Office of Research and Policy Analysis

SJR 6:
Background Report on
Civil Legal Services in Montana

A REPORT TO THE LAW AND JUSTICE INTERIM COMMITTEE

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> *The first duty of society is justice.*
> -- Alexander Hamilton

Purpose

The study requested by Senate Joint Resolution No. 6 challenges the Law and Justice Interim Committee (LJIC) to determine what role the State of Montana should play in providing equal access to justice for Montanans with limited means. This report provides basic background information about what access to justice means, in the civil legal sense, by summarizing the history of civil legal services, the resources available in Montana, legal needs, and the key questions that the LJIC will need to address as it takes up the SJR 6 challenge.

Historical perspective

Immigrant aid societies: In the early 1870's, America was a nation of immigrants coming to a new world to start a new life. Immigrants, new to America and usually without financial means, needed housing, food, clothing, healthcare, employment, and security -- all of the essentials. Merchants, tradesmen, lawyers, and other community leaders organized aid societies and pooled their resources to help those newly arriving in America secure those basic needs. These aid societies were essential to helping new American citizens establish themselves, open new businesses, and develop healthier communities.[1]

[1] Houseman, Alan W., and Perle, Linda E., *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, Center for Law and Social Policy, November 2003.

Legal aid societies: Eventually, communities found that, in a nation built on the rule of law, access to the law was the key to unlocking doors for the aid societies, and sometimes the only way to ensure that new immigrants had equal opportunities unfettered by ethnic prejudices or unfair practices. Thus, "legal" aid societies were born and began to take hold in America's largest cities.

In 1911, 15 legal aid societies joined forces to form a national network of legal service providers called the National Alliance of Legal Aid Societies. This national alliance later matured into what we know today as the National Legal Aid and Defender Association (NLADA), the oldest non-profit membership and resource organization for criminal and civil legal service providers and advocates.[2]

> *All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.*
>
> -- President Thomas Jefferson, First Inaugural Address, March 4, 1801

Society's moral obligation: Heralded as the father of legal aid in America, Boston Legal Aid Society counsel Mr. Reginald Heber Smith in 1919 published a book entitled *Justice and the Poor*. In this landmark work, Smith proclaimed that legal aid to all, regardless of financial means, was essential to the health of American democracy and a fundamental precept of justice; and that ensuring access to the machinery of the law, regardless of financial status, was society's moral obligation. He challenged those skilled in the practice of law to help fulfill this obligation and to practice law for the public good...*pro bono publico*.

Responding to Smith's challenge, the American Bar Association soon established a Committee on Legal Aid Work and encouraged local bar associations to do the same. Today, attorneys who best exemplify these values are honored with the Reginald Heber Smith Award.

[2] Ibid.

Early delivery models varied: By the mid-1950s, some type of legal aid program existed in nearly every urban center, but delivery methods varied. Legal aid societies employed a paid staff, bar associations encouraged private *pro bono* work, law schools and students provided help, and city and county social services programs often provided legal assistance so their clients could establish eligibility for state or federal programs.[3]

War is declared on poverty: In the 1960's, legal aid was employed as an indispensable weapon in the war on poverty declared by President Lyndon B. Johnson in 1964. Following in Smith's footsteps, Jean and Edgar Cahn wrote an article entitled "War on Poverty: A Civilian's Perspective", which was published in the Yale Law Review in 1964. The article became a blueprint for legal services to be provided through neighborhood law offices in every community. Inspired by the Cahns' work, the director of the Office of Economic Opportunity (OEO), the agency leading the charge in the war on poverty, determined that legal aid needed to become a key component of the OEO's programs. The OEO director, Sargent Shriver, hired Edgar Cahn to spearhead the effort.[4] The rest, as they say, is history.

> *It early became apparent,...that if legal aid societies were to be effective in their fight against injustice, they must...take a part in the formulation of remedial legislation. They saw cases of injustice which the law was powerless to redress because of the inadequacy of certain provisions or the lack or proper laws framed to meet the changed conditions.*

Public funding transforms legal "aid" to legal "services": The OEO's funding of legal aid programs for the poor marked the first time in American history that public funding was provided for legal services. Legal "aid" had developed into more than a charity, it became a "service".

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[3] Ibid.

[4] National Equal Justice Library web site at http://nejl.wcl.american.edu/cahnarticle.html,summary of the Jean and Edgar Cahn Article Award.

Advocacy and "impact litigation": Under the OEO, legal services expanded exponentially. The OEO grant programs favored organizations that hired full-time staff attorneys to deliver legal services to the poor and that pursued an agenda for social reform to make a difference beyond single individual...i.e., legal advocacy through "impact litigation".

Landmark court decisions force social reforms: Legal service agencies, along with the ACLU, NAACP and others, won key court battles, forcing government agencies as well as private entities to make numerous changes in areas such as housing, employment, entitlement programs, personal liberty, property, and court procedures.

> *Lawyers must be activists to leave a contribution to society. The law is more than a control; it is an instrument for social change. The role of the OEO Legal Services Program is to provide the means within the democratic process for the law and lawyers to release the bonds which imprison people in poverty, to marshal the forces of law to combat the causes and effects of poverty.*
>
> -- E. Clinton Bamberger, first Director of the OEO Legal Services Program, Speech to National Legal Aid and Defender Association,

The Legal Services Corporation (LSC) is born: In an effort to make federal agency legal services programs more responsive to local policymakers and independent of political agendas, the Congress in 1974 established an independent, non-profit entity called the Legal Services Corporation (LSC). Funding was provided by direct appropriations. The LSC used its funding to provide grants to local legal services associations who carried on the efforts first started under the OEO, employing a paid staff of full-time attorneys to provide civil legal services to the poor.

Reagan era reforms: When Ronald Reagan became president of the United States in 1980, he called for the LSC to replaced by social service block grants, law student clinical programs, and an alternative to staffed legal services offices called "judicare". Judicare was similar in concept to Medicare and involved private attorneys receiving payment under government contracts for providing their services to low-income clients. Although the LSC Act itself was not reauthorized by Congress in 1981, funding for the LSC was included in the

general appropriations bill, though the LSC budget was cut by 25%. Appropriation "riders" restricted how the funding could be used. Lobbying and rulemaking by the LSC, class action lawsuits, and representation of certain illegal aliens, among other activities, were restricted. Additionally, state and local bar associations were given the authority to appoint members to the boards directing LSC-funded associations.

> *As lawyers, our first responsibility is, of course, to see that the legal profession provides adequate representation for all people in our society. I would suggest there is no subject which is more important to the legal profession, that is more important to this nation, than...the realization of the ideal of equal justice under law for all.*
>
> -- President Richard Nixon, Speech to the National Legal Aid and Defender Association, October 1962

A push for more private attorney involvement: The LSC joined with local bar associations to increase private attorney involvement. The effort earned its own acronym -- PIA. As a condition of funding, the LSC required that grantees spend at least 12.5% of their grant money on PAI such as programs to encourage *pro bono* services, judicare contracts, clinics for private attorneys, and co-counseling between private attorneys and staff attorneys. Additionally, banking law changes allowed for Interest on Lawyer Trust Accounts (IOLTA) programs whereby an attorney's client services account money could be pooled to earn interest. The interest earned became a funding source for civil legal service associations.

The "Contract with America" reforms: In 1994, with the 104th Congress, reforms required the LSC to issue competitive rather than presumptive grants, established further restrictions of lobbying and class action law suits, and prohibited LSC-funded associations from serving prisoners and certain categories of aliens.

A series of budget cuts: From 1995 through 2003, a series of budget cuts forced numerous LSC-funded legal services associations to drastically reduce the size of their staffs and number of offices. The national support network of training centers and clearinghouses, initially begun under the OEO, shut down.

The national picture today: While LSC funding remains the largest single source of funding for civil legal service programs, total non-LSC funding now exceeds total LSC funding in 32 states. The $335.3 million LSC annual budget funds 143 programs and 3,700 attorney positions nationwide. Annually, more than 1 million cases and 4 million "matters" are handled by LSC-funded programs, though 4.2 million Americans are financially eligible for the services. State-level strategic planning efforts has become a pre-requisite for receipt of LSC funding. There is renewed emphasis and more reliance on *pro bono* work by private attorneys, self-help programs, and student legal services.[5]

Components of civil legal services in Montana

Civil legal services in Montana consists of four components:

(1) attorneys employed by the Montana Legal Services Association;

(2) *pro bono* services performed by private attorneys;

(3) self-help programs; and

(4) collaborations and planning.

Montana Legal Services Association (MLSA): Founded in 1966, the MSLA is a private, non-profit association that provides civil legal services to Montanans at or below 125% of federal poverty guidelines. ***Figure 1*** provides a chart showing income levels used in current federal poverty guidelines.

The MSLA is governed by a board of directors and is administered by an Executive Director. Attorneys working for the MSLA staff 8 offices in Montana: Billings, Bozeman, Browning, Crow, Helena, Missoula, and Poplar. (See ***Attachments*** for more information from the MLSA.)

[5] Legal Services Corporation, 2002-2004 Annual Report.

Figure 1

Size of Family Unit	Percent of Federal Poverty Level 100%	125%
1	$9,310	$ 11,638
2	12,490	15,613
3	15,670	19,588
4	18,850	23,563
5	22,030	27,538
6	25,210	31,513
7	28,390	35,488
8	31,570	39,463
Each Additional Person	$3,180	$3,975

Source Note: These are calculated using the simplified poverty guidelines used by the U.S. Department of Health and Human Services, published in the Federal Register Vol. 69, No. 30, February 13, 2004, pp. 7336-7338

The MLSA's administers a budget of approximately $2.4 million, employs 14.63 full-time attorneys and 11 paralegals. In 2004, MLSA offices closed a total of 4,735 cases (374 of which were closed with private attorney assistance) and helped 11,697 people with a variety of legal needs. Family law was the most frequent legal need handled: 1,948 cases. (See the ***Attachments*** to this report for more information provided by the MLSA.)

For 2005, LSC-funding provided to the MLSA totals $1,529,033. Non-LSC funding totals $855,529. Thus, LSC funding accounts for about 56% of the MLSA's total funding. The largest non-LSC funding sources for the MLSA are as follows:

- $186,562 from district court filing fees deposited to a state special revenue account for civil legal services to indigent domestic violence victims;[6]

- $144,756 from the Montana Justice Foundation, which is raised from the interest earned on client trust accounts in the IOLTA program;[7] and

- $106,683 from Fort Peck Tribes.

Pro Bono Activities: The second component of civil legal services in Montana is provided by private attorneys who provide civil legal aid on a free or reduced fee (*pro bono*) basis. Under the Montana Supreme Court's Rules of Professional Conduct, private attorneys are encouraged to donate at least 50 hours of service annually to providing *pro bono* services either through direct services to individual clients or by providing services to charitable, religious, civic, or community governmental and educational organizations. There is no penalty if an attorney does not provide *pro bono* services.[8] Paralegals, law students, and law faculty also provide *pro bono* services.

Through a collaborative effort among various groups supporting civil legal services in Montana, an internet forum for *pro bono* service provides has been

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[6] Under section 25-1-201(3)(a) and (5), $19 from the filing fee for dissolution of marriage and $9 from the fees for filing other actions or proceedings must be deposited to an account in the state special revenue fund created in section 3-2-714, MCA, for civil legal assistance for indigent victims of domestic abuse. This fund is administered by the supreme court administrator.

[7] Montana's IOLTA program is provided for by the Montana Supreme Court under Rule 1.18 of the Rules of Professional Conduct. Participation is mandatory (though some lawyers and law firms are specifically excepted). Funds received from a client by the participating lawyer or firm that are nominal in amount or to be held only for a short period of time are deposited to interest-bearing accounts with a participating financial institution. All interest or dividends generated on the money in these accounts is paid quarterly to the Montana Justice Foundation. The Montana Justice Foundation distributes the money through a competitive grant process to qualified non-profit organizations providing civil legal services to low income Montanans. According to a Montana Justice Foundation flyer, 80% to 90% of all interest generated on the IOLTA accounts has gone to the MLSA.

[8] Rule 6.1 - *Pro Bono Publico.*

established at www.MontanaProBono.net. This web site provides an on-line resource library, a listing of *pro bono* service opportunities, an events calendar, legal news, and a list service. Statistics about how many Montana attorneys, other professionals, and students, participate in pro bono activities and how many cases or "matters" are handled on a *pro bono* basis was not immediately available for this report.

Self-help: The third component of civil legal services in Montana is "self-help" whereby support is provided so people can help themselves and legally represent themselves in court (i.e., *pro se*).[9]

A key self-help resource is a web site at www.MontanaLawHelp.org. A product of collaboration among civil legal service advocations, this web site organizes legal information by type of legal need, such as family law, employment, benefits, disability, taxes, seniors, American Indian, etc. It also provides a resource directory, *pro se* forms and materials, and referral services.

Another civil legal self-help resource is the Eastern Montana Self-Help Law Project sponsored by the MLSA and funded in part by the Echoing Green Foundation and the Initiative for Public Interest at Yale. The project offers classes, individual explanations of the law and legal options, information on court locations and procedures, court forms, computer work stations, and legal advise from staff or volunteer attorneys.[10]

The state law library and the University of Montana law library is also a key resources in the self-help area of civil legal services.

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[9] *Pro Se* is a Latin term meaning "on one's own behalf; in courts, it refers to persons who present their own cases without lawyers.

[10] Eastern Montana Self-Help Law Project flyer, revised 3/04.

Collaboration: Collaboration is the engine that coordinate the efforts of the other components parts of civil legal services in Montana. Several committees and organizations play leading roles in "producing" and "directing" the civil legal services "performance".

The following are the civil legal services "cast members":

Montana Supreme Court

- Commission on Self-Represented Litigants
- Equal Justice Task Force
- State Law Library

Montana State Bar Association

- Access to Justice Committee; and

Montana Legal Services Association

- Eastern Montana Self-Help Project.

Montana Justice Foundation

- Interest on Lawyer Trust Accounts (IOLTA)

UM Law School

Montana Advocacy Program

People's Law Center

Cascade County Law Clinic

Department of Justice

Department of Health and Human Services

What are the legal needs?

In 2004, the State Bar of Montana commissioned a study of civil legal needs among low-income Montanans. The following information is a bullet-point summary of the major findings published in the study's draft final report:

- An estimated 174,900 people in Montana are low income.[11]

- Montana has about 71,388 low-income families.[12]

- Each low-income household experiences about 3.47 civil legal problems per year, which amounts to about 247,716 total legal problems per year.[13]

- Assistance is provided in only about 16.4% of the situations in which a low-income person encounters a legal problem. Thus, 83.6% of the need (about 207,051) go unassisted.[14]

- In the 16.4% of the situations where assistance was provided, the MLSA provided assistance in 9.3% of the situations. Private attorneys assisted in 7.1% of the situations. [15]

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[11] State Bar Association of Montana, *Draft: Montana Legal Needs Study*, p. 48. The study cites the U.S. Census 2000 as the source of this figure. However, this figure could not be independently verified. Additionally, the draft does not define "low-income" and the Appendix to which the reader is directed for more information was not available.

[12] Ibid.

[13] *Legal Needs Study*, p. 48. The figure of 247,716 legal needs seems to be arrived at by multiplying 3.47 legal needs per "household" by the number of low-income "families" in Montana. However, a "household" is not a "family" as defined by the U.S. Census. Thus, without more information, it is unclear whether this number is a valid representation of legal needs.

[14] *Legal Needs Study*, p. 15. The figure of 207,051 needs being "unmet" or "unassisted" includes needs for which a person did not seek assistance or for which a person may have used a self-help resource.

[15] *Legal Needs Study*, p. 15.

- In the 7.1% of the situations where assistance was provided by a private attorney, 3.3% involved the client paying the full fee for services, 2.8% involved no fee, and 0.9% involved the client paying a reduced fee.[16]

- The most common types of legal problems encountered among those surveyed for the study were employment (18%), family (10.7%), and housing (10.1%).[17]

- Demographic populations reporting the most number of legal "problems" and "issues" were as follows:
  - incarcerated adults;
  - domestic abuse victims;
  - homeless persons;
  - Native Americans; and
  - physically disabled persons.[18]

Policy issues and study questions

The purpose of the September 21 meeting of the LJIC, is to help committee members identify the nature and scope of the policy issues involved in this study and to decide which of the issues should be further examined so that policy options can be developed. The following are some (certainly not all) of the policy issues and questions that could be discussed on September 21:

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[16] Ibid.

[17] *Legal Needs Study*, p. 4.

[18] *Legal Needs Study*, p. 37. One legal "problem" may have multiple legal "issues".

RESEARCH QUESTION #1

Should the study further examine civil legal needs of low-income Montanans and certain demographic populations? If so, what information or data would be helpful to the committee members in order to better define the needs and develop options?

Discussion: A draft report from the legal needs study commissioned by the State Bar of Montana has been provided to each LJIC member. A few highlights from the report were summarized above. The information gathered may be sufficient, the LJIC may wish to further dissect the data already collected, or the LJIC may wish to collect additional information. In any case, it is important for staff to know what additional information would be most helpful to committee members and why so that the appropriate information is gathered.

RESEARCH QUESTION #2

What information would be most helpful to the Committee about how technology may be used to enhance and/or coordinate civil legal services in Montana?

Discussion: A study task listed in SJR 6 is to review how technology can be used and coordinated to address unmet needs. This research question asks what additional information members need in order to decided whether the state should spend resources on technology to enhance "access to justice" in civil legal matters.

RESEARCH QUESTION #3

Should the study explore options for providing statutory incentives to civil legal service providers?

Discussion: One of the SJR 6 study tasks is to study "changes in state law necessary to facilitate the provision of civil legal services

to those unable to afford them". This study task needs further definition. Staff has interpreted the term as providing "statutory incentives" (e.g., tax incentives, standards or requirements, commissions, etc.) to promote civil legal services. How do committee members interpret "facilitate" and what areas of statute does the committee want to examine?

RESEARCH QUESTION #4

What fiscal questions, concerns, and goals do committee members have with respect to raising state revenue and providing state funding for civil legal services in Montana?

Discussion: Language in SJR 6 highlights the fact that federal funding cuts have drastically reduced MLSA's ability to provide civil legal services in Montana. Additionally, the SJR 6 poses the following study tasks:

-- "determine the level of public funding required to provide the assistance necessary to enhance equal access to the Montana justice system"; and

-- "review of the revenue options that could be considered in providing state funding for civil legal services for low-income residents of Montana and the manner in which state funds could be appropriated".

In order to provide meaningful fiscal information to the LJIC, staff needs direction on what fiscal questions, concerns, and goals members have and will wish to discuss at future meetings.

Conclusion

Civil legal services was conceived in the womb of an immigrant nation where those newly arrived in America needed shelter, employment, food, clothing, health care, and safety so they could establish healthy communities and prosperous businesses. As immigrant aid societies matured, communities realized that, in a nation built on the rule of law, the battle against discrimination and other injustices had to be legally fought in the courts by those skilled in the practice of law.

> *Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of classes....And when the law recognizes and enforces a distinction between classes, revolution ensues or democracy is at an end.*
>
> -- Reginald Heber Smith, JUSTICE AND THE POOR (1919) page 12.

A keen sense that society shared a public duty and a moral obligation led to federal funding for civil legal services, which transformed private aid organizations into public services. Private attorneys also took up the call to provide legal services *pro bono publico*. "Impact litigation" forced social reforms and key legal battles were won in the courts to secure liberty, property, employment, housing, and human services rights irrespective of social or financial status.

However, whether because strident advocacy challenged ideological limits, or whether lean fiscal times forced smaller budgets, or whether "re-thinking government" forced organizational reforms, significant cuts were made in public funding for civil legal services. These budget cuts have drastically reduced the capacity of civil legal service providers, such as the MLSA, to meet needs.

The challenge posed by SJR 6 to the LJIC is to determine what role the state of Montana should play in facilitating and funding the provision of civil legal services to moderate and low-income Montanans.

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