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NATIONAL LEGAL AID & DEFENDER ASSOCIATION

# CORNERSTONE



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## 2014 Events

**National Farmworker Law Conference**  
November 12-14  
Hyatt Regency Crystal City  
Arlington, VA

**NLADA Annual Conference**  
November 12-15  
Hyatt Regency Crystal City  
Arlington, VA

## 2015 Events

**Appellate Defense and Persuasive Writing Institute**  
January 22-25  
New Orleans, LA

**ABA/NLADA Equal Justice**  
May 2015

**NLADA Annual Conference**  
November 4-7  
New Orleans, LA

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# Supreme Court Watch

## Competency to be Executed

By Marshall J. Hartman and  
 Laurence A. Benner

In *Hall v. Florida*, 134 S. Ct. 1986, Justice Kennedy, writing for five members of the court, held that Florida's death penalty law was unconstitutional because it determined competency to be executed without taking into account deficits in adaptive behavior while rigidly assessing intellectual functioning using a flawed measurement of IQ. These errors created an unacceptable risk that Hall, who had an IQ of 71, would be executed, contrary to *Atkins v. Virginia*, 536 U.S. 304 (2002).

In *Atkins*, the Supreme Court established a categorical rule holding that the intellectually disabled cannot be executed. The rationale for this decision was that while such defendants may know the difference between right and wrong and are competent to stand trial, they nevertheless "have diminished capacities to understand and process information, to...learn from experience, to engage in logical reasoning,[and] to control [their] impulses..." Death is therefore a disproportionate punishment for such offenders and constitutes cruel and unusual punishment in violation of the Eighth Amendment.

The problem remaining for the Courts after *Atkins* was what constitutes "intellectual disability" for the purpose of this categorical rule precluding execution of such persons. *Atkins* left this determination up to the states, noting only that clinical definitions of intellectual disability

(formerly called mental retardation) involved three criteria: 1) subaverage intellectual functioning, 2) significant deficits in adaptive behavior, and 3) onset of both criteria prior to age 18.

**"Florida law presumes a defendant is categorically eligible for capital prosecution unless his IQ test score is 70 or below."**

Florida law presumes a defendant is categorically eligible for capital prosecution unless his IQ test score is 70 or below. By conclusively establishing death eligibility under *Atkins* solely on an IQ test score over 70, Florida therefore precludes defendants from presenting evidence of adaptive deficits or other evidence from early childhood at an *Atkins*' hearing. The issue in *Hall* (whose lowest test score was 71) was therefore whether Florida used an improper method for determining categorical eligibility for death based upon his IQ test score alone. Of course Florida had allowed Hall to present evidence of deficits in intellectual functioning and adaptive behavior as mitigating evidence during the death penalty phase of his capital trial. But Hall argued that under a proper test he is clearly intellectually disabled and not eligible to be executed under *Atkins*' categorical rule.

### Facts

On February 21, 1978, Hall and Mark Ruffin abducted a 7-month pregnant



**"Hall argued that under a proper test he is clearly intellectually disabled and not eligible to be executed under *Atkins*' categorical rule."**

woman and stole her car. After driving to a wooded area, she was raped and then shot in the head with a .38 caliber pistol. Thereafter the two men drove together in the victim's car to the parking lot of a convenience store they planned to rob. A Sheriff's deputy who attempted to apprehend them was also shot and killed with the same pistol. Both Ruffin and Hall claimed the other man did the killings. There were no eyewitnesses. At trial the prosecution proceeded on the theory that Hall and Ruffin planned and did everything together. Therefore even if there was no direct evidence that Hall was the shooter, he was nevertheless guilty of first degree murder as an aider and abettor. Hall was convicted of capital murder with respect to both victims, although the killing of the sheriff's deputy was later reduced on appeal because of the lack of evidence of premeditation necessary for first degree murder.

At the time of Hall's trial, the Supreme Court had not yet ruled that the Eighth Amendment precluded the States from executing defendants who were intellectually disabled (or, using the term then employed — mentally retarded). Evidence of Hall's intellectual disability was, however, introduced in mitigation during the penalty phase. This included school records from his teachers indicating that he was mentally retarded, a statement from his lawyer in a prior case that he "couldn't really understand anything Hall said" and testimony from his lawyer in the current case that Hall could not really assist in his own defense. His capital trial lawyer compared Hall mentally to his own daughter who was four years old. There was also testimony that Hall walked and talked at a far later age than his siblings and had great difficulty in speaking. Finally there was ev-

idence that Hall suffered horrible parental abuse as a child. This included repeated beatings with a belt because he was slow or made simple mistakes, being tied to his bed at night, being poked with sticks, and once being buried in sand up to his neck.

Nevertheless the jury voted to sentence Hall to death, and the Trial Court adopted this recommendation. The trial judge found that although there was substantial evidence in the record that Hall had been mentally retarded his entire life, he could not comprehend how Hall could have planned the robbery of the store and theft of the car if he was so mentally retarded. The Florida Supreme Court affirmed, with the Chief Justice dissenting.

### **“...Hall presented evidence of nine IQ test scores ranging from 60 to 80. The judge excluded the two tests below 70 on evidentiary grounds...”**

After *Atkins* was decided, Hall filed a motion arguing that he was intellectually disabled and could not be executed. Five years later a hearing was held at which Hall presented evidence of nine IQ test scores ranging from 60 to 80. The judge excluded the two tests below 70 on evidentiary grounds, leaving only test scores ranging from 71 to 80. The state successfully precluded Hall from presenting additional evidence based upon Florida's "70-point threshold" and the Florida Supreme Court ultimately upheld this restriction as constitutional. Justice Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, reversed.

## **Analysis**

Observing that “the Eighth Amendment is not fastened to the obsolete” *Weems v. United States*, 217 U.S. 349 (1910) but “looks to the evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 101, (1958), Justice Kennedy framed the question presented in *Hall* as how intellectual disability must be defined in order to implement *Atkins*. Relying upon “established medical practice” and Standards of the American Psychiatric Association (APA) for guidance, Kennedy began by acknowledging that “[i]ntellectual disability is a condition, not a number.”

Kennedy first attacked Florida's blind reliance upon a fixed IQ test score number without taking into account “the inherent error” in IQ tests known as the Standard Error of Measurement (SEM). Observing that this omission went against “the unanimous professional consensus” and made Florida an outlier among the other states,” Kennedy asserted:

Courts must recognize, as does the medical community, that the IQ test is imprecise... [I]n using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A state that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability. 134 S. Ct. at 2001.



**“...defense counsel should, in a proceeding to determine categorical eligibility for death under *Atkins*, always seek to present all available evidence regarding deficits in both intellectual and adaptive functioning...”**

Thus even if it is assumed that an IQ of 70 or below generally indicates subaverage intellectual functioning, it cannot be said that a particular individual’s test score of 71 actually is above 70 with any degree of reasonable certainty. This is because, as Kennedy explained, a test score of 71 actually represents a range of possible scores falling five points on either side (from 66 to 76).

Kennedy concluded Florida’s rigid rule, based upon a fixed IQ test score alone, therefore violated the Eighth Amendment because “when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.” 134 S. Ct. at 2001.

Quoting the APA’s Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), Justice Kennedy went on to assert:

It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM-5 at 37 (“[A] person with an IQ score above 70 may have such severe adaptive behavior problems that the person’s actual functioning is comparable to that of individuals with a lower IQ score.”) 134 S. Ct. 2001 (emphasis added).

Thus Kennedy concludes that Florida’s determination that Hall was not intellectually disabled “could not be valid” because it gave conclusive weight to an imprecise test measurement and because “the relevant clinical authorities all agree that an individual with an I.Q. score above 70 may properly be diagnosed with intellectual disability if significant limita-

tions in adaptive functioning also exist.” (quoting the APA’s brief).

While prosecutors will, of course, attempt to limit *Hall* to its facts and limit the ability to present evidence of adaptive deficits only to defendants who have IQ test scores falling within the margin of error for an IQ cutoff, the Court did not endorse 70 or indeed endorse the idea of any IQ cutoff at all. Indeed in light of the tenor of Justice Kennedy’s opinion, defense counsel should, in a proceeding to determine categorical eligibility for death under *Atkins*, always seek to present all available evidence regarding deficits in both intellectual and adaptive functioning, found, for example, in medical and family histories, juvenile records, and other school records, tests and reports.

**“...rejection of the strict 70 cutoff in the vast majority of states... provides strong evidence of consensus that our society does not regard this strict cutoff as proper or humane.”**

Justice Kennedy concludes his analysis by noting that 41 states do not treat a person with an IQ of 71 as automatically eligible for the death penalty. Since *Atkins* five states have abolished the death penalty and five others have passed legislation allowing a defendant to present additional evidence of intellectual disability even when his I.Q. score is above 70. (California, Idaho, Louisiana, Nevada, and Utah.) Only Kentucky and Virginia have fixed score cutoffs identical to Florida. While Alabama, Arizona, Delaware, Kansas, North Carolina, and Washington also appear to have cutoffs similar to that of Flori-

da, they have not yet been so rigidly interpreted by the courts. Kennedy therefore concludes that “rejection of the strict 70 cutoff in the vast majority of states... provides strong evidence of consensus that our society does not regard this strict cutoff as proper or humane”.

**“...the Supreme Court nevertheless will exercise its own independent judgment in determining whether a particular practice resulting in the death penalty is acceptable under the Eighth Amendment.”**

Finally, Justice Kennedy and the five justice majority, reaffirm that while consideration will be given to how the medical profession and the states define intellectual disability, the Supreme Court nevertheless will exercise its own independent judgment in determining whether a particular practice resulting in the death penalty is acceptable under the Eighth Amendment.

## Dissent

Justice Alito, joined by the Chief Justice and Justices Scalia and Thomas, reject the approach to Eighth Amendment analysis taken by Justice Kennedy. They agree that the prohibition of cruel and unusual punishment embodies evolving standards of decency. However Justice Alito feels that those standards must represent American society as a whole rather than just the view of professionals and the APA, which is a private association. Quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989), Alito asserts that the enactments of state legislatures provide the “clearest and most reliable objective

evidence of contemporary values” of our society. Alito also rejects Justice Kennedy’s assertion that the Court should use its own independent judgment in determining whether the Eighth Amendment has been violated, because in a democratic society legislatures, not courts are constituted to respond to the will and consequently the moral values of the people.

Justice Alito acknowledges that there is no clear national consensus about how to determine whether a defendant has an intellectual disability. Lacking such a consensus on methodology, Alito would therefore leave it to each state to decide how to proceed because “there is no basis for holding that Florida’s method contravenes our society’s standards of decency.”

Alito disputes the majority’s claim that 41 states would not automatically allow execution of a defendant who scored above 70 on an I.Q. test. That is because Justice Kennedy included in this total the 19 states that have abolished the death penalty in all cases. Justice Alito feels that it is not fair to count those states, and thus challenges Kennedy’s assertion that a majority of states would not allow Hall’s execution.

**“...Justice Alito feels that those standards must represent American society as a whole rather than just the view of professionals and the APA, which is a private association.”**

## Conclusion:

This is an important decision by the Roberts Court. It expands the methodology for determining intellectual disability, allowing for increased em-

phasis on adaptive deficits. This will require more investigation and expertise on the part of defense counsel, social workers, prosecutors and the courts. Hopefully this decision will result in more accurate assessments of intellectual disability which will comply with the Eighth Amendment and fulfill the promise of *Atkins*.

It is likely that more cases involving intellectual disability will come before the Court, because there are a host of other issues that also need to be addressed including: whether the defendant also has a right to a jury trial on this issue, what the burden of proof should be, and who should have the burden of persuasion. See James W. Ellis, “Mental Retardation and the Death Penalty: A Guide to State Legislative Issues,” 27 *Mental and Physical Disability Law Reporter* 11-24, (2003) arguing, for example, that under *Ring v. Arizona*, 122 S. Ct. 2428 (2002) the defendant should ultimately have the right to a jury determination on the issue of intellectual disability. ■

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# Legal Ethics Reacts to Technology: Is Civil Legal Aid Keeping Up?

By Mariam Morshedi

What does it mean to be a competent lawyer today? As technology changes, a lawyer's ethical obligations change. That is one of the messages of the ABA's 2012 update to the Model Rule 1.1 on Lawyer Competence. The new addition to the Model Rule obligates lawyers to "keep abreast [of] the benefits and risks associated with relevant technology."<sup>1</sup>

What does that mean for the legal aid attorney? What are the relevant technologies and how do you "keep abreast" of them? The National Legal Aid & Defender Association hosted a panel on this topic at the Litigation and Advocacy Directors' Conference in Austin in July of this year. The engaged audience members raised many issues relevant for legal aid offices. No one walked out of the room with a road map to lawyer ethics in the age of technology, but one rule of thumb emerged: have the conversation. Bring people together to flag changing issues in technology and discuss the ethical implications. The conversation might spark important procedural changes, especially relevant for managing attorneys or executive directors.

Technology is not static, and the lawyer's obligations are not either. Articles on legal ethics are appearing with catch phrases such as "Lawyers can't be Luddites"<sup>2</sup> and titles like "The Ethical Duty to Crawl Out From Under Your Rock."<sup>3</sup> The message is clear: you cannot ignore new technologies. You don't have to know everything about new technologies, but you should know enough to know what you don't know.

One major factor that has changed with technology is the existence of data: the amount of data and its accessibility. A large amount of our communications are done through electronic devices, and our devices all talk to each other. Security breaches can be of the sophisticated sort, like the huge security breach of Target that released masses of customer personal information.<sup>4</sup> Or they can be unsophisticated security breaches, like a lawyer leaving her computer unlocked while visiting the restroom at a coffee shop. Legal aid organizations should address how to protect client data, how to adequately inform staff to do so, and also how to advise clients about protection of their data. And this should be an ongoing process because technology is ever-changing.

**"Legal aid organizations should address how to protect client data, how to adequately inform staff to do so, and also how to advise clients about protection of their data."**



**"The new addition to the Model Rule obligates lawyers to "keep abreast [of] the benefits and risks associated with relevant technology."**



**“Cloud computing offers many benefits, but it also carries risks of which lawyers and especially litigation directors should be aware.”**



One of the main concerns for the legal aid community is how technology can implicate a lawyer’s duty to keep client information confidential. Rule 1.6(c) requires a lawyer to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”<sup>5</sup> These days, most law firms use cloud computing, “where your data and software are stored on servers owned and maintained by a third party.”<sup>6</sup> The 2012 amendment to Model Rule 1.6 on Confidentiality contains additional comment text addressing this issue, as it requires lawyers to protect against “unauthorized access by third parties.”<sup>7</sup>

Cloud computing offers many benefits, but it also carries risks of which lawyers and especially litigation directors should be aware. An Iowa ethics committee issued a 2011 ruling outlining what it means for a lawyer to take “reasonable steps” to ensure client information stored on a cloud is protected.<sup>8</sup> Some of the steps involve conducting due diligence on the company that will be storing the data, such as reviewing the company’s operating record and the laws of the state within which the server sits. The lawyer should also review the conditions of its end user’s licensing agreement: what happens in the case of financial default or in case of service termination. Also, what parties have access to the data, what passwords are required, and what is the potential for encryption?<sup>9</sup>

The interaction between business and personal online presence is another issue to think about. Do the lawyers send client information via their personal email accounts? As a litigation director, if half of your staff uses Gmail, you might want to read Google’s privacy policy. Do you want your staff to be aware?

Another major issue is staff use of personal devices for handling client information. Policies your organization might want to institute may address which devices are permitted, password requirements, support limitations (whether the organization will provide technical support), ownership of data applications (whether the organization will own certain applications used to access client information and data stored within), integration with the organization’s



**“Twitter use is growing rapidly, and numbers of other social media outlets such as Instagram, Pinterest and LinkedIn are increasing in usage as well. With such frequent and casual use, people may lack precaution.”**

acceptable use policies for organization devices, whitelisting or blacklisting certain applications, loss or theft procedure, and exit strategy (in case of staff termination).<sup>10</sup>

Some firms institute a stronger albeit more expensive step called mobile device management software (“MDM” software). The firm or organization contracts with a vendor to supply a management application for staff to download onto their personal devices. The application contains security settings set by the organization and vendor, and staff must log-on to the application to access work and client information.<sup>11</sup> MDM software may impose the policy choices listed above, and perform other functions such as preventing data share between personal use applications and work use applications. It allows the vendor to erase all data from a device if it is deemed lost or stolen. If your organization wants to weigh the costs and benefits of instituting policies to satisfy the requirements of Model Rule 1.6 (to “make reasonable efforts to prevent the access or disclosure”), visit Comment 18 for a list of factors to consider.<sup>13</sup>

Certain types of representation may require different policies. A lawyer working with victims of domestic violence flagged some issues especially important for her clients. A victim of domestic violence may suffer lack of privacy on her personal device if, for example, the perpetrator of abuse accesses the client’s personal email account. An organization serving victims of domestic violence may want to have a conversation with clients about making efforts to preserve confidentiality from the client’s end. Perhaps if a client facing similar issues elects to use email to communicate with the lawyer, the client could sign an agreement acknowledging that the organization cannot ensure against a confidentiality breach stemming from the client’s personal devices.

Another realm in which issues arise from technology comes from staff use of social media in their personal time. Because technology may blur the personal-work dichotomy, even online presence meant to be personal may reflect on a lawyer’s professional capacity. Venting about an anonymous client on social

**“Another realm in which issues arise from technology comes from staff use of social media in their personal time.”**





**“The Model Rule’s technological competence addition imposes a requirement not just for protecting against risk but also for taking advantage of the benefits of technology.”**

media is not only distasteful and may hinder a lawyer’s representation, but it can also have leads to the client’s confidential information. Lawyers and judges alike have blundered majorly from failing to recognize the exposing power of our online presence. We expect to be observed in the way we observe things. When you walk down the street, you may or may not notice that a passerby’s button is undone. But computers pick up things that humans do not. Not only do they pick up masses of data, but they analyze and connect it in ways and with speed that humans cannot. Our expectations about perception do not match the technological realities of how we are perceived, nor account for the wide breadth of our online footprint.

71% of adult Internet users use Facebook, 19% of them use Twitter, and Twitter usage is nearly doubled among the 18-29 age group (35%).<sup>14</sup> Twitter use is growing rapidly, and numbers of other social media outlets such as Instagram, Pinterest and LinkedIn are increasing in usage as well. With such frequent and casual use, people may lack precaution. The most obvious pieces of advice should not go unsaid. Zappos’ social media policy puts it simply: “Don’t do anything stupid,” and Microsoft went with an even shorter word count: “Be Smart.”<sup>15</sup> Err on the side of advising staff about personal social media use. Legal services organizations should establish rules for staff online social media use that may implicate work or clients.

The Model Rule’s technological competence addition imposes a requirement not just for protecting against risk but also for taking advantage of the benefits of technology. There may be Internet sources or new technologies that provide potential for “unofficial discovery” about opposing parties. You might want your staff to be trained on how best to use Google or other online sources to find evidence of opposing parties. There could come a day when lawyers are expected to make use of applications like Maltego, an “open source intelligence and forensics application” that mines online and gathers online information as you direct.<sup>16</sup>

*Continued on pg. 24*



**“Senator Harkin has stood tirelessly as a staunch defender of legal aid through a Congressional career that... has spanned five terms in the Senate.”**

## Sen. Tom Harkin to be Honored at Annual Conference

The Annual Conference Awards are NLADA’s opportunity to honor the giants of our community. In front of our largest gathering of legal aid and public defense advocates, we recognize the contributions of individuals that epitomize America’s promise of equal justice for all.

The full list of award winners has not yet been revealed, but NLADA is proud to announce that Senator Tom Harkin (D-IA) will become the first ever recipient of the Champion of Justice through Public Service Award. Senator Harkin has stood tirelessly as a staunch defender of legal aid through a Congressional career that began in 1974 and has spanned five terms in the Senate. Having served as a legal aid lawyer in Iowa, Senator Harkin has continued to protect equal justice while in public service.

Senator Harkin is a true champion of this cause. As Chair of the Health, Ed-

ucation, Labor and Pensions (HELP) Committee, he has made a critical impact on the legal aid community. In addition to his repeated commitment to the protection of the Legal Services Corporation, he has been an instrumental figure in countless pieces of legislation supporting legal service providers and their clients, most notably as lead sponsor of the Americans with Disabilities Act.

Senator Harkin is celebrated as a proponent of American labor rights, and his advocacy around loan forgiveness has made him a hero to the legal aid and public defense communities alike. NLADA is honored that he will be joining us in November to accept the Champion of Justice through Public Service Award.

More information about the conference can be found at [www.nlada-100years.org/AnnualConference](http://www.nlada-100years.org/AnnualConference). ■

# Mary McClymont to Recieve Award, Speak at Annual Conference

Fall promises to be an exciting time for NLADA and our supporters, as we ramp up our preparations for this year's Annual Conference. This is the largest training opportunity designed exclusively for our community of practitioners engaged in civil legal aid and public defense. For four days, you will have access to dozens of elite peer-led learning sessions, expert speakers, and the opportunity to network with the top legal service professionals in America.

The full line-up for the Opening Ceremony has now been confirmed, and NLADA is very pleased to announce that attendees will have the opportunity to hear from Mary McClymont, President of the Public Welfare Foundation.

The foundation is currently leading a special initiative to support and strengthen America's legal services infrastructure. In recognition of this, and of her ongoing efforts to promote civil and criminal justice reforms, Ms. McClymont will be accepting the NLADA Award for Justice through Philanthropy as we kick-off the 2014 Annual Conference.

Mary E. McClymont joined the Public Welfare Foundation in Washington, DC as its president in 2011. Previously, she served as executive director of Global Rights, an international human rights organization promoting the rights of marginalized populations in the developing world;

and as president and chief executive officer of InterAction, the largest alliance of U.S.-based international development and humanitarian NGOs. She held various executive positions at the Ford Foundation, including as vice president of the Peace and Social Justice Program.

Ms. McClymont earlier served as the national director for legalization of the Migration and Refugee Services, U.S. Catholic Conference; senior staff counsel, the National Prison Project of the American Civil Liberties Union; trial attorney, Civil Rights Division, U.S. Department of Justice; and assistant director for corrections, National Street Law Institute, Georgetown University Law Center.

She is a member of the Council on Foreign Relations and a member of the District of Columbia bar. She currently serves on the board of the Washington Regional Association of Grantmakers, and is a member of the New Perimeter Advisory Board. She is the co-founder of Grantmakers Concerned with Immigrants and Refugees.

Ms. McClymont has an LL.M. in International Legal Studies from the American University Washington College of Law and a J.D. from Georgetown University Law Center. ■



**“...NLADA is very pleased to announce that attendees will have the opportunity to hear from Mary McClymont, President of the Public Welfare Foundation.”**

# Defender Lead Pretrial Reform in Kentucky

By B. Scott West

## A Historical Perspective on Bail

### The Beginning of Bail in England, the United States, and Kentucky.

The year 2015 marks the 800th anniversary of the Magna Carta, a pivotal agreement that compromised the power of English Kings over its subjects, establishing a right to liberty and property for, at least, the nobility they protected. The origins of the right to bail stem from this landmark document.

Not until the reign of Richard III was there any right to bail for the poor. King Richard, in his short two-year reign, established two institutions to address the needs of the indigent:

- The Court of Requests (1483)  
A court to which people too poor to hire a lawyer could apply to have grievances heard.
- The Right to Bail (1484)  
Introduced to protect suspected felons from imprisonment before trial and to protect their property from seizure during that time.

Despite his death in 1485 and the subsequent rise of his enemies, the Tudors, the institutions created by Richard III continued; and the concepts of a right to bail and access to justice for the poor eventually became so ingrained in the minds of the citizens that these notions of justice carried over to the new world and became law by their inclusion in the Constitution

of the United States.

When Kentucky became a state, it adopted bail provisions for its Constitution:

- **Ky. Constitution § 16:** “All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great...”
- **Ky. Constitution § 17:** “Excessive bail shall not be required...”

Likewise, Kentucky’s case law adopted principles of bail that were very similar to those to which the judge in *U.S. v. Lawrence* adhered:

- ***Adkins v. Regan*, 233 S.W.2d 402 (Ky. 1950):** “Reasonableness in the amount of bail should be the governing principle. The determination of that question must take into consideration the nature of the offense with some regard to the prisoner’s pecuniary circumstances. If the amount required is so excessive as to be prohibitory, the result is a denial of bail.”
- ***Day v. Caudill*, 300 S.W.2d 45 (Ky. 1957):** “The right to bail is a constitutional one, which has been safeguarded. Excessive bail is denounced.” Kentucky Constitution, Section 17.
- ***Long v. Hamilton*, 467 S.W.2d 139 (Ky. 1971):** “Any attempt to impose excessive bail as a means to deny freedom pending trial of charges amounts to a punishment of the prisoner for charges upon which he has not



“...until recent reforms, defendants in Kentucky were being detained far more often than they were released pretrial.”

been convicted and of which he may be entirely innocent. Such a procedure strikes a blow at the liberty of every citizen.”

## **“The history, the constitution, the laws — all had been repeatedly interpreted to require presumptive release.”**

After *Long v. Hamilton*, decided less than 50 years ago, one might conclude that Kentucky would have been free of any problems with pretrial release of its citizens on bail. The history, the constitution, the laws — all had been repeatedly interpreted to require presumptive release.

## **Erosion of the Right to Pretrial Release**

Even without a major research effort, it was plain that, until recent reforms, defendants in Kentucky were being detained far more often than they were released pretrial. Some speculate that the marketplace drove bond amounts too high, where those with means could secure release and the poor were left to languish. Even when Kentucky outlawed the use of commercial bonds, the typical bond amounts remained at unreasonably high levels. A rise in the crime rate between 1960 and the 1990s is what some argue led to the diminished reliance on a presumption of pretrial release. But as the crime rates dramatically receded, courts did not change in favor of pretrial release.

Regardless of the cause, the effect was that the criminal justice system in Kentucky relied on pretrial detention as the presumption, not the exception. Criminal defense attorneys, both the private bar and public defenders, had lost their sense of

moral repugnancy of unconscionable bonds, too high for the average person to meet. High bonds and cash-only bonds had become the de facto standard. Defense lawyers would litigate only the outliers from the “standard” bail, and not the standard itself, even though 75% of indigent clients were not making the standard bail.

Jails became overcrowded. There were few, if any (statistically none) bail appeals to a higher court. Older attorneys would instruct newer attorneys that it was a misuse of time to motion for bail reductions, and in most instances, that proved true. Criminal defense attorneys were resigning themselves to a world of high, arguably excessive and unconstitutional bails.

## **Fighting Back for the Presumption of Innocence**

Beginning in 2011, a series of events occurred in Kentucky that brought about a re-birth of bail advocacy:

Legislative Action: Kentucky’s General Assembly enacted HB 463, a bill designed to address Kentucky’s over-incarceration problem, ushering in a systemic culture shift to be “smart” on crime. The legislation reformed significant portions of Kentucky’s drug and penal code, and addressed reform in the areas of parole, probation, classification of crimes, and pretrial release. Through its reform efforts, Kentucky also embraced “evidence-based practices,” requiring the courts and court service vendors use evidence based methodologies and tools in pretrial release and post-conviction monitoring.

The critical pretrial reform: a mandatory “shall” release clause — persons found by a court to be a low or moder-

ate risk to reoffend, flee, or fail to appear in court shall be released on their own recognizance or unsecured bond.

Judicial Action: Kentucky’s Administrative Office of the Courts’ Pretrial Services Division, managed by Tara Boh Klute, successfully obtained validation of its pretrial risk assessment instrument, which assigned statistical probabilities of whether someone would reoffend or fail to come to court, based on objective criteria.

## **“...Kentucky trained its attorneys in the area of pretrial release, but without the emphasis it deserved, and not in a way designed to address, much less change, the culture of apathetic acceptance of unacceptable bails.”**

Pursuant to a grant by the Pretrial Justice Institute, the JFA Foundation conducted a study of Kentucky’s data and determined that the instrument was in the 90th percentile for accuracy in predicting whether persons released under a low or moderate risk finding would appear in court and not commit a new offense. This data and this instrument, along with data from several other states and the federal system, was later used by the Laura and John Arnold Foundation (LJAF) in development of an objective, statistically verified, national pretrial risk assessment tool.

Executive Action: At a conference in Georgia, Kentucky’s Public Advocate Ed Monahan, the Executive Commissioner of Kentucky’s state-wide public defender system, met with then Executive Director of the Pretrial Justice



**“Select a point person, or “guru,” to undertake the task of promoting bail advocacy. Ideally, it will be one of the old trial dog war horses who everyone likes to hear teach, and who has the respect of the rank and file.”**

Institute, Tim Murray. Murray approached Monahan on Kentucky’s pretrial detention issues and essentially said “You defenders dropped the ball. Clients are being hurt. You need to do better in pretrial release.” Prior to that encounter, Kentucky trained its attorneys in the area of pretrial release, but without the emphasis it deserved, and not in a way designed to address, much less change, the culture of apathetic acceptance of unacceptable bails. Mr. Monahan left that conference with an agenda: to develop a strategic plan to change the culture of poor bail advocacy in Kentucky.

- Guru. Select a point person, or “guru,” to undertake the task of promoting bail advocacy. Ideally, it will be one of the old trial dog war horses who everyone likes to hear teach, and who has the respect of the rank and file. Think more like someone who has been in the trenches and has lots of trial experience, and less like an ivory tower educator who has been out of the field too long. This person must not only have the internal “authority” to tell other litigators what to do in bail advocacy situations, but must also be given actual authority to act by the head of the organization.
- Catalyst. Use existing law or some event as a catalyst to kick off the campaign. In Kentucky, the recent actions of the legislature and judiciary gave the perfect opportunity to start a revolution in bail reform. However, use whatever is available. An outside speaker who inspires at a conference; a news-reported story of someone who was convicted wrongfully who was recently released, but who spent substantial time in jail, both before and after conviction. A government

report which shows the vast resources being drained to support jail overcrowding. If you look, you will find the catalyst to use. Think of anything symbolic that can serve as a “wake up” call.

- Training. Develop a bond advocacy curriculum, and involve a team of persons, not just one person, to create it. Get supervisors to buy into the training and promote it, and then make it widely and repeatedly available. One time a year will not cut it; think annual conference, new attorney training, long distance webinars or other electronic forms of communication.

**“The manual is suitable not only as a training guide and resource tool, but also as a marketing tool, as our manuals were distributed freely among judges, prosecutors, legislators, and the public.”**

- Manual. In conjunction with the training, create a manual which has everything, EVERYTHING, a person needs to know for bail advocacy in your area. It should have all the statutes, rules, and cases pertaining to bail, along with form bail motions, bail appeals, and other forms (e.g., petition for writ of habeas corpus). It should contain step by step checklists on how to argue a bail motion, and how to perfect an appeal. Kentucky’s manual also contained some persuasive pieces from national promoters of pretrial release, such as Prof. Doug Colbert of the University of Maryland, Tim Murray



of the Pretrial Justice Institute, and Jerry Cox, then President of the National Association of Criminal Defense Lawyers. The manual is suitable not only as a training guide and resource tool, but also as a marketing tool, as our manuals were distributed freely among judges, prosecutors, legislators, and the public.

- Directives. While fiat from management cannot alone change a culture, fiat is necessary. Management must make bail advocacy reform a priority and must continually tell staff that it is a priority.

### **“Bail advocacy must be part of the annual or whatever periodic review staff gets.”**

- Performance Evaluations. You get what you measure. Bail advocacy must be part of the annual or whatever periodic review staff gets. The goals set by a performance agreement must be specific, measureable, attainable, relevant and time-bound, to use the old “S.M.A.R.T.” acronym. But more important than the setting of the goals is the follow-through on the part of the evaluator to hold the attorney to the goals. There should be no social promotion at the attorney level.
- Hiring. Hiring a new attorney is the first chance to set expectation and get a new employee’s commitment to bail advocacy. Now, when they are agreeable to anything to get a job, set forth that expectation, and make them orally and verbally commit. Then, make sure supervisors follow up on that commitment.

- Promotion. Take the message that “lack of pretrial release is a presumption of guilt” outside the courtroom (media, legislators, stakeholders, etc.) Where can you talk? Local bar meetings? Legislator’s office? Churches? Rotary club? Local reporter? What will you say? What will you write? Use bullet points. Research and report on impacts on local jail budgets. Quote other persons’ studies. Quote LJAF. Quote ANYBODY that brings home the point that the presumption of innocence is only achieved where there is pretrial release.
- Collaboration. Who are the other stakeholders in pretrial release? The pretrial officers, county judge executives, mayors, local jailers, legislators, everyone who has a stake in saving money without placing the community in further danger. We now have the tools to prove the argument we should have been making all along, that the presumption of innocence can be honored without placing the public in jeopardy. We just have to sell it. Incorporate the services of as many people as you can who believe this as we do.

### **“Most every state has some good bail law, we just have to use it.”**

- Litigation. For the longest time we have lived with the idea that judge’s have plenary discretion to set the amount and method of making bail, and there is no evidentiary way that we can overcome a judge’s decision not to reduce bail. Baloney. Most every state has some good bail law, we just have to use it. File written motions. Call witnesses to bail

hearings. Put objective pretrial risk assessments into evidence.

### **“Clients want to see their attorneys fight for their right to release.”**

- Appeals. Kentucky has in the past three years filed nearly a hundred bail appeals. We have roughly won a third, lost a third and a third was mooted out by settlement, dismissal or other reason. But more important than the appeal of a case is its impact on other cases not appealed. Showing an effort to appeal bails results in lower bails for other cases. The win is more in the effort than it is in the success of an appeal.

### **Kentucky’s Strategic Plan Success Can Work in Your State**

In the three years since this initiative began, some progress has been made. Release rates have gone up 3%, and while that sounds meager, for Kentucky that has translated into \$4-5 million reduction in jail costs for every percent saved every year. Meanwhile, during the same period of time, appearance rates and public safety rates have remained consistently in the ninety percentiles for low and moderate risk individuals.

Meanwhile, the culture is changing. Bail advocacy is improving, and as a result, our relationships with clients are improving. Clients want to see their attorneys fight for their right to release.

Although other states may not be legislating more favorable bail laws, chances are the ones already on the books have good language, they just never have been litigated enough.



**“It has long been recognized that ‘[u]nless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.’ ”**

Applying Kentucky’s strategic plan to a state, with changes to adapt to a different environment, may start to move a culture of bad bail acceptance.

## Next Steps

Impact litigation to bring a national bail case before the United States Supreme Court.

It has long been recognized that “[u]nless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 72 (1951). Yet, prior to 2010, had you asked a knowledgeable Constitutional scholar whether the Eighth Amendment’s “excessive bail” clause had been applied to the states through the Fourteenth Amendment, as the “cruel and unusual punishment” clause has been, you likely would have gotten an answer ranging from “no,” to “maybe,” or “yes,” depending upon how one interpreted *Schilb v. Kuebel*, 404 U.S. 357 (1971). In that opinion, the Supreme Court stated that “the Eighth Amendment’s proscription against excessive bail has been assumed to have application to the states through the Fourteenth Amendment.” *Id.* at 484. The Court cited to *Pilkinton v. Circuit Ct.*, 234 F.2d 45 (8th Cir. 1963) and *Robinson v. California*, 370 U.S. 660 (1965) as the bases for this “assumption.” However, the Court then stated that “we are not at all concerned here with any fundamental question of bail excessiveness,” and did not reach the issue of whether the “assumption” of state application was well-founded, leaving the question of whether the clause had been incorporated into the states largely unanswered.

That all changed in *McDonald v. City of Chicago*, 78 USLW 4844, 130 S.Ct.

3020, 177 L.Ed.2d 894(2010), the case where the Supreme Court held that the Second Amendment applies to the states through the Fourteenth Amendment. As a precursor to its holding, the Court in two footnotes listed respectively those amendments and clauses which had been applied to the states, and those which had not. (See *id.* at ns. 12, 13). In the first list, the “excessive bail” clause appeared, with *Schilb* cited as the authority. Thus, the Supreme Court has now squarely put the “excessive bail” prohibition into the list of Amendments incorporated against the states.

**“The Bail Reform Act of 1984, as then written, added a new consideration in making bond decisions on federal cases.”**

If the Eighth Amendment now applies to the states, federal law interpreting its implementation must also apply to the states. Thus, when the Bail Reform Act of 1984 was interpreted by the Supreme Court in *U.S. v. Salerno*, 481 U.S. 739 (1987), its holding must be also applicable to the states.

The Bail Reform Act of 1984, as then written, added a new consideration in making bond decisions on federal cases. Going further than HB 463 in Kentucky does, the act provided that if a person was a “danger to community,” he could be detained by a high bond that was more than reasonably calculated to secure his attendance in court without violating the Eighth Amendment. The provision of this act was being employed to hold Salerno, who was the alleged “boss” of the Genovese crime family. The government persuaded the district court that no condition or combination of conditions would ensure the safety of the

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community or any person, given his reputation as the head of a criminal syndicate. His detention was upheld:

In a full-blown adversary hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U.S.C. § 3142(f)....

On the other side of the scale, of course, is the individual's

strong interest in liberty. We do not minimize the importance and fundamental nature of this right. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard. When the Government proves by clear and convincing evidence that

an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. *Id.* at pp. 750-51 [emphasis added].

Subsequent decisions have shown this to be a very high standard for a violation of the Fifth Amendment's Due

*Continued on pg. 25*

# Human Rights Framework and Maryland Legal Aid

By Reena Shah

Maryland Legal Aid is the first direct legal services organization in the U.S. to adopt a human rights framework. It adopted the framework in 2009 after engaging in a thorough needs assessment and strategic planning process. The assessment showed that low-income Marylanders identified affordable housing, jobs that pay a living wage, and affordable health care and health insurance as their most pressing needs. By adopting the framework, the organization resolved to address these needs by placing a sharper focus on bringing about sustainable change in the lives of low-income Marylanders and advancing the principles of human dignity, equality, and fairness within Maryland's justice system.

**The human rights framework defines those basic rights and freedoms through international norms and law.**

In 2012, Maryland Legal Aid propelled its human rights advocacy to the next level after being selected to partner with the Local Human Rights Lawyering Project at the Center for Human Rights and Humanitarian Law at American University's College of Law. The partnership enabled Maryland Legal Aid to create the Human Rights Project and hire a dedi-

cated person to implement the human rights framework within the organization. This article will describe the human rights framework and the value it has added to Maryland Legal Aid.

## What is the human rights framework?

Human rights are rights that every single person has by virtue of being human. The human rights framework defines those basic rights and freedoms through international norms and law. Underpinned by universal principles, the human rights framework recognizes that people must have their basic needs met and their basic freedoms guaranteed to live a life filled with dignity, equality and justice. The human rights framework protects and promotes civil, political, economic, social and cultural rights and espouses that human rights are both indivisible and inter-dependent. It asserts that as part of the social contract, governments have an obligation to ensure all of these rights, not as a matter of charity but as an internationally recognized duty. A key tenet of the human rights framework is the focus on both securing people's short-term needs and preventing immediate harm, and improving society in the long-term by addressing the root causes of problems that give rise to discrimination, exploitation and poverty.



**“While Maryland Legal Aid’s work for over a century has been about upholding the principles and values behind human rights, the official adoption of the human rights framework added distinct value.”**

## What value does the human rights framework add to Maryland Legal Aid?

While Maryland Legal Aid's work for over a century has been about upholding the principles and values behind human rights, the official adoption of the human rights framework added distinct value. Two of the most tangible and significant impacts on Maryland Legal Aid are the expansion of the legal toolkit available to advocates to advance client goals and the strengthening of a dignity-oriented approach to serve clients.

### Expanding the Legal Toolkit:

The adoption of the human rights framework opened up a new body of law – international human rights law – to frame, interpret and advocate client goals. It also provided additional international and regional human rights forums to raise client claims and offered a new set of strategies, such as human rights monitoring and documentation, to address client needs.

International human rights law is prolific and often broader and more expansive in the protections it guarantees. The majority of human rights law is composed of legally binding treaties that obligate the State Party (government) to uphold the spirit and comply with the terms of the treaty. While international human rights treaties may be difficult to directly enforce in U.S. courts, treaty language can serve as interpretive guidance for domestic issues.

Maryland Legal Aid has strategically incorporated human rights language and law in trial advocacy, administrative proceedings, appellate briefs and amicus briefs. To do this, it has worked with its partners at Ameri-

can University to build staff capacity by offering over 20 educational webinars and in-person trainings in human rights law, in how to build a human rights argument, and in how best to strategically use it in advocacy. Also, staff has been provided and trained on the Human Rights Handbook, a resource created by American University for use by legal aid attorneys in the U.S. Maryland Legal Aid is now developing additional resources – such as one-pagers for specific case types and model pleadings with inserted human rights language – to make using human rights frames, language, and law as easy as possible for its advocates.

### “Maryland Legal Aid is also conducting the first-ever human rights monitoring and documentation study of rent court processes and procedures in Maryland.”

Maryland Legal Aid is also conducting the first-ever human rights monitoring and documentation study of rent court processes and procedures in Maryland. Rent court is of particular concern to housing advocates here because the volume of cases is high, due process requirements are minimal, trials are short, and the social ramifications of decisions there can be dire. The scope of the statistical study is to collect, analyze, and report on data from 1,380 rent court cases from all 24 jurisdictions across the state.

Maryland Legal Aid has also engaged with international human rights mechanisms to shine an international spotlight on entrenched local issues affecting clients. For example,

Maryland Legal Aid wrote a Human Rights Complaint to the United Nations Special Rapporteur on Extreme Poverty and Human Rights that was joined by over 40 other legal services, healthcare and community service organizations. The complaint alleged that legal and other advocates' lack of meaningful access to migrant farmworker labor camps, where farmworkers live and work, violated the farmworkers' human right to access justice, in addition to other inter-related human rights. The organization also requested a hearing before the Inter-American Commission on Human Rights on the issue. Other international forums available to raise the issue may be engaging with the treaty review processes for the treaties that the U.S. has both signed and ratified; engaging in the Universal Periodic Review process; or filing a case at the Inter-American Commission. While there has yet to be a resolution on the issue, the use of international mechanisms has prompted interest from local and national media and created space for further movement.

### Strengthening the Dignity-Oriented Approach to Serve Clients:

Since the adoption of the human rights framework, Maryland Legal Aid has sought to educate clients about their human rights as well as uphold clients' human rights in every interaction with them. The organization has developed and published a brochure for clients about human rights. It has also dedicated time and resources to understanding and developing ways in which human rights norms can guide the relationship between staff and client as well as its service delivery model.

*Continued on pg. 25*



**“Over the last several months, NLADA has substantially expanded and upgraded two civil legal aid websites making them even more valuable resources for the access to justice community.”**

# NLADA’s Expands Unique Civil Legal Aid Websites: Research and Federal Funding Resources

*By Chuck Greenfield*

Over the last several months, NLADA has substantially expanded and upgraded two civil legal aid websites making them even more valuable resources for the access to justice community. Both the civil legal aid research site and the federal funding resources site offer fresh new approaches to providing information in a quickly obtainable and easily searchable manner. The improvements reflect NLADA’s commitment to improving its resource and communication platforms.

## NLADA’s Civil Legal Aid Research Site

Looking for the latest published research on civil legal aid? Want to know what legal aid research is in progress in a particular area of civil legal aid and who is involved? Searching for the 1980 Delivery Systems Study released by the Legal Services Corporation? NLADA’s unique website on civil legal aid research has become the go-to location to find answers to these and other research-related questions.

The site, <http://www.LegalAidResearch.org>, first went public in Dec. 2012 and has just recently undergone a major upgrade and reorganization

thanks to funding from the Public Welfare Foundation.

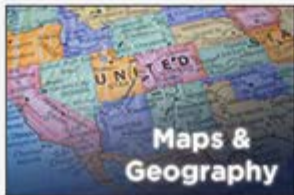
The site contains an online database of research on civil legal aid, with summaries and key findings that are easily located and searchable. Links are also provided to the full studies, articles and papers. The site contains compilations of civil legal aid research studies and papers and includes ongoing research projects. It is searchable in a variety of ways, including by case types, population served, how services are provided, legal practice areas, topics and geographic locations.

The main page of the site allows visitors to select any of six different categories that may indicate their interest: Legal Aid Practitioners; Policymakers and Funders; Researchers and Academics; News Media; Maps and Geography; and Search and Filter. Information is then provided based on the expressed interest.

LegalAidResearch.org was created with the advice and assistance of a number of legal aid researchers, academics, legal aid leaders and others. Instrumental in its development was information shared at two sessions on legal aid research held in conjunction with the NLADA annual conference in Chicago in Dec. 2012.

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The research imperative of refining ways to measure justice is important and necessary. Our work as lawyers improves the more we know about our effectiveness and the more our choices are evidence based. Nevertheless, quantifying the work of a lawyer is not easy.

> How do we ensure that any measure of justice captures outcomes for both trial-based advocacy and non-trial-based advocacy on behalf of clients, including negotiated outcomes?

> How do we quantify the role lawyers play in listening to our clients, explaining the systems in which they operate, and supporting them through often very difficult times in their lives?

> How do we ensure that any measure of justice includes a client's sense of the process as well as the outcome?

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## Civil Legal Aid Federal Funding Resources

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 BY NLADARESEARCH on AUGUST 26, 2014 · (0)

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NLADA helped plan, along with Rebecca Sandefur of the American Bar Foundation and David Udell of the National Center for Access to Justice, a poster session and town hall session held at the conference. The purpose of the sessions was to bring civil legal aid researchers together with the legal aid practitioner community to identify civil legal aid issues that could and should be researched. The National Science Foundation helped sponsor the research effort.

Since it was created, the site has had over 20,000 page views. The recent upgrade and reorganization of the site reflects an effort by NLADA to increase its functionality and to en-

courage even more people to regularly use the site. NLADA was assisted in the effort to revise and improve the site by an advisory committee of researchers, academics, legal aid leaders and others, who provided valuable advice and guidance on content and improvements. NLADA wishes to thank the members of the site's 2014 Advisory Committee:

**Don Saunders**, NLADA

— Chairperson

**Katherine Alteneider**, Self Represented Litigation Network

**Elizabeth Arledge**, Voices for Civil Justice

**Carol Bergman**, Legal Services Corporation

**Deborah Smith**, National Center for State Courts

**Steve Eppler-Epstein**, Connecticut Legal Services

**Jim Greiner**, Harvard Law School

**Steve Grumm**, American Bar Association Resource Center for Access to Justice Initiatives

**Bonnie Hough**, California Administrative Office of the Courts

**Alan Houseman**, National Equal Justice Library and NLADA

**Rebecca Sandefur**, American Bar Foundation and University of Illinois at Urbana-Champaign

**Steve Scudder**, ABA, Standing Committee on Pro



Bono and Public Service

**David Udell**, National Center on Access to Justice

**Richard Zorza**, Self Represented Litigation Network

Greatly assisting NLADA in developing the website was Rafael DeGennaro of True North Projects.

NLADA strongly believes in the importance of legal aid research and the use of evidence-based practices. Toward this goal, NLADA has developed draft Core Principles of Importance to the Civil Legal Aid Community – To Provide Guidance to Research Efforts Conducted about Civil Legal Aid (<http://www.nlada-100years.org/sites/default/files/ResearchCorePrinciples.pdf>).

## **NLADA's Federal Funding Resources Site**

Are you looking for other funding sources for civil legal aid? Would you like to see which federal government programs provide funding that can be used for legal aid? Would you like to have a comprehensive look at all federal funding that can be used to provide legal aid to the homeless? NLADA's newly revised federal funding resources website answers these and other questions about federal funding for civil legal aid.

The website, [www.LegalAidResources.org](http://www.LegalAidResources.org), was originally created in 2013 to create a database of federal funding opportunities for legal aid. It has been significantly expanded and now contains over 125 different federal programs that can be used for legal aid.

This summer, NLADA systematically reviewed hundreds of federal grant programs to determine whether there was any express language allowing for

funding of civil legal aid or whether there is a possibility that legal aid would fit with the goals of the program. We have also incorporated the great work that Karen Lash and others at the DOJ Access to Justice Initiative Office have done in their office's Legal Aid Interagency Roundtable (LAIR) Toolkit on federal funding resources for civil legal aid.

NLADA gathered information on federal programs, including the objectives of the program, the target population, whether there is express language for legal aid, whether there is a matching requirement, maximum and minimum grant amounts, information on how to apply, funding priorities, relevant policies and regulations, applicant eligibility, grant contact information and, in some cases, a list of current/past recipients and sample successful applications. Our new site is searchable in a number of ways including by area of law, persons served, federal agency, new opportunities, express language for legal aid, pass through funding, subgrant possibilities and eligible applicants.

The federal funding resources site is made possible by generous grants from the Public Welfare and Kresge Foundations. ■

*Chuck Greenfield is Of Counsel at the National Legal Aid & Defender Association.*



## *Legal Ethics Reacts to Technology: Is Civil Legal Aid Keeping Up?* continued from Page 9

The technological competence obligation in the Model Rule has broad implications, and the obligations will continue to grow. Corporations are putting more pressure on corporate law firms to keep up with technology and privacy procedures, but low-income clients do not have the power to drive the policies of the organizations serving them. It is important for legal aid organizations to act proactively to account for the benefits and risks of technologies in order to best serve their clients. ■

### IMPORTANT DISCLAIMERS:

The views expressed in the article are strictly those of the author and do not necessarily reflect the opinion of AARP or its affiliates, including AARP Foundation.

This article is not legal advice and should not be treated as legal advice. Consult your jurisdiction's legal ethics rules and opinions or an ethics attorney for more information.

*Mariam Morshedi is an attorney at AARP Foundation Litigation and works on consumer, housing and low-income issues. She has authored and contributed to amicus curiae briefs relating to fair housing and consumer rights.*

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7. American Bar Association, Model Rules of Professional Conduct, 1.6 (2012); Will Harrelson, *Mobile Device Security for Lawyers: How Solos and Small Firms can Ethically Allow Bring Your Own Device*, CuroLegal Blog, <http://www.curolegal.com/news/mobile-device-security-lawyers-solos-small-firms-can-ethically-allow-bring-your-own-device/>.
8. Iowa Committee on Practice Ethics and Guidelines Ethics Opinion 11-01 (2011).
9. See Black, *supra*, n.9.
10. Harrelson, *supra*, n. 7.
11. Id. (Harrelson)
12. Id.
13. American Bar Association, Model Rules of Professional Conduct, 1.6, cmt. 18 (2012) ("Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).").
14. Pew Research Internet Project, Social Networking Factsheet, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (site listed results as of January 2014).
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***Human Rights Framework and Maryland Legal Aid***  
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In 2010, soon after the adoption of the framework, Maryland Legal Aid started an annual tradition of celebrating Human Rights Day with an all-staff training. The 2012 Human Rights Day training kicked-off the work on human rights in staff-client relationships. The training emphasized that the rules of professional responsibility established a floor, not a ceiling for the lawyer-client relationship. For the training, Maryland Legal Aid produced and showed a video of clients talking about their understanding of human rights and how they thought the organization could further align with human rights norms. It also conducted an exercise where staff identified specific Articles from the Universal Declaration of Human Rights (UDHR) relevant to the staff-client relationship and brainstormed about how those articles could be translated practically to improve interactions with clients.

Based on the results of this training, Maryland Legal Aid developed its own Principles for Staff-Client Relationships and now is analyzing how the principles can guide the organization's system of intake. Further, staff continues to be trained on best practices to serve certain segments of Maryland's low-income population that may be particularly vulnerable to discrimination or ill-treatment in society, including individuals with mental illness or behavioral challenges, the LGBT community and clients with Limited English Proficiency (LEP).

Maryland Legal Aid is proud to have adopted the human rights framework, and it is committed to continuing to

translate human rights aspirations into practical application to enhance advocacy and improve client services. ■

*Reena Shah is director of Human Rights Project at Legal Aid Bureau, Inc.*

***Defender Lead Pretrial Reform in Kentucky***  
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Process Clause not to occur. If you read the cases that follow *Salerno*, you will see that it takes a great deal of evidence before you can be found to be a danger to the community. See *Foucha v. Louisiana*, 504 U.S. 71 (1992), where Louisiana was found not to have met the “clear and convincing evidence” burden to detain a non-convicted person charged with a crime. In that case the future dangerousness was based upon an alleged diagnosis of an anti-social personality.

The Fifth Amendment's Due Process Clause was applied to the states with the enactment of the Fourteenth Amendment. Thus, any state which attempts to detain someone without a bond — or a bond which is excessively high for the purposes of making the bond unobtainable — should be found to be in violation of the Fourteenth Amendment, unless such finding is made upon a showing by the state by clear and convincing evidence. To make this a black letter rule, there must be a ruling by the United States Supreme Court that delineates excessive bail and restores the presumption of innocence. ■

*B. Scott West, General Counsel, Kentucky Department of Public Advocacy*

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