

MIE ARTICLE

CIVIL LEGAL AID PROGRAMS AND ACCESS TO JUSTICE

By

ALAN W. HOUSEMAN

Within the last fifteen years, a broad access to justice movement has emerged at the state level, including state supreme courts, access to justice commissions, bar associations, self-help centers, technology initiatives and researchers on delivery of legal services. This movement seeks to provide access to courts and other adjudicatory bodies to achieve equal justice for all. This includes millions of individuals and families that are not eligible for civil legal aid. In addition to civil legal aid programs, this movement involves other providers of civil legal information and assistance and a range of initiatives to improve access to and effective functioning of state courts.

This movement seeks 100% access to effective assistance to address civil legal needs. The Conference of Chief Justices and the Conference of State Court Administrators at their joint meeting in July 2015 adopted a resolution specifically supporting “the aspirational goal of 100 percent access to effective assistance for essential civil legal needs,” urged “their members to provide leadership in achieving that goal and to work with their Access to Justice Commission or other such entities to develop a strategic plan with realistic and measurable outcomes,” and urged “the National Center for State Courts and other national organizations to develop tools and provide assistance to states in achieving the goal of 100 percent access through a continuum of meaningful and appropriate services.” In November, 2016, the National Conference of State Courts and the Public Welfare Foundation announced that grants were awarded to seven states under the Justice for All project, which is supported by the Public Welfare Foundation and housed at the National Center for State Courts. The grants will support each state grantee in forming partnerships with all relevant stakeholders in the civil justice community and beyond to develop state assessments and strategic action plans in order to implement the Resolution referenced above.

This article lays out a broad access to justice agenda that should be pursued and the role of civil legal aid programs in this movement.

WHAT IS ACCESS TO JUSTICE

Former Chief Justice Lippman of the New York Court of Appeals has been a leader in attempting to improve access to justice in NY and around the country. In his report *State of the Judiciary 2015*)¹ he set out a clarion call about access to justice:

“Access to justice means ensuring that litigants have meaningful representation when their liberty or the very necessities of life are at stake. Access to justice is the issue when citizens struggle to understand our justice system and the judicial process is hidden from view. Access to justice is also front and center when rich and poor, the privileged and the disadvantaged alike seek a level playing field before the courts, and it is what victims want when they enter the halls of our courts desperately seeking assistance. And access to justice is the driving force behind the court system’s determination to secure the resources necessary to meet our constitutional mission of fostering equal justice. Access to justice means that everybody —regardless of race, ethnicity or orientation, irrespective of wealth or poverty, whether we are mighty or weak —each and every one of us gets his or her day in court. Equal justice, that defining principle of our country, requires that every human being has access to the courts and a judicial system where the scales of justice are exquisitely balanced.”

OVERVIEW OF A COMPREHENSIVE ACCESS TO JUSTICE SYSTEM

A comprehensive “access-to-justice system” focuses on state courts and administrative agencies as well as prevention of disputes and numerous matters that are not necessarily handled in courts. Its goal is not solely access to courts but providing equal justice for all.

Coordinated and integrated civil legal aid system: Access to Justice cannot be achieved without a coordinated and integrated system of robust civil legal aid and pro bono programs that provide a full range of services and are accessible by all low-income persons in a state. The outline of such a system was set out in the American Bar Association (ABA) *Principles of a State System for the Delivery of Civil Legal Aid*.² Within a state, there should be sufficient civil legal aid programs to serve all persons including undocumented persons and prisoners who need a lawyer to resolve civil legal problems. The programs must be able to provide the full range of legal services without restrictions on the type of assistance provided.

Specifically, the system must ensure the availability for aggregate remedies for common claims and issues affecting neighborhoods and particular groups of clients through the use of class actions, and policy advocacy before legislative bodies and administrative agencies. The system must also ensure systemic advocacy in courts, agencies, and communities to ensure that the

¹ <http://www.nycourts.gov/ctapps/news/SOJ-2015.pdf>

² See http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_tencivilprinciples.authcheckdam.pdf

rights and interests of low-income people are protected and advanced, that poverty is alleviated and that racial inclusion and justice are pursued

Legal aid programs, pro bono providers, human services agencies, and other providers serving the poor should collaborate to ensure a seamless system of legal services to the low-income citizens in the state. There should be a state capacity for support, training, and coordinated state level advocacy.

Right to counsel in civil cases: A critical corollary to this system of providers must be a right to counsel in cases where lawyers are needed for justice to be equal and real. In 2006, the ABA adopted a resolution urging federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction. The National Coalition for a Civil Right to Counsel (NCCRC) actively seeks to establish such a right and catalogues and coordinates efforts to achieve such a right.

Increased pro bono initiatives: State and local bar associations, access to justice commissions and related entities, and legal aid providers must increase pro bono efforts among all lawyers including in-house counsel and law faculty not admitted in a state, government lawyers, retired lawyers and law students residing in a state through traditional means, mentorship, and support as well as through means such as:

- Mandatory reporting of pro bono hours and financial contributions for civil legal aid providers
- Technology assistance to civil legal aid providers
- Unbundled volunteer lawyer programs
- Technology innovations to enable and expand pro bono

Full utilization of technology: The access to justice system must utilize fully technology advances in the practice of law and the delivery of justice. Included among such advances are:

- Websites that provide legal information, including how to access civil legal aid and pro bono programs
- Document assembly systems for use by lawyers and litigants that permit a lay person to generate and file accurate court documents
- Hotlines and other means of providing advice and brief service
- Systems, including mobile apps providing universal access to civil legal aid programs, self-help centers and other providers

- Online dispute resolution forums that permit parties to resolve legal problems themselves with oversight and review by courts
- Use of social media for information, training and other justice related activities.

Triage systems: The state system should explore and develop accurate triage systems (not just one) for matching a client's problem with the appropriate level of legal advice and representation. The goal should be to create a system that provides the level of assistance that a client actually needs not just to accept the current system's limitations of assistance. There are theoretical constructs often in the form of a pyramid of what appropriate assistance would be for various types of clients and legal problems, but little actual evidence of what level of assistance would be necessary to resolving different types of issues affecting individuals with differing social, racial, ethnic, gender, geographical and economic circumstances. In 2017, LSC, Microsoft Corporation, and Pro Bono Net named Alaska and Hawaii as state partners in a pilot program to develop online, statewide legal portals to direct individuals with civil legal needs to the most appropriate forms of assistance.

Referral systems: The state should have effective referral systems including enhanced collaboration with human services and other relevant entities to ensure that clients with legal problems are referred to the appropriate civil legal assistance providers.

Unbundled representation: Each state should have a system to educate lawyers about, and specifically encourage lawyers to undertake, unbundled discrete task representation.

Self-help assistance: Each state should have comprehensive and coordinated self-help assistance to unrepresented litigants through court-based self-help centers. One example is the system of self-help centers used in California courts, which are court-based, staffed self-help centers supervised by an attorney. The Self-Represented Litigation (SRL) Network brings together courts, bar and access to justice organizations in support of innovations in services for the self-represented and has undertaken a number of activities to ensure the justice system works for all including those forced to go to court on their own. See www.srln.org

Court reform: States must reform how courts operate to ensure efficient and effective access, implementing:

- E-filing for all including those who cannot afford fees
- Changes in judicial codes and practices so that judges make reasonable accommodations for unrepresented litigants to have their matters heard fairly
- Court-based programs to assist those with special needs including disabilities, limited English proficiency, the elderly, and others.
- Simplification of court procedures and rules to enable unrepresented litigants and lay advocates to better present and advocate before the judge

- Creation of new forums to efficiently and effectively resolve routine matters

Law student assistance: States should expand the use and education of law students through pro bono requirements, clinical programs that serve indigent clients, internships with providers, inclusion of access to justice developments in the curricula and other means.

Non-lawyers: States should experiment with and pursue using lay advocates (non-lawyers) in certain administrative proceedings, simple court cases, and as facilitators in courts and community settings.

Language access: States must develop comprehensive and enforceable language access services suitable to the communities served to enable all clients to effectively communicate to the court or other adjudicatory personnel and to understand their rights, responsibilities and adjudicatory processes.

Legal incubators: each state should consider and pursue legal incubators. Incubators provide support to young lawyers interested in launching their own practice to serve low-income communities that lack access to legal representations. Incubators foster the lawyers working with them to understand and cultivate the services they wish to provide. They perform market research to determine how to best reach the underserved population. They assist the community in identifying legal needs, and create legal packages that are affordable, understandable, and accessible. The end goal is to assist attorney is establishing successful and sustainable practices.

Alternative Dispute Resolution: States should continue to facilitate alternative dispute resolution where appropriate.

Libraries:, states should ensure education and outreach to law libraries and all public libraries to enable their staff to suggest legal resources, information, and referrals to individuals seeking assistance.

Delivery research: Our system should have an ongoing and institutionalized capacity to conduct research on how to improve the delivery of civil legal aid and conduct and evaluate demonstration projects testing new ideas and innovations for possible replication across the system. The United States had such a component, the Research Institute, during the first era of the Legal Services Corporation from 1976 – 1981. During the funding and political crisis of 1981, the Research Institute was closed. Several recent developments are promising. Harvard Law School opened an Access to Justice Lab is dedicated to transforming adjudicatory administration and engagement with the courts into evidence-based fields. LSC has raised private funding for and has recently established an Office of Data Governance and Analysis which now has six analysts. Rebecca Sandefur, a professor at the University of Illinois and a researcher at the American Bar Foundation, has actively perused a delivery research agenda.

In addition to these court and delivery focused strategies, state access to justice efforts should pursue other strategies to expand access to justice. Possible initiatives include:

- Working with legislative bodies and administrative agencies to write statutes and regulations in clear language that can be easily understood by non-lawyers and the public
- Working with state and federal administrative agencies to incorporate best practices to ensure administrative justice

STATE ACCESS TO JUSTICE COMMISSIONS

One of the most effective ways to develop, expand, and institutionalize comprehensive, integrated state systems for the delivery of civil legal aid is through the establishment of state Access to Justice Commissions. Today, there are 39 active commissions. They are conceived as having a continuing existence, in contrast to a blue-ribbon body created to issue a report and then sunset. They have a broad charge to engage in ongoing assessment of the civil legal needs of people in the state and to develop, coordinate, and oversee initiatives to respond to those needs. In addition to more traditional roles, such commissions should follow the lead of the Washington State Access to Justice Board whose new state plan includes as one of five goals to promote and foster race equity.

THE CRITICAL ROLE OF LAWYERS

The access to justice movement includes a broad array of providers and non-lawyer advocates and facilitators. These experiments and initiatives should be pursued, but they do not minimize or undermine the critical role of lawyers in achieving equal access to justice.

Lawyers are necessary to provide full representation in cases that need such representation, to provide unbundled and brief services and to provide legal advice.

Lawyers are often necessary to oversee paralegals and lay advocates who work for legal aid programs, other non-profits and for law firms.

Lawyers are critical to ensuring effective access to courts, administrative agencies adjudicating matters and to agencies and legislative entities when they make policies affecting legal rights of individuals. Lawyers are also necessary to help clients prevent disputes and informally resolve disputes. Finally, lawyers are critical to ensuring that individuals and low-income communities received real justice, not just access, in the courts, agencies and dispute resolution venues. .

THE ESSENTIAL ROLE OF CIVIL LEGAL AID PROGRAMS

Legal aid programs are the essential component of any system in the United States that seeks to provide legal representation, systemic advocacy, policy advocacy, brief service and legal advice to low-income persons and organizations. Unless there is a system of robust civil legal aid programs, supplemented by effective pro bono programs and initiatives, low-income individuals will not have equal access to courts, administrative agencies and other dispute resolution venues and they will not achieve equal justice.

Legal aid programs have other essential roles within the broader access to justice movement. Legal aid leaders must be actively involved within each state in access to justice initiatives in their state. This includes working with and participating on Access to Justice Commissions and related entities; working with courts and court committees; working with state and local bar associations; and working with administrative agencies to improve their adjudicatory procedures and to increase their focus on bringing justice to the people the agencies serve.

Legal aid should be innovators within the system, trying and experimenting with new approaches to access and to justice. They should work with researchers to improve their programs and to use their resources efficiently. Funders must encourage and give space for innovation, experimentation and evaluation to learn what innovations work and what do not. Some innovations will involve new uses of technology while others may involve new ways of reaching and addressing client problems.

CONCLUSION

Civil legal aid and pro bono programs are the core and central components of the broader access to justice movement. To maintain that core, civil legal aid must be funded to serve many more low-income persons and communities who have civil legal needs including undocumented persons and prisoners. The programs must also be able to provide the full range of legal services without restrictions on the scope of representation (what type of assistance can be provided) and engage in systemic and policy advocacy. The broader access to justice movement includes many more components which need to be fully developed and funded but not at the expense of funding for civil legal aid. Civil legal aid has an essential role in advancing the broader access to justice movement, but it must also continue to focus on serving those low-income and marginalized individuals, families and communities with the most pressing legal problems.