

LEGAL AID IN THE UNITED STATES

Robert W. Peterson

Professor of Law

School of Law

Santa Clara University

Santa Clara, California

U.S.A.¹

“Here’s a fish hangs in the net, like a poor man’s right in the law; ‘twill hardly come out.” William Shakespeare, *Pericles, Prince of Tyre*, II, i, 107-108

Shakespeare knew well that poverty and injustice were joined. In using the image of fishermen trying to disentangle a suit of armor dredged from the deep and tangled in their nets, Shakespeare acknowledges that poverty and injustice under the law are bedfellows.

This, in spite of the fact that it is claimed that the first legal aid scheme for the poor was launched in England in 1495 during the reign of Henry VII.² Permitting litigants to sue *in forma pauperis*, however, does little to insure adequacy of representation. The problem of adequate representation certainly persisted through the English Commonwealth (the mid-1600’s), as John Cooke, the barrister who prosecuted Charles I, argued that barristers should advocate *pro bono* for the poor. He argued that successful advocates should devote 10% of their practice to *pro bono* work – a proposal unpopular among his lawyer friends.³

The history of legal aid in the United States has been one of promise and disappointment – especially with respect to civil litigants. Let me briefly explain why.

One may be surprised to learn that it was not until 1963, in the famous case of *Gideon v. Wainwright*,⁴ that the U.S. Supreme Court confirmed for the first time that all those who were charged with serious crimes, but who could not afford counsel, were entitled to representation at public expense. Previously, a case-by-case test was applied which usually resulted in appointed counsel only in death penalty cases.

When it comes to civil cases, however, the Supreme Court has yet to hold that there is a right to counsel; and it seems unlikely that it will do so. Thus, civil litigants

¹ © 2009 Paper first presented at the Korea Family Legal Service Center 2009 International Conference on Legal Aid (Developing Plans of Legal Aid System), December 3, 2009. One of the purposes of this paper is to supply a web-based resource for those interested in pursuing some of the ideas mentioned. I have included in this paper numerous links to web sites that may be helpful. If you would like a copy of this paper in electronic format so that you may follow these links simply by clicking on them, please send me an email and I will send you an electronic copy. rpeterson@scu.edu

² An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, 1495, 11 Hen. 7, ch. 12, *reprinted in* 2 Statutes of the Realm, (William S. Hein & Co., 1993).

³ Robertson, *THE TYRANNICIDE BRIEF* (Pantheon Books 2005), pp. 104-105, 388 n.2 (John Cooke, *Unum necessarium or Poor Man’s Case, an expedient to make provision for all poor people in the Kingdom* (London, 1648)).

⁴ 372 U.S. 335 (1963). The history of the case is reviewed in the book by Anthony Lewis, *Gideon’s Trumpet*, [ISBN 0-679-72312-9](https://www.amazon.com/Gideons-Trumpet-Justice-William-Lewis/dp/0679723129)

without means are left to charity, to the beneficence of the bar, and to the generosity of government.

This is not to say that these sources have not responded. Sadly, the response, especially when contrasted with other countries of Western Europe, has been wholly disappointing. The difference between Europe and the U.S. may be summarized as the difference between the European “rights-based” legal aid philosophy, and the U.S.’s more limited “fixed resource” approach. The former guarantees representation in civil cases to those who cannot afford it, while the latter, U.S. approach, affords representation only to so many as may be served from a very limited fund. Indeed, all countries bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵ (42 in all) must now provide counsel in civil cases to those too poor to afford counsel. This ruling, which came in the 1979 decision in *Airey v. Ireland*,⁶ is discussed in the fine law review article by Earl Johnson, Jr., *Justice for America’s Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DePaul L. Rev. 393 (Winter 2009). I draw significantly from this article in this talk and paper. The Court, like Shakespeare, recognized that the guarantee in article 6, paragraph 1 of the Convention (the right to a “fair and public hearing”) was not satisfied unless the right was “practical and effective.” Mrs. Airey’s rights simply would not be “effective” unless she were afforded counsel.

California is the first state in the country to establish, by statute, a “Civil *Gideon*” principle providing for representation for the poor in civil cases involving life altering moments, such as home foreclosure and various family law issues.⁷ While this is a grand vision, unfortunately this new law establishes only a few pilot projects throughout the state. The \$11 million per year project takes effect in 2011, lasts for 6 years, and will be funded from existing court fees.

The California legislature estimates that in California alone, over 4.3 million Californians are currently unrepresented in civil court proceedings, largely because they cannot afford representation.⁸ Approximately 80% of those appearing in family law matters represent themselves at critical stages involving child custody, support, spousal abuse, and access to assets.⁹ Lack of sufficient funding also means that current legal services programs can serve less than one-third of California’s poor and lower income residents.¹⁰

A Brief History of Legal Aid in Civil Cases in the U.S.

Other than attorneys occasionally volunteering their time, legal aid in the United States began in the latter quarter of the 19th century.

⁵ 213 U.N.T.S. 222

⁶ 2 Eur. H.R. Rep. (ser A) 305 (Eur. Ct. H.R. 1979)

⁷ A.B. 590 (2009). This bill may be viewed at: http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20091011_chaptered.pdf (The references to web sites, unless otherwise indicated, were visited during the month of December, 2009)

⁸ *Id.*

⁹ California Bar Journal, December, 2009, p. 8.

¹⁰ California Bar Journal, November, 2009, p. 6.

“Most people identify the beginning of the delivery of free legal services to poor people in America with the year 1876, when the German Society of New York incorporated an entity ‘to render legal aid and assistance gratuitously to those of German birth who may appear worthy thereof, but who from poverty are unable to procure it.’ In 1890, however, the organization amended its constitution to allow the delivery of legal services to all people, regardless of their national origin, and the organization became known simply as the New York Legal Aid Society. By this time, a similar organization, called the Bureau of Justice, was formed in Chicago with a similar mandate to provide legal assistance to needy people without regard to race, gender, or nationality. Such organizations did not seek out particular types of cases or clients. Rather, the legal needs of those who sought their services determined their work.”¹¹

Although a number of similar organizations sprang up over the next few decades,

“in 1919, Boston attorney Reginald Heber Smith concluded that ‘the administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, [and] the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.’” *Id.*

In the ensuing decades, and despite the support of the American Bar Association, there was haphazard growth in legal aid. Legal aid, such as it was, was consigned entirely to private charity. Neither state nor federal governments accepted any obligation to provide aid for the poor.¹² The next big step came in the mid-1960’s.

As part of President Lyndon Johnson’s “War on Poverty,” the Office of Economic Opportunity (OEO) was created. This included a federally funded Legal Services Program. In 1975 the legal services function was transferred to the Legal Services Corporation (LSC).¹³ The birth of the LSC was not an easy one. It was initially opposed by President Nixon, who wanted more control over it and its Board. In the end, though, it was created and the law creating it was the last law signed by President Nixon before he resigned office in the wake of the Watergate scandal.¹⁴

Although the LSC showed considerable promise, that promise was eroded by hostility towards its mission from some powerful legislators and their constituents. They would have been comfortable invoking another line from Shakespeare: “The first thing we do, let’s kill all the lawyers.” *Henry VI, part 2, act IV, sc. ii, 74.*

The hostility came largely from two quarters. One was from those who, since the time of John Cooke, found it inconvenient that the courts were not their private domain in

¹¹ Steven K. Berenso, A Primer for New Civil Law Clinic Students, 38 *McGeorge L. Rev.* 603, 604-611 (2007).

¹² Johnson, *supra* at 394.

¹³ <http://www.lsc.gov/>

¹⁴ President Nixon had tried to eliminate the OEO Legal Services Program (predecessor of the LSC) in 1973. Houseman & Perle, *supra* at 16; NLADA History, *supra* note 33; Quigley, *supra* note 8, at 253.

which they could easily defeat unrepresented, poor litigants. Since poverty lawyers were few and funds scarce, poverty lawyers tried to leverage these scarce resources by challenging practices, legislation or administrative procedures that unreasonably injured or disadvantaged the poor. Likewise, they realized that lobbying for changes in laws that adversely affected the poor could accomplish much more than individual advocacy. Sadly, powerful members of the government found it inconvenient that “poverty” lawyers were challenging obnoxious aspects of government programs. In addition, their impressive success rate made members of government even more hostile.¹⁵ Consequently, legislation funding LSC added a large number of restrictions.¹⁶ These restrictions forbade any group receiving any (even \$1) of LSC money from participating in:

- Redistricting cases;
- Abortion cases;
- Advancing attorneys’ fees claims;
- Prisoner limitation;
- Most immigrants cases; and
- Defense of public housing residents facing eviction based on drug-related charges.

The use of test case litigation, class actions suits, and legislative advocacy was anathema to many, especially to those who were on the conservative side of the aisle, so they also forbade participation in:

- Class actions;
- Training for political activities such as boycotts, picketing or strikes;
- Lobbying; and
- Challenging the validity of federal *or state* welfare laws, even in the course of representing individual clients (this restriction was overturned by the U.S. Supreme Court in Legal Services Corporation v. Velazquez.)¹⁷

Poverty lawyers met this challenge by forming entirely separate entities that did not use any LSC funds. These entities, however, had to look elsewhere for funding.

Since opponents could not “kill the lawyers,” in addition to the above restrictions, they attempted to strangle the LSC budget. They were largely successful. It was “zero” budgeted in many years and only succeeded in receiving any appropriation at all because of very strong lobbying, largely on the part of the American Bar Association. At its high point in 1981, the LSC budget was \$321 million (\$730 million in 2008 dollars). Today it

¹⁵ Between 1966 and 1974 legal services lawyers argued 118 cases before the U.S. Supreme Court. They won 62% of them. SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING*, p.150 (1990).

¹⁶ Steven K. Berenson, *A Primer for New Civil Law Clinic Students*, 38 *McGeorge L. Rev.* 603 (2007). The complete set of LSC regulations may be viewed at: http://www.lsc.gov/lscgov4/45cfrParts1600_1644.PDF
See also: http://www.lsc.gov/lscgov4/45cfrParts1600_1644.PDF

¹⁷ *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001)(5-to-4 decision) available at: http://oyez.org/cases/2000-2009/2000/2000_99_603

is only \$340 million in 2008 dollars. This would have been only \$121 million in 1981 dollars. Thus, the LSC budget is, in effect, only slightly more than one-third of what it was in 1981!¹⁸

It is anticipated that the Obama administration will look more favorably on the LSC. The current Senate appropriation bill contains \$400 million for LSC,¹⁹ an increase of 10 million over fiscal 2009.²⁰ This is still only about one-half the level of funding in 1981.²¹

IOLTA

Thus, to have a truly viable legal aid system in the U.S., one must look elsewhere for support. The state Bar Associations of all states, including California and Canada (where it started) have created a source of funding referred to as IOLTA (Interest on Lawyers Trust Accounts). The State Bars require that the interest earned on trust accounts containing client funds be remitted to the State Bar. The State Bar, then, distributes these funds among legal aid groups²² – including, for example, Santa Clara University School of Law’s clinic. After grants from the LSC, IOLTA funds are the second largest single source of funding for civil legal services to the poor.²³

¹⁸ E. Johnson, Jr., *supra* at 394-397.

¹⁹ http://www.lsc.gov/press/pressrelease_detail_2009_T248_R17.php The house bill contains \$440 million. http://www.lsc.gov/press/pressrelease_detail_2009_T248_R15.php

²⁰ http://www.lsc.gov/press/pressrelease_detail_2009_T248_R20.php This was passed in the Senate on November 6, 2009.

²¹ As generous as this may sound, \$400 million in 2009 dollars is only the equivalent of \$168.84 million in 1981 dollars. Recall that the appropriation in 1981 for LSC was \$321 million dollars. Thus, in real value, the LSC will be funded at only about 1/2 its 1981 level. For calculating the change in the value of dollars, see Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl>

This is also \$35 million less than the Obama Administration requested, and \$40 million less than approved by the House. The two chambers must now confer and agree on a final number to send to the President.

²² See <http://www.iolta.org/grants>

“A lawyer who receives funds that belong to a client must place those funds in a trust account separate from the lawyer’s own money. Client funds are deposited in an IOLTA account when the funds cannot otherwise earn enough income for the client to be more than the cost of securing that income. The client - and not the IOLTA program - receives the interest if the funds are large enough or will be held for a long enough period of time to generate net interest that is sufficient to allocate directly to the client.

“In 2003, state IOLTA programs generated more than \$133.8 million nationwide. These funds, together with state and federal appropriations as well as private grants and donations, enable non profit legal aid providers to help low-income people with civil legal matters such as landlord/tenant issues, child custody disputes and advocacy for those with disabilities.”

Every state in the U.S. operates an IOLTA program. Between 1991 and 2003, IOLTA generated more than \$1.5 billion nationwide to ensure justice for our country’s most vulnerable residents.”

- [IOLTA Makes a Difference](#)
- [IOLTA History](#)
- [Interest Rates](#)
- [IOLTA Challenged](#)
- [Equal Justice Landscape](#)

²³ http://www.iolta.org/grants/item.Equal_Justice_Landscape

Behind IOLTA come grants from state and local government and private foundations, charitable donors, occasional court awarded fees, and some add-ons to filing fees. Funds from all sources came to about 1 billion dollars in 2008.²⁴

Here is a snapshot of funding among the 50 states in 2005²⁵:

As impressive as this may appear, the American Bar Association still estimates that 80% of the legal needs of the poor in civil matters are not met.²⁷ If one sets the eligibility line at 125% of the poverty level (about \$25,000), this yields one lawyer for every 13,000 eligible people. If one sets the poverty line at 200%, as some non-federally funded programs do, this yields one lawyer for every 6,861 people. By contrast, there are over 10 times as many lawyers, a ratio of 1 for every 525 people, serving the rest of the population. It is hardly surprising, then, that the legal aid scheme in the U.S. does not fill the “Justice Gap.”²⁸ All expenditures combined amount to only .5% of the amount the nations spends on lawyers each year. This is well behind what other industrial democracies spend.²⁹ For example, in 2004 England spent \$7.90 (\$10.50 if one includes immigration cases) per \$10,000 of its GDP on civil legal aid. By contrast, the U.S. spent only one-tenth as much--\$0.65 per \$10,000 GDP!

In practical terms, England’s expenditures on civil (as opposed to criminal) legal aid means that approximately 29% of the population qualified for legal aid.³⁰ In the Netherlands, fully 40% of the population qualifies for legal aid, although some may have to pay a minor part through an income-related test.³¹

²⁴ E. Johnson, Jr., *supra* at 395.

²⁵ Alan W. Houseman, *Civil Legal Aid in the United States: An Overview of the Program and Developments in 2005* (July, 2005)

²⁶ Most state governments now have commissions devoted to seeking funding for legal aid systems. These are often referred to as “Access to Justice” commissions. California’s may be viewed at:

http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10126&id=1077

²⁷ http://www.iolta.org/grants/item.Equal_Justice_Landscape

²⁸ LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 15 (2005), *available at* <http://www.lsc.gov/justicegap.pdf> In September, 2009, LSC released its updated report on the “Justice Gap” in America. It found that for every client served by LSC programs, another person who seeks help is turned away due to a lack of program resources. The conclusion reaffirms the findings of the original report on the justice gap published by LSC in 2005 and again in 2007. See http://www.lsc.gov/press/pressrelease_detail_2009_T248_R27.php

²⁹ E. Johnson, Jr., *supra* at 397-398.

³⁰ Tamara Goriely, *Legal Aid in England and Wales*, Conference Paper delivered at the 2009 International Conference on Legal Aid, Seoul, Korea, Dec. 3, 2009 (on file at Santa Clara University School of Law).

³¹ Peter van den Biggelaar, *Legal Aid in the Netherlands*, Id.

Comparison of National Investment of Legal Aid³²

NATION	Public Civil Legal Aid Investment	Public Civil Legal Aid Investment per \$10,000 GDP	U.S. Public Civil Legal Aid Investment Required to Match This Nation's Investment per \$10,000 GDP
UNITED STATES	\$800 million	\$0.65	\$800 million
GERMANY	\$520 million	\$2.25	\$2.85 billion
IRELAND	\$26.9 million	\$2.35	\$2.9 billion
FINLAND	\$35.6 million	\$2.35	\$2.9 billion
CANADA	\$287 million	\$2.80	\$3.4 billion
NEW ZEALAND	\$30 million	\$3.25	\$4.0 billion
HONG KONG	\$67 million	\$4.07	\$5.1 billion
SCOTLAND	\$33.5 million	\$4.90	\$6.0 billion
NETHERLANDS	\$300 million	\$6.90	\$8.5 billion
NORTHERN IRELAND	\$27 million	\$7.00	\$8.56 billion
ENGLAND	\$1.24 billion (excluding immigration cases) \$1.61 billion (including immigration cases)	\$7.90 (excluding immigration cases) \$10.50 (including immigration cases)	\$9.6 billion \$12.8 billion
TEN-NATION AVERAGE		\$4.38	\$5.36 billion

One “advantage,” if one may call it that, of the parsimonious support for civil legal aid in the U.S. is the incentive it creates for exploring the most cost-efficient ways to employ these limited resources. As mentioned above, one of the most cost effective ways is to attack, through class actions, legislative and administrative advocacy, etc., those institutional rules and practices adversely impacting the poor. While this still may not be done through any agency receiving LSC funds, many independent groups have formed to continue this fight.

The California State Bar has recognized the need for more attorneys to assist in providing legal aid through law firm *pro bono* clinics or simply on a case-by-case basis. By Resolution, the California State Bar urges (but does not require) attorneys to provide at least 50 hours of *pro bono* service per year.³³ This obligation, such as it is, may also be discharged by giving a similar level of support to groups that supply *pro bono* services. In addition, the California State Bar, as part of its “Justice Gap” program, asks each lawyer to contribute at least \$100 per year to the Justice Gap Fund. This fund is used to support over 100 non-profit legal aid organizations throughout the state. Unlike the tax rule of some countries, these donations are tax deductible.³⁴

³² Chart from E. Johnson, Jr., *supra* at 424.

³³ The resolution may be viewed at: <http://www.calbar.ca.gov/calbar/pdfs/accessjustice/2003-Pro-Bono-Res.pdf>

³⁴ <http://calbar.org/justicegapfund>

Conflict of interest rules sometimes deter members of larger firms from participating in advice clinics or similar services. Many attorneys found the cost and feasibility of running a potential legal services client through a law firm's client-conflict database too burdensome to warrant representing the client. To overcome this dilemma, in 2009 the California Supreme Court adopted Rule 1-650 of the California Rules of Professional Conduct.³⁵ Rule 1-650 allows lawyers to provide short-term limited legal services without the burden of running a complete conflict of interest check. Rule 1-650(A)(2) prohibits an attorney from taking on a client only if there is an imputed conflict of interest. Under the new rule, a conflict will be imputed to the attorney or the attorney's firm only if the attorney "knows" that the attorney, or another in the attorney's firms, has a conflict. Rule 1-650(B). This provides an incentive for law firms to permit or even encourage their attorneys to provide *pro bono* services without the risk of conflicting with present or future clients.

Law School Clinics

Most law schools in the United States have "clinics." Much like medical schools, these clinics teach students how to handle actual cases. Most clinics take cases from the underserved population. There are three distinct advantages arising from law school clinics. Clinics train students in real-life cases, they serve the disadvantaged population, and they build the ethic of *pro bono* service. The ethic of *pro bono* service, then, carries forward into the students' professional lives, thus paying an additional dividend for the investment.

Clinical education, because of the intense level of supervision required by the faculty, is expensive. While a typical law school clinic may serve only a small portion of the need, there are many law schools in California and in the United States. In combination, they can be a significant source of legal services.

Santa Clara University School of Law's clinic is fairly typical. The clinic services a number of needs, including workers' rights, tenant-landlord rights, consumer law and immigration law. With a student to attorney ratio of approximately 8 to 1 and a client to student ratio of about 3 or 4 to 1 the clinic assists about 1,000 clients on-site per year and 1,200 individuals through mobile workshops on consumer rights, workers' rights and tenant-landlord rights through the Santa Clara community.³⁶

The overall budget for the clinic for 2009 is about \$950,000. The \$950,000 budget is supported by the following sources:

- SCU School of Law (\$200,000)
- Endowment Income (\$50,000)(the clinic was initially endowed by George and Catherine Alexander, and the clinic bears their name)

³⁵ The rule may be viewed at:

http://calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=Current_Rules.gif&sCategoryPath=/Home/Attorney%20Resources/Rules/Rules%20of%20Professional%20Conduct&sFileType=HTML&sCatHtmlPath=html/RPC_Current-Rules-1-650.html

³⁶ <http://law.scu.edu/kgacalc/about-us.cfm>

- Private Donations (Firms and Individuals) (\$25,000)
- *Cy Pres* Funds (\$200,000)
- Special Event Revenues (\$25,000)
- Foundation Grants (\$80,000)
- State Bar of California Legal Services Trust Fund (\$60,000)
- City of San Jose (Community Development Block Grant) (\$28,000)
- County of Santa Clara (Legal Services, Immigrant Services) (\$65,000)
- U.S. Department of Justice (Human Trafficking) (\$50,000)
- Attorney Fees (\$150,000)

Not all countries utilize law student resources. Countries whose legal practice rules impede supervised representation by law students may wish to review and possibly liberalize their rules. Recognizing both the educational value for law students and the potential value to the underserved, in 1993 the California Bar Association adopted a rule allowing supervised representation. This rule may be an appropriate model for other countries to consider.³⁷

Cy Pres

Note that in Santa Clara School of Law’s budget, there appears \$200,000 from “*cy pres*.” *Cy pres* (pronounced “*sigh-PRAY*”) is a common law doctrine of equity. When the charitable purpose of a trust could not, or could no longer be achieved, the funds may be used for a related charitable purpose.

The *cy pres* doctrine has become a significant source of funding for many not-for-profit endeavors, including legal aid and clinics such as Santa Clara’s. The source of these funds usually comes from large judgments or settlements, often on behalf of consumers in class action cases. When class actions are terminated either by judgment or settlement, a fund is often created against which benefitted consumers may make claims. These funds can be substantial. Once the claim period is over, it is not uncommon for a considerable amount of money to remain unclaimed. These funds are then available for non profit organizations to use in related areas. These typically include legal aid associations and clinics such as Santa Clara School of Law’s clinic.³⁸

While *cy pres* funds are very helpful, they are not a consistent funding stream. Sometimes funds are available, and sometimes they are not. Moreover, the class action procedure, which generates a large portion of these funds, may not be as available in countries outside the United States.

³⁷ California’s rule may be found at:

http://www.courtinfo.ca.gov/rules/index.cfm?title=nine&linkid=rule9_42

More information may be found at:

http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10169&id=1342

³⁸ On December 7, 2009 Dean Donald Polden announced that Santa Clara University School of Law’s clinic would receive a *cy pres* award from a consumer class action of \$400,000. One may read more on *cy pres* at:

<http://www.calbarfoundation.org/contribute/cypres.html>

and

<http://www.cypresfunds.net/about.html>

Other Tactics to Support Legal Aid

On the front lines of legal aid, legal aid lawyers are experimenting with various ways to stretch their resources and still satisfy as much of the need as possible. Some examples are:

- Self-Help assistance—especially in Family Law cases
- Kiosks
- Brief Services Units
- Advice Clinics
- Legal Hotlines
-

The sections below briefly outline these systems and give web references which may be used to gather more information for those interested in exploring the U.S. experience.

Self-Help assistance (Focusing on Family Law)

As mentioned above, approximately 80% of those appearing in family law matters in California represent themselves. Doubtless the situation is similar in other states. Given this state of affairs, it is important to make these proceedings as easy as possible for the lay person. Some states have undertaken a review of the forms and proceedings in this area to simplify them and to make them as understandable as possible. Indeed, the California Supreme Court held in 2007 that proceedings in family law matters must be clear and understandable.³⁹ In response to this opinion, the California Judicial Council established the Elkins Family Law Task Force (named after the case) and charged the task force comprehensively to review family court procedure with a view to making them more accessible. The review is in progress.⁴⁰ A similar task force is working in Maryland to simplify family law forms.⁴¹

Limited Scope Representation

Limited scope representation (sometimes called “unbundling”) is a way that an attorney can help with part of a case while the client does the rest of the case. It allows an attorney to advise or participate in a limited way without taking on the obligations of an entire case. For example:

1. Clients can consult with an attorney to prepare or review the paperwork but attend the hearing themselves;
2. Clients can represent themselves through the whole case and periodically consult with an attorney who can coach them on the law, procedures and strategy;
3. Clients can do the preparation themselves and hire an attorney just to make the court appearance;
4. Clients may want to do their own investigation of the facts (“discovery”) and ask the

³⁹ *Elkins v. Superior Court*, 41 Cal.4th 1337 (2007).

⁴⁰ See: <http://www.courtinfo.ca.gov/jc/tflists/elkins.htm>

⁴¹ <http://www.digital-lawyer.com/kiosk1.htm>

attorney to assist in putting the information in a format useful to the court;
5. Clients may ask the attorney to be on “standby” while the client attends the settlement conference.

With limited scope assistance, the client may be able to handle the whole case, except for a few technical areas, such as pension rights, where the attorney can help the client. It is between the client and the attorney to decide how much of the case the client engages the attorney to do. Forms for limited representation for California are available on the web.⁴² These may be useful models for others.

Self-help is also offered by providing packets of forms tailored to a specific area or a specific legal issue; *i.e.* Family Law or Domestic Violence Restraining Orders. California courts are consistently good at providing forms online and grouped together in interest area and topic. Furthermore, the receiving desks at the courthouse are staffed with persons who are aware of the required forms for the specific situations and are able to recommend the correct forms to use. Below are web sites with examples of the forms available to litigants.⁴³

Kiosks

Maricopa County, Arizona, introduced stand-alone computer-based kiosks located in the courthouse. The kiosks generate legal forms in response to input from the user. They generate no-fault divorce documents, child support petitions, domestic violence petitions, and documents that are used in landlord-tenant actions. The kiosks proved to be

⁴² FORMS FOR LIMITED REPRESENTATION (CAL-ACCESS):

- Family Law Limited Scope Representation Risk Management Package:
http://www.calbar.ca.gov/calbar/pdfs/accessjustice/Risk-Management-Packet_2004-01-12.pdf
- Notice of Limited Scope Representation:
<http://www.calbar.ca.gov/calbar/pdfs/accessjustice/FL-950.pdf>
- Application to be Relieved as Counsel upon Completion of Limited Scope Counsel:
<http://www.calbar.ca.gov/calbar/pdfs/accessjustice/FL-955.pdf>
- Objection to Application to be Relieved as Counsel upon Completion of Limited Scope Counsel: <http://www.calbar.ca.gov/calbar/pdfs/accessjustice/FL-956.pdf>
- Order on Application to be Relieved as Counsel upon Completion of Limited Scope Counsel: <http://www.calbar.ca.gov/calbar/pdfs/accessjustice/FL-958.pdf>
- 20 Things Judicial officers can do to encourage attorneys to provide Limited Scope Representation: <http://www.calbar.ca.gov/calbar/pdfs/accessjustice/20-Things-Judicial-Officer.pdf>

⁴³ CONVENIENT SOURCES FOR LEGAL FORMS

- All California forms: <http://www.courtinfo.ca.gov/forms/>
- California family law self-help forms:
<http://www.courtinfo.ca.gov/selfhelp/forms/familylaw.htm>
- California Superior Court EZ Legal File:
<http://www.ezlegalfile.org/go.jsp?act=actShowHome>
- All states guide to family law forms: <http://family.findlaw.com/family/family-law-help/state-family-court-forms.html>

very popular. They were developed by [North Communications, Inc.](#) The kiosks are expensive to build and maintain (between \$10,000 and \$15,000 each), so users are charged a fee of approximately \$25.00 for each set of legal documents in order to create a source of revenue to finance the expansion of the program, provide a source of revenue to the county, and provide a return on investment to the developer.⁴⁴

Internet Kiosk

Rather than create free-standing kiosks placed in a limited number of locations, Maryland developed new internet technologies, primarily the World Wide Web, for creating a network of community-based self-help legal information centers. The core component of this network is a Website set of libraries in major substantive areas, such as family law, consumer law, and landlord-tenant law. Each library contains explanations of the law in lay terms, legal forms, instructions on how to complete the forms, and step-by-step procedures on how to file the forms. The user can complete the forms directly on the screen and print out the forms on their local printer replicating the functionality of the stand-alone kiosk.⁴⁵

Brief Service Units

In 2001, the Brief Services Unit (BSU) of the District of Columbia was created to increase the efficiency and decrease the cost of delivering legal services to the low-income older residents of the District of Columbia. Under the supervision of an attorney, an associate attorney, legal associate, and non-attorney volunteers, the BSU handles matters that cannot be resolved by their legal advice line. Additionally, the BSU develops cases that require extended representation for referral to the Legal Counsel for the Elderly (LCE) *Pro Bono* Project for placement with a *pro bono* attorney. In 2007, the *Pro Bono* Project referred 828 cases to *pro bono* attorneys on behalf of 416 clients; 756 cases were closed during this period for 395 clients. The BSU also identifies systemic cases.

The unit handles a wide array of issues: grandparent subsidy and custody work; debt collection defense; identity theft; procurement of benefits [food stamps, Medicaid, TANF (Temporary Assistance for Needy Families), SSI/Social Security, Veterans pension, rental and utility assistance]; security deposits; repair issues for tenants; deed transfer and probate matters; traffic ticket and license revocation defense; and contracts and warranties cases.⁴⁶ Their 2007 Annual Report, which outlines their projects, funding sources, etc., is available on line.⁴⁷

Advice Clinics

In Minnesota, volunteer lawyers give brief, free legal advice at several locations in the Hennepin County Court, including the [Self-Help Centers](#), [Conciliation Court](#),

⁴⁴ <http://www.digital-lawyer.com/kiosk1.htm>

⁴⁵ *Id.*

⁴⁶ <http://www.aarp.org/makeadifference/gettinghelp/articles/briefservicesunit.html>

and

<http://www.aarp.org/aarp/lce/>

⁴⁷ <http://www.aarp.org/aarp/lce/>

[Housing Court](#), and the [Courthouse at Brookdale](#). Use of these advice clinics is generally limited to people who live in Hennepin County or have a court case in Hennepin County. Some are also limited to people whose income is within a [range of the federal poverty guidelines](#).⁴⁸

There are similar advice clinics in other locations. See, e.g., Washington County free legal advice clinic offering 30 minute consultations on marriage dissolution, child support, domestic abuse, paternity issues, child custody, visitation, and spousal maintenance.⁴⁹ See also the San Francisco Free Legal Advice and Referral Clinics offering advice or referral to appropriate agencies in the areas of criminal law, family law, landlord/tenant, immigration, employment, personal injury, estate planning, consumer, contracts, and business issues. This clinic sponsored by the Bar Association of San Francisco.⁵⁰

Legal Hotlines:

Most legal hotlines are tailored exclusively for senior citizens. Perhaps this is due to their limited access to the Internet or because they are more apt to use the legal hotlines than other classes of people. Regardless, most legal hotlines require every person seeking advice to meet certain income requirements. Legal hotlines usually give advice only in the civil area. The topic areas addressed may include:

- Real estate: evictions, foreclosures, mortgages and other housing issues;
- Government aid and services;
- Education;
- Divorce, custody, visitation and child support;
- Domestic violence,
- Debts, purchases and other consumer issues;
- Jobs and unemployment;
- Immigration;
- Clearing a criminal record;
- Small claims court;
- Name changes;
- Disability issues;
- Health care access and related issues;
- Social Security Disability and other seniors' issues.

For example, the Center for Elder Rights Advocacy sponsors a web site which is supported by a grant from the United States Administration on Aging. The Project provides technical assistance to legal hotline managers and developers. The website provides a compilation of hotline-related materials produced by the Project as well as those produced by numerous other programs.⁵¹

Innocence Projects

⁴⁸ <http://www.mncourts.gov/district/4/?page=1200>

⁴⁹ http://www.co.washington.mn.us/client_files/documents/adm/2009_Press_Releases/ADM-1109Legal_advice_clinic.pdf

⁵⁰ <http://www.sfbar.org/volunteer/larc.aspx>

⁵¹ <http://legalhotlines.org/>

Although those accused of serious crimes who cannot afford a lawyer enjoy a constitutional right to appointed counsel at state expense, once appeals have been exhausted, there is no longer a right to appointed counsel. Sadly, even with counsel, some innocent people are convicted of serious crimes. Legal aid groups, usually known as “Innocence Projects,” have formed in most states to attempt to secure exoneration of those wrongfully convicted.⁵² Since the state is the accusing party, these projects are typically funded by private donors. The Northern California Innocence Project at Santa Clara University School of Law⁵³ has thus far exonerated 8 innocent people. They also helped one person, who had served 20 years of a 40 year prison sentence, to settle his claims against various state actors for \$5,500,000.⁵⁴ In addition, the Project recovered over \$700,000 in state compensation (\$100 per day) for the wrongful conviction.

Conclusion

Legal Aid in the United States is much like a meal made from leftovers. Many dedicated lawyers make do with such scraps of funding as they can gather from many different sources. The federal government still plays a major part, but its funding levels are far below past efforts, the efforts of other nations, and the need. Other sources, such as IOLTA, *cy pres* funds, private donations, and state Access to Justice programs greatly aid the effort. Still, with 80% or more of the need unfulfilled, one cannot count the United States experience as a success. Indeed, its effort is humbled by that of many less wealthy countries.

It has been said that “necessity is the mother of invention.” Born from the necessity created by underfunding are a number of ways to deliver some aid to those who need it. Utilizing these various methods, *e.g.*, hotlines, limited representation, sources for forms, help desks, etc., though inadequate, partial measures, may be of some help to others attempting to deliver legal aid in the face of similar challenges. If there is a bright side to the U.S. system, these methods, conceived by these dedicated lawyers, may be it.

⁵² The Innocence Projects for each state may be found at: <http://law.scu.edu/ncip/project-links.cfm>

⁵³ <http://law.scu.edu/ncip/index.cfm>

⁵⁴ California Bar Journal, December 2009, p. 4