharges earmarked for civil legal services, as well as new proposals, most notably a dedicated gross receipts tax on lawyers' professional income. Some conferees identified a number of obstacles to this approach, including the historical opposition of the bar to a similar initiative - a proposal for a professional services sales tax. Others warned of the potentially regressive nature of such a proposal. It was argued, in rebuttal, that the gross receipts tax would be highly progressive since business enterprises and wealthy individuals presently employ a disproportionate

percentage of legal resources and would pay most of the tax. Still others felt the tax could be made more progressive by limiting it to lawyers with revenues in excess of a certain amount. Other caveats posed with respect to this approach included fears that the success of such a tax would erode the societal obligation to fund legal services for the poor, alarm at the prospect that jurisdictions might ultimately allocate these funds to other uses, and concern over the limitations in some states with respect to use of dedicated or targeted taxes. Despite the controversy engendered by this proposal, it was felt that the concept of a gross receipts tax should be further explored;

- another innovative idea that surfaced at the conference was the allocation to a fund supporting legal services for the poor of a portion of punitive damage awards which are a windfall to the client. Similarly, it was suggested that class action awards which could not be distributed in a cost-effective manner because of the small size of the recovery for any individual member of the class could become part of a legal services fund;
- conferees also suggested an expansion of the use of contingency fees and fee shifting awards into new areas. For example, it was suggested that legal fees be awarded to those seeking benefits from the state whenever the state incorrectly withheld those benefits;
- another, similar proposal called for the inclusion of funding for legal services in all legislation that creates entitlement programs, since representation to ensure that benefits are properly awarded and that the programs are properly administered should properly be seen as part of the cost of these programs.

Another potential source of funds identified at the conference are those private interests which often benefit from the representation of poor persons. For example, hospitals might be approached to support a program to obtain Medicaid or Medicare benefits for individuals.

On the Legal Profession's Contribution to Legal Services for the Poor

Although they acknowledged that ensuring the provision of legal services for the poor is an obligation of society as a whole, the conferees identified a special role for the bar in providing both pro bono services and supplemental funding for legal services. Spirited debate on the question of mandatory versus voluntary *pro bono* service by lawyers left the conferees divided, but they strongly favored the promotion and support of *pro bono* service in every way possible.

- Despite the lack of consensus on mandatory *pro bono*, the conferees agreed that the organized bar must clarify the nature of its *pro bono* obligation and define a reasonable level of expectation and achievement.
- The conferees also urged the organized bar to establish a concrete goal for increasing its financial support for legal services.

Although no consensus was reached, conferees endorsed the concept of special assessments of the bar - akin to assessments for client security funds - for the support of legal services through a surcharge on attorney registration fees.

On the Need for a Clearinghouse for Funding Innovations

Conference participants strongly urged the American Bar Association to serve as a clearinghouse and catalyst in promoting innovative funding schemes and in enhancing financial contributions from the bar. Just as the ABA has provided leadership with respect to *pro bono* services and IOLTA programs, the bar should educate the profession as well as local and state bars with respect to their

critical role in increasing resources for civil legal services to the poor.

On Procedural Rules Restricting Access to Courts and Administrative Agencies

Recent changes in judicial and administrative practices, including the imposition of Rule 11 sanctions, attorneys fees limitations, and decisions on standing, have had a disproportionately negative impact on the public interest bar. If resources are to be enhanced, court and administrative agency rules must promote access, rather than restrict it. Conferees urged the ABA to examine these barriers to access and to oppose any actions which restrict the resources available to poor and disadvantaged litigants.

CONCLUSION

The Conference on Access to Justice in the 1990s was but a first step. This report of its results is intended to initiate a process of examination by state, local and national organizations and governmental bodies of existing laws, regulations and practices. In many areas further experimentation or research will be necessary. In others, experience highlighted herein may provide sufficient basis for implementation elsewhere of new procedures or programs to enhance access to the civil justice system.

The American Bar Association, through the Consortium on Legal Services and the Public and many of its other entities, will continue to develop policy proposals and to mount national programs to further broaden public access to civil justice. Following the publication of this report, the Consortium will offer technical assistance to state and local bar associations and court systems interested in presenting conferences focusing on access to justice in their jurisdiction. Model agendas, papers and other background materials and knowledgeable speakers will be made available. It is hoped that this combination of national leadership and stimulus for new developments at the state and local level will coalesce to produce a rich harvest of improvements in the civil justice system throughout the next decade.

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