

**And Justice for All: Fulfilling the Promise of
Access to Civil Justice in California**
Executive Summary & Findings, Recommendations and Funding Options

After three years of work, the State Bar-appointed Access to Justice Working Group released "And Justice For All," (October 1996). This comprehensive study examines whether the legal needs of the state's indigent population are currently being met and provides both historical and international perspectives. It also develops estimates of the additional funding necessary to meet the unmet legal needs of the poor and to subsidize the unmet legal needs of the near-poor.

(Copies of "And Justice For All" are available by calling the State Bar Office of Legal Services, 415-538-2534.)

- Access to Justice Requires Lawyers; Many Nations Provide Counsel as a Matter of Right
- Civil Legal Needs of Three Out of Four Poor Californians Are Not Being Met
- Legal Services Programs Promote Peaceful Dispute Resolution and Efficiently Serve Millions of Poor Clients
- Funding for Legal Services Must Be Increased Dramatically
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***"The first duty of society is justice."
—Alexander Hamilton***

Access to justice is a fundamental and essential right in a democratic society. It is the responsibility of government to ensure that all of its people enjoy this right — that there is indeed "justice for all."

Access to Justice Requires Lawyers; Many Nations Provide Counsel as a Matter of Right

In most parts of our civil justice system, access to justice requires that lawyers represent both parties. As a practical matter, in most cases there can be no access to justice without access to adequate legal representation. Thus, justice is endangered unless those who cannot afford

counsel are provided lawyers. This is particularly true when one side, often a corporation or government agency, is represented by counsel.

The absence of representation also has a negative effect on the functioning of the judicial system. Courts must cope with the need to provide guidance and assistance to pro per parties to ensure a fair trial or hearing. Such efforts, however, are a burden on both the court's time and personnel.

[The contingent fee system plays a separate but important role in the existing legal system. Such cases offer another avenue to improve access to justice as their focus on significant monetary recoveries allows poor and moderate-income plaintiffs to pay attorneys fees only if there is an award. Clients pay their attorney an amount proportional to the level of damages awarded. This report, however, focuses on access to legal services in cases that are not appropriate for contingent fee representation: those where damages are normally not of paramount importance.]

The governments of many industrial democracies other than the U.S. already guarantee low-income people the assistance of free lawyers in civil cases either as a statutory or constitutional right. A few of these countries, for example Italy and Spain, implement this right through mandatory pro bono programs requiring lawyers to supply representation without compensation. But the majority — England, France, Germany, the Netherlands, the Scandinavian countries, and Canadian provinces — fund civil legal services for the poor by providing lawyers, at state expense, to those who would otherwise go unrepresented.

Legal Needs of Three Out of Four Poor Californians Are Not Being Met

The need for civil legal assistance among low-income Californians far exceeds the current level of resources provided through government and private charity. Today, the legal needs of approximately three-quarters of all poor people are not being met at all. The legal needs of the other one-quarter are sometimes being met only partially and the number of poor people in California continues to increase at a pace faster than that of the state's overall population.

The lives of California's poor are highly regulated, giving rise to the need for legal assistance. The legal needs of the poor fall primarily into the areas of housing, food, health, family, employment, education, consumer finance, and individual rights. Those Californians who often need legal representation on matters that may be critical to their very survival include battered women, children, youth, the disabled, the elderly, farmworkers, the homeless, minorities, single parents, the unemployed, and victims of crime.

Legal Services Programs Promote Peaceful Dispute Resolution and Efficiently Serve Millions of Poor Clients

Since California's first legal aid office opened its doors in San Francisco in 1916, legal services programs have promoted an ordered society and the peaceful resolution of disputes. At the same time, they have provided direct legal assistance to millions of this state's poor. Equally important, legal services programs have promoted confidence in low-income people that our system of laws can work for them.

Many of the services provided to legal services clients actually result in a savings to local and state government entities. When a woman receives adequate child care payments and is able to stay off welfare, when an illegal eviction is stopped and a family is able to avoid homelessness, when a disabled couple can live independently with in-home support rather than be institutionalized, not only is critical help provided to the poor client, but taxpayers save money as well.

In addition, legal services offices try to begin to help people on public assistance find a way to enter the mainstream of working America. For example, some offices have recently put programs in place to assist poor people to set up their own businesses and to redevelop neighborhood housing using a nationwide network of business lawyers.

In the best of times, California's legal services lawyers were too few to meet more than a fraction of the need for their services. Now California's 114 legal services programs are forced to make do with fewer and fewer resources at the same time that more and more Californians are falling into poverty. In 1996, there are 130 fewer legal services attorneys and over two million more poor people in the state than there were in 1980. There are now only 500 legal services lawyers to serve almost six million poor people. This means there is one attorney for every 11,000 poor people in a state where there is approximately one lawyer for every 300 people in the rest of the population. /

After the 1994 national elections, the makeup of Congress changed dramatically. Congressional concern about the rising deficit and alleged abuses by legal services programs, combined with fundamental attacks on the concept of legal services for the poor, resulted in much debate and uncertainty. The ultimate outcome was diminished funding for legal services coupled with significant restrictions on the work that could be done by federally funded programs.

The FY 1996 appropriation for the Legal Services Corporation decreased 33% from the year before, resulting in a net loss of 38% of LSC money in California. Many new restrictions were proposed, including bans on class actions, court awarded attorneys fees, and welfare reform advocacy, restrictions on legislative representation, and the extension of the LSC restrictions to all other funds of a program, and many other requirements and prohibitions.

Legal services programs are undertaking a comprehensive planning process, working with the private bar, clients, and others. Despite cutbacks in staff and services, legal services programs are dedicated and creative in making the best use of their extremely limited resources. However, greater efficiency and an infusion of pro bono services have not come anywhere near closing the gap between need and service.

Funding for Legal Services Must Be Increased Dramatically

Funding for civil legal services must be increased dramatically in order to implement a right to justice for low-income Californians. The Access to Justice Working Group's best estimate is that it will require an additional \$250 to \$300 million (in 1993 dollars) to fill the gap between the 1993 level of funding (about \$100 million) and the amount required to provide justice to almost six million poor people currently living in California.

Experience in the U.S. and other countries demonstrates that the private bar, acting on its own, cannot and should not be called upon to provide full representation for California's civil indigent. California lawyers already provide more than one million hours of pro bono service each year. At the same time, more California lawyers — acting individually and collectively — can and should provide additional pro bono services and/or financial contributions to legal services programs on an ongoing basis.

One group of attorneys who might be able to perform significantly more pro bono work could be those who are currently unemployed or underemployed. Encouraging volunteer work by these attorneys, many of whom are young, could benefit both the lawyers, who would gain legal experience, and poor clients, who would get free representation. It would not be realistic to encourage pro bono work from all unemployed or underemployed attorneys, but coordination with the California Young Lawyers Association could prove fruitful.

In 1993, the state's 121 legal services programs reported to the State Bar of California that they had received approximately \$100 million in total funding that year, with the federal Legal Services Corporation being the single largest funding source. (The number of legal services programs in the state has since declined to 114.)

More recently, federal funding has been reduced dramatically. California's 1996 share of the Congressional appropriation was \$28.2 million, down from the 1995 level of \$45.3 million. This was a 38% decrease, without accounting for inflation.

The State Bar's Legal Services Trust Fund Program was the second largest funding source in 1993. The Trust Fund was established by a 1981 California statute requiring California lawyers who hold client funds which are either small in amount or held for a short period of time to place them in an interest-bearing account. Banks forward the interest earned to the State Bar, which in turn distributes the funds through the Trust Fund Program to qualifying non-profit legal services programs. Similar programs are now functioning in all 50 states.

With the decline in interest rates, Trust Fund Program revenues plummeted nearly 75% in recent years, to a low of \$5.7 million in 1994 -1995, although they did increase slightly in 1995-1996. As a result, the Trust Fund was able to distribute approximately \$6.6 million to qualifying programs that year.

Other funding sources for legal services programs included foundations, the United Way, contributions (from bar associations, individual lawyers, fundraising events, etc.) court-awarded fees, and miscellaneous funding.

Near-Poor and Moderate-Income Californians Also Require Increased Access to Civil Legal Services

While almost two million California households (representing around five million people) lived below 125% of the poverty line in 1990, another 2.2 million households (representing over six million people) lived just above this level, struggling to maintain a minimum standard of living.

Many of these families are unable to afford legal services for pressing needs without some form of legal assistance. And, those who try to represent themselves are very likely to lose, even when the evidence indicates they should prevail.

As funding for legal services in California increases as a result of future efforts of the Commission on Access to Justice recommended by this report, consideration must be given to establishing some level of subsidized legal services or other means to increase meaningful access to justice for the near-poor. Steps to assist them must be taken even before the needs of the poor are completely satisfied.

Another two and one-half million California households (representing almost seven million people) comprise the middle fifth of the state's population, with annual household incomes of more than \$27,500 but less than \$45,000. While these middle-income people are able to obtain legal assistance more often than the poor and near-poor, they still are unable to afford representation in many instances. This may result in harm and injustice to these families of moderate means. New legal services delivery models and financing arrangements must be developed, tested, and evaluated, with the goal of making quality legal services more widely available to middle-income people in this state.

Innovative Delivery Methods Must Be Developed and Expanded, in addition to New Funding Sources

Increased funding for legal representation is the most important but not the only approach to giving low-income Californians access to justice. There are also some promising possibilities for developing less traditional delivery methods to address certain legal problems. Some of these options would not require lawyers, yet they would still provide quality justice for poor, near-poor, and middle-income people. It may also be possible to simplify substantive law in certain areas so that lawyers are not needed for some problems for which they are now essential.

Innovative delivery methods that are being developed or that should be expanded include prepaid legal services, court-affiliated alternate dispute resolution, independent alternative forums, carefully supervised use of paraprofessionals, small claims courts, peer counseling, and unbundled legal services. Others, such as pro per coaching, could be explored as interim measures.

At the same time, it is critical that society ensures that these measures actually deliver on their promises and do not deny justice to the unrepresented. This will require the creation of a mechanism capable of designing, establishing, and evaluating experimental programs for their impact on access to quality justice on an ongoing basis.

Achieving access to justice as a matter of right will require the honest commitment and ongoing attention not just of lawyers, but also of a broad spectrum of California's public and private sector leaders. The legal profession should provide initial leadership by calling attention to the magnitude and seriousness of the problems and by building the coalition necessary to address the issue. However, lawyers are but co-equal members of the diverse team of leaders who must work together to meet the challenge of providing "equal justice under law."

Findings of the Access to Justice Working Group

The report makes twelve findings that form the basis for the recommendations and funding options that follow. The findings reflect the fact that adequate civil representation remains an unfulfilled promise for the vast majority of poor and near-poor Californians, as well as for many moderate-income citizens, and that legal representation is the basis for access to justice. The findings state that this lack of counsel, which is a societal concern, seriously burdens the justice system. They also note the importance of delivery methods such as pro bono work, alternative dispute resolution mechanisms, and law simplification to the goal of increasing access to justice.

Recommendations Regarding the Delivery of Legal Services

The report offers thirteen recommendations for consideration by leaders in both the public and private sectors. Paramount is the recommendation that it should be the state government's legal obligation to ensure all Californians receive access to justice. Increased funding should be provided to the poor for legal representation in civil cases, beginning with matters in which basic human needs are involved. The state should also improve access to legal services to near-poor Californians who often find themselves without representation even in the most pressing circumstances.

The report recommends the creation of a California Commission on Access to Justice to provide ongoing leadership, to explore new sources of funding, and to oversee efforts to increase funding and improve delivery methods. The Commission would include members appointed by the State Bar, the judiciary, and business and community organizations.

The report recommends that new methods be developed to deliver quality legal services at affordable prices to larger numbers of moderate-income Californians. This includes exploring the feasibility of a statewide prepaid legal insurance plan available to all Californians and continuing efforts to develop alternative methods of dispute resolution that increase access without decreasing the quality of justice.

In other areas, the report encourages the development of promising approaches to simplifying the law and the evaluation of their impact on access to justice. This might lead to expanded use of supervised paraprofessionals where the result is increased access to justice and no diminution in the quality of services provided.

The report recommends the study, development, and improvement of programs that assist litigants in representing themselves in court proceedings until adequate legal representation can be provided to all who need it. It encourages the development of programs designed to make courts more "user friendly" to low- and moderate-income individuals.

For example, Small Claims Court should be modified to become even more effective in providing increased access to low- and moderate-income clients. In all cases, the report emphasizes the need to carefully evaluate the results of any proposed initiatives.

Finally, the report recommends the development of effective public education programs on understanding legal rights and responsibilities and finding affordable legal assistance. These efforts should target low- and moderate-income people, taking care not to raise expectations that cannot be fulfilled at current funding levels.

First-Priority Options to Obtain Necessary Funding

In order to obtain the funding necessary to achieve its recommendations, the Working Group identified five priority "options" which, in some combination, could result in the requisite funding.

As its top priority, the report urges the federal government to affirm its responsibility for maintaining independent legal services programs throughout the country and to increase the national Legal Services Corporation appropriation significantly as soon as possible. State government should also recognize that lawyers are as essential to justice as courts and, therefore, the state should fund lawyers out of general fund revenues for people who cannot afford representation.

The report urges California lawyers to continue to increase the substantial pro bono efforts they are already making with strong support from the organized bar. Additional "priority options" include considering ways to increase litigation-related fees to support increased access to justice and exploring the feasibility of imposing a tax on the value of legal work performed that could generate significant revenue to expand access to justice.

Second-Priority Options Regarding Funding

The report discusses ten "second-priority options" that could enhance legal services funding. Although the options in this category would not yield the high level of funding needed to achieve the Working Group's goals, they are nevertheless potentially valuable sources of supplemental financial support.

These options include dedicating a portion of punitive damage awards to increasing access to justice and diverting class action residuals to support increased access to civil legal services for the indigent. The report also suggests directing interest on real estate escrow accounts to expand access in civil matters, possibly targeting resulting funds to legal services housing work and other affordable housing groups. It is additionally important to continue efforts to increase the net yield on the Legal Services Trust Fund. Other options involve increasing government contracts with legal services organizations to provide services to low-income clients and exploring revenues to be generated from litigation-based fees.

The report advocates efforts to broaden pro bono opportunities for currently under-represented groups of legal advocates. For example, the participation in public interest work of more law students and other non-lawyer legal paraprofessionals should be encouraged and facilitated. Currently underemployed attorneys (recent graduates or people in transition) might also be a good source for increased pro bono work. Efforts should additionally be made to increase the

quantity and quality of advice provided through Lawyer Referral Services to low- and moderate-income clients.

A final option recognizes the need to expand efforts to increase philanthropic giving to provide legal services to low-income people.

In Conclusion

Over the past three years, the Access to Justice Working Group has examined the relationship between poverty and justice for all in California. Their findings are clear: the civil legal services available to the poor and near poor are wholly inadequate to meet the need.

No single entity can solve this problem. There must be a sustained, coordinated effort among leaders in the public and private sectors. Legal services programs, local bar associations, and client groups are contributing through coordination and regional and statewide planning, but much more is needed. Greatly increased funding must be devoted to the provision of legal services for the millions of Californians who are currently denied access to justice. This denial all too frequently means they also lack adequate food, safe housing, basic medical care, fair employment, and other necessities of life.

Ultimately, the majority of the necessary funding must come from the Californian people themselves, through the tax dollars which represent our commitment to our democratic system of government and to a better future in which the historic promise of "justice for all" is at last fulfilled.

1- See Public Interest Clearinghouse, Unequal Justice: A Report on the Declining Availability of Legal Services for California's Poor 1980-1990, June 1991, at 5; data on file with the Office of Legal Services, State Bar of California.

SUMMARY OF FINDINGS, RECOMMENDATIONS, AND OPTIONS REGARDING FUNDING

Findings

Recommendations

Options Regarding Funding

First Priority Options

Second Priority Options

FINDINGS

Finding 1. Fundamental Right

Access to justice is a fundamental and essential right in a democratic society.

Finding 2. Importance of Legal Representation

Access to justice in most parts of our civil system requires access to lawyers.

Finding 3. Counsel as Necessary as Courts

Since lawyers are as essential as judges and courts for citizens to gain access to justice in civil cases, government has just as great a responsibility to ensure adequate counsel is provided to all as it does to supply judges and courthouses in those cases.

Finding 4. Counsel Guaranteed in Other Countries

The governments of most industrial democracies have established a legal right to free assistance of lawyers in civil cases for low-income citizens.

Finding 5. Higher Contributions in Other Countries

The governments of many industrialized democracies fund legal representation for low-income citizens in civil cases at a much higher level than does the United States or California.

Finding 6. Unmet Legal Needs of the Poor

The need for civil legal assistance among low-income Californians far exceeds the current level of public and charitable funding; an additional \$250 to \$300 million (in 1993 dollars) in funding is necessary to meet the legal needs of California's poor.

Finding 7. Subsidized Services for the Near-Poor

The near-poor population in California also has significant unmet legal needs which must be addressed through partially subsidized legal services even before the needs of the poor are completely satisfied.

Finding 8. Assistance for the Moderate-Income

Innovative methods of financing and delivering affordable legal services to moderate-income Californians should be developed, tested, and evaluated.

Finding 9. Pro Bono

California lawyers perform a substantial amount of pro bono work and it is reasonable to expect more lawyers to provide representation or financial contributions to legal services programs in the future; nonetheless, the private bar alone cannot approach meeting all the unmet legal needs of the poor.

Finding 10. ADR and Law Simplification

Innovative methods of dispute resolution and simplification of substantive law may provide poor, near-poor, and moderate-income Californians access to quality justice in selected areas without always requiring the assistance of an attorney.

Finding 11. Burden on the Justice System

A lack of representation not only disadvantages litigants, but it also burdens the justice system itself. More fundamentally, it detracts from public confidence in the justice system when the financial situation of a party is more likely than the merits of an issue to determine the outcome.

Finding 12. Societal Obligation

Achieving access to civil justice as a matter of right will require the commitment and ongoing attention not only of the legal profession, but also of public and private sector leaders.

RECOMMENDATIONS

Recommendation 1. State Obligation

Establish the state government's legal obligation either in the state Constitution or by statute to ensure all Californians receive access to justice.

Recommendation 2. Commission

Create the California Commission on Access to Justice to provide ongoing leadership and oversee efforts to increase funding and improve delivery methods.

Recommendation 3. Civil Representation for the Poor

Increase funding to guarantee the poor appropriate representation in civil cases, beginning with matters in which basic human needs are at issue.

Recommendation 4. Access for the Near-Poor

Improve access to legal services for California's near-poor residents who often find themselves without representation even in the most pressing circumstances.

Recommendation 5. Innovative Delivery Methods

Develop innovative methods to deliver quality legal services at affordable prices to more of California's moderate-income residents, ultimately benefitting all Californians.

Recommendation 6. Prepaid Legal Services

Explore the feasibility of a statewide prepaid legal insurance plan to help make legal representation available to all Californians.

Recommendation 7. Alternative Dispute Resolution

Continue to develop alternative methods of dispute resolution that increase access without decreasing the quality of justice.

Recommendation 8. Law Simplification

Continue to develop promising approaches to simplifying the law and evaluate their impact on access to justice.

Recommendation 9. Supervised Paraprofessionals

Expand the use of supervised paraprofessionals in cases where such use results in increased access to justice without decreasing the quality of justice.

Recommendation 10. Pro Per Assistance

Recognizing they can never provide equal access to justice, as an interim measure, programs that assist litigants in representing themselves in court proceedings should be studied, developed, and improved until adequate legal representation can be provided to all who need it.

Recommendation 11. User-Friendly Courts

Encourage the development and evaluate the results of programs designed to make courts "user-friendly" to low- and moderate-income individuals.

Recommendation 12. Small Claims Court

Improve Small Claims Courts to make them as effective as possible in providing increased access to justice to low- and moderate-income clients.

Recommendation 13. Public Education

Expand public education programs on understanding legal rights and responsibilities and on finding affordable legal assistance that are targeted to low- and moderate-income people, taking care not to raise expectations that cannot be fulfilled at current funding levels.

OPTIONS REGARDING FUNDING

Fifteen options for increasing funding for civil legal services in California follow. These are not presented as recommendations of the Access to Justice Working Group, but as possibilities to pursue to create new methods of funding in the future. They are presented as alternatives and are meant to be considered independently from one another. Some may work in concert, while others may work better on their own.

FIRST-PRIORITY OPTIONS

These first five options have the potential to yield substantial amounts of additional funding for access to justice.

Option 1. Federal Responsibility

Pursue ways to reaffirm federal responsibility for maintaining independent legal services programs throughout the country and increase the national Legal Services Corporation appropriation significantly as soon as possible, rather than reduce or eliminate it altogether.

Option 2. State Responsibility

Recognizing that lawyers are as essential to justice as courts are, explore having the state government pay for legal representation out of general revenues for those who cannot afford it.

Option 3. Pro Bono Efforts

Develop ways to ensure that California lawyers continue to increase the substantial pro bono efforts they are already making with strong support from the organized bar.

Option 4. Litigation-Related Fees

Consider ways to increase litigation-related fees to support increased access to justice.

Option 5. Tax on Value of Legal Work

Explore the feasibility of imposing a tax on the value of work performed by attorneys, private judges, and other legal professionals that would generate significant revenue to expand access to civil justice.

SECOND-PRIORITY OPTIONS

These ten options should be considered on a lower-priority basis than the five options above as these could generate smaller amounts of supplementary funding for civil legal services.

Option 6. Punitive Damages

Dedicate a portion of punitive damage awards to increasing access to justice.

Option 7. Class Action Residuals

Divert class action residuals to support increased access to civil legal services for the indigent.

Option 8. Real Estate Escrow

Direct interest on real estate escrow accounts to expand access to justice in civil matters.

Option 9. Government Contracts

Increase government contracts with legal services organizations to provide services to low-income clients.

Option 10. Other Litigation-Based Fees

Explore revenues to be generated from other litigation-based fees.

Option 11. Pro Bono Outreach

Broaden pro bono opportunities to involve currently under-represented groups of lawyers in making a significant contribution.

Option 12. Law Students

Encourage and facilitate the participation of more law students and legal paraprofessionals in public interest work.

Option 13. Increase Trust Fund Yield

Continue efforts to increase the net yield on the Legal Services Trust Fund.

Option 14. Lawyer Referral Services

Increase the quantity and quality of advice Lawyer Referral Services provide to low- and moderate-income clients.

Option 15. Philanthropic Giving

Continue and expand efforts to increase philanthropic giving to fund legal services for low-income people.

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