

# ACCESS TO JUSTICE IN UTAH: TIME FOR A COMPREHENSIVE PLAN

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## I. INTRODUCTION<sup>1</sup>

This Article argues that an ongoing state planning process should be established to ensure all residents have access to justice in all forums. Many states have established such planning processes and structures that allow courts, bar associations, publicly funded staff programs, other charitable entities, and the branches of government to engage in coordinated design, assessment, and enhancement of legal services for the public. Although much good work is underway in Utah, the lack of coordination and candid assessment mean that many needy Utahns are not served and many services are not available. It is time for an honest study of the available resources, a search for a common mission, and a commitment to ongoing coordination and planning so all have access to justice.

During most of the twentieth century our society substantially expanded access to justice for various disadvantaged groups—the poor, minorities, and persons with disabilities. This was accomplished by recognizing rights to representation in criminal<sup>2</sup> and other matters involving denial of basic liberties,<sup>3</sup> by providing that the plaintiff's attorneys' fees would be paid by a party violating

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<sup>2</sup> In *Johnson v. Zerbst*, the Supreme Court held indigent criminal defendants were entitled to counsel in federal criminal cases under the Sixth Amendment. 304 U.S. 458, 463 (1938). In *Gideon v. Wainwright*, the right to counsel was extended to indigent defendants in state felony cases under the due process clause. 372 U.S. 335, 344 (1963). This right was extended to juveniles facing incarceration in *In re Gault*, 387 U.S. 1, 41 (1967), and to misdemeanor defendants facing possible incarceration in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). Utah provides for the appointment of counsel for indigent criminal defendants constitutionally entitled to counsel at UTAH CODE ANN. § 77-32-301 (2003).

<sup>3</sup> Although the U.S. Supreme Court declined to find a due process right to counsel in all parental termination cases, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981), most states provide for the appointment of counsel to represent indigent parents accused of abusing or neglecting their children and parents facing the termination of their parental rights. *See, e.g.*, UTAH CODE ANN. § 78-3a-913 (Supp. 2006). Similarly, counsel or a guardian ad litem is often statutorily provided for the children in such cases. *See, e.g., id.* § 78-3a-912. Other Utah statutes provide for the appointment of counsel in involuntary commitment cases. *See id.* § 62A-5-312 (regarding mentally retarded adults); *id.* § 62A-15-631 (regarding mentally ill adults).

significant rights,<sup>4</sup> by funding legal service agencies to provide representation to the poor<sup>5</sup> and other disadvantaged groups,<sup>6</sup> and by creating law reform and public interest entities engaged in litigation and lobbying activities.<sup>7</sup>

Although the right to be represented in criminal (and similar) cases has nowhere atrophied, nor have statutory claims for attorneys' fees been eliminated, nor have law reform and public interest groups disbanded; representation of the

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<sup>4</sup> Fee-shifting statutes have ensured counsel will be available (and paid by the losing party) in a panoply of areas, most notably cases involving violation of civil rights, 42 U.S.C. § 1988 (2000), and employment discrimination, 42 U.S.C. § 2000e-5 (2000).

<sup>5</sup> The first legal aid society in this country was established in 1876 to assist German immigrants. By 1919 there were approximately forty such societies with sixty-two staff attorneys and a combined budget of less than \$200,000 to provide legal services to the "deserving poor." In 1919 Reginald Heber Smith wrote *Justice and the Poor*; shortly thereafter the American Bar Association appointed him to chair its Standing Committee on Legal Aid, and that committee began providing modest support to local legal aid offices. By 1963, about 12 percent of the nation's legal aid budgets were provided by bar association contributions. DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 853–54 (4th ed. 2004). However, their "budgets amounted to less than two-tenths of one percent of the nation's total annual expenditures for legal services." *Id.* By 1963 there were approximately 250 legal aid offices with a combined budget of \$4 million annually. *Id.* President Lyndon Johnson's administration, and later Congress, provided public funding for the provision of free legal services for the poor with civil legal problems. *Id.* In 1965 President Johnson's Office of Economic Opportunity "began allocating the first federal funds for civil legal assistance programs" providing traditional legal services as well as "a focus on law reform . . . . The consequences were quickly apparent, as legal aid offices achieved significant victories on consumer, welfare, housing, health, and related issues." *Id.* In 1974 Congress established and began to fund the Legal Services Corporation. *Id.*

<sup>6</sup> Federal funding for protection and advocacy agencies serving persons with disabilities began in 1975 with the passage of the Developmental Disabilities Assistance and Bill of Rights Act. *See* 42 U.S.C. § 15001 (2000); 45 C.F.R. § 1386 (2005). This legislation "was prompted in part by reports of inhumane and horrific conditions at Willowbrook, a New York State institution for persons with developmental disabilities" and the recognition that this vulnerable population needed representation. Garry P. Gross, *The Protection and Advocacy System and Collaboration with Legal Services Programs*, <http://www.napas.org/aboutus/MIEarticleFinal301.htm> (last visited Aug. 29, 2006).

<sup>7</sup> The American Civil Liberties Union was the first such law reform organization, created during World War I to protect the First Amendment rights of pacifists and conscientious objectors. Nan Aron, *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond*, in *LAWYERS: A CRITICAL READER* 273–77 (Richard L. Abel ed., 1997). The NAACP (National Association for the Advancement of Colored Persons) Legal Defense Fund, established in 1939, worked hand-in-hand with the NAACP attacking racial segregation in courts and in the legislative arena. *Id.* The number of public interest law centers expanded from twenty-three in 1969 to 158 in 1984, then employing 906 attorneys and funded at \$105 million. *Id.*

poor in civil matters has suffered substantial cutbacks<sup>8</sup> and limitations since 1980. Federal funding for legal assistance to the poor in 2000 was only half what it was in 1980, and in 1996 Congress enacted stringent limits on how those depleted funds could be used. Many states responded<sup>9</sup> by developing comprehensive state plans to serve all segments of the poor in all forums; with the courts, lawmakers, bar associations, legal service agencies, law schools, and the public partnering in an ongoing planning process.

Although Utah has taken certain steps to enhance funding for legal service to the poor and to address pro bono volunteering,<sup>10</sup> our efforts have been limited by the lack of a comprehensive and ongoing plan. As Utah Supreme Court Chief Justice Christine Durham urged: “It is time to take these efforts to the next level, and to create a network of providers, stakeholders, lawmakers, community leaders, consumers, lawyers, and court leaders who can address the issue of access to justice on a statewide level.”<sup>11</sup>

This Article reviews the evidence that Utah’s poor have significant unmet legal needs and presents a snapshot of the current delivery system, including

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<sup>8</sup> President Ronald Reagan’s administration recommended abolishing the Legal Services Corporation but instead succeeded in getting “Congress to cut its funding from \$321 million to \$241 million.” Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1220 n.52, 1222 (2002).

<sup>9</sup> In the mid-1990s the Legal Services Corporation began to require each of its grantees to participate in such state planning efforts. RHODE & LUBAN, *supra* note 5, at 860.

<sup>10</sup> In August 1996 the Utah State Bar formed the Access to Justice Task Force pursuant to an order of the Utah Supreme Court and in light of reduced congressional funding for the Legal Services Corporation. See UTAH STATE BAR, ACCESS TO JUSTICE TASK FORCE, PRELIMINARY FINAL REPORT (1997) [hereinafter TASK FORCE REPORT]. Its purpose was to “review current legal services options for the poor in Utah, to explore new ideas for improving and expanding those services, and to make recommendations . . . to implement improved services.” *Id.* In 1997 the Task Force issued its report, making various recommendations including: a centralized intake unit and more effective utilization of technology by staff programs, enhanced private and public funding, various approaches to encourage pro bono volunteerism, education for individuals proceeding pro se, implementation of a reduced-fee program, and creation of a permanent access to justice board. *Id.* However, the task force was not charged with ongoing planning or monitoring. Since that report, staff programs providing free legal services have partnered with private bar leaders to establish “and Justice for all,” a private nonprofit corporation initially dedicated to increasing funding for civil legal services to the needy and now dedicated to the mission of increasing “access to civil legal services for the disadvantaged and for persons with disabilities in Utah.” “and Justice for all” History, <http://www.andjusticeforall.org/history.html> (last visited Aug. 29, 2006).

<sup>11</sup> Chief Justice Christine M. Durham, Utah Supreme Court, State of the Judiciary Address 12 (Jan. 19, 2004), available at <http://www.utcourts.gov/resources/reports/statejudiciary/state04.htm>.

sources and amounts of funding and services provided. It shows the poor have limited or no representation in a plethora of matters. It argues a state plan is needed to address all legal needs in some way and to provide representation to all categories of clients in all forums. A comprehensive state plan involving all stakeholders is needed so service providers can candidly share both what they are accomplishing and what they are unable to accomplish, so we can accept shared responsibility for the unmet needs. Without a comprehensive plan, our good efforts will be less efficient, less coordinated, and less publicized than is ideal. Moreover, unless stakeholders agree to coordinate this work, there will be no assurance our services are provided to the neediest segment of society rather than to the most “attractive” clients or issues.

## II. THE EVIDENCE THAT LEGAL NEEDS ARE *NOT* MET NATIONALLY

While our national concern during the 1960s and 1970s was providing civil legal services for the poor, today there are much wider concerns. The income of lawyers has risen at a greater rate than has inflation.<sup>12</sup> At the same time the difference between rich and poor has widened, with the poor and the middle class receiving a smaller share of our nation’s income over time.<sup>13</sup> Today, there is widespread concern about modest-income families gaining access to legal services when needed.

This appropriate concern for the middle class must not divert us from focusing on the needs of the least well-off. Contrary to what some believe, all available evidence suggests, even with free legal service agencies funded to serve them, the poor have more and greater unmet needs than do middle-income individuals. As we formulate approaches to meeting legal needs, we may be able to use some service delivery systems for both low- and moderate-income individuals

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<sup>12</sup> National data regarding salaries of law graduates has been collected since 1985 when the median starting salary was \$27,500 compared to the median starting salary of \$60,000 paid to the 2005 graduates. NAT’L ASS’N FOR LAW PLACEMENT, JOBS & J.D.’S: EMPLOYMENT AND SALARIES OF NEW LAW GRADUATES, CLASS OF 2005, at 18 (2005). Utah’s 2005 graduates had even higher median salaries—\$63,000—the eighth highest in the nation. *Id.* at 80. The 118 percent national increase in lawyers’ starting salaries contrasts with the consumer price index that shows only an 82 percent increase during the period from 1985 to 2005. *See* Federal Reserve Bank of Minneapolis, Consumer Price Index, 1913-, <http://www.minneapolisfed.org/Research/data/us/calc/hist1913.cfm> (last visited Dec. 11, 2006).

<sup>13</sup> From 1985 to 2004 the median U.S. household income increased only a small amount—from approximately \$39,000 to \$44,389. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 3 & fig.1 (2005), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf>. This 11 percent increase is far less than the 74 percent increase in the consumer price index during that period and miniscule when compared with the over 100 percent increase of lawyers’ starting salaries. *See supra* note 12.

and achieve efficiencies. However, an ongoing planning process is necessary to avoid developing programs that are only functional for the middle class who do not suffer from disadvantages (illiteracy, lack of education, foreign language, and depression) that disproportionately affect our poorest citizens.

A. *American Bar Association's Comprehensive Legal Needs Study*

The American Bar Association ("ABA") has been instrumental in studying and reporting on the legal needs of the poor and middle class.<sup>14</sup> The most complete survey of this sort, commonly known as The Comprehensive Legal Needs Study (hereinafter "CLN Study"), was published in 1994 and explored household legal problems during 1992.<sup>15</sup> The survey involved interviews with 3000 low- and moderate-income Americans<sup>16</sup> with these five objectives: (1) determine the type and number of situations in a household that raise legal issues, (2) learn how people deal with those situations, (3) discover what legal services are provided once needs reach the legal system, (4) assess the public's awareness of what legal services are available to them, and (5) learn the reactions of those who have encountered the civil justice system. The same questionnaire was used for both the low- and moderate-income households.

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<sup>14</sup> In the decade from 1983 to 1993 "at least one national and 13 statewide studies assessing the legal needs of the poor have been conducted. Of those studies reporting unmet legal need, there has been a consistent finding that only about 15%–20% of the legal needs of the poor are being addressed." Standing Comm. on Lawyers' Pub. Serv. Responsibility, ABA, Committee Report Supporting 1993 Amendment to Rule 6.1, *reprinted in* STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTE & STANDARDS* 31 (2006).

<sup>15</sup> INST. FOR SURVEY RESEARCH AT TEMPLE UNIV. FOR THE ABA CONSORTIUM ON LEGAL SERVS. & THE PUB., *FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 5* (1994) [hereinafter CLN STUDY]; *see also* CONSORTIUM ON LEGAL SERVS. & THE PUB., ABA, *LEGAL NEEDS AND CIVIL JUSTICE, A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY* (1994), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf> [hereinafter MAJOR FINDINGS].

<sup>16</sup> Low-income households were those that had a combined annual income of not more than 125 percent of the poverty level as designated by the federal government. This group accounts for almost 20 percent of all households, nationally. Moderate income households were those that had a combined annual income above 125 percent of the poverty threshold but below \$60,000. This group accounted for approximately 60 percent of all households. MAJOR FINDINGS, *supra* note 15, at 1. The income level of \$60,000 was and is above the national and the Utah median household incomes. U.S. CENSUS BUREAU, *supra* note 13, at 23 tbl.9; *see also* U.S. Census Bureau, *Income 2005*, <http://www.census.gov/hhes/www/income/income05/statemhi2.html> (last visited Dec. 11, 2006).

### 1. *The Needs*

The results of this national study were that “40% of all low-income . . . households had at least one new legal need” during the year and “47% of those households had one or more new or continuing” legal need at the time of the survey.<sup>17</sup> The average household with legal needs had 2.1 new needs each year and 2.3 total (new and continuing) legal needs annually.

When Utah’s Access to Justice Task Force was formed in 1996, and in the absence of any Utah-specific data, the task force relied on national data to estimate Utah’s needs.<sup>18</sup> The task force applied the national figures regarding legal needs of the poor to the Utah population and estimated “that in the early 1990’s there were about 37,720 households with new legal needs each year and more than 44,000 with a new or continuing legal need at any given time.”<sup>19</sup> Because households with legal needs typically have more than one need each year (2.1 new needs and 2.3 new and ongoing needs), the result would be that Utah’s poor faced over 70,000 legal problems each year.

### 2. *The Actions and Outcomes*

The CLN Study did not stop with cataloguing legal needs. It also inquired what action the households took to address their legal problems and how successful these actions were. The chart below shows the most formal action taken by poor and moderate income families facing a legal problem.

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<sup>17</sup> TASK FORCE REPORT, *supra* note 10, at 11. “[A]mong moderate-income households the figure was 52 percent” having one or more new or continuing legal needs. MAJOR FINDINGS, *supra* note 15, at 3.

<sup>18</sup> TASK FORCE REPORT, *supra* note 10, app. A, at 8–15. “Utah census data uses ‘persons’ rather than ‘households’” as used in the study and household income levels rather than the 125 percent of the federal poverty guidelines as used in the Study. However, by using census data about individual income and average family size, numbers for Utah can be estimated. The task force estimated 275,000 individuals (or 16.2 percent of the population) in Utah live below 125 percent of the poverty guidelines, or an estimate of 94,000 households (or 17.5 percent of 540,000 households) below 125 percent of the poverty threshold. *Id.* at 9.

<sup>19</sup> *Id.* at 11. At the time, there were 275,000 low-income Utahns. *Id.* at 9. Today, Utah Legal Services estimates that there are over 350,000 Utahns eligible for its services. Utah Legal Services, About Us, <http://www.andjusticeforall.org/uls/about.html> (last visited Aug. 29, 2006) [hereinafter ULS, About Us].

Most Formal Action Taken	Low Income Household	Moderate Income Household
Legal/Judicial Action	29%	39%
Non-Legal/Judicial Third Party	8%	12%
"On Own" Efforts	24%	23%
Did Nothing at All	38%	26%

Of the problems for which "legal/judicial action" was taken, 73 percent (poor) and 72 percent (moderate income) involved a lawyer's assistance.<sup>20</sup>

The authors of the CLN Study conclude:

One of the study's major findings jumps out . . . . Nearly three fourths of the legal needs of low-income households and nearly two thirds of legal needs of moderate-income households were *not* taken to the civil justice system . . . .

A collateral finding . . . is that *no action at all* is taken regarding more than one third of the legal needs of low-income households and about one quarter of needs of moderate-income households.<sup>21</sup>

Respondents were asked what their main reason was for not seeking legal help with their legal problems. The answers<sup>22</sup> differed somewhat for poor and moderate-income households:

Most Commonly Cited Reasons for Not Getting Legal Help	Low-Income	Moderate-Income
Didn't think it would help	20%	15%
Cost concerns	16%	8%
Not really a problem	10%	18%
Handled on one's own	7% (5th or 6th)	15%

This data indicates that the poor disproportionately were discouraged from handling their situations while the moderate-income households more often chose to handle the situation themselves. A related question probed why a respondent had taken no action in cases where that occurred. Here, too, the poor were most

<sup>20</sup> MAJOR FINDINGS, *supra* note 15, at 20.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> CLN STUDY, *supra* note 15, at 26.

often discouraged about being able to do anything, while the modest-income respondents found other solutions.<sup>23</sup>

Most Commonly Cited Reasons for Taking "No Action"	Low-Income	Moderate-Income
Thought nothing could be done	28%	17%
Turned to someone else to handle	21%	33%
Not a problem—just the way things are	12%	19%

The study also considered how satisfied the household was with the outcome of the legal problem.<sup>24</sup> Here, again, there were some differences, with low-income households being less satisfied:

Satisfaction with Outcome Based on All Legal Needs	Low-Income	Moderate-Income
Satisfied	38%	54%
Dissatisfied	53%	38%
Don't know	9%	8%

Households at all income levels were more satisfied with the outcome when they took steps<sup>25</sup> to solve the problem, and most satisfied when they had access to lawyers and/or courts:

Satisfied with Outcome Based on Action Taken	Low-Income	Moderate-Income
Legal/Judicial Action	48%	64%
Non-legal Third Party Assistance	46%	57%
"On Own" Efforts	36%	50%
Took No Action	29%	39%

This data dispels any notion that middle-income families are more harmed by the lack of access to the civil justice system.<sup>26</sup> Moderate-income individuals

<sup>23</sup> *Id.* at 25.

<sup>24</sup> MAJOR FINDINGS, *supra* note 15, at 17.

<sup>25</sup> CLN STUDY, *supra* note 15, at 32.

managed to access the justice system more frequently (39 percent) than did the poor (29 percent); they also appeared to be better able to handle matters on their own, considering their reasons for not taking action, and particularly given their higher rate of satisfaction when they went to third parties or handled the matter on their own. This data suggests that different service-delivery modalities may well be fashioned successfully for moderate-income families than for poor families, given the greater success the middle-income families experience in handling matters on their own.

The CLN Study sounds a warning that the needs of the poor should not be compromised in favor of programs thought beneficial to the middle class (who appear to have the ear of lawmakers and bar leaders). Innovations designed to meet middle-class needs may do little to address the needs of our poorest residents.<sup>27</sup>

### 3. Source of Legal Help

It is also useful to understand the circumstances under which families obtained the services of lawyers.<sup>28</sup> Among the poor, the majority (55 percent) were not (or did not expect to be) charged for the service, while only 38 percent of the moderate-income households expected no charge.

FEE STRUCTURE	LOW-INCOME	MODERATE-INCOME
Not charged (or don't expect to be) because	55%	38%
Free initial consultation	20	11
Eligible for legal aid	13	1
Pro bono work	3	6
Lawyer worked as a favor	1	5
Contingency fee and lost	5	3
Other	6	3
Don't know the reason	6	3

<sup>26</sup> It is not unusual to read or hear assertions that the middle-income family is in a “worse” situation than a poor family, since a poor family has access to free legal services. It is important to note this data does not support such an assertion—quite the opposite.

<sup>27</sup> A bar task force pursuing focus group research (see *infra* note 73) also “explored the concept of developing a web-based clearinghouse of information about legal services.” Debra Moore, *Utah State Bar Explores Delivery of Legal Services to Middle Class*, UTAH B.J., December 2002, at 10, 10. It would be important to know whether such a plan would address the legal needs of Utah’s neediest residents as well as the needs of the middle class.

<sup>28</sup> CLN STUDY, *supra* note 15, at 29.

Charged (or expect to be charged)	43%	59%
Usual fee	30	45
Reduced fee	8	8
Don't know if usual or reduced	6	6

It is interesting to note both the poor and moderate-income households most often avoided a fee by receiving a free initial consultation. The next most valuable resource for the poor was legal aid—presumably staffed programs such as those funded by the LSC. Interestingly, moderate-income households were twice as likely (6 percent compared to 3 percent) to receive pro bono services, and five times as likely (5 percent compared to 1 percent) to have a lawyer work as a favor. This, too, raises a question of whether the services made freely available are distributed to those with the greatest need. The small contribution made by pro bono counsel to the poor (only 3 percent of the 21 percent of the problems taken to a lawyer—or only 0.6 percent of the legal problems of the poor) is another reason commentators look to greater pro bono efforts to meet the legal needs of the poor.

#### *B. Legal Services Corporation Report on the Justice Gap*

The Legal Services Corporation (hereinafter “LSC”) was created by Congress in 1974 to provide legal assistance to those unable to afford legal counsel. In 1980 LSC conducted a study regarding the disparate levels of funding of its local programs throughout the nation and identified its initial goal as a “minimum level of access to legal aid”—which LSC defined as two attorneys for every 10,000 low-income residents—throughout the nation.<sup>29</sup> Congress heeded this advice and achieved that minimal level of funding in fiscal year 1981 with an appropriation of \$321,300,000. Today, LSC is funded at less than half that amount (adjusted for inflation)<sup>30</sup> suggesting that even “minimum access” may still elude our nation’s poor.

However, while federal funds have been cut, some new funding sources have developed since 1981 and non-LSC providers have been created. Accordingly, in 2004 LSC undertook a new study of the legal needs of the poor.<sup>31</sup> This study utilized three separate approaches—analyzing legal needs studies conducted by states, counting clients turned away from LSC-funded programs, and comparing

<sup>29</sup> LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 & n.1 (2005), available at <http://www.lsc.gov/JusticeGap.pdf> [hereinafter LSC REPORT].

<sup>30</sup> *Id.* at 2. The 1981 appropriation amount of \$321 million would be equivalent to \$687 million in 2005, which is more than twice the 2005 appropriation of \$330,803,705. *Id.* at 18.

<sup>31</sup> *Id.*

the number of legal aid attorneys serving the poor with the pool of lawyers in private practice.

Between 2000 and 2005 nine states conducted their own legal needs studies using survey methods based on the ABA CLN Study. All nine studies confirmed “the continuing validity of the ABA study” and “that, if anything, the ABA study actually *under-represents* the current level of need.”<sup>32</sup> All nine states found that fewer than 20 percent of legal problems faced by the poor are addressed with the assistance of a lawyer.<sup>33</sup> Several of the studies asked the respondents to describe the seriousness of the problems they recounted, and discovered that over half of the problems were “extremely important” and over 90 percent were “important,” dispelling the notion that these poor families did not seek help because the problems were inconsequential.<sup>34</sup>

For two months during spring 2005, all LSC programs collected data about potential clients who contacted them but were denied legal assistance. LSC discovered that for every client who received help, another potential client was turned away due to insufficient resources.<sup>35</sup> The annualized figures show LSC assisted approximately 901,067 clients and was unable to serve 1,085,838 potential clients who asked for help.<sup>36</sup>

These figures understate the legal needs because they do not include the many clients with problems who did not contact a legal services provider. Many potential clients do not know that free legal services are available; others know that the local program does not provide a particular type of service and thus will not waste their time trying to get that help.

The programs also counted how many clients they helped by providing only limited assistance (advice/counsel) where full representation would have been preferable. There were 76,000 of these “limited representation” cases<sup>37</sup> (or 456,000 annualized). When compared to the annual cases handled in 2004 (901,067),<sup>38</sup> this study also shows that of the clients who were helped, over half received only limited assistance (advice/counsel).

Finally, the LSC study counted the number of attorneys employed by LSC recipients (3845) and attorneys employed by other agencies serving the poor in civil matters (2736) for a total of 6581 lawyers serving the needy in 2002.<sup>39</sup> LSC then calculated the number of attorneys in private practice (765,000) and those

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<sup>32</sup> *Id.* at 9. The states were Oregon, Vermont, New Jersey, Connecticut, Massachusetts, Washington, Tennessee, Illinois, and Montana. *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.* at 5. This data about potential clients turned away did not include individuals who were financially or otherwise ineligible or whose cases had insufficient merit or who were referred to another program that was likely to represent them. *Id.*

<sup>36</sup> *Id.* at 7.

<sup>37</sup> *Id.* at 6 n.8.

<sup>38</sup> *Id.* at 7.

<sup>39</sup> *Id.* at 15.

private attorneys who worked in small firms representing ordinary individuals (536,000).<sup>40</sup> The availability of private attorneys to serve the U.S. population of 281,421,906 people was calculated to yield a ratio of one attorney for 525 people while the ratio of legal aid attorneys (6581 for 45,187,635 poor people) yields a ratio of one attorney for 6861 poor people.<sup>41</sup> The LSC report concludes that the difference between the level of resources available for the poor and the resources available for the general population “is enormous”—given there are thirteen times more resources for the general public than for the needy.<sup>42</sup>

The LSC report concludes that there is “a very serious shortage of civil legal assistance—an urgent justice gap—in the United States.”<sup>43</sup>

### *C. National Studies on Effectiveness of Brief Advice for the Poor*

As the LSC study indicated, many poor clients who receive assistance receive only advice or brief service.<sup>44</sup>

It is notoriously difficult to assess how effective legal service agencies are in serving their clients. All programs are understandably eager to publicize what they have accomplished and clients they have helped, and much less inclined to publicize the number of cases turned away or the clients who got “triage” services when they might have benefited from more. Moreover, few studies have been conducted to assess the quality of free legal services. A noteworthy exception is the recent Hotline Outcomes Assessment Study undertaken to determine whether using telephone lines to provide “brief legal advice and referrals” to low-income people was an effective approach to serving them.<sup>45</sup>

This national study found that about half the time this approach led to a successful outcome, and about half the time it did not.<sup>46</sup> Minority clients and clients with less education, language barriers, or no income were less likely to have satisfactory outcomes as were clients with barriers such as transportation problems, inflexible work or daycare schedules, or literacy problems.<sup>47</sup>

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<sup>40</sup> *Id.* at 15–16.

<sup>41</sup> *Id.* at 16.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 18.

<sup>44</sup> *Id.* at 6 n.8.

<sup>45</sup> JESSICA PEARSON & LANAE DAVIS, CTR. FOR POLICY RESEARCH, THE HOTLINE OUTCOMES ASSESSMENT STUDY—FINAL REPORT—PHASE III: FULL-SCALE TELEPHONE SURVEY 1 (2002), available at <http://www.nlada.org/DMS/Documents/1037903536.22/finalhlreport.pdf> [hereinafter HOTLINE REPORT]. The Hotline Report was commissioned by the Project for the Future of Equal Justice with funding by the Law and Society Program of the Open Society Institute.

<sup>46</sup> *Id.* at i.

<sup>47</sup> *Id.* at ii.

III. THE EVIDENCE THAT LEGAL NEEDS ARE *NOT* MET IN UTAHA. *Utah Legal Services Data*

The only statewide provider of free civil legal services for the poor in Utah is the LSC-funded Utah Legal Services, Inc. (hereinafter “ULS”). ULS is required by federal regulation to prioritize the services it provides.<sup>48</sup> ULS is also required to maintain certain records of requests for service, the nature of any services provided, and cases declined.<sup>49</sup> Their data show, much like all other legal services programs nationwide, that many people are turned away without any assistance and only a minority of eligible individuals receive full representation.

Consistent with the recent LSC study, ULS data show that in 2005 slightly fewer than half of those seeking representation (7240 of 15,180) were actually helped.<sup>50</sup>

Census figures from 2000 indicate that there were over 350,000 individuals in Utah eligible for free legal services from ULS.<sup>51</sup> ULS case data between 1999 and 2002 indicate that during each of these years ULS received over 18,000 requests for legal help.<sup>52</sup> In 2002 ULS was able to assist only 4500 of those seeking help (264 cases per attorney) and over 14,000 individuals (75 percent) were turned away.<sup>53</sup>

During these years (1999-2002) ULS provided only limited services (referral, advice only, or brief service) for 58–67 percent of the clients it helped. This is slightly better than the national level during that period. “Historically, more than two-thirds of the cases handled by [LSC]-funded legal services programs are for advice and counsel, referral, or brief service.”<sup>54</sup> In 2002, ULS provided more

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<sup>48</sup> 45 C.F.R. §§ 1600.1–1644.5 (2005); *see also* 45 C.F.R. §§ 1620–1620.7 (regarding priorities).

<sup>49</sup> As will be discussed *infra* Part IV, other staff programs that serve different disadvantaged groups maintain data unique to their missions, but not the same data sets as ULS.

<sup>50</sup> Interview with Ken Bresin, Deputy Dir., Utah Legal Servs., in Salt Lake City, Utah (Aug. 4, 2006).

<sup>51</sup> ULS, About Us, *supra* note 19; *see also* Utah Legal Services: Who Qualifies, <http://www.andjusticeforall.org/uls/who%20qualifies.html> (last visited Jan. 12, 2007) (stating ULS may serve persons living at 125 percent of the poverty level).

<sup>52</sup> Data on file with author and ULS.

<sup>53</sup> Data on file with author and ULS. While 2291 individuals were not helped because they were ineligible due to their income or assets, and 2772 were not represented because there was no contact after the initial call, 7458 (53 percent) of all callers were not helped because their legal problem was not a “priority.” Data were obtained from ULS data regarding case closings as provided to LSC for 1999 to 2002. The LSC record-keeping system has changed somewhat between 2002 and 2005, so the statistics from these two different periods are not validly comparable with one another. Interview with Ken Bresin, *supra* note 50.

<sup>54</sup> HOTLINE REPORT, *supra* note 45, at 1.

substantial representation (negotiation with or without litigation, agency decision, or court decision) for 35 percent of its clients, which was more comprehensive service than the national average of only 20 percent of clients who received the same level of substantial representation.<sup>55</sup>

The services that the Legal Aid Society of Salt Lake County provides also include brief advice for clients in a self-help clinic. During 2005–2006 Legal Aid assisted 8357 clients in domestic violence and domestic relations cases. Of these clients, 5286 (63 percent) received services in the Self Help Family Law Clinic.<sup>56</sup>

### *B. Low Number of Utah Staff Attorneys Serving the Poor*

The LSC study calculated the number of attorneys working in staff programs serving the needy and compared those numbers with attorneys in small private practices during 2002. A similar comparison can be made for Utah during that same year. Where LSC counted 6581 full-time “legal aid” attorneys nationally,<sup>57</sup> in Utah during 2002 there were only 25 full-time equivalent attorneys serving the poor.<sup>58</sup> The national figure of legal aid attorneys represents 0.63 percent of all active attorneys in the USA, but the Utah figure represents a substantially smaller share, only 0.47 percent of Utah’s attorneys.<sup>59</sup>

Today (in 2006) there are twenty-eight FTE staff attorneys serving the needy in Utah. The LSC study concluded that nationally there was one attorney for every 6861 poor persons<sup>60</sup>; in Utah the ratio is one to 12,500.<sup>61</sup> The LSC study set the “minimal level of access” at two attorneys for every 10,000 poor persons.<sup>62</sup> Given there are 350,000 poor persons in Utah today, there should be seventy attorneys, not twenty-eight, to achieve that “minimal access.”<sup>63</sup> Thus, if the number of legal

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<sup>55</sup> Legal Services Corporation, Welcome to Grantee/Program Profile, <http://www.rin.lsc.gov/scripts/LSC/grantpro/pgp1.asp> (last visited July 16, 2004).

<sup>56</sup> Interview with Stewart Ralphs, Dir., Legal Aid Soc’y of Salt Lake, in Salt Lake City, Utah (Aug. 4, 2006).

<sup>57</sup> LSC REPORT, *supra* note 29, at 16.

<sup>58</sup> Interview with Kai Wilson, Dir., “and Justice for all,” in Salt Lake City, Utah (Aug. 4, 2006) (confirming seventeen attorneys at ULS, four at Legal Aid Society, two at Holy Cross Ministries, one at Catholic Community Services and one at Multicultural Legal Center during 2002). Attorneys at the Disability Law Center are not included in this count since attorneys working for similar protection and advocacy agencies nationwide are not included in the national counts of attorneys working at “legal aid” programs serving the poor. *Id.*

<sup>59</sup> See ABA, NATIONAL LAWYER POPULATION BY STATE 3 (2004), available at <http://www.abanet.org/barserv/statebars2004.pdf>; see also LSC REPORT, *supra* note 29, at 16.

<sup>60</sup> LSC REPORT, *supra* note 29, at 16.

<sup>61</sup> See *supra* note 51 and accompanying text.

<sup>62</sup> LSC REPORT, *supra* note 29, at 1 n.1.

<sup>63</sup> See *id.*

aid attorneys available in our nation demonstrates a lack of resources for the poor, the figures for Utah raise even greater concerns.

*C. Utah Court Data Suggest Unmet Needs*

Utah's judiciary has noted the large number of litigants who appear pro se (self-represented) in cases ranging from divorces and evictions to debt collection matters.<sup>64</sup> Over the past four years almost no respondents were represented in landlord-tenant matters (96–97 percent unrepresented) or in debt collection cases (97 percent unrepresented).<sup>65</sup> While this lack of representation might be explained by the possibility that debtors and tenants who have no defenses fail to obtain counsel, the data on divorce cases suggest many people who would benefit from legal representation go without. The Administrative Office of the Courts reports that from 2002 to 2005 between 33 percent and 49 percent of petitioners and between 77 percent and 82 percent of respondents in divorce cases were unrepresented.<sup>66</sup> In the past two years almost half of all divorces had no attorneys appearing at all.<sup>67</sup>

Moreover, the number of cases with pro se parties is substantial: approximately 12,000 new divorce matters, 7000 landlord-tenant matters, and 56,000 debt-collection cases filed each of these years. In 2002, pro se issues were ranked as its most important long-range planning task by the Public Outreach Subcommittee of the Judicial Council's Education Committee.<sup>68</sup>

In 2005 the Utah Judicial Council created the Standing Committee on Resources for Self-Represented Parties to assess the "pro se needs within the courts and make recommendations . . . about how those needs might be addressed."<sup>69</sup> In its first year of operation the committee has employed a consultant to conduct a survey of and about self-represented parties and has begun to make recommendations to the judicial council.

Certain data discovered in the survey indicate the unmet legal needs of the pro se litigants. While 40 percent of unrepresented parties filing in district court thought their cases were "not complicated enough" for a lawyer, 33 percent of those filing papers and 50 percent appearing in court reported they could not afford an attorney. Most litigants had household incomes well below the median, with 60 percent of the households earning less than \$36,000 annually.<sup>70</sup> While these figures

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<sup>64</sup> Interview with Mary Boudreau, Program Manager, Pub. Access to the Courts, Utah Admin. Office of the Courts, in Salt Lake City, Utah (Aug. 24, 2006).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Letter from Chief Justice Christine Durham to the Standing Comm. on Res. for Self-Represented Parties (May 24, 2005) (on file with author) (giving the committee its charge).

<sup>70</sup> COMM. ON RES. FOR SELF-REPRESENTED PARTIES, STRATEGIC PLANNING INITIATIVE REPORT TO THE JUDICIAL COUNCIL 3–4 (2006), available at <http://www>.

do not dovetail with LSC data regarding the poor, they do paint a picture of litigants who are appearing pro se because they cannot afford the services of an attorney at market rates.

*D. Utah's Anecdotal Evidence of Unmet Needs*

Utah's legislative and judicial branches have also collected anecdotal and opinion evidence that legal needs of ordinary citizens are unmet. In 2001 the Utah Legislature made the following findings: "(a) there is significant unmet need for legal services within the state of Utah; (b) this unmet need for legal services is linked in part to the high cost of those services; (c) the unmet need for legal services adversely impacts the health, safety, and welfare of Utah citizens; . . . ."<sup>71</sup>

In response to these findings and in compliance with the legislature's request for study, a Utah Supreme Court Study Committee concluded:

While there seems little doubt that there does exist an unmet need for legal services among our citizens, the exact extent and nature of this need is not yet well defined by reliable data available to the Committee. Clearly, there are many who are required by the structure of our legal system to appear in our courts for criminal and civil matters who can neither afford nor are supplied with lawyers competent in the matters at issue . . . . While the Legislative finding of a significant unmet need for legal services may be correct, the scope, nature, and cause of the need are not yet clear, and would benefit from additional clarification prior to any meaningful attempt to satisfy such a need. Indeed, failing to correctly

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utcourts.gov/resources/reports (follow "Self Represented Litigants Strategic Plan 2006" hyperlink).

<sup>71</sup> Unauthorized Practice of Law Amendments, ch. 3, § 1(a)–(c), 2001 Utah Laws 2d Spec. Sess. (codified at UTAH CODE ANN. §§ 63-55b-17b, 78-9-101 (2001)). The Utah Legislature made further "findings" about non-attorney professionals, self-representation, and technology and requested the judiciary to study certain approaches to addressing the situation:

(2) The Legislature requests that the Judiciary study the following: (a) increasing the availability of standardized legal forms for use in filing legal matters; (b) increasing the use of technology to make legal services available to the public; and (c) allowing non-lawyers to provide charitable legal help; (d) allowing duly-authorized officers to represent their business entities; and (e) allowing independent lay professionals to perform certain functions now requiring an attorney.

*Id.* § 2(a)–(e).

diagnose the problem may result in efforts at solution that dramatically miss the mark.<sup>72</sup>

#### *E. Utah State Bar Data Suggest Unmet Needs*

The Utah State Bar commissioned a study of the public's perception of "their access to legal services."<sup>73</sup> An independent research firm conducted five focus groups of "average middle class Utahns" who did not have attorneys in their immediate families.<sup>74</sup> They discovered these "[s]trong, consistent themes . . . about the perceived barriers to obtaining legal services":

- Difficulty estimating the total out-of-pocket costs for a legal matter;
- Generalized distrust of lawyers;
- Reluctance to litigate;
- Lack of awareness of the preventive value of legal services;
- Not knowing how to select a lawyer despite a sense that plenty of lawyers are available;
- Lack of awareness of ADR and other alternatives;
- Uncertainty about the outcome of availing legal services; and
- Questionable value for the dollar as a result of few perceived tangible benefits<sup>75</sup>

This data suggests that there may be residents who could benefit from (and perhaps afford) legal services, but who do not even try to obtain legal representation given these attitudinal barriers.

While convincing Utah residents that lawyers can provide valuable services for an affordable price is certainly a legitimate goal, such a marketing campaign cannot solve the much more serious problem of poor persons who want legal representation but cannot find it. The Utah State Bar has yet to focus on this aspect of the problem.

#### *F. Utah's Legal Needs Survey*

During the past year ULS has conducted a survey of the legal needs of the poor throughout the state.<sup>76</sup> It was modeled on the ABA CLN Study and on other

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<sup>72</sup> REPORT TO THE UTAH SUPREME COURT OF THE SUPREME COURT STUDY COMMITTEE ON THE DELIVERY OF LEGAL SERVICES (Sept. 5, 2002), <http://www.utcourts.gov/resources/reports/Reportfinal2a.htm>.

<sup>73</sup> Moore, *supra* note 27, at 10. This study was motivated, in part, by the legislative finding that there were serious unmet legal needs. *See id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Interview with Anne Milne, Dir., Utah Legal Servs., in Salt Lake City, Utah (Aug. 4, 2006).

states' similar studies.<sup>77</sup> The results should be available during this year and provide useful information about the legal needs of the poor—including the nature of the legal problems the poor face, what they have done about their legal problems, how often they received legal representation, and how well their legal problems have been addressed.<sup>78</sup> Obviously the outcome of this survey should be of interest to many stakeholders in the legal community and among the poor and agencies who serve them. The sharing of these results should lead to planning and action.

### *G. Conclusions*

One important observation is that both ULS and the courts are leading out with attempts to assess the situation. Both will shortly be reporting the data they have collected during this past year. ULS will have data regarding the legal needs of the poor and the degree to which their legal problems have been addressed (inadequately or adequately). The courts' data will paint a comprehensive picture of pro se advocacy in the Utah courts—when it occurs and what the parties and the professionals think about this approach to justice.

The existence of these initiatives suggests that there should be a state plan and a state planning body with all stakeholders represented. In that way, all steps to analyze and react to this important information could be coordinated and efficiency and effectiveness maximized.

## IV. UTAH'S RESOURCES

While it is useful to understand the public's legal needs and attitudes toward legal representation, it is not necessary to begin comprehensive analysis with needs. It is equally important to fully understand the resources that are available to serve the public and meet its legal needs. This section presents the legal resources that are available to low- and moderate-income families in Utah.

The ultimate conclusion is that funding for free legal services for the poor has declined over the past twenty-five years and fewer low-income residents have access to full legal representation than in the past. Even without measuring the public's legal needs, this is strong evidence that greater coordination of existing resources is called for. Similarly, since federal funding for legal services has significantly declined as part of the trend to devolve social services to the states, there is an argument that state and local funding must be increased to deal with the shortfall. Finally, relying on comprehensive planning that has gone forward in

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<sup>77</sup> *Id.*

<sup>78</sup> Unfortunately the Utah State Bar did not partner with ULS to collect comparable data regarding moderate-income Utahns, despite the fact that the legal needs of moderate-income folks have been a concern of the Utah State Bar and the Utah Legislature in the recent past.

other states, Utah should consider a wider array of services to help households avoid legal difficulties and to resolve them efficiently and fairly.

In general, individuals with legal problems may benefit from one of the following approaches:

- Representation by a private attorney for a fee;
- Representation by a pro bono or volunteer attorney without a fee;
- Representation (with no or minimal fee) by a legal services program funded by governmental and charitable contributions;
- Representation by a law school clinical program;
- Representation by a court-appointed and state-paid attorney;
- Pro se (self representation) with advice, coaching, or drafting assistance from counsel;
- Unassisted pro se (self representation);
- Use of alternative methods for resolving disputes (e.g., mediation) for a fee or pro bono;
- Avoidance of legal problems through better education and training.

#### A. *Private Attorneys Working for a Fee*

Poor and middle-class clients look to private attorneys for many of their legal problems. Many low-income (43 percent) and most moderate-income (59 percent) respondents in the national legal needs study went to private lawyers expecting to be charged either the usual fee or, in a few cases (8 percent), a reduced fee.<sup>79</sup> Private attorneys also provide affordable services through free initial consultations, contingency fee cases, and pro bono cases, and as favors for family, friends and acquaintances.<sup>80</sup>

##### 1. *Current Programs*

The Utah State Bar has not compiled any statistics to show how well private, compensated attorneys meet the legal needs of the public. It is worth noting, however, that Utah has fewer lawyers per capita than the nation at large. There is one attorney for every 270 people in the United States but one Utah attorney for every 404 people in Utah; although Utahns represent 0.8 percent of the U.S. population, Utah attorneys represent only 0.5 percent of the attorney population.<sup>81</sup>

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<sup>79</sup> CLN STUDY, *supra* note 15, at 29.

<sup>80</sup> *Id.*

<sup>81</sup> The most recent ABA census data (for 2004) reports 1,084,504 active licensed attorneys in the nation and 5919 active licensed attorneys in Utah. *See* ABA, *supra* note 59, at 3. Census data indicates a national population in 2004 of 293,655,404 and a Utah population of 2,389,039. *See* POPULATION DIV., U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND STATES, AND FOR PUERTO

The Utah State Bar's qualitative study of the public's attitudes toward lawyers and the real or perceived barriers that might prevent the average citizen from seeking legal services suggested that many individuals who could benefit from legal representation decline to seek it for various reasons, including difficulty finding the right attorney, failure to appreciate preventative legal services, and the belief that legal help would be too expensive.<sup>82</sup> It is possible that many middle-income residents could be well served by private paid counsel if they had more information about how to find the right lawyer and some assurance about the value of those services at the outset (e.g., through a free initial consultation). The bar may have intended to make such information more available through its web site and new online referral system administered by Legal Match. The bar has not reported whether this approach has improved the general public's ability to find appropriate legal representation.

## 2. *New Ideas*

The Utah State Bar has not heretofore maintained a reduced-fee panel or program for low-income individuals who are not poor enough for free legal services, as some other communities have done.<sup>83</sup> A "Modest Means Panel is a facet of a lawyer referral and information service that is specially structured to improve the availability of lawyers to those of moderate income . . . the ABA Lawyer Referral Directory identifies approximately 90 such programs."<sup>84</sup> In addition to helping middle-class individuals find affordable representation, such a program might provide useful evidence of when moderate-income individuals seek (and how often they obtain) affordable reduced-fee representation.

Similarly, there is no program in Utah comparable to the "Civil Justice Network" existing in Maryland or the Community Legal Resource Networks supported by law schools in various other locales.<sup>85</sup> Maryland's Civil Justice, Inc., is a not-for-profit corporation formed for the purpose of increasing the delivery of legal services to clients with low and moderate incomes through a network of solo, small firm, and community-based lawyers who share a common commitment to

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RICO: APRIL 1, 2000 TO JULY 1, 2004 (2004), available at <http://www.census.gov/popest/states/tables/NST-EST2004-01.pdf>.

<sup>82</sup> See Moore, *supra* note 27, at 10; see also DAN JONES & ASSOCS., INC., QUALITATIVE RESEARCH ANALYSIS: FOCUS GROUPS OF MIDDLE-CLASS UTAH RESIDENTS 6-8 (2002).

<sup>83</sup> Such reduced-fee panels are suggested by the task force studying the legal needs of the middle class. See Moore, *supra* note 27, at 10-11.

<sup>84</sup> American Bar Association, Standing Committee on the Delivery of Legal Services, A Blueprint for Lawyer Referral and Information Service Modest Means Panels, <http://www.abanet.org/legalservices/delivery/blueprint1.html> (last visited July 30, 2003).

<sup>85</sup> For the research involving Maryland's Civil Justice Inc. and the Community Legal Resource Networks, I am indebted to my former student, John H. Brown, J.D. 2003.

increasing access to justice through traditional and non-traditional means.<sup>86</sup> It involves various solo practitioners, University of Maryland clinical faculty members, and local community organizations. The inclusion of network members affiliated with local community organizations, as well as private practitioners, helps bring neighborhood issues forward and serves as a source of client referrals to network members.<sup>87</sup> The specialty areas in which network members practice include consumer, wills and estate planning, family, real estate, personal injury, lemon law and auto fraud, products liability, worker's compensation, administrative law, elder law, and alternative dispute resolution. In addition, some members provide "unbundled" legal services, or limited legal services. Members meet once a month and share their experiences and receive substantive law presentations or practice tip discussions. Maryland's project services and resources include:

- Networking and peer technical assistance;
- Mentoring;
- Practice management assistance;
- Substantive law training;
- Access to a listserv;
- Reduced-price legal products and services;
- Client referral service;
- Marketing services and opportunities; and
- Mediation training.

In 1997, thanks to a grant from the Open Society Institute Program on Law & Society, various east coast law schools joined together to create the Law School Consortium Project.<sup>88</sup> The goal was to extend the educational and professionalism missions of law schools beyond graduation to provide training, mentoring, and other support to solo and small-firm lawyers. By helping this segment of the legal profession, the project sought to make quality legal services more widely available to low- and middle-income individuals and communities.

Given survey information that "half of all lawyers' time on individual clients is devoted to those with incomes in the top 15% of the population, and only 10% is

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<sup>86</sup> Civil Justice Homepage, <http://www.civiljusticenetwork.org/> (last visited Aug. 29, 2006).

<sup>87</sup> Beyond a general agreement with the mission of civil justice, there are few membership requirements. There are no quotas as to the number of under-served clients a lawyer must take nor is there a prescribed fee schedule. Whenever anyone contacts the program for a lawyer, the project director posts the query to the group. If a lawyer is interested in the case, he or she contacts the client and sets up a fee schedule. *See* Civil Justice, CJ Lawyer Referral Service, <http://www.civiljusticenetwork.org/pages/cjdirectory.php?showareas=true> (last visited Jan. 12, 2007).

<sup>88</sup> *See* Law School Consortium Project, About Us, <http://www.lawschoolconsortium.net/about/index.html> (last visited Aug. 29, 2006).

devoted to those in the bottom third,”<sup>89</sup> there may be strong arguments in favor of funding reduced-fee referral systems and other programs that assist solo and small office practitioners who aim to provide competent legal services to the middle class.

### 3. Critique

Naturally the Utah State Bar is concerned about the public’s perception of lawyers and with encouraging more paying clients to retain lawyers when it is sensible and affordable for them to do so. However, state bar support for market-driven referral systems is not enough. There are strong policy reasons why the bar should do more to assist the needy—both the poor and the near-poor who could pay only reduced rates—and the lawyers willing to provide services to them.

#### *B. Private Attorneys Serving Pro Bono*

The Utah State Bar, certain bar sections, ULS, and various other entities sponsor various pro bono programs. Each of these programs maintains some sort of records about its services. In addition, the state bar queries each attorney annually about her pro bono work and analyzes the responses provided. However, the sparse and varied records that are available do not make clear the nature or amount of the pro bono work accomplished or for whom. The most consistent fact about pro bono programs in Utah is that they are in constant flux. The other consistent generalization is that most organized pro bono work is brief advice rather than full representation.

#### *1. Pro Bono Programs Providing Full Representation*

In 1996 the Utah State Bar established its Pro Bono Program to recruit attorneys and to refer cases to them for full representation.<sup>90</sup> This program was initially headed by an attorney and later by a former ULS paralegal. It maintained a database of lawyers willing to accept cases, noting the areas of law each would handle, languages spoken, and location. In 2004 the Bar’s pro bono data showed 1000 volunteer lawyers on that list.<sup>91</sup> This program regularly received referrals from ULS regarding cases they had rejected due to conflicts of interest, client ineligibility, disallowed service, and problems outside ULS priorities. Referrals also came from other staff programs, the courts, and state agencies such as adult protective services. A related endeavor operated by the bar’s Pro Bono Program

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<sup>89</sup> RHODE & LUBAN, *supra* note 5, at 736–37 (citing LEGAL ETHICS 736–37 (Deborah L. Rhode & David Luban eds., 3d ed. 1995)).

<sup>90</sup> Charles R.B. Stewart, *Utah State Bar Pro Bono Program*, UTAH B.J., May 2004, at 14, 14.

<sup>91</sup> *Id.*

was initiated when our military forces were mobilized after 9/11 to provide representation to members of the military in matters arising because of their service. Of the 1000 volunteers, 155 individuals and eight law firms volunteered for this armed forces pro bono work.<sup>92</sup> During 2001 the bar's Pro Bono Program placed 216 cases with volunteer attorneys for full representation. During 2003 this program placed 160 cases with volunteer attorneys.<sup>93</sup>

In fall 2004, staffing for the bar's Pro Bono Program changed and during that year the bar altered its operation to focus primarily on the "recruit, retain and reward" aspects of the program.<sup>94</sup> The bar provided ULS with its database of volunteers and ULS undertook the task of placing pro bono cases with individual attorneys willing to provide full representation. The bar continued to place a limited number of cases, including habeas corpus cases referred by the judiciary and pro bono cases for members of the military.

ULS has employed a lawyer-coordinator for "private attorney involvement" for many years given LSC requirements that 12.5 percent of its funds be expended to support private attorney involvement. While these ULS funds are used in a variety of ways, including screening cases for pro bono attorneys and providing education and training for them, since 2004 these funds are increasingly needed to "place" pro bono cases with the private bar. However, because ULS's record-keeping system differs from that used by the bar, comparable data is not available.

During 2005 the Utah State Bar and ULS sought and underwent an ABA Pro Bono Program Peer Review involving national experts analyzing pro bono activities in Utah. The peer consulting team interviewed various "staff, leaders and volunteers of ULS and the USB" during February 2005 and provided its report during fall 2005.<sup>95</sup> While space does not permit a comprehensive account of the findings and recommendations, one clear theme was the need for improved collaboration, including ULS looking to the state bar for more assistance and the creation of a pro bono committee.

The incoming president of the bar, Augustus Chin, indicates that during fall 2006 he hopes to form an ad hoc pro bono review committee to gather current data and make recommendations to the bar commissioners.<sup>96</sup>

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<sup>92</sup> Memorandum from Ilona Kase, Utah State Bar Staff, to Debra Moore, Utah State Bar President (Aug. 10, 2003) (on file with author).

<sup>93</sup> Data provided by Charles R.B. Stewart, Coordinator, Utah State Bar Pro Bono in Salt Lake City, Utah (May 2004).

<sup>94</sup> UTAH STATE BAR, PRO BONO PROGRAM REPORT 1 (2005).

<sup>95</sup> CTR. FOR PRO BONO, ABA, REPORT OF PEER CONSULTING TEAM 1 (2005) (on file with author) [hereinafter PEER CONSULTING REPORT].

<sup>96</sup> E-mail from Augustus Chin, President, Utah State Bar, to Linda Smith, Professor of Law, S.J. Quinney College of Law (Aug. 9, 2006) (on file with author).

## 2. *Brief Advice and Pro Se Clinics*

There are a number of free legal clinics staffed by private attorneys<sup>97</sup> where individuals can obtain brief legal advice, but rarely ongoing representation. The frequency and number of persons consulted during these clinics<sup>98</sup> include:

Clinic	Supported by/At	Consultations/Frequency
Tuesday Night Bar	Young Lawyers' Section-SLC	Weekly—2000 clients annually
Tuesday Night Bar	Park City	1 time per month
Tuesday Night Bar	Your Community in Unity in Brigham City	2 times per month
Tuesday Night Bar	Your Community in Unity In Ogden (Weber Co. Bar)	2 times per month
Tuesday Night Bar	Central Utah Bar in Provo	1 time per month
Tuesday Night Bar	Central Utah Bar in Orem	1 time per month
Mt. View Legal Clinic	Christian Legal Society-Layton	2 times per month for 6 clients each session
Community Law Help for Immigrants	Centro Hispano in Provo and BYU students	Weekly
Talk to a Lawyer	Snow Jensen & Reese in St. George	1 time per month
Street Law—Guadalupe	Salt Lake City	Weekly
Street Law—St. Vincent's	Salt Lake City	Weekly
Street Law—Viaduct	Salt Lake City	Weekly
Clinic for Deaf	Community Center for Deaf	1 time per month

<sup>97</sup> ULS assists in staffing some of these clinics and offers similar free clinics for income-eligible clients on twenty-nine separate dates throughout the state. *See* Utah Courts Website, Legal Clinics, Agencies & Organizations, <http://www.utcourts.gov/howto/legalclinics/> (last visited Aug. 29, 2006). ULS clinics are discussed together with the services of legal service programs. *See infra* Part IV.B.2.

<sup>98</sup> Utah Courts Website, Finding Legal Help, <http://www.utcourts.gov/howto/legalassist/> (last visited Oct. 3, 2006). Attendance figures taken from TantaLisa Clayton, *Needs of Elderly Committee Pro Bono Project*, UTAH B.J., May 2004, at 36, 36; Stewart, *supra* note 90, at 14; and Utah State Bar Website, Public Services, Tuesday Night Bar, [http://www.utahbar.org/public/tuesday\\_night\\_bar.html](http://www.utahbar.org/public/tuesday_night_bar.html) (last visited Aug. 29, 2006).

Family Law Clinic	SLC—Family Law Section, U of U Pro Bono, ULS & LAS	2 times per month
Senior Center Consultations	Needs of the Elderly Committee >19 sites per month	684 annually

Some programs have been operating for years, others for a much shorter period, and others no longer exist. All ongoing programs have some infrastructure but a few are heavily dependent on the goodwill of one individual. The Tuesday Night Bar program began in 1985 and is staffed by the Young Lawyers' Section, which relies on Utah State Bar staff for scheduling appointments a week in advance. The senior center consultations have been ongoing for the past ten years and rely on the bar's Needs of the Elderly Committee as well as part-time bar staff. The weekly Street Law program (with current sites at Guadalupe School, St. Vincent de Paul Center, and the 400 South viaduct) was initiated by the S.J. Quinney College of Law at the University of Utah ("U of U College of Law") in conjunction with ULS as the Shelter and Support Project to serve the homeless. After LSC funding for that project ended, ULS continued certain sites. Today the sites are staffed by volunteer attorneys<sup>99</sup> and occasional law student assistants. They receive little or no administrative assistance from the bar or ULS. The newest program—the Family Law Clinic—is a public-private partnership of ULS, Legal Aid Society of Salt Lake (LAS), the Family Law Section, and the U of U College of Law Pro Bono Initiative. It operates twice each month, carrying on the work of Wayne's Clinic—the mission of one man—which no longer operates.<sup>100</sup> Most of these pro se programs maintain minimal if any records, making it impossible to gauge the need and how well it is satisfied.

Most of these programs are open to any individual irrespective of income. A few—street law sites at St. Vincent's and under the viaduct—focus on helping the poor, since they are set up at soup kitchens that feed the needy. Similarly, the work of the Needs of Elderly Committee probably serves mostly low-income seniors utilizing the senior centers of senior housing. However, there is no assurance that the largest bar-sponsored program, the Tuesday Night Bar, is serving the poor rather than the middle-class who would prefer not to hire a lawyer.

### 3. Data Reported on License Renewal Forms

The Utah State Bar does poll its members regarding their pro bono work each year. The bar reported that in the July 2003 licensing forms, 1615 attorneys (21

<sup>99</sup> The St. Vincent de Paul Center is staffed by one attorney—Jay Kessler. The viaduct site is staffed by three lawyers—Jensie Anderson and two lawyers from Salt Lake Legal Defenders, Shannon Romero and Patrick Corum.

<sup>100</sup> Wayne Riches, a former ULS attorney, provided brief advice to pro se litigants three evenings each week. See Wayne Riches, *Creating Access to Justice: Moving Toward Success—A View from the Trenches*, UTAH B.J., May 2004, at 4, 7.

percent of the bar) “reported performing a total of 88,125 hours of pro bono work” during the prior year.<sup>101</sup> The reporting lawyers averaged 55 hours of work each (giving the bar as a whole, then with 5368 active members, an average of 16 hours of work each). This appears to represent a substantial resource—forty-four full-time equivalent (FTE) lawyers. When one compares this FTE to then twenty-five staff attorneys working in legal service agencies (see above), it underscores how significant a resource pro bono lawyers should be.<sup>102</sup>

However, here as well, there is no assurance that these pro bono services have been focused on the neediest clients. As part of its annual dues form, the Utah State Bar inquires:<sup>103</sup>

- C. Each lawyer is urged to voluntarily report whether the lawyer has annually satisfied his or her professional responsibility to provide pro bono legal services.
  - (1) I have personally provided \_\_\_hours of pro bono legal services during this past reporting year.
  - (2) I have contributed \$\_\_\_\_\_. (Only contributions to organizations which provide direct services as defines in section (b) of Rule 6.1 should be reported)
- D. I am willing to accept a pro bono referral from the bar in the following practice areas: \_\_\_\_\_

While a scholar of the Rules of Professional Conduct might realize that satisfying the “professional responsibility to provide pro bono legal services”<sup>104</sup> would mean that the majority of such services had been provided to poor persons (or to agencies serving the poor), there is nothing in the licensing form that focuses

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<sup>101</sup> Debra Moore, *Utah State Bar Members Give \$8.9 Million to Legal Services for the Poor*, UTAH B.J., October 2003, at 6, 6.

<sup>102</sup> Moreover, if all the members of the bar would donate this level of pro bono work the result would be quintupled to 220 FTE lawyers, dwarfing the contributions of the staff attorneys working full-time at legal service agencies.

<sup>103</sup> The Utah State Bar includes this inquiry as part of the annual dues form, in accordance with the Utah Rules of Professional Conduct which state: “Each lawyer is urged to report annually to the Utah State Bar whether the lawyer has satisfied the lawyer’s professional responsibility to provide pro bono legal services. Each lawyer may report this information through a simplified reporting form that is made a part of the Bar’s annual dues statement.” UTAH RULES OF PROF’L CONDUCT R. 6.1(d) (2005).

<sup>104</sup> *Id.* at R. 6.1 (“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to: (a)(1) persons of limited means or (a)(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means.”); *see also* MODEL RULES OF PROF’L CONDUCT R. 6.1 (2002) (advocating similar service).

the lawyer's attention on this requirement. In teaching the professional ethics class (entitled "Legal Profession"), I find that many students fail to grasp that the rule places the emphasis on service to the needy. Similarly, the ABA Peer Consulting Team noted there did not seem to be "a clearly communicated or agreed upon definition of pro bono" such that some lawyers count cases where clients failed to pay and other lawyers count mediation services performed for the LDS church—even though the recipients of these services "may not be persons of limited means."<sup>105</sup>

Most attorneys completing the bar's reporting form probably include any legal service provided for free to any individual or group as well as other public service such as bar committee work.<sup>106</sup> Indeed, if the lawyer does not include all her hours of public service in this response, these hours are not recorded anywhere. The result is that some (21 percent) attorneys report a number of hours spent without expectation of pay; but there is absolutely no assurance the majority of these resources were focused on serving the neediest clients and no data is collected about how many hours went to serving the poor.

#### 4. *Private Attorney Involvement with ULS*

The primary provider of civil legal aid, ULS, is required by federal law to devote 12.5 percent of its LSC grant to "private attorney involvement," which can include contracting with private bar members to represent clients in (usually rural) areas, operating an in-house pro bono program, or working with an external pro bono program (providing screening, referrals, and training).<sup>107</sup> In 2002, the ABA Center for Pro Bono commissioned a study that examined how reconfiguration in legal services programs had affected pro bono. Based on the findings of this study, it is recommended both legal services and bar staff in charge of pro bono be high level management staff:

A strong statewide model would combine high-level leadership and support for pro bono with local-level authority and responsibility . . . [H]igh level [deputy director level] program support could be coupled with a strong pro bono person on the staff at the state bar association to help keep the bar focused on pro bono, provide support for any independent pro bono programs that may exist, and, depending on the

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<sup>105</sup> PEER CONSULTING REPORT, *supra* note 95, at 5.

<sup>106</sup> The rule distinguishes between services for the poor (which should be the majority of one's pro bono commitment) and "provid[ing] any additional services" to "charitable, religious, civic, community, governmental and educational organizations" at no or a reduced fee or "participation in activities for improving the law, the legal system or the legal profession." UTAH RULES OF PROF'L CONDUCT R. 6.1(b).

<sup>107</sup> See MEREDITH MCBURNEY, ABA CTR. FOR PRO BONO, THE IMPACT OF LEGAL SERVICES PROGRAM RECONFIGURATION ON PRO BONO 1–3 (2003), available at [http://www.abanet.org/legalservices/probono/impact\\_reconfiguration.pdf](http://www.abanet.org/legalservices/probono/impact_reconfiguration.pdf).

model, may be the person in the state who handles some pro bono services, such as recruitment and recognition. With management level people at the statewide legal services program and the state bar, there is a potential for regular collaboration and cooperation.<sup>108</sup>

Well before 1996 ULS had decided to assign a lawyer to oversee its pro bono program and has increasingly assigned experienced lawyers to this task. One full-time experienced lawyer is devoted solely to pro bono and the deputy director also has this task as part of his portfolio.<sup>109</sup> Unfortunately, the same cannot be said of the Utah State Bar's Pro Bono Program which has been the responsibility of a para-professional and often a staff person with other responsibilities as well. The ABA Peer Consulting Team Report recommended:

The USB needs to commit at least one full time position to carry out its responsibilities in establishing a strong pro bono presence in the state. This person should be 100% dedicated to this effort and not be split between multiple responsibilities. Additional support staff may be required to assist with the administrative functions required . . . .<sup>110</sup>

A strong centralized bar program led by an experienced lawyer may be necessary to effectively leverage the important resource of pro bono attorney volunteers. Such experienced attorney leadership at the bar may be necessary to begin to gather the data needed to assess the various brief advice programs, to explore whether private attorneys' preferences for pro bono "advice only" consultations could be coordinated with ULS's approach to providing such advice through a telephone intake system, to increase the involvement of inactive attorneys (approximately 25 percent of the bar) in pro bono work,<sup>111</sup> and to

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<sup>108</sup> *Id.* at 4.

<sup>109</sup> Interview with Anne Milne, *supra* note 76.

<sup>110</sup> PEER CONSULTING REPORT, *supra* note 95, at 12.

<sup>111</sup> The current rule permits an inactive attorney to work on pro bono cases, provided she is affiliated with a staff program and supervised by a staff program attorney who must sign any pleadings and approve any advice. UTAH SUP. CT. RULES OF PROF'L PRACTICE R. 14-803 (2006). This level of oversight—tantamount to treating the inactive lawyer as a paraprofessional—is administratively burdensome and may often be irrational. The only difference between supervising such an inactive lawyer and supervising a third-year law student is that the supervisor must be present when the law student appears in most court hearings and the supervisor need only give written approval for the inactive lawyer to appear in court or in an agency hearing. *Cf.*, UTAH SUP. CT. RULES OF PROF'L PRACTICE R. 11-301 (stating requirements for third-year student participation). Indeed, few inactive attorneys have gone through this process to serve in this manner. *See* Interview with Ken Bresin, *supra* note 50; Interview with Anne Milne, *supra* note 76; Interview with Fraser Nelson, Dir., Disability Law Ctr., in Salt Lake City, Utah (Aug. 7, 2006); Interview with

effectively refer contested and impact cases to private attorneys. Indeed, an experienced lawyer not employed by ULS must be available to develop and support matters that ULS is prohibited from handling, because ULS is likewise prohibited from doing so.<sup>112</sup> Establishing a state plan and planning body should increase the chances that a vibrant pro bono program will be sustained over time.

### 5. *Survey Results*

In understanding the private bar as a pro bono resource, it is useful to reference the survey my students conducted in 1996 with lawyers who had then volunteered with the Utah State Bar Pro Bono Program.<sup>113</sup> While some might object that this survey, ten years old, is dated, a comparison of its findings with the programs that have been developed shows how accurately the survey predicted what has occurred in the intervening years.

We developed this survey in order to assess the kind and amount of untapped pro bono resources available in Utah, since there were 1275 Utah attorneys who had registered with the Utah State Bar Pro Bono Program and expressed their willingness to accept additional pro bono work. Of the 1225 attorneys contacted, 313 completed and returned the survey.<sup>114</sup>

In developing our survey, we sought to address the following issues: (1) What types of cases (legal subject matter) are these volunteer lawyers willing to take? (2) Would the volunteer lawyers need training or consultation to be competent in certain areas? (3) How much time would volunteers be able to devote to this pro bono work? (4) What range of legal services would the volunteer lawyers render—from giving brief advice alone, to representing a client in an uncontested matter, to representing in a hotly contested case, to representing in a complex (class action or appeal) case? (5) What support do these volunteers have from their firms to engage in pro bono work? Might new firm contributions be forthcoming? We also imagined that some or all of these attorneys were already engaged in pro bono

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Stewart Ralphs, *supra* note 56. In my view this is strong proof that this policy is not meeting its intended purpose.

<sup>112</sup> See discussion *infra* Part VI.B.

<sup>113</sup> The survey (hereinafter “1996 Survey”) was conducted by Melinda Silk, J.D. 1998 and Terry Silk, J.D. 1998 as students in my legal profession class. An article reporting and analyzing these results was published by the author, see Smith, *supra* note 1, and the following report is published here with permission.

<sup>114</sup> *Id.* at 452–53. This is approximately a 25 percent rate of return. Higher return rates are generally desired in social science studies. However, we imagine the most motivated volunteers and/or the volunteers with the most available time would be the ones who chose to respond. Those not responding would be unlikely to have either a greater willingness or availability to undertake pro bono work. Thus, these results are at most representative of the average willing volunteer. However, relying on these raw numbers alone would be unduly pessimistic regarding the total available pro bono resources within the bar.

efforts. Accordingly, we decided to ask about their current level of pro bono efforts.

We utilized the categories of legal problems relied on by the CLN Study to study what areas of law the pro bono bar “would be willing” to address. We sought to compare the areas of need with the areas in which pro bono volunteers were willing to work. The survey form described each area of concern and asked the lawyer to respond by indicating “yes” he would be willing to work in that area, “no” he would not be willing, or “maybe.” In many instances the respondent only answered by marking “yes” when it was an area of availability. The “maybe” responses, designed to gauge flexibility, were given in only 2 to 8 percent of the cases. Hence it is most useful to study the “yes” responses.

In addition to areas of law, we also asked about willingness to participate in “general intake screening” with the result that 118 attorneys (or 38 percent of those surveyed) were willing to do this.

What is clear from the results is that the availability of these lawyers for pro bono work varied widely from one area of law to the next. The largest number of respondents (50 percent) were willing to undertake work in the areas of wills/estates<sup>115</sup> and family/domestic.<sup>116</sup> The area of next largest number of volunteers (45 percent) was work for seniors/disabled.<sup>117</sup> The willingness to accept cases in these areas may relate to the fact there had been pro bono programs underway in each of these areas. The involved pro bono lawyers may have become comfortable working on these problems. It may also be that family law and wills and estates are areas of law with which many private lawyers are familiar through their own practices.

Substantial numbers of volunteers indicated they would be available for small business/farm cases (39 percent), housing/real property<sup>118</sup> (36 percent), and personal finance<sup>119</sup> (30 percent). This availability probably relates to the fact that these areas of law were familiar to the volunteers.

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<sup>115</sup> 1996 Survey, *supra* note 113 (describing “Wills/Estates” as “[i]ncluding, for example, drafting simple wills, estate administration, counseling regarding advance directives”).

<sup>116</sup> 1996 Survey, *supra* note 113, (describing “Family/Domestic” as “[i]ncluding, for example, divorces, child custody and visitation, domestic violence”).

<sup>117</sup> 1996 Survey, *supra* note 113 (describing “Seniors/Disabled” to include “[g]uardianship, exploitation, abuse, wills & estates, power of attorney”).

<sup>118</sup> 1996 Survey, *supra* note 113 (describing “Housing/Real Property” as “[i]ncluding for example, eviction, unsafe rental housing, housing discrimination, mobile home park problems and possession bonds”).

<sup>119</sup> 1996 Survey, *supra* note 113 (describing “Personal Finances/Consumer” as “[i]ncluding, for example, problems with creditors or debt collection, bankruptcy, consumer fraud”).

Of some concern was the sparse number of volunteers willing to work in areas of law the poor frequently face, including particularly health/health care<sup>120</sup> (13 percent), public benefits<sup>121</sup> (14 percent), and community/regional problems<sup>122</sup> (10 percent). The fewest number of volunteers (9 percent) were available for legal problems of “immigrants,”<sup>123</sup> “military/veterans,”<sup>124</sup> and vocational training/disability.<sup>125</sup> The lack of volunteers in these areas renders the private bar less valuable as a resource to the neediest clients. This situation appears to be unchanged, as the ABA Consulting Team recommended “a coordinated training strategy to build a pro bono panel equipped to handle cases in areas of high client demand.”<sup>126</sup>

Respondents were asked whether they would need “training or consultation to be competent in any of the . . . area(s)” listed. The responses were:

Need Training/Consultation?	Number	Percentage
Yes, in All	13	4%
Yes, in Some	169	55%
No, I would not need training/consulting	111	35%
No Response	20	6%

Thus, the majority of volunteers identified themselves as needing some training in order to be effective as pro bono attorneys.<sup>127</sup> While a substantial percentage of volunteers identified themselves as needing some additional training or consultation, the suggestion of training or consultation did not have the effect of causing these respondents to say “yes” in large numbers to working in any or all areas of need.

<sup>120</sup> 1996 Survey, *supra* note 113, (describing “Health/Health Care” as “[i]ncluding, for example, barriers to health care, problems with charges/payments, patients rights”).

<sup>121</sup> 1996 Survey, *supra* note 113 (describing “Public Benefits Problems” as “[i]ncluding, for example, problems with welfare to Families with Dependent Children, Food Stamps, Supplemental Security Income for the Disabled”).

<sup>122</sup> 1996 Survey, *supra* note 113 (describing “Community/Regional” as “[i]ncluding, for example, inadequate policing of municipal services, environmental health hazards”).

<sup>123</sup> 1996 Survey, *supra* note 113 (describing “Immigrants” as “[i]ncluding immigration problems, exploitation, benefits for legal residents”).

<sup>124</sup> 1996 Survey, *supra* note 113 (describing “Military/Veterans Needs” as “[i]ncluding veterans benefits problems”).

<sup>125</sup> 1996 Survey, *supra* note 113 (describing “Voc. Training/Disability” as “[i]ncluding access to vocation training for disabled individuals”).

<sup>126</sup> PEER CONSULTING REPORT, *supra* note 95, at 6.

<sup>127</sup> Unfortunately the questions were not phrased so as to distinguish in which areas training was needed and how that related to the willingness to volunteer.

The Comprehensive Legal Needs Study concluded that 12 percent of the legal problems faced by poor households “resulted in the involvement of a court or administrative hearing body”<sup>128</sup> with family/domestic needs most often (31 percent) going to a hearing. When poor persons involved the legal/judicial system, they were satisfied with the outcome 48 percent of the time. When they relied on their own efforts or took no action, their satisfaction was substantially lower—36 percent and 29 percent respectively.

Accordingly, we sought to assess the nature of the legal tasks the pro bono volunteers would be willing to undertake. The question and responses were as follows:

What legal work would you be willing to do?	Yes	Maybe
Give brief advice about a legal problem	91%	3%
Representation on uncontested cases (e.g., uncontested divorce, will)	71%	12%
Representation in hotly contested matters (e.g., contested child custody)	13%	24%
Representation in a complex case (e.g., civil rights, class action, appeal)	9%	23%

Not surprisingly, the willingness of these volunteers was highest in the least involved cases and decreased as the work became more complex or time-consuming. The large number of volunteers interested in giving brief advice is very consistent with the current array of brief advice pro bono programs or pro se clinics in operation. Unfortunately, the much smaller number of attorneys willing to handle hotly contested matters is also consistent with the small number (160 in 2003) of cases placed with these volunteers by the Utah State Bar Pro Bono Program.

Given that achieving satisfactory solutions to the legal problems of the poor often involves court action, it is disheartening that only 13 percent of these volunteers were willing to accept “hotly contested matters.” However, the percentage of attorneys who *might* be willing to undertake contested (24 percent) or even complex matters (23 percent) was substantial. This is much greater flexibility than indicated in the responses regarding particular areas of law (2 to 9 percent “maybe” to all areas of law). These “maybe” responses suggest that there may be some flexibility within the pro bono bar to expend more effort if the right case or the right cause was presented.

The largest group of respondents indicated an interest in volunteering between five and ten new hours per year, and only five expected to volunteer fifty or more new hours, so the total new hours possibly available was between 3400 and 7000. Their willingness to volunteer new hours was no doubt affected by the fact that most (82 percent) were already engaged in pro bono work, with 54 percent

<sup>128</sup> CLN STUDY, *supra* note 15, at 29.

contributing fewer than fifty hours per year and 46 percent contributing fifty or more hours per year.

Of the 257 attorneys reporting ongoing pro bono commitments, 188 listed one or more particular areas of law, with a few respondents listing as many as four areas of law. After categorizing these areas to be consistent with the legal needs categories,<sup>129</sup> it was clear future volunteer willingness comported closely with then-existing pro bono efforts. Family law and wills/estates were both ongoing foci of pro bono efforts and areas of willing future volunteerism. Housing and personal finance were (and are) similarly high needs, involved substantial volunteers, and were seen as attractive to substantial groups of future volunteers. Although health law and public benefits law are almost equivalent to Wills/Estates in terms of the incidence of the problems, few attorneys were engaged in these cases and few attorneys were willing to take on cases in these areas.

In addition to the areas that can be categorized as legal needs of the poor, respondents listed other public service activities that probably cannot be so categorized (small claims judge, public service, minority affairs, tax exempt organizations, and professional malpractice).

The listing of these public service activities raises another definitional problem the survey did not address. The survey asked about “pro bono work” without limiting that definition to service for the poor. Like the state bar’s dues reporting data, it is impossible to know from our survey results what percentage of the current level of volunteer efforts are (or the intended volunteer efforts will be) directed to serving the poor. However, it is very likely some of the responses (“small claims court judge, small business, environmental, non-profit corporation, estate planning, tax planning, community service, public service, land use, civil rights”) fall into the public service categories rather than being focused on the needs of the poor.

#### *6. Critique of the Pro Bono Bar as a Partner and Resource*

The 1997 survey results paint a picture consistent with the current practices of the private bar in providing pro bono services—a preference for brief advice rather than contested or law reform matters.<sup>130</sup> Although once touting a thousand volunteers, our pro bono programs place fewer than two hundred cases with lawyers for full representation each year. Whether this is due to a failure to match

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<sup>129</sup> The number of hours in any one area was not tabulated, given that many respondents listed more than one area without any breakdown and some respondents listed an area without any hours.

<sup>130</sup> The growth of the Family Law Clinic and the Senior Citizen Center Clinic also suggests a preference for areas of law that middle- and upper-income individuals may face (wills/family) rather than for areas of law unique to and needed by the poor (public benefits/health).

problems with attorney expertise or due to attorneys' disinclination to accept contested cases is unknown.

Our largest pro bono efforts appear to be offering brief advice to individuals. However, there is no centralized coordination of or record-keeping from these pro se clinics. Thus, they cannot be fully efficient in discovering the problems faced by the poor and developing efficient strategies to address them or even to educate the public to prevent the problems. In 1998 our neighboring state of Idaho began a statewide coordinated effort for pro se litigants that includes court assistance officers for family matters and a reduced fee panel for low-income parties. The Idaho program has since won awards.<sup>131</sup> We should be able to do at least as much with a coordinated statewide effort.

Moreover, our brief advice clinics offer advice to anyone, without any screening for need, and our license renewal data fail to distinguish between pro bono work for the poor and other uncompensated public service. Although we may be proud to do uncompensated work for sympathetic clients, there is no assurance that even a substantial part of that work is for disadvantaged clients whose needs are most pressing.

Since "giving to the poor actually represents only a tiny percentage of elite philanthropy,"<sup>132</sup> it should not be surprising that less than a "substantial majority" of lawyers' pro bono work goes to serving the needy. Indeed, national data suggest that most pro bono hours do not go to serving the needy. Professor Deborah Rhode summarizes: "Much of the uncompensated assistance that lawyers do provide goes not to low-income clients but to family, friends, clients who fail to pay their fees, and middle-class organizations like hospitals and schools that might become paying clients."<sup>133</sup> She further states that:

Less than 10 percent of practitioners accept referrals from federally-funded legal aid offices or bar-sponsored poverty-related programs . . . . In short, the best available research finds that the American legal profession averages less than half an hour of work per week . . . in support of legal services for the poor . . . .<sup>134</sup>

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<sup>131</sup> Frances H. Thompson, *Access to Justice in Idaho*, 29 FORDHAM URB. L.J. 1313, 1313–15 (2002). The American Judicature Society selected this project to showcase at the National Conference on Pro Se Litigation in November 1999, and the National Association of IOLTA Programs featured the project in its report published in July 2000. *See Idaho Supreme Court, Self Help Center*, [http://www.courtsselfhelp.idaho.gov/overview\\_old.asp](http://www.courtsselfhelp.idaho.gov/overview_old.asp) (last visited Oct. 4, 2006).

<sup>132</sup> DAVID WAGNER, WHAT'S LOVE GOT TO DO WITH IT? A CRITICAL LOOK AT AMERICAN CHARITY 193 n.52 (2000).

<sup>133</sup> DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 37 (2000).

<sup>134</sup> DEBORAH L. RHODE, ACCESS TO JUSTICE (2004), *excerpted in* RHODE & LUBAN, *supra* note 5, at 889.

If a state plan were in place, we should be able to collectively discover information about who is served in what way and on what sort of case. With that information collected centrally and available to all stakeholders, we should be able to adjust service delivery systems to ensure our volunteer efforts are targeted first and foremost on helping the neediest clients with the most serious problems.

Other states that have undertaken substantial coordinated planning efforts have come to recognize the private bar must be seen as a resource and an equal partner in guaranteeing access to justice. New York's Plan for Justice recognized it "was appropriate and important that pro bono programs be recognized as and treated as equal partners in the overall delivery system."<sup>135</sup> Similarly the Washington State revised plan corrected its prior omission, recognizing that the 1995 Volunteer Attorney Legal Services Action Plan "did not focus on integrating staffed and volunteer attorney program civil legal services delivery. Nor did it define an overarching vision of the best possible complementary relationships."<sup>136</sup> Like the New York planners, the authors of the revised Washington State Plan concluded that their plan "must reflect the reality that the private bar is no longer a tertiary provider left to handle cases that the staffed programs for one reason or another lack the resources to handle. The *State Plan* must embrace the private bar as a full and equal partner . . ."<sup>137</sup> We must establish an ongoing state planning process if we are to have any hope of maximizing the value of this important resource—the Utah State Bar pro bono volunteers.

### *C. Legal Service Programs*

#### *1. Legal Service Agencies Serving the Poor and Under-Represented*

Since the founding of legal aid societies in the early 1900s, legal service staff programs have been the predominant way our society has addressed the civil legal needs of disadvantaged groups. It is important to understand what staff programs exist, what clientele they serve, the areas of law they handle, the funds available to them, their funding sources, and any structural limitations on the services they might provide or the missions they could pursue.

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<sup>135</sup> N.Y. STATE PLANNING STEERING COMM., NEW YORK'S PLAN FOR JUSTICE: BUILDING PARTNERSHIPS THAT WORK FOR OUR CLIENTS, IN OUR COMMUNITIES 42 (2002), available at <http://www.wnyc.net/web/home/planning/StatePlanFinal.pdf>.

<sup>136</sup> WASH. STATE ACCESS TO JUSTICE BD., REVISED PLAN FOR THE DELIVERY OF CIVIL LEGAL SERVICES TO LOW INCOME PEOPLE IN WASHINGTON STATE 41 (1999), available at <http://www.wsba.org/atj/committees/resdev/stateplan.doc>.

<sup>137</sup> *Id.* at 42.

Today, there is only a handful of staff programs<sup>138</sup> dedicated to serving the poor and other disadvantaged groups with legal problems in Utah. Each agency has unique funding arrangements and particular missions as set by statutes, funding sources, and governing boards. A general understanding of each agency's current mission, limitations, and the sources of any limitations is necessary to understand what services are provided by these programs and what gaps in service exist. Similarly, a sense of the sources and amounts of funding provided to the staff programs is helpful. The following<sup>139</sup> is a list of funding for each source:

Agency	Area	Cases Accepted	# Attyns	Annual Funds
Utah Legal Services (ULS)	State	Any Civil—with priorities	19.5	\$ 3.0 M
Legal Aid Society (LAS)	SL County	Family Law	4.5	\$ 1.1 M (56,000)
Disability Law Center <sup>140</sup> (DLC)	State	Disability-related cases for clients with disabilities	7	\$ 1.7 M
Holy Cross Ministries (HCM)	State	Immigration for nonresidents	2	\$ 55,470 (\$ 24,000) <sup>141</sup>
Catholic Comm. Serv.	State	Immigration for refugees and nonresidents	1	\$ 230,000 ( 90,000)

<sup>138</sup> The agencies discussed here are private, non-profit agencies utilizing combinations of public and private funding to serve the poor in civil matters. Because the national discussion of access to justice for the poor does not typically include agencies representing victims in criminal matters or representing convicted individuals in innocence or habeas corpus cases, the two Utah agencies that provide those services are not discussed here. Both Utah law schools operate clinical programs; however these programs rely entirely upon these private agencies (or various public agencies) and pro bono attorneys for the supervision of students, and do not currently operate as independent law offices.

<sup>139</sup> See *infra* Part IV.C.2–5.

<sup>140</sup> National data regarding access to justice for the poor in civil matters do not include information about protection and advocacy agencies, such as the DLC, that are funded and mandated by the federal government to serve persons with disabilities in cases that relate to their disability. I include a discussion of DLC's services and resources here because DLC has been instrumental in bringing the other staff programs and the bar together to advance the cause of serving the needy and because most of DLC's clients are economically needy. However, where funding and staffing data in Utah are compared to national data, figures about DLC are excluded to make the comparisons more accurate.

<sup>141</sup> Numbers in parentheses represent client fees charged by the agency. The total funding amount deletes these fees and indicates only funding donated from public or other private sources.

Multicultural Legal Center (MLC)	State	Minorities with minority-related problems	1	\$ 99,000
Total Funding			28	\$ 4.28 M

## 2. ULS—Utah Legal Services, Inc.

ULS is the largest program—with more lawyers and more funding than all other programs combined. It is also the only program that provides representation in a wide range of subject matters. ULS is a statewide program funded predominately (\$1.8 million, or 60 percent) by the federal LSC<sup>142</sup> to provide civil legal services to low-income clients (125 percent of poverty). ULS has an annual budget of \$3 million<sup>143</sup> and staff of nineteen and one-half attorneys plus additional para-professionals.

Over the past twenty-five years the federal LSC (which funds ULS) has suffered substantial cuts. Federal funding to LSC in 2001 was, adjusted for inflation, only half what it was in 1980.<sup>144</sup> The U.S. Congress slashed the budget for legal services for the poor in 1982, 1984, and again in 1996, and caused the substantial decline in available funding. These cuts have directly affected ULS's funding. Moreover, in light of the fact that attorneys' salaries have increased at a much greater rate than inflation, this cut to legal services funding makes hiring and retaining attorneys even more difficult.

Although ULS is the one agency whose mission includes the full range of civil legal needs, it is important to be aware of two significant limitations. First, ULS has always been required to establish priorities for service. Thus, many legal problems are low priority and hence no representation is actually available for clients with these problems. Secondly, in 1996 Congress enacted new, stringent limitations to prevent LSC recipients from serving certain groups (undocumented immigrants, prisoners in litigation) and from providing certain legal services (no class actions, no legislative advocacy). Accordingly, even in the high-priority areas of law, ULS is unable to serve certain Utah residents and is forbidden from providing certain kinds of legal services. These limitations were not taken up by

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<sup>142</sup> ULS receives other funds under various federal and state grants to serve particular populations (e.g., the elderly and victims of domestic violence), and from United Way, the Utah Bar Foundation (which administers the Interest on Lawyers' Trust Accounts funds), and the "and Justice for all" campaign.

<sup>143</sup> ULS financial information provided by ULS Director Anne Milne (on file with author).

<sup>144</sup> LSC appropriations in 1980 (\$300 million in actual dollars, equivalent to \$646.238 million in 2001 dollars) were twice as much as they were in 2001 (\$329.274 million). Houseman, *supra* note 8, at 1221–22.

the Utah Task Force in 1997, but are often a central concern in a comprehensive state planning effort.

### 3. *Legal Aid Society of Salt Lake County*

A second service provider is the Legal Aid Society of Salt Lake (“LAS”) which provides representation in family law cases in Salt Lake County. As of 2006 LAS employs four and one-half attorneys plus additional para-professionals with approximately \$1.1 million in grants and donations. LAS represents victims of domestic violence (irrespective of income) with federal grant monies<sup>145</sup> and a state appropriation. Its other work is supported by the United Way, the Utah Bar Foundation (IOLTA funds), the “and Justice for all” campaign, foundations, and private contributions.<sup>146</sup> Recently LAS established the Self Help Family Law Clinic in which a paralegal helps poor individuals complete court forms for divorces. Almost all of LAS’s other cases are accepted for full representation, including litigation through trial in court. LAS does not engage in impact litigation cases or class action litigation. LAS is, however, active in advocating to the state legislature matters involving domestic relations and domestic violence, and there is no limitation or prohibition on this activity.<sup>147</sup>

### 4. *Disability Law Center*

The Disability Law Center (“DLC”) is the federally funded and federally mandated “protection and advocacy” agency for persons with disabilities living in Utah. The DLC provides representation and advocacy for individuals with disabilities in cases that directly relate to their disability.<sup>148</sup> The DLC estimates that

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<sup>145</sup> Interview with Stewart Ralphs, *supra* note 56. Federal funding to serve victims of domestic violence comes under the Victims of Crime Act of 1984 (VOCA), Pub. L. No. 98-473, 98 Stat. 2170 (codified in scattered sections of 18, 42 U.S.C.); the Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 18, 42 U.S.C.); and a Department of Justice grant that amounted to approximately \$426,000 in 2006. *Id.*

<sup>146</sup> *Id.*; Interview with Ken Bresin, *supra* note 50; Interview with Anne Milne, *supra* note 76; Interview with Fraser Nelson, *supra* note 111. Private donations currently total over \$350,000. LAS must comply with federal regulations and its grant proposal in providing representation in domestic violence cases. However, only the policies of its board determine or limit the nature of the agency’s work funded by private contributions.

<sup>147</sup> Interview with Stewart Ralphs, *supra* note 56.

<sup>148</sup> The DLC is funded by eight different federal grants that establish the requirements for and limits on its work. Protection and Advocacy for Persons with Developmental Disabilities Program, under 42 U.S.C.A. § 15001 (West 2005 & Supp. 2006); Protection and Advocacy for Individuals with Mental Illness Program, under 42 U.S.C. § 10801 (2000); Protection and Advocacy for Individual Rights Program under the Rehabilitation Act of 1973, 29 U.S.C. § 794e; Client Assistance Program under the Rehabilitation Act, *id.* § 732; Protection and Advocacy for Assistive Technology Program under the Assistive

as of the year 2002, there were 376,000 disabled individuals living in Utah.<sup>149</sup> DLC clients may have mental illness, developmental disabilities, or physical disabilities. The areas of representation can include cases involving proper treatment in residential institutions (hospitals, nursing homes, prisons) to disability discrimination, to access and public education. While most of DLC's clients are poor, since they are institutionalized, incarcerated, children, or receiving supplemental security income ("SSI"), the DLC's mission is not representing the poor, per se. Rather, its mission is to serve persons with disabilities in matters involving those disabilities. The DLC has an annual budget of \$1.7 million and employs seven attorneys, plus additional paralegals and staff throughout the state.

The DLC engages in systemic advocacy and education as well as in individual representation and group representation of clients. It estimates that its work consists one-third of community education and outreach, one-third individual representation, and one-third systemic advocacy in the courts or legislature. While the bulk of the DLC's legal work deals with individuals, the DLC regularly brings impact cases and advocates before the legislature.

##### 5. *Agencies Serving Immigrants and Minorities*

In the last few years four entities have come into existence to serve the needs of the immigrant population: Holy Cross Ministries, Catholic Community Services, International Rescue Committee, and the Multicultural Legal Center.<sup>150</sup> Holy Cross Ministries employs two Catholic nuns who work as attorneys on a full-time basis advising and representing individuals in contested immigration matters. They are currently funded by the Holy Cross Ministries Trust Fund, a federal Violence Against Women Act grant to represent nonresident alien victims of domestic violence in immigration matters, and grants from "and Justice for all"

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Technology Act of 2004, 29 U.S.C.A. § 3001 (West Supp. 2006); Protection and Advocacy for Voting Accessibility under the Help America Vote Act of 2002, 42 U.S.C.A. §§ 15421–15425 (West 2005); Protection and Advocacy for Persons with Traumatic Brain Injury under the Traumatic Brain Injury Act of 1996, 42 U.S.C. § 300d-52 (2000); Protection and Advocacy for Beneficiaries of Social Security under the Ticket to Work and Work Incentives Improvement Act of 1999, *id.* § 1320b-21. As a protection and advocacy agency, the DLC is free to represent individuals, to represent classes of clients in impact cases, or to represent no one in a legal dispute but instead to serve only as a systemic advocacy and educational agency. Interview with Fraser Nelson, *supra* note 111.

<sup>149</sup> Interview with Fraser Nelson, *supra* note 111.

<sup>150</sup> The Sisters of the Holy Cross established this organization as a social service and legal service program ministering to immigrants. The operating budget for Holy Cross Ministries is approximately \$158,000 annually, according to Sister Sharlett Wagner. Interview with Sister Sharlett Wagner, Holy Cross Ministries, in Salt Lake City, Utah (Oct. 2004).

and the Utah Bar Foundation. Clients pay fees on a sliding scale and amount to an estimated \$24,000 annually.<sup>151</sup>

Catholic Community Services reestablished legal services for refugees and nonresidents in immigration matters, and currently has an annual budget of \$230,000 funded by the Utah Bar Foundation (\$10,000), a grant from “and Justice for all” (\$2500), client fees (\$70,000–\$90,000) and donations (\$100,000+). This charity employs one full-time attorney and two and one-half case managers to handle the work.<sup>152</sup>

The International Rescue Committee (“IRC”) receives funds from “and Justice for all” and the Utah Bar Foundation. IRC does not employ any lawyers but does employ an immigration agent and provides services to refugees.

Since the 1996 task force report, the Multicultural Legal Center (“MLC”) was established to represent minorities in basic service cases arising because of their minority status (e.g., employment discrimination) and to engage in impact work on these issues (e.g., amicus briefs or legislative advocacy). MLC’s funding has waxed and waned and its ability to accomplish this mission has varied accordingly. MLC has received Violence Against Women Act (VAWA) grants and foundation funds to represent immigrant victims of domestic violence, and has also received funds from “and Justice for all” and the Utah Bar Foundation.<sup>153</sup>

#### 6. *Other Offices Providing Legal Services*

Other offices exist whose purpose is to represent certain classes of individuals (who are often poor) under contract with the state, county, or other governmental actor. Thus, the state-funded Guardian ad Litem’s office represents minor children subject to abuse, neglect, and parental termination cases.<sup>154</sup> There is no income limit, although most of the parents of these children are poor. Private law offices are appointed (and paid) to represent indigent parents in these same cases once the court determines the parent or parents are indigent.<sup>155</sup> Similarly, private law offices may be appointed and paid to represent juveniles charged with delinquency<sup>156</sup> and adults who face civil commitment due to mental illness or retardation.<sup>157</sup> While there are a few other areas in which state statute provides for counsel to be

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<sup>151</sup> *Id.*

<sup>152</sup> E-mail from Aden Batar, Dir., Catholic Cmty. Servs., to Linda Smith, Professor of Law, S.J. Quinney College of Law (Aug. 16, 2006) (on file with author).

<sup>153</sup> Interview with Su J. Chon, President of the Bd., Multicultural Legal Servs., in Salt Lake City, Utah (2004).

<sup>154</sup> *See* UTAH CODE ANN. § 78-3a-912 (Supp. 2006).

<sup>155</sup> *See id.* § 78-3a-913.

<sup>156</sup> *Id.*

<sup>157</sup> *See id.* § 62A-5-312 (mentally retarded adults); *id.* § 62A-15-631 (mentally ill adults).

appointed,<sup>158</sup> the Utah Legislature has not funded any staff programs to provide such representation.

### 7. Law School Clinics and Pro Bono Programs

Both the U of U College of Law and the J. Reuben Clark Law School at Brigham Young University (“BYU Law School”) operate clinical programs in which students receive credit for legal work and are given instruction to facilitate their learning and performance. Both law schools operate extern or placement programs in which the students are placed with public interest law offices (including all of those listed above), private practitioners engaged in pro bono work,<sup>159</sup> state agencies, and courts.<sup>160</sup> Neither school requires a clinical experience or pro bono involvement.

Although the students’ time can be seen as a resource, the clinical programs themselves are not *separate* resources available to represent the needy. Some law schools operate separate in-house clinics in which a particular group of clients or particular types of legal problems are accepted for representation because they offer educational benefits for the students while providing service to the public. When a law school establishes an in-house clinic, it may focus the mission of the clinic on unmet needs of the community.

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<sup>158</sup> The Utah code provides for appointment of counsel in cases seeking guardianship of incapacitated adults (mentally ill, mentally retarded, or elderly), and provides that the cost of counsel will be paid by the incapacitated person’s estate or by the petitioner (if the person is not found to be incapacitated). UTAH CODE ANN. § 75-5-303 (1993). The Utah code also provides that the court may order one party to pay the attorneys’ fees of another party in an action regarding “custody, parent-time, child support, alimony, or division of property” or in a divorce, separate maintenance or co-habitant abuse action “to enable the other party to prosecute or defend the action.” *Id.* § 30-3-3(1) (Supp. 2006). These provisions demonstrate recognition that counsel should be available in these instances. Yet they do little to ensure counsel is available to an alleged incapacitated person with no estate or in a family law case in which both parties are poor. The staffed agencies regularly represent such poor persons in these actions.

<sup>159</sup> BYU Law School’s “Law Help” project involves law students working only on pro bono cases with private practitioners. *See* BYU, J. Reuben Clark Law School, Pro Bono, Law Help, <http://www.law2.byu.edu/proBonoHome/Opportunities/lawHelp.php> (last visited Jan. 12, 2007).

<sup>160</sup> The BYU program relies on students to arrange their own placements, often with experienced supervisors. The U of U College of Law program includes various ongoing placements including placements with the pro bono agencies listed above as well as with various state court judges, federal court judges, administrative law judges, the Salt Lake District Attorney, the Salt Lake Legal Defender office, and individually arranged placements with public or private non-profit offices in health law and environmental law. *See* University of Utah S.J. Quinney College of Law, Clinical Program, <http://www.law.utah.edu/academic/clinic/> (last visited Jan. 12, 2007).

Similarly, it is doubtful the bulk of student clinical time is devoted to serving the poor. A snapshot of enrollment data from the U of U College of Law between 2002 and the present reveals that an average of forty-nine students each year (less than 25 percent of all clinic students) enroll in the civil clinic with agencies serving the poor in civil matters. During the 2002-2003 academic year 190 University of Utah law students (approximately 73 percent of those eligible) completed clinical work serving public and non-profit entities for a total of 25,200 hours. That same year sixty-seven students (only 25 percent of those eligible and 35 percent of the clinical students) worked with staff programs serving the disadvantaged. They provided 9150 hours of service to these agencies or the equivalent of four and one-half full-time law clerks. Just as most “public service” is not directed toward the neediest, most clinical work is spent working for judges, agencies or prosecutors with a greater emphasis on educational and career enhancement than on service.

Both BYU Law School Professor Jim Backman<sup>161</sup> and I have offered seminars in which students completed research papers or other projects that would benefit legal service programs or community organizations.<sup>162</sup> This, too, while a resource, is not a separate option for a client unable to obtain representation from an existing program.

Professor David Dominguez at the BYU Law School offers a class in community lawyering in which he and his students assist the low-income residents of the Boulders Apartments in Provo, Utah, to engage in grassroots advocacy and problem resolution.<sup>163</sup> Their work has involved advocating for better (more resident-sensitive) police service and public transportation. This is an additional resource, but available to only a limited group for a limited range of issues.

The Pro Bono Initiative of the U of U College of Law arranges for law students to engage in pro bono (not for credit or pay) work with the above agencies or with private attorneys on their pro bono cases. This initiative, like the U of U College of Law Clinical Program, provides a resource, but not a *separate* resource for needy clients or groups. While pro bono volunteers may not work with state agencies or courts, their work with private attorneys may serve the needy or may serve other good ends; no records are currently kept that make this distinction. Between 2000 and 2004 students participating in the Pro Bono Initiative provided

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<sup>161</sup> See James Backman, *Law Schools, Law Students, Civic Engagement, and Community-Based Research as Resources for Improving Access to Justice in Utah*, 2006 UTAH L. REV. 953, 960–61 (describing these courses).

<sup>162</sup> See Linda F. Smith, *Why Clinical Programs Should Embrace Civic Engagement, Service Learning and Community Based Research*, 10 CLINICAL. L. REV. 723, 741–42, 746 (2004).

<sup>163</sup> David Dominguez, *Community Lawyering*, UTAH B.J., May 2004, at 31, 31; David Dominguez, *Redemptive Lawyering: The First (and Missing) Half of Legal Education and Law Practice*, 37 CAL. W. L. REV. 27, 31–36 (2000); see also David Dominguez, *Equal Justice from a New Perspective: The Need for a First-Year Clinical Course on Public Interest Mediation*, 2006 UTAH L. REV. 995, 997–98 (describing first-year community lawyering courses).

7337.4 hours<sup>164</sup> of volunteer time (averaging 1834.35 hours per year—slightly less than one full-time clerk).

#### 8. *Other Entities and Related Services*

There are other private non-profit entities that advocate for the poor or disadvantaged and from time to time employ lawyers. Such agencies have included Voices for Children (formerly Utah Children), an advocacy agency for children, Crossroads Urban Center, an agency that provides social services to the poor, and Community Action Program, which provides assistance to the Disability Rights Action Committee. While these agencies may include legal staff, they have not undertaken to include individual or group legal representation as one of their services. There are of course many other social service agencies that advocate for or serve the poor or other needy groups. However, none of these agencies employ lawyers and none focus on helping their clients with legal problems.

### V. FUNDING AVAILABLE FOR LEGAL SERVICE FOR THE POOR

The previous section provides a snapshot of the current configuration of staff programs—the populations served, the services provided, and the funding. However, it is also useful to take a separate look at the funding currently available to serve poor clients with civil legal problems<sup>165</sup> and to compare Utah's funding picture with the past and with current comparable national statistics. These comparisons are necessary to fully assess our current situation and develop new strategies for funding legal services for the needy.

The first noteworthy point is that free legal services for the poor in Utah are still predominantly funded by the federal government, and especially by the LSC (see chart below). However, there were substantial cuts to LSC funding in 1982, 1984, and then again in 1996, so that LSC funding is currently only half of what it

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<sup>164</sup> *Pro Bono Statistics at a Glance*, PRO BONO INITIATIVE NEWSL. (Pro Bono Initiative, Univ. of Utah, Salt Lake City, Utah), Summer 2004, at 1, 8, available at [http://www.law.utah.edu/\\_FILES/PROBONO/newsletters/Summer2004.pdf](http://www.law.utah.edu/_FILES/PROBONO/newsletters/Summer2004.pdf).

<sup>165</sup> Since this section of the Article seeks to make meaningful national comparisons, funding for DLC is not included here because national studies of funding for civil legal services to the poor do not include the monies for protection and advocacy programs. However, in considering the best way to coordinate services and maximize efficiencies, see *infra* Part VI, the benefits of cooperation between DLC and other staff programs will be re-introduced, as is recommended by policy analysts. See Gary P. Gross, *The Protection and Advocacy System and Collaboration with Legal Services Programs*, MGMT. INFO. EXCHANGE J., Summer 2001, available at <http://www.ndrn.org/aboutus/MIEarticleFinal301.htm>.

was in 1980.<sup>166</sup> Clearly the legal problems of poor people have not been cut in half since 1980, so this presents a substantial problem.

During the 1980s when LSC funding cuts were first proposed, some states developed state and local funding sources. The 1996 federal cuts to LSC and related federal budgetary moves devolving more social service programs to the states caused states to accelerate local fund raising initiatives. Many states have been actively working to increase private, state, and local funding for free legal services much longer than Utah.<sup>167</sup> Accordingly, today while LSC is still the largest single source of funding for legal aid in Utah, it does not provide the majority of monies nationwide. In thirty-four states, non-LSC funds are greater than LSC funds. However, in certain areas of the country (the Rocky Mountain region and the South), LSC still provides the bulk of the monies.

Total funding for legal aid nationwide for the poor was about \$907 million in 2003, with LSC providing about one-third.<sup>168</sup> If Utah were to receive its proportionate share of these funds, based on Utah's population constituting 0.8 percent of the nation, there would have been \$7.25 million available for civil legal service for the poor in Utah in 2003.<sup>169</sup> This far exceeds the approximately \$4.28 million currently available for the legal needs of Utah's poor.

Another comparison could be based on LSC federal funds which typically represent one-third of the total funds. Thus, if Utah's LSC grant (\$1,812,900 currently) represented one-third of all Utah funds available, Utah's total funds for civil legal services for the poor would be \$5,438,700 rather than the \$4.28 million currently available. Using these figures Utah provides about 79 percent of what the rest of the nation provides.

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<sup>166</sup> Houseman, *supra* note 8, at 1220 n.52, 1221–22. Analyzed in 2001 dollars, LSC appropriations in 1980 would have been \$646 million and in 2001 were only \$329 million. See LSC REPORT, *supra* note 29, at 18.

<sup>167</sup> In 1997 Utah's Access to Justice Task Force presented its report and similarly recommended "new funding, better technology, better communication between existing agencies, and the creation of new agencies and structures." TASK FORCE REPORT, *supra* note 10, at 30. The funding committee recommended each attorney aspire to contribute thirty-six hours of pro bono or \$360, and that private funding from foundations and additional public funding continue to be sought. *Id.* at 20–21.

<sup>168</sup> ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN OVERVIEW OF THE PROGRAM IN 2003, at 3–4 (2003), available at [http://www.clasp.org/publications/Legal\\_Aid\\_2003.pdf](http://www.clasp.org/publications/Legal_Aid_2003.pdf).

<sup>169</sup> See U.S. Census Bureau, State & County QuickFacts, Utah, <http://quickfacts.census.gov/qfd/states/49000.html> (last visited Dec. 11, 2006).

The following chart<sup>170</sup> depicts the amounts and sources of legal aid funding nationally in 2003:

NATIONAL FUNDING FOR CIVIL LEGAL SERVICES FOR THE POOR		
Source	Amount (in millions)	Percent of Total
Legal Services Corp.	\$ 299	33%
State/Local Gov.	\$ 227	25%
IOLTA	\$133	15%
Other Govt. Grants	\$ 78	8%
Foundations	\$ 61	7%
Private Attorneys	\$ 39	4%
United Way	\$ 23	3%
Other	\$ 47	5%
TOTAL	\$ 907	100%

Consider what Utah's funding picture would look like if it had the same mix of contributing sources and same levels of contribution available nationally. The table that follows compares the national calculation to Utah's actual funding sources and amounts.

IF UTAH SOURCES FUNDED CIVIL LEGAL SERVICES FOR THE POOR AT THE NATIONAL LEVEL			
Source	National Rate	Amount at National Rate	Utah's Actual Amount
LSC	33%	\$ 1,800,000	\$1,800,000
State/Local Gov.	25%	\$ 1,350,000	\$ 100,000
IOLTA <sup>171</sup>	15%	\$ 810,000	\$ 125,000 <sup>172</sup>

<sup>170</sup> HOUSEMAN, *supra* note 168, at 3–4. This information was originally provided by Meredith McBurney, a consultant for the Project to Expand Resources for Legal Services by the ABA Standing Committee on Legal Aid and Indigent Defendants.

<sup>171</sup> Utah's IOLTA funding has varied between \$100,000 and \$400,000 annually due to interest rate fluctuations and amounts in lawyers' IOLTA accounts. Interview with

Other Govt. Grants	8%	\$ 432,000	\$ 210,547 ULS Seniors \$ 216,859 ULS Benefits \$ 921,213 Domestic Vio.
Foundations	7%	\$ 378,000	\$ 179,168
Private Attorneys	4%	\$ 216,000	\$ 464,544
United Way	3%	\$ 162,000	\$ 237,916
Other	5%	\$ 270,000	\$ 300,000
TOTAL	100%	\$ 5,418,000	\$4,555,247

This information allows us to assess where we have succeeded as well as what more or different can be done to increase resources in Utah.

A. *“And Justice for All” Fund Raising from Attorneys*

Noteworthy success in raising funds from members of the bar has been achieved since the Task Force Report was issued. In 1998 the three largest programs (ULS, LAS, DLC) joined together in a fundraising campaign called “and Justice for all.” “The intent of the campaign is to secure private support from the legal community to preserve and expand access to civil legal services for the poor and people with disabilities in Utah.”<sup>173</sup> “The campaign asks attorneys to donate the monetary equivalent of two billable hours annually.”<sup>174</sup>

Since its inception in 1999, this campaign has been quite successful. While previously only 5 percent of Utah lawyers contributed to support legal services for the needy, in 1999, the first year of the campaign, “[o]ver 40 law firms contributed on behalf of their attorneys with firm donations totaling over \$230,000. Individual

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Kimberly Paulding, Executive Dir., Utah Bar Found., in Salt Lake City, Utah (Nov. 29, 2006).

<sup>172</sup> The Utah Bar Foundation Website reports funding approximately \$220,000 for 2006–2007, including law-related education and mediation programs and DLC. The bulk of that amount, \$125,000, went to funding services for the poor. Utah Bar Foundation, Who We Fund, [http://www.utahbarfoundation.org/html/who\\_we\\_fund.html](http://www.utahbarfoundation.org/html/who_we_fund.html) (last visited Jan. 12, 2007).

<sup>173</sup> *Lawyers Face Off on Opposing Sides of the (Pool) Table and Raise Funds for “and Justice for all,”* UTAH B.J., December 2004, at 40, 40, available at [http://www.utahbar.org/barjournal/archives/2004/12/lawyers\\_face\\_of.html](http://www.utahbar.org/barjournal/archives/2004/12/lawyers_face_of.html). The original mission was “to provide a stable and consistent source of funding for those who cannot afford legal representation.” “And Justice for all,” History, <http://www.andjusticeforall.org/history.html> (last visited Dec. 11, 2006).

<sup>174</sup> *And Justice for All: Creative Ways to Support “and Justice for all,”* UTAH B.J., November 2000, at 35, 35.

donations . . . amounted to nearly \$80,000<sup>175</sup>; total contributions reached over \$400,000.<sup>176</sup> In 2005, \$464,544 was raised from attorneys.<sup>177</sup> Although the bulk of these funds go to support the three founding programs, funds are also given to other programs that represent the poor—Holy Cross Ministries, Catholic Community Services, International Rescue Committee, the Multi-Cultural Legal Center, DNA (Navajo Nation Legal Services), Utah Dispute Resolution, and the Community Mediation Center.

The absolute success in fund raising from the bar should also be understood in comparative terms. At the beginning of 2003, attorneys nationwide contributed \$39 million, making up 4 percent of the funding for free legal services.<sup>178</sup> This 2003 rate would have required only \$216,000 from Utah's attorneys. In 2005 national contributions increased to \$57 million which means Utah lawyers' share would be \$285,000—far less than the over \$460,000 currently contributed. Fortunately Utah's attorneys are contributing above the rate needed so that Utah's 0.8 percent share of the U.S. population will get the proportionate share of pro bono dollars (\$456,000).<sup>179</sup>

### B. IOLTA Funding

In 1983, the Utah State Bar began a voluntary Interest on the Lawyers' Trust Account ("IOLTA") program.<sup>180</sup> In December 2005, the program became mandatory with interest going either to the Utah Bar Foundation or, if accounts were large enough, to the lawyer's client.<sup>181</sup> The IOLTA funds distributed each year have fluctuated between \$100,000 and \$400,000, probably dependent upon the interest rates. The bar foundation distributes the bulk of this amount to staff

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<sup>175</sup> *First Year Raises over \$410,000!*, "AND JUSTICE FOR ALL" UPDATE (Salt Lake City, Utah), 1999, at 2. The current goal is to raise \$825,000 annually and have 50 percent of the bar contribute.

<sup>176</sup> "And Justice for all," Accomplishments, <http://andjusticeforall.org/accomplishments.html> (last visited Jan. 12, 2007). During the first three years The Church of Jesus Christ of Latter-day Saints made a challenge grant of \$100,000 if the bar would contribute \$300,000; and each year that goal was met. During subsequent years the bar has managed to raise \$400,000 itself.

<sup>177</sup> *2005 Contributions*, "AND JUSTICE FOR ALL" UPDATE (Salt Lake City, Utah), Summer 2006, at 4.

<sup>178</sup> See HOUSEMAN, *supra* note 168, at 4. This information was originally provided by Meredith McBurney, a consultant for the Project to Expand Resources for Legal Services by the ABA Standing Committee on Legal Aid and Indigent Defendants.

<sup>179</sup> The American Bar Association indicates 1,058,662 active resident lawyers nationwide for 2003 (1,084,504 for 2004) and 5368 active resident lawyers in Utah for 2003 (5919 for 2004), about 0.5 percent of the total U.S. attorney population. See ABA, *supra* note 59, at 2.

<sup>180</sup> *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406, 407 (Utah 1983).

<sup>181</sup> See Utah Bar Foundation, Information for Attorneys, [http://www.utahbarfoundation.org/html/information\\_for\\_attorneys.html](http://www.utahbarfoundation.org/html/information_for_attorneys.html) (last visited Jan. 12, 2007).

programs discussed above.<sup>182</sup> It is unclear if this source of funding will be increased now that all members of the bar must maintain IOLTA accounts. The discrepancy between funding at the national rate (\$810,000 in 2003, and \$856,000 in 2005 for Utah's 0.8 percent of the national population)<sup>183</sup> may relate more to the level of monies kept in IOLTA accounts in other centers of commerce that simply are not available to Utah lawyers. However, because Utah's IOLTA funding is less robust than the national average, there is a strong argument for careful analysis of where those more limited funds should go.

It is unfortunate that the Utah Bar Foundation and the "and Justice for all" campaign have no formal relationship with one another that could ensure coordinated funding efforts and minimize administrative costs. An important service of a state plan is to consider how this good work could be improved to enhance efficiency and effectiveness.

### C. State Governmental Funding

The "and Justice for all" campaign has also had some (more limited) success in obtaining direct funding from the public sector. The Utah Legislature appropriated \$100,000 of one-time funds to assist the purchase of a building to house the three largest programs (ULS, LAS, and DLC)<sup>184</sup> and thereafter appropriated \$100,000 annually in general funds for domestic violence and family law representation. While this is a noteworthy first step, Utah's state and local government funding compares poorly with the rest of the nation.

Nationally \$227 million is provided annually by state governments for civil legal services, representing 25 percent of all funding. If Utah were to provide funding at that rate, state contributions would amount to \$1.35 million—more than thirteen times the current rate. Although Utah's lawyers are twice as generous as lawyers nationwide, Utah's citizens (representing 0.8 percent of the national population) are not contributing 0.8 percent of the \$227 million of state monies. If we did, Utah's citizens would provide even more—\$1.8 million—for free civil legal services for the poor.

While continuing to seek additional funds from lawyers, foundations, and private citizens should be a goal of any state planning effort, establishing a robust program for state funding must also be given serious consideration in light of the federal government's major cutbacks.

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<sup>182</sup> The bar foundation has also funded law-related education, alternative dispute resolution programs, and scholarships. See Utah Bar Foundation, *supra* note 172.

<sup>183</sup> See HOUSEMAN, *supra* note 168, at 3–4; Robert Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1060 (discussing 2005 figures). These articles provide U.S. national statistics, from which the author calculated what the national rate would be if Utah were to meet it.

<sup>184</sup> UTAH STATE PLANNING SELF-ASSESSMENT REPORT (2002), available at [http://www.lri.lsc.gov/state\\_planning/slfevals/ut\\_slfeval\\_02.pdf](http://www.lri.lsc.gov/state_planning/slfevals/ut_slfeval_02.pdf).

*D. United Way, Foundations, and Other*

United Way funding appears to be higher and foundation funding appears to be lower in Utah when compared to the rest of the nation. A state plan should study any differences and determine how funding could be enhanced from all appropriate sources.

VI. GAPS, LIMITATIONS, AND PROHIBITIONS

One obvious concern is that funding falls far short of what is needed. The situation is further complicated by limitations and prohibitions imposed by certain funding sources. It is certainly possible the services of a staff program funded by various donations would be driven by what the funding sources thought were worthy projects rather than by the needs of clients who sought legal assistance or the needs of the poor as discovered through careful study.

Of course, each program has its defined mission and seeks funding in accordance with grants currently available or public solicitation thought to be compelling. If thorough study demonstrated different missions should be pursued, then missions might be altered or grant requests focused accordingly. However, statewide planning can have little immediate impact on requirements and prohibitions imposed by federal law on LSC-funded programs. Since LSC is still the major funding source of free legal services for the poor in Utah, it is important to understand these federal prohibitions and take account of them in any statewide planning effort.

*A. Utah Legal Service Priorities*

In accordance with federal requirements and in light of the overwhelming need, ULS has identified priorities—the types of cases in which ULS will provide some level of representation. It may be instructive to look at the types of cases that ULS has rejected for services simply because the claim is not a priority or the client is not eligible. In 2002, ULS rejected 7458 requests for representation because these problems were not “a priority.”<sup>185</sup>

Reasons for Declining Cases—2002		
Not Represented—Not a Priority	7458	53% of cases declined
Not a Priority—Family Law	4208	
Not a Priority—Housing Law	980	

<sup>185</sup> Interview with Ken Bresin, *supra* note 50.

Not a Priority—Consumer Law	913	
Not a Priority—Employment Law	258	
Not a Priority—Income Maintenance	248	
Not a Priority—Individual Rights	145	
Not a Priority—Juvenile	84	
Not a Priority—Health	30	
Not a Priority—Other and Misc.	583	
Not Represented—Over Income	2291	16%
Not Represented—Fee Generating	190	1%
Not Represented—Conflict of Interest	236	2%
Not Represented—Ineligible Alien	166	1%
Not Represented—Prohibited Activity	431	3%
Not Represented—No contact after intake	2772	20%
Not Represented—Other	577	4%

Most of the clients who did not obtain representation had problems outside the priorities for this staff program. Although federal regulations require ULS to adopt priorities, they do not mandate what those priorities should be.<sup>186</sup> While ULS must take into account the nature of other programs' missions and the nature of the bar's pro bono resources in determining its priorities; a vibrant state planning endeavor should ensure that these other resources take ULS priorities into account as well.

At the present time, ULS prioritizes all cases into three classes. ULS "First Priority: Most Important Case Services" involve "meeting a prospective client's immediate need for food, shelter, health care, and freedom from physical harm."<sup>187</sup> Thus, such cases as expedited food stamps, eligibility for income maintenance or Medicaid programs, prevention of homelessness through eviction, and obtaining protective orders or divorces in cases of domestic violence are generally accepted for some level of assistance. ULS "generally lacks the staff to handle" cases that are "Moderately Significant" and a second priority, and rejects all clients with consumer problems (collection defenses, unlawful garnishment, violations of Fair Debt Collections Practices), education cases, employment cases (discrimination and wage claims), other family law cases (custody, guardianship), certain health

<sup>186</sup> HOTLINE REPORT, *supra* note 45.

<sup>187</sup> ULS Core Case Service Priorities data on file with author.

care (workers compensation), housing cases involving collection of rent or damage claims, and individual rights (immigration). ULS third-priority cases, which are also turned away, include other consumer problems (bankruptcy, contracts/warranties, access to credit, violation of unfair sales practices acts), other family law matters (simple divorce, visitation, adoption, name change, support), and other individual rights cases. Listing all the types of problems that are *not* accepted for representation at ULS should provide ample proof that there are significant unmet legal needs.

Clients whose legal problems are not priorities for ULS are often referred to a pro bono program to see if pro bono private counsel will accept these cases. The utility (both actual and potential) of pro bono representation is discussed above. However, when one compares the almost 7500 callers who presented problems that were not a priority with the fewer than 200 cases the pro bono bar picked up for full representation, it should be clear that many needy clients with legal problems are going without adequate assistance. The availability of pro bono counsel to step in to meet the need has been dependent upon the individual willingness of private lawyers to accept the cases presented. Currently there are no predetermined priorities that the bar's program promises to meet and no law firm committed to covering a particular area of law.

A smaller number of clients were turned away from ULS representation not because their problems were not of the most serious nature, but based on regulatory limits of ULS's work. How the organized state bar and individual pro bono lawyers should respond to these limitations is also a topic that merits discussion. A clear understanding of these limitations can be a useful starting point.

### *B. Utah Legal Service Restrictions*

There is only one agency whose charge is to serve the poor in civil matters and whose scope of service is statewide: ULS. With this broad charge, ULS has the most substantial budget. However, it must conform to the most rigid and technical limitations in providing such service.<sup>188</sup> In 1996 these limitations became even more restrictive.<sup>189</sup>

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<sup>188</sup> See Legal Services Corporation Act, 42 U.S.C. § 2996e (2000). LSC, the source of ULS funding, has always had to deal with political questions and criticism about its work. These questions and criticisms have resulted in various restrictions over time as well as movements to fund other service delivery systems (e.g., *judicare*).

<sup>189</sup> In the summer of 1996, Congress passed the Omnibus Consolidated Rescissions and Appropriations Act, which added various new restrictions to the work that LSC recipients can undertake. Pub. L. No. 104-134, §§ 501–509, 110 Stat. 1321 (1996) [hereinafter *Appropriations Act*]. Few of these new restrictions were included in LSC's originating statute. See 42 U.S.C. § 2996. Subsequently the federal regulations that govern LSC recipients were redrafted to incorporate the new restrictions. See 45 C.F.R. §§ 1600.1–1644.5 (2005).

It is useful to review the restrictions and understand to what extent they have changed the services available to the poor in Utah. If these restrictions did not exclude any clients who had previously required assistance or did not restrict any activities that have, in the past, been needed by poor clients, then they are not actually cutbacks in services. However, because these restrictions have actually excluded people who used to get services and prohibited legal work that used to be done, the legal community should be aware of those changes.

While the task force report studied the 1996 cuts in funding, it did not address these legal restrictions on what ULS can do and whom ULS can represent. The report did not consider what plan should be implemented to deal with these cutbacks. However, the Utah Ethics Advisory Opinion Committee did address the situation and opined that the bar, collectively, had a responsibility to address not only the reductions in funding but also the restrictions imposed:

The responsibility for coping with funding reductions *and practice restrictions* does not fall solely on the shoulders of modestly paid legal services attorneys. The Comment to Rule 6.1 of the Utah Rules of Professional Conduct, Pro Bono Publico Service, makes clear that *members of the Bar have an ethical duty to assist in the provision of legal services for those unable to pay*:

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal service to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

If more than lip service is to be paid to this ethical duty, the Bar, individually and collectively, must respond to the coming crisis in indigent representation imposed by the recent funding reductions and practice restrictions.<sup>190</sup>

As part of this Access to Justice Symposium, Professor Robert Kuehn makes a compelling case that such restrictions must be addressed to comply with the bar's

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<sup>190</sup> Utah State Bar Comm. on Ethics, Advisory Op. 96-07, at \*2 (1996).

ethical responsibilities.<sup>191</sup> A comprehensive state plan to meet the legal needs of the poor should be established to grapple with these federally imposed restrictions on ULS to ensure all appropriate representation is available to the poor with significant legal problems.

Certain restrictions<sup>192</sup> prohibit ULS from using federal LSC funding to represent certain categories of poor clients in all, most, or particular cases. Other restrictions prohibit ULS from engaging in certain types of legal work.

### *1. Client Groups Denied Legal Services*

#### *(a) Ineligible Aliens*

ULS is now prohibited from representing an alien who is not lawfully in the United States<sup>193</sup> with very narrow exceptions.<sup>194</sup>

In the past, undocumented workers have sought help from ULS for various legal problems, including being mistreated by unscrupulous employers or slum

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<sup>191</sup> See Kuehn, *supra* note 183, at 1063–69.

<sup>192</sup> LSC recipients, such as ULS, have always been prohibited from undertaking certain cases for certain clients for political reasons. The original 1974 LSC statute prohibited the use of its funds for “political activities” including voter registration or transportation to the polls, 42 U.S.C. § 2996f(a)(6), (b)(4), legal assistance to obtain an abortion, *id.* § 2996f(b)(8), legal assistance in desegregation cases, *id.* § 2996f(b)(9), and legal assistance regarding a violation of the Military Selective Service Act, *id.* § 2996f(b)(10). My experience as a legal services lawyer from 1978 to 1984 was that many other political and bar groups were, or had been, actively engaged in providing legal services in these areas. The only occasion in which these restrictions affected my representation of a client was my denying representation to an aunt who was the custodian of a teenage girl and wished to obtain guardianship of her. Although I regularly represented family members in obtaining such guardianships, I declined to represent this individual because her ultimate purpose was to gain the legal authority to consent to the teenager having an abortion. I referred this woman to a group of pro bono lawyers who were available to provide representation to minors seeking abortions.

<sup>193</sup> See Appropriations Act § 504(a)(11)(A)–(F) (prohibiting legal assistance for “any alien” except for lawful permanent resident aliens, aliens seeking permanent residence based on marriage to or parentage of a citizen, lawfully present refugee aliens, aliens with the lawful withholding of deportation, aliens lawfully granted a conditional entry before April 1, 1980, and certain limited assistance to aliens under section 305 of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.)).

<sup>194</sup> ULS can, however, use non-LSC funds to represent any alien “who has been battered . . . by a spouse,” parent, or member of the same household in the United States. 45 C.F.R. § 1626.4 (2005). LSC regulations permit limited representation of alien agricultural workers who are not residents but who are legally admitted to this country for their work. See Appropriations Act § 504(a)(15); 45 C.F.R. § 1626.11. LSC regulations also permit certain representation of aliens who are victims of domestic violence. See Appropriations Act § 502(a)(2).

lords. Some employers prey, primarily, on these vulnerable groups, almost enslaving them in sweatshops, exposing them to unsafe working conditions, and often refusing to pay wages for weeks of labor. Some slum lords rent inadequate housing to those unable to afford safe, habitable apartments. During 2002, ULS rejected 166 cases because the clients were “ineligible aliens.” The only representation available to this group of persons is representation in immigration matters.<sup>195</sup> No program in Utah is funded or structured to provide representation to these individuals in employment, housing, consumer, or other legal matters. When abused workers or tenants have no recourse, there is little deterrent for unscrupulous employers or landlords not to mistreat economically vulnerable people.

*(b) Prisoners*

ULS is also prohibited from participating “in any litigation on behalf of a person incarcerated in a Federal, State, or local prison.”<sup>196</sup> Presumably this change was intended to prevent participation in habeas corpus cases and cases involving conditions in the prison.<sup>197</sup> However, ULS has never participated in such cases, and the sweep of this prohibition is much broader than those cases. Incarcerated individuals face many problems that can involve litigation—the most prevalent, perhaps, being family law issues. An inmate may wish to obtain a divorce as part of a release plan. An incarcerated parent may seek visitation rights or may have valid concerns with the care a substitute custodian is providing her children. While inmates whose children are placed in foster care are represented by appointed counsel if abandonment or termination cases are filed,<sup>198</sup> inmates with divorce or intra-familial custody or visitation problems will get no such representation.

This is not merely an abstract worry. During the first year these restrictions were imposed, ULS turned away 331 clients due to the new restrictions, and of these, 290 were prisoners with family law cases.<sup>199</sup>

The Legal Aid Society provides representation to individuals in family law matters and could, presumably, represent a prisoner in a family law matter as long as the prisoner was a resident of Salt Lake County.<sup>200</sup> The Disability Law Center

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<sup>195</sup> Because the Legal Aid Society has no such restriction, it could represent an “ineligible alien” in a family law matter if the client resided in Salt Lake County (its catchment area) and the Disability Law Center could represent a nonresident alien who was disabled in a case about his disability.

<sup>196</sup> Appropriations Act § 504(a)(15); 45 C.F.R. § 1637.

<sup>197</sup> “[N]or may a recipient participate on behalf of such an incarcerated person in any administrative proceedings challenging the conditions of incarceration.” 45 C.F.R. § 1637.3.

<sup>198</sup> See UTAH CODE ANN. § 78-3a-913 (Supp. 2006) (providing indigent parents with the right to counsel in juvenile proceedings).

<sup>199</sup> Interview with Anne Milne, *supra* note 76.

<sup>200</sup> Interview with Stewart Ralphs, *supra* note 56.

regularly represents prisoners in matters related to the prison's compliance with the Americans with Disabilities Act access provisions (e.g., the proper treatment of mentally ill prisoners).<sup>201</sup> No rational state plan would conclude that prisoners from Salt Lake County should get family law assistance while prisoners from other counties should not. And if prisoners should be able to litigate some issues (e.g., violation of the rights of disabled prisoners) and not others (e.g., race discrimination), then a planning body should enunciate the rationale for such different treatment.

## 2. *Prohibited Advocacy*

The 1996 restrictions broadly prohibit the use of LSC funds for various basic advocacy activities: legislative lobbying and participation in agency rule making,<sup>202</sup> class action litigation,<sup>203</sup> representation “involving an effort to reform a Federal or State welfare system,”<sup>204</sup> and conducting training programs advocating particular public policies, on prohibited cases, or about prohibited advocacy activities such as lobbying.<sup>205</sup> A legal services program is also prohibited from receiving attorneys' fees under any statute that would otherwise award such fees to a prevailing party.<sup>206</sup> “The new legislation restricts all of a grantee's funds regardless of source[,] . . . unique and unprecedented” restrictions.<sup>207</sup> This prohibits ULS from using any funds—even funds provided from private donors or state or local governments—to engage in the forbidden representation and advocacy activities.

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<sup>201</sup> Interview with Fraser Nelson, *supra* note 111.

<sup>202</sup> Appropriations Act, Pub. L. No. 104-134, § 504(a)(2)–(6), 110 Stat. 1321 (1996). ULS may now comment or provide testimony to legislative bodies or agencies only if the body or agency asks ULS for such comment or testimony, if ULS had not arranged for the comment or testimony to be requested, and if ULS has other funding (not from LSC) that can be devoted to this purpose. *Id.* § 504(e).

<sup>203</sup> *Id.* § 504(a)(7); 45 C.F.R. § 1617 (2005).

<sup>204</sup> Appropriations Act § 504(a)(16); 45 C.F.R. § 1639. However, the United States Supreme Court narrowed this prohibition somewhat in *Legal Services Corp. v. Velazquez*, when it declared that Congress had unconstitutionally violated the First Amendment by restricting arguments legal services lawyers could make in individual welfare cases. 531 U.S. 533, 537 (2001).

<sup>205</sup> Appropriations Act § 504(a)(12); 45 C.F.R. § 1612.8.

<sup>206</sup> Appropriations Act § 504(a)(13); 45 C.F.R. § 1642.

<sup>207</sup> See Appropriations Act § 504; 45 C.F.R. § 1610; Houseman, *supra* note 8, at 1214–15.

(a) *Legislative Advocacy—Congress Prohibited the Use of LSC Funds in Any Attempt to Influence Legislation or a Regulation.*

Non-LSC funds may be used to respond to a written request from a government agency for testimony or information on proposed legislation or regulation.<sup>208</sup> Three possible justifications occur for prohibiting poor people's lawyers from engaging in legislative advocacy or administrative rule making. One may be that this is not what lawyers do or what clients need. Another may be the suspicion the legal services lawyer is not actually representing a client, but advancing her own personal "liberal agenda." And a third rationale may be that lobbying smacks of special interests "buying off" legislators and preventing them from serving the public interests.

The first justification is clearly wrong; the ABA Model Rules of Professional Conduct directly consider the "Advocate in Non-adjudicative Proceedings" and address the "lawyer representing a client before a legislative or administrative tribunal."<sup>209</sup> The rules allow the client to determine "the objectives of the representation,"<sup>210</sup> so there should be no ethical problems with a poor client wanting his lawyer to try to get a law changed.

In the past, LSC-funded programs have been permitted to advocate for clients before legislative and administrative bodies.<sup>211</sup> Today, ULS may speak in this forum only if invited by a legislator and not solely to advance a client's cause. In contrast the Disability Law Center and the Legal Aid Society are both permitted to engage in legislative advocacy for their clients and both agencies do advocate issues within their missions (laws affecting persons with disabilities and family law, respectively).

Today, as the state's welfare program evolves,<sup>212</sup> poor clients' interests are at risk of being ignored. New standards and procedures have been forged to deal with eligibility for the Temporary Assistance for Needy Families program, and changes may well develop in response to welfare reauthorization at the federal level. In many cases, flaws with the content of the regulations or procedures will come first to the attention of Utah Legal Services<sup>213</sup> when clients pose their problems to ULS

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<sup>208</sup> Appropriations Act § 504(a)(2); 45 C.F.R. §§ 1612, 1612.6.

<sup>209</sup> MODEL RULES OF PROF'L CONDUCT R. 3.9 (1983, 2002); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-15, EC 7-16, DR 7-106(B)(1) (1980) (regarding a lawyer's duty to a client in administrative and legal proceedings and requiring the disclosure of legal authority that is directly adverse to the client's position).

<sup>210</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983, 2002-2006).

<sup>211</sup> Interview with Anne Milne, *supra* note 76. ULS has advocated in consumer, public utilities, and housing matters.

<sup>212</sup> *See* discussion *infra* Part VI.B.2(c).

<sup>213</sup> My students who have worked on these cases as interns at ULS have handled cases in which problems have arisen with the following: notice for in-person hearings, definition of absent parent when the parent is disabled, and definition of cooperation to establish paternity when the father's identity is unknown.

staff. Yet ULS is barred from taking the most efficient tack—pointing out structural problems or unfairness to the Department of Human Services and suggesting the department alter its regulations.

It is unclear why the prior limitation—that one must have a client needing the law change advocated—was not sufficient to keep “liberal lawyers’ personal agendas” in check. Today, it seems unnecessarily rigid to prohibit any affirmative comment on behalf of a client and to further prohibit even responding to legislators’ requests for comments unless outside funding is available to pay for that response.

Finally, if the concern is that legislative advocacy is a dirty business of advancing special interests, then the words of the famous Louis Brandeis should warn us against denying poor people any representation in the legislative arena:

[A]ble lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people . . . .

The leading lawyers . . . have been engaged mainly in support of the claims of the corporations. . . . and the people have been represented, in the main, by men of very meager legal ability . . . .

. . . .

. . . [T]he leaders of the Bar have, with few exceptions, not only failed to take part in constructive legislation designed to solve in the public interest our great social, economic and industrial problems: but they have failed likewise to oppose legislation prompted by selfish interests. . . . They have often advocated, as lawyers, legislative measures which as citizens they could not approve . . . .

. . . .

. . . [T]he public is often inadequately represented or wholly unrepresented. Great unfairness to the public is apt to result from this fact.<sup>214</sup>

Indeed, Brandeis’s words are as true today as ever; private lawyers zealously represent private interests in the legislative arena while the poor go with no advocacy whatsoever.

*(b) Class Action Litigation—Utah Legal Services Is Prohibited from Engaging in Any Class Action Litigation.*

This is probably the most significant change and limitation, because ULS has successfully pursued clients’ rights through class action litigation in the past and

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<sup>214</sup> Louis D. Brandeis, *The Opportunity in the Law*, in *BUSINESS—A PROFESSION* 313, 321–24 (1914) (delivering an address on May 4, 1905 at Phillips Brooks House before the Harvard Ethical Society).

because no other entity has stepped forward to undertake this responsibility. When the restriction went into effect, ULS had eight class action suits pending—three related to public benefits and two dealt with abusive practices of certain collection agencies. ULS sought pro bono counsel and ultimately obtained counsel to substitute in some, but not all, of these cases.<sup>215</sup>

One way to illustrate the reason class action litigation should be available to the poor is to describe the last class action case ULS handled. In the early 1990s ULS attorneys, University of Utah law students, and I were working together to provide outreach and legal services to homeless individuals.<sup>216</sup> Many of the homeless people we encountered had applied for and been denied disability benefits.<sup>217</sup> Yet these individuals often appeared to have serious mental illnesses, given their disheveled appearances and their incoherent speech. We began taking individual cases to appeal the denial of SSI and Supplemental Security Disability Income (“SSDI”) benefits; and we were rewarded with a very high rate of success on appeal before administrative law judges. While it was satisfying to win almost all these cases, the clients remained homeless and at risk during the lengthy appeal process. Moreover, we knew many of the most disturbed applicants were too disorganized to find ULS and take an appeal. Accordingly, we wondered why the original mistakes on our clients’ cases had been made and what we could do to make a change.

One of the law student volunteers undertook to analyze a few dozen of ULS’s closed cases that had originally been denied benefits but won on appeal. She was looking for what was alike about those cases and comparing the cases themselves to the federal regulation that governed the application and review process. Working with ULS senior benefits lawyer Mike Bulson, Jencie Anderson (then a student and now a clinical professor of law at the U of U College of Law) discovered various problems that persisted in the way the Utah state agency assessed SSI/SSDI cases. Together they outlined these problems and brought them to the attention of the state agency and the Social Security Administration (“SSA”).<sup>218</sup> However, neither the state agency nor the SSA agreed that any practices should be changed or that the agency was misapplying federal law and regulation.

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<sup>215</sup> Interview with Anne Milne, *supra* note 76.

<sup>216</sup> We worked under the auspices of the Shelter and Support Project, a law school clinic funded by the LSC, with the U of U College of Law contracting with ULS to provide direct supervision of our students.

<sup>217</sup> The benefits sought included SSI and SSDI, which are available to individuals who were permanently and totally disabled.

<sup>218</sup> At that time, LSC regulations required ULS to request that a state actor change its practices before ULS could file a class action or appeal challenging those practices. ULS complied with this policy to no avail. *See* Mike Gorrell, *Advocates for Disabled Threaten Lawsuit*, SALT LAKE TRIB., Dec. 16, 1991, at B1.

So in 1992 ULS filed a class action in federal court,<sup>219</sup> asking the court to order the state agency and the SSA to change its practices. Ultimately the case was successful and a consent decree was signed in which the state agency and the SSA agreed to various changes in the way they evaluated applications for disability benefits. Many cases were to be reviewed and estimated millions of dollars in back-benefits paid to disabled individuals wrongly denied benefits for years. There was even an award of substantial attorneys' fees for this successful case.

However, this case almost died completely when ULS was forced to withdraw as counsel because of the new LSC restrictions. The restrictions required ULS to have no further involvement in the case after August 1, 1996, so ULS sought a pro bono private attorney to take it on. The first volunteer attorney later backed off, but ULS was fortunate in locating a second attorney, Brent V. Manning, to become counsel. Mr. Manning and his firm devoted many additional hours of work and successfully settled the case, earning attorneys' fees for his time and probably \$22 million in back benefits for disabled clients whose claims had been wrongly denied.<sup>220</sup> The Utah Bar Journal covered this case:

Manning sees the case as justice—even more than money—being denied. “People were being wronged every day in that system. It was a typical overworked bureaucracy—as a response to overwork, people were cutting corners. As a result, people were getting hurt. I’m glad we could help.”<sup>221</sup>

Although this case had a successful conclusion, its history does not bode well for future cases. Brent Manning and his firm had been willing to take this case entirely pro bono. They prevailed and were ultimately paid, and later contributed generously to “and Justice for all”; however, Mr. Manning was the only volunteer after months of searching and after a prior volunteer backed out. Moreover, as Mr. Manning notes, much of the analysis necessary for this case had been done by ULS before he took the case pro bono.<sup>222</sup>

What is happening today? Are ULS lawyers and volunteer students taking critical looks at systems that seem to be broken? Are they analyzing persistent

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<sup>219</sup> The *Goodnight v. Apfel* case was filed in 1992 in the United States District Court for the District of Utah and certified as a class action in October 1993. Final Order Approving Settlement, *Goodnight v. Apfel*, No. 92-C-279C (D. Utah July 30, 1998), available at [http://www.ssa.gov/OP\\_Home/hallex/I-05/I-5-4-61.html](http://www.ssa.gov/OP_Home/hallex/I-05/I-5-4-61.html).

<sup>220</sup> Before the restrictions, ULS would also have qualified for attorneys' fees, which would allow ULS to serve other clients whose needs may have been deferred for this case. The firm of Manning, Curtis, Bradshaw and Bednar contributed \$20,000 over a three-year period to “and Justice for all” after this settlement. See *Manning, Curtis, Bradshaw & Bednar Contributes Time and Money*, UTAH B.J., April 1999, at 54, 54.

<sup>221</sup> *Id.*

<sup>222</sup> See *id.* (“Utah Legal Services attorneys saw a situation where a huge injustice was going on, but they were hamstrung by Congress to do anything about it.”).

problems and requesting that government agencies correct them? No—ULS lawyers are prohibited from such advocacy.

Yet, it seems a misuse of scarce resources for ULS to limit itself to fixing a few individuals' problems one after another, never addressing any systemic problems. Such an approach is not only inefficient, but unfair to many clients—to those whose cases cannot be accepted due to the press of work and to those who are too discouraged or disorganized to appeal. Yet if ULS does look into systemic problems that may require a class action approach to correct, who is available to file the class action lawsuit? There is no other program in Utah funded to handle such major litigation. There are few attorneys willing to accept such cases pro bono. And there is no organized pro bono program focused on such cases.

(c) *Representation "To Reform a Federal or State Welfare System"*<sup>223</sup>

In 1996 the U.S. Congress ended "welfare"<sup>224</sup> as we know it," making the most sweeping change to our public benefits programs since their creation in the 1930s. We moved from a system with substantial federal control to a system of block grants to the states with substantial local choice. We also moved from a system of categorical eligibility (supporting single, unemployed parents with dependent children) to a system of limited lifetime eligibility (a lifetime cap of three to five years of eligibility). While our booming economy and local initiative initially resulted in reduced welfare roles across the country, we are now dealing with poor single parents who have "maxed out" their lifetime eligibility.

It is not patently obvious that this new program will have no systemic flaws. Indeed, it is highly likely that there will be mistakes made in designing a new program. Not only will individuals have random mistakes made in their cases, but some systemic mistakes will occur in this bureaucracy that will affect the lives of many similarly situated poor people. If nothing else, the *Goodnight* case amply demonstrates that, from time to time, state agencies make systemic errors in administering a public benefits program that can affect many individuals at a loss of millions of dollars.<sup>225</sup>

When a ULS client is suffering from an error affecting Temporary Assistance for Needy Families ("TANF") eligibility, what is ULS to do? This restriction does not prevent ULS from taking the individual case to challenge a denial of TANF benefits.<sup>226</sup> Does it permit ULS to point out when an aspect of the agency's practice is systemically denying others the benefit the client wins? At a minimum,

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<sup>223</sup> Appropriations Act, Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321 (1996).

<sup>224</sup> These changes refer to ending the Aid to Families with Dependent Children (AFDC) program and creating the Temporary Assistance for Needy Families (TANF) program.

<sup>225</sup> See *supra* note 219.

<sup>226</sup> See *Legal Services Corp. v. Velazquez*, which held that it was an unconstitutional denial of First Amendment rights to limit the arguments a lawyer could make in an individual case. 531 U.S. 533, 548 (2001).

ULS is here again prevented from representing a class of welfare recipients in a case that tried to reform the program. Thus in two ways—no class actions and no welfare reform representation—ULS lawyers are barred from any involvement in litigation to challenge systemic aspects of this brave new world of welfare.

The prohibition against representation to “reform a . . . welfare system” should also be understood in conjunction with the prohibition against representing clients in legislative lobbying or administrative rule making. The new TANF system has required new administrative rules and may well continue to require amendments and adjustments to those rules. The statute itself may need amending as we see how the program works. Yet here again, ULS is doubly forbidden to have any input into such changes.

It is unclear whether the prohibition on “representation to reform a state or federal welfare program” was intended to apply only to the new TANF “welfare” program or to all programs involving public benefits. Does this restriction doubly prevent precisely the work that was needed in the *Goodnight* case? If “welfare system” is understood to include all public benefits programs—SSI/SSDI, Social Security, Medicare, Medicaid, Veteran’s Benefits, Food Stamps, WIC, Unemployment Compensation, Workers Compensation, public housing—this prohibition may be very broad indeed.

It may be tempting for lawmakers to imagine that poor clients will typically need little more than brief advice and help with simple documents. There is little historical support for this belief. Indeed, over the past few decades, legal services attorneys have been instrumental in successfully asserting the rights of the poor in many conflicts that were hotly contested and that necessitated complex litigation including class actions and appeals. If the rights of the poor have, at times, been denied by powerful private interests as well as public bureaucracies, it is likely such denials will occur again. Any responsible plan to provide access to justice for the poor must provide for representation in class actions and complex litigation, including actions that may be seen as reforming a welfare program.

Similarly, if the civil rights movement and the abortion controversy have taught us nothing else, we have at least learned that society can best grapple with possible change when advocacy (and change) occur in the legislative forum as well as in the courts. The best way for society to come to grips with new welfare and work-support programs is for the needs of the poor beneficiaries to be advocated not only in court, but in the agencies and state house as well. To preclude legislative advocacy invites the imbalances in power that have kept the judicially controlled abortion issue so raw and controversial.

Utah should recognize the meaning of these restrictions imposed on ULS and design a way to provide the full range of legal services needed by the poor in these areas.

(d) *Collecting Fees as Prevailing Parties—The 1996 Restrictions Prohibit ULS Lawyers from Claiming Attorneys’ Fees under Any Law (State or Federal).*<sup>227</sup>

Various statutes require the losing party to pay the legal fees of the prevailing party, including consumer protection, civil rights, and discrimination cases. Typically legislatures have provided for such fee shifting where important rights should be protected, but no or minimal money damages makes it impossible for the wronged person to obtain representation.

DLC regularly claims such fees and in prior years ULS has claimed attorneys’ fees, though this has been infrequent and the amount of these fees has not been large. The availability of fees never drove case selection or priorities at ULS.<sup>228</sup> However, the fees were resources that could be used by ULS for future cases in any area of law.<sup>229</sup>

This restriction not only eliminates a possible resource, but denies rights to plaintiffs with viable claims. Attorneys’ fees not only reimburse the winning attorney for her time, but also serve as leverage for defendants encouraging settlement of such cases. If ULS accepts a case where attorneys’ fees might be claimed, it has denied its client this leverage. This, perhaps, is one reason ULS priorities do not include consumer cases, since occasionally attorneys’ fees may be claimed under Utah statute. Yet, today there is no other program poised to accept these cases and use this leverage, and many of these cases are too small to ensure the private bar will provide representation. In a state that often has the highest bankruptcy rate in the nation<sup>230</sup> and one of the highest foreclosure rates, it is extremely unfortunate that no staff program exists to represent defrauded consumers.

Utah needs a state plan that would consider how small fee-generating cases can be handled—either by a program without LSC funding or by a pro bono or reduced fee panel—so these resources are not lost and the leverage is available to parties who have been wronged.

(e) *Limitation on Outreach and Education*

Federal restrictions state ULS cannot accept any case that results from its community outreach and “in-person unsolicited advice to . . . obtain counsel or take legal action.”<sup>231</sup>

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<sup>227</sup> Appropriations Act § 504(a)(13).

<sup>228</sup> Interview with Anne Milne, *supra* note 76.

<sup>229</sup> LAS occasionally obtains fees in family law cases. DLC, too, is entitled to obtain fees when it prevails and also does so occasionally.

<sup>230</sup> Richard I. Aaron, *Access to Justice: Consumer Bankruptcy*, 2006 UTAH L. REV. 925, 932 n.20.

<sup>231</sup> Appropriations Act § 504(a)(18).

While private attorneys are ethically prohibited from in-person solicitation where the lawyer's pecuniary gain is a significant motive,<sup>232</sup> public interest and pro bono lawyers are constitutionally entitled to educate the public through in-person outreach and to solicit cases in this way.<sup>233</sup> This restriction provides the third tool to prevent legal service lawyers from doing anything to address systemic problems they uncover. ULS cannot ask a government agency to alter its regulations or advocate legislative changes, it cannot bring a class action to challenge an illegal practice, and with this restriction ULS cannot broadly and effectively educate the public about any such problem. If ULS reaches out to inform groups about their legal rights or of schemes employed by unscrupulous landlords or employers, ULS is thereafter prohibited from representing anyone who hears its message.

Unless there is some reason why poor folks should not be both informed of their rights and also represented when their rights are violated, a state plan should explore how both can be accomplished.

#### VII. PLANNING—WHAT IS NEEDED AND HOW TO PROVIDE IT

A comprehensive plan for serving the poor and other disadvantaged groups must involve setting priorities and developing a diverse service delivery system, including: paid staff programs, pro bono programs, pro se clinics, law school clinics, alternative dispute resolution programs, conveniently available sources of legal information, and partnerships with human service agencies and advocacy organizations not heretofore part of the civil legal aid system. The service delivery approach selected for any given type of case or activity should seek both efficiency and effectiveness; the highest and best use should be made of the legal abilities of the participants and the various mechanisms for resolving disputes and solving problems. The preferences of individual lawyers for certain types of work, while necessary to accommodate to some extent in a pro bono setting, should otherwise not govern what services are provided.

Some underlying principles for setting priorities and devoting resources should include: seriousness of harm to the client (e.g., domestic violence cases being more serious than divorces for childless couples), difficulty of the case (e.g.,

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<sup>232</sup> UTAH RULES OF PROF'L CONDUCT R. 7.3 (2005); MODEL RULES OF PROF'L CONDUCT R. 7.3 (2006). This prohibition is intended to prevent over-reaching by the lawyer.

<sup>233</sup> In *NAACP v. Button*, the United States Supreme Court held that bar rules against in-person solicitation violated First Amendment rights of political speech when employed to prevent NAACP lawyers from seeking plaintiffs to challenge school segregation. 371 U.S. 415, 437 (1963). In *In re Primus*, the Court extended this holding to permit a pro bono lawyer volunteering with the ACLU to invite a welfare recipient to challenge her forced sterilization. 436 U.S. 412, 439 (1978).

if pro se representation is ineffective there is an argument for counsel),<sup>234</sup> and efficiency in effectively using resources for the poor (e.g., fully litigating a legal issue that frequently arises will help more people than litigating a novel question).

*A. A Plan for the Full Range of Services*

Because of the seriousness of having no income and the possibility of positively affecting a large group of clients, a comprehensive plan must provide representation that might reform a welfare program when poor clients are unfairly treated by the existing bureaucracy. A comprehensive plan should provide for class action litigation and for legislative and administrative advocacy since there are instances where these mechanisms are most efficient and most effective for clients with serious problems. Indeed, winning or settling individual cases at the administrative hearing stage time after time does not create precedent, will never change a flawed policy, and will bring justice only to the few who find their way to a ULS or pro bono lawyer.

Currently there is no plan in place to make these services available to the poor. While the Disability Law Center provides a full range of services to its clients with disabilities concerning legal issues arising out of their disabilities, other poor clients in Utah do not have comparable access to such advocacy. ULS has ceased to do this important work for the poor, and no other agency has stepped in to pick up the slack. Reliance on the pro bono bar has, to date, not resulted in this comprehensive range of services being provided.

This important work must not fall by the wayside. ULS is not unique in being required to divest itself of important work it has done for decades. Other legal services programs throughout the nation have faced the same challenge. We should look to how other communities have dealt with a need for legislative advocacy and impact litigation. Alan Houseman reports that “[a] number of new entities have been developed to carry on state level advocacy, particularly policy advocacy,” including, “William E. Morris Institute for Justice (Arizona); Colorado Center for Law and Policy and the Colorado Fiscal Policy Institute; . . . New Mexico Center on Law and Poverty; . . . North Carolina Justice and Community Development Center . . . Oregon Center for Public Policy.”<sup>235</sup>

In some states, already-existing entities funded by state or private dollars changed their focus to include legislative advocacy and impact litigation in light of federal restrictions on LSC-funded programs. In Michigan, a unique partnership was forged between a legal service program and the University of Michigan Law School that involves the law school clinics focusing on systemic and impact cases

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<sup>234</sup> Indeed, one thing that a comprehensive plan should do is address ways in which pro se representation or alternative methods of dispute resolution may be developed and provide just outcomes more efficiently or more effectively.

<sup>235</sup> See Houseman, *supra* note 8, at 1239 & n.1360.

that federally funded legal service offices are forbidden to undertake.<sup>236</sup> The State of Washington, which has been vigorously engaged in systemic state planning for almost a decade, has recognized the importance of private lawyers filling the gaps left after prohibitions were imposed on federally funded legal services:

The *State Plan* must promote a vision of private attorney involvement where attorneys are actively recruited to provide assistance in the fullest range of legal forums on the broadest scope of important client legal needs. This includes the full array of legal representation . . . including but not limited to legislative and regulatory representation, complex litigation including class actions, and transactional and other specialized forms of legal representation.<sup>237</sup>

It is premature to determine how Utah should address these unmet needs—whether through a new staff program, the redirected efforts of an existing staff program, the establishment of an innovative law school clinic (or combination of two law schools in this clinical endeavor), or a refocused pro bono program. However, it is not premature to decide that Utah must honestly grapple with this challenge.

#### *B. A Plan to Serve the Unserved*

Just as a comprehensive state plan must determine how the full range of advocacy services should be provided, it must also address how all of the public will have access to justice. It is simply not acceptable to fail to offer any legal service to prisoners with family law cases and undocumented persons with any case outside of an immigration case. If we recognize these groups as unserved, we must either devise an approach to providing services to them or candidly admit that we have decided they should *not* have access to justice.

While it may be premature to decide how these groups should be served, it is high time to discuss the viability of different approaches.

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<sup>236</sup> ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, THE MISSING LINK IN STATE JUSTICE COMMUNITIES: THE CAPACITY IN EACH STATE FOR STATE LEVEL ADVOCACY, COORDINATION AND SUPPORT 7 n.8 (2001), available at <http://www.clasp.org/publications/missinglink.pdf> (“The Michigan Poverty Law Project is a cooperative effort of the University of Michigan Law School and Legal Services of Southeastern Michigan. . . . MPLP contracts to provide legislative and administrative advocacy on public benefits, health care, education, housing, elder law and consumer rights. The law school clinical program, which is a part of MPLP, focuses on systemic impact cases and projects, including appeals, class actions, or other law reform litigation.”).

<sup>237</sup> WASH. STATE ACCESS TO JUSTICE BD., *supra* note 136, at 42.

*C. Innovative Services*

Given the absolute decline in funding for civil legal aid for the poor, in many states “legal providers are collaborating with other human service providers, community organizations, and other entities to deliver holistic interdisciplinary services and help non-legal service providers provide their clients with information about legal rights and options.”<sup>238</sup> Such collaboration has certain advantages, including the possibility of reaching more clients, providing legal services in a holistic problem-solving context, and educating human service agencies about legal rights and remedies. Some also suggest that such human service providers “can often influence policy more effectively than the legal services program.”<sup>239</sup>

In Utah there are both human-service providers and faith-based programs<sup>240</sup> that should be stakeholders in state planning for the delivery of legal services to the poor. This would not only result in wider knowledge about legal rights, but would enhance the effectiveness of legal assistance as lawyers become part of integrated services, by becoming “a part of a bigger solution for our client’s problems.”<sup>241</sup>

Another innovation that must be considered in any coordinated plan is the development, support, and appropriate use of alternative dispute resolution systems. Proponents of alternative dispute resolution have the goal of obtaining “an acceptable result in the shortest possible time with the least amount of stress and at the lowest possible cost to the client.”<sup>242</sup> However, this must not mean that all poor people’s problems are shuttled off to mediation or arbitration processes. Rather, “adjudication is appropriate in cases involving fundamental rights or unsettled legal principles, but other procedures might be more suitable for routine matters, for parties with ongoing relationships, or for grievances that affect multiple stakeholders or do not lend themselves to principled win-lose

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<sup>238</sup> Houseman, *supra* note 8, at 1238.

<sup>239</sup> *Id.*

<sup>240</sup> Crossroads Urban Center, the YWCA, Utah Issues, Voices for Children, Catholic Community Services, and Holy Cross Ministries are only a few of the entities that might be involved. To date the only such entities that provide direct legal services are Catholic Community Services (immigration for refugees) and the Holy Cross Ministries (immigration for the undocumented), although Crossroads Urban Center currently has lawyers on staff. The possibility of involving such entities in planning for and providing legal services to the community should be fully explored.

<sup>241</sup> Houseman, *supra* note 8, at 1239 (quoting LeAnna Hart Gipson, *Effective Delivery: Rethinking Fundamental Issues*, MGMT. INFO. EXCHANGE J., Nov. 1997, at 41, 46).

<sup>242</sup> COMM’N ON PROFESSIONALISM, ABA, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 41 (1986) (quoting Chief Justice Warren Burger), *reprinted in* 112 F.R.D. 243, 268 (1987).

decisions.”<sup>243</sup> Thus, appropriate programs must be developed for those “routine” matters that poor, middle-class and wealthy individuals face; and access to full adjudication must be made available for those disputes that violate the fundamental rights of the poor or require judicial interpretation of laws or regulations. Strong leadership from the courts, the private bar, the programs serving the poor, and other community stakeholders will be necessary for such planning to take place.

#### *D. Study and Assessment*

It is not enough to devise new programs or approaches to meet a perceived need. There must be candid and regular assessment of services and any innovations to ensure new approaches do, indeed, meet the intended need and do so as efficiently as possible. Unless there is a statewide, ongoing planning body devoted to this honest reassessment and redirection, all stakeholders in the service delivery will be motivated to tout their successes (with whatever data is conveniently available) rather than honestly publicize outcomes.

#### *E. Other Supports*

If a state planning body for access to justice were created and endowed with ongoing responsibilities, it would be a catalyst for appropriate changes to court rules, court practices, and rules of professional conduct that would enhance access to justice. While the bodies that develop these rules are mindful of access to justice issues, a body with “access to justice” as its portfolio would certainly consider, study, and develop many more ideas in a more focused way. Since there are so few lawyers permanently committed to serving the least well off, it is doubly important that a planning body with substantial respect devote itself to these issues. Otherwise, the leaders of the bench and bar risk remaining unaware of possible approaches that have been developed elsewhere and ought to be considered for Utah.

### VIII. CONCLUSION

In the past decade, the Utah bar has taken some important steps to address the issue of equal access to justice. Attorneys from the three largest staff programs have partnered with leaders from the private bar to establish the “and Justice for all” program. This program has inspired attorneys to contribute substantial funds to support programs serving the needy. The courts have begun to address the issue of pro se litigants. Efforts to improve pro bono programs have been made by various institutions. Yet much has proceeded by fits and starts. Valuable ideas and

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<sup>243</sup> RHODE & LUBAN, *supra* note 5, at 872 (citing Lon Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978)).

innovations have not become an established part of our service delivery system. Certain challenges have not even been discussed, let alone addressed. As a community we have not developed a comprehensive plan to ensure the most efficient and effective legal services are available to the least well off. The time is ripe to undertake this important endeavor.