

The Initial Report of the
**NORTH CAROLINA EQUAL ACCESS
TO JUSTICE COMMISSION**

MAY 2008

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Acknowledgements

The Initial Report of the North Carolina Equal Access to Justice Commission was written by Commission members Ken Schorr, Executive Director of Legal Services of Southern Piedmont, and Carol Spruill, Senior Lecturing Fellow and Associate Dean for Public Interest and Pro Bono at Duke Law School. As referenced in this report, contributions were made by all speakers at the Equal Access to Justice Summit held October 12, 2007.

Special contributors are North Carolina Chief Justice Sarah Parker; Cal Adams, Commission Vice President and Partner at Womble Carlyle Sandridge & Rice; Commission Secretary Anita Earls, Founding Director of the Southern Coalition for Social Justice; Michelle Cofield, Executive Director for the Commission and Director of Public Service and Pro Bono Activities at the North Carolina Bar Association Foundation; and Robert Echols, State Support Consultant at the ABA Resource Center for Access to Justice Initiatives.

Special thanks to the editorial group: Cal Adams; Michelle Cofield; Anita Earls; and George Hausen, Executive Director of Legal Aid of North Carolina. The Commission thanks third-year Duke Law student Matt Wolfe who did excellent work in editing the final draft of the report. Thanks to Jessica Griffin, Assistant to Ms. Cofield, for her assistance in transcribing Summit presentations. Editing and graphic design by Archetype.

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1 May 2008

Greetings:

Access to the civil justice system for those people of modest means who do not have the resources to pay for legal services is an issue of grave concern. In an effort to address this serious problem, the North Carolina Equal Access to Justice Commission was created by order of the North Carolina Supreme Court in November 2005. In its simplest terms, the charge to the Commission was to evaluate the need, propose possible solutions, and undertake initiatives to implement solutions. This initial report of the Commission reviews the needs assessment and summarizes the work of the Commission to date.

Of particular note was the Equal Access To Justice Summit convened in October 2007. This interdisciplinary gathering brought together representatives of the legal, business, academic, governmental, and nonprofit communities to learn and engage in dialogue about the economic and social implications of lack of access to the civil justice system.

The peaceful resolution of civil disputes is essential to the preservation of ordered liberty in a democratic society. However, our citizens lose confidence in the process when meaningful access to the forum for resolution of disputes is denied to a significant segment of our population.

Some of the information in this report is startling. As you read this material, I urge you to reflect upon it and to give especial thought to the following words of Thomas W. Lambeth, Senior Fellow and Former Director of the Z. Smith Reynolds Foundation, in his address to the Summit:

[D]enial of access to civil justice imprisons those denied in a situation that prevents them from being all that they might be. It prevents them from contributing all that they might contribute to the common good. Yet they are not the only prisoners when such a condition prevails. All of the community in which they live is to some extent imprisoned. We are all denied the benefits that would come from a society in which equality of access and opportunity prevail.

Thank you for your consideration of this Report.

Sincerely yours,



Sarah Parker

Real People, Real Injustice

A working mother of two who has been a victim of domestic violence—one of 40,000 domestic violence victims in North Carolina each year:

“I had black eyes. I got a little baby chair thrown at me, and it snipped a corner of my eye. I've been thrown into the side of a door, and the back of my head busted open. I've been choked while holding my youngest child. Since we have been going to Legal Aid of North Carolina and getting their help, we don't look over our shoulders. The boys are a lot happier. They're not as nervous. They don't have that scared look on their face. They have smiles on their faces.”

A recent study found that the availability of legal services in the county of residence of victims is one of the most important factors in decreasing the incidence of domestic violence.

After kidney and pancreas transplants, a 44-year-old woman with diabetes was denied disability insurance benefits. Legal aid representation was the only way she was able to afford anti-rejection medicine needed to maintain her transplant:

“The letter terminating the disability was a shocker; it meant no medication, no doctors' visits, and the medication was very, very expensive. The anti-rejection medication is about \$1,500 a month, and I need that every day for the rest of my life as long as I have the transplant. Legal Services of Southern Piedmont really came through for me. It was a life or death situation, and they brought me life.”

More than 1.3 million people under age 65 are uninsured in North Carolina, including some 240,000 children. Availability of legal services often makes the difference in access to vital health care.

Just after the death of his parents, a 73-year-old man and his wife who lived on \$15,000 a year were facing the loss of the home that they had shared with his parents, because the state did not realize that they had part ownership of the property:

“If it weren’t for the Pisgah Legal Services, I don’t know where I’d be. I was fixin’ to be out on the street.”

Nearly 740,000 North Carolina households—including working families, the elderly, and the disabled—lack affordable, safe housing. Legal aid representation can mean the difference between having shelter and being out on the street.

A 56-year-old cafeteria worker turned to Legal Aid of North Carolina when her landlord refused to repair dangerous problems in the house she rents:

“My problems with the house was gas leaks, a problem with the roof, and leaking in the kitchen and in the bedroom, leaking everywhere. Problems with the floors. The outside, ah, peeling, paint peeling. My stairwell and steps was weak. The floor was weak.

“I called the housing inspector, and he told me I had 16 violations, 16 different violations. After that I contacted Legal Aid. We went to court. After we went to court, my landlord had my house fixed up, and I didn’t have any more problems. But if I hadn’t gone to Legal Aid, I would still have these problems, and I thank them very much.”

A mother and her 21-year-old daughter sought help from Legal Services of Southern Piedmont when area mental health services denied them communication equipment that should have been covered under the law:

“As a mother I think that everyone has a strong desire to communicate with their children. With Sara for many years she had a real inability to tell me about her day. The equipment would enable her to continue to process what was going on in her life and be able to communicate more effectively about it. We were quite elated to find out that Sara was finally going to get the equipment.”

EXECUTIVE SUMMARY

When they need assistance with a civil legal matter, over 80 percent of low-income people and people of modest means cannot afford to pay attorneys and are unable to secure representation by publicly funded attorneys or pro bono volunteers.¹ In 2006, approximately 3.1 million of North Carolina's 8.8 million people (over one-third of the population) had sufficiently low incomes to qualify for assistance from legal aid agencies. These low-income people and people of modest means face legal problems caused by, or exacerbated by, poverty—problems such as evictions, foreclosures, loss of custody, loss of benefits, domestic violence, and lack of access to health care. Cynicism about the system of justice is rising, as people are not able to obtain legal counsel to assist them in resolving their disputes through the courts.

Judges are seeing an increasing number of people appearing pro se—without any legal representation. The usual operation of court is disrupted when untrained lay advocates do not know court procedures, evidence rules, or substantive areas of the law. Judges are pressured to play a double role as an advisor to the unrepresented and as an impartial decision-maker.

Poverty creates problems that easily become legal problems. In 2006, 1.2 million people—over 13 percent of the population of North Carolina—lived on incomes below the poverty level, which is \$17,170 for a family of three. Many of these 1.2 million individuals live far below the poverty level. Twenty-four percent of children younger than five live in poverty. The median household income of legal aid clients is \$9,000 per year. Of workers, 28 percent make less than \$9.60 per hour. About 16 percent of the population of North Carolina is without either government or private health insurance. Home foreclosures rose 300 percent from 1998 to 2005, even before the current crisis.

Current resources do not adequately meet this growing need for civil legal assistance. The total amount of public and private funding for civil legal services in North Carolina was \$23.7 million in 2008. The per capita amount of funding available for all legal aid agencies in North Carolina is \$7.58 per eligible person. Currently, funds are available for only about 200 attorneys employed by legal aid agencies, or one attorney for every 15,500 low-income clients. In contrast, overall there is one attorney for every 442 North Carolinians. Legal Aid of North Carolina (LANC) must turn away eight clients for every client accepted. Each of these cases represents a real person with a real problem. Studies have shown, and other providers confirm, that only about one-fifth of low-income people in need of legal assistance in civil matters are able to obtain assistance from a legal aid agency.

Legal aid attorneys who represent those low-income North Carolinians who are able to secure representation are stretched thin and face the emotional difficulty of triaging among people with a wide variety of desperate circumstances. Legal aid attorneys earn low professional salaries and often bear high law school debt. Under these circumstances, retention of legal aid attorneys is difficult.

Many private attorneys across North Carolina are donating countless hours to representing those who cannot afford to pay. Many more attorneys need to engage in or increase their commitment to pro bono in order to help fill the gap that LANC currently cannot fill.

The Commission finds that North Carolina must address the lack of access to the civil justice system for the poor by:

- ⊗ Increasing state funding for legal aid organizations.
 - ⊗ Providing a statutory right to counsel for specific types of cases.
 - ⊗ Taking new measures to increase pro bono representation.
 - ⊗ Combining the efforts of lawyers with leaders in the business community, the religious community, the government community, the nonprofit community, the academic community, and the client community.
 - ⊗ Establishing clear guidelines for the courts in cases with pro se litigants and providing more assistance for those representing themselves in the courts pro se.
 - ⊗ Providing more support for legal aid attorneys, especially through debt reduction.
 - ⊗ Improving access to the courts for those with limited English proficiency.
 - ⊗ Educating the public about the realities of poverty and barriers to access to the civil justice system.
-

I. History of the Commission

Existing legal aid programs in North Carolina have long been unable to meet the need of low-income people for legal assistance in cases involving basic human needs. Currently resources are available to provide help in approximately one-fifth of such cases. As the number of low-income people needing legal assistance has continued to increase, court, bar, and community leaders in North Carolina have looked to other states which have established Equal Access to Justice Commissions to develop new methods and strategies to address this growing need.

The Executive Director of the North Carolina State Bar's Interest on Lawyers Trust Accounts Program (IOLTA), Evelyn Pursley, and the North Carolina Bar Association Foundation's (NCBAF) Director of Public Service and Pro Bono Activities, Michelle Cofield, attended a meeting of State Equal Access to Justice Commissions held in Austin, Texas in May 2005. Working with Legal Aid of North Carolina's Assistant Director for Advocacy and Compliance, Celia Pistolis, they reported to the NCBAF Public Service Advisory Committee (PSAC) on the growing national effort to improve access to the civil justice system through the establishment of state commissions. David Daggett was Chair of the PSAC when this presentation was made and was actively involved in the development of the Commission through the summer of 2005.

According to the American Bar Association's (ABA) Access to Justice Support Project, which provides technical support to local efforts to improve access to justice:

The role of Access to Justice Commissions is generally to bring together representatives of the key institutions involved in improving and expanding access to civil justice for low-income people to identify goals and objectives and the steps necessary to achieve them, and to oversee and coordinate implementation of those steps.

These commissions are often established by a state's highest appellate court. The PSAC embraced the idea of having a commission in North Carolina and invited North Carolina Supreme Court Chief Justice I. Beverly Lake and bar leaders to its next meeting. At the May 12, 2005 meeting, Evelyn Pursley presented a review of the last few decades of legal services at the national and state levels, as well as the national movement of establishing state commissions.

Justice Lake declared his intention to establish such a commission. North Carolina Bar Association (NCBA) Executive Director Allan Head suggested that Lake convene a discussion at the upcoming NCBA Annual Meeting in Asheville in June 2005. Chief Justice Lake's first step was to invite bar leaders and legal advocates for low-income people to an Equal Justice Roundtable Event that was held during the NCBA's annual convention in Asheville, North Carolina on June 24, 2005. The event was well-attended and support for establishing a commission was strong. Over the summer of 2005, David Daggett, Michelle Cofield, Celia Pistolis, Evelyn Pursley, Cal Adams, and Duke Law School Associate Dean for Public Interest and Pro Bono and Senior Lecturing Fellow Carol Spruill worked with Chief Justice Lake to draft an order.

In December 2005, shortly before his retirement from the bench, Chief Justice Lake, by order of the state Supreme Court, established the North Carolina Equal Access to Justice Commission, making North Carolina the nineteenth state to establish such an entity. The Chief Justice established the Commission to expand access to civil legal representation for people of low income and modest means in North Carolina with the following order, which is also printed at Appendix II:

In recognition of the need to expand access to civil legal representation for people of low income and modest means in North Carolina, the Supreme Court of North Carolina charged the Equal Access to Justice Commission with these eight goals, purposes, and responsibilities:

(1) Identify and assess current and future needs of low-income North Carolinians for access to justice in civil matters by conducting a study to determine the full range and volume of such unmet legal needs. The study shall: (a) determine and document how unrepresented people with legal disputes are attempting to meet these needs without attorneys, the extent to which these efforts are successful, and the consequences of the lack of attorney representation; (b) recognize the enormous efforts currently being made by attorneys to serve low-income North Carolinians; (c) analyze the need for funding and other resources to close the gap; and (d) address any other matters related to the delivery of equal access to justice in civil matters to all North Carolinians.

(2) Develop and publish a strategic plan for delivery of civil legal services to low-income North Carolinians throughout the state that will (in part) educate the public about the large gap between the ideal of equal access to the legal system and the reality of lack of representation.

(3) Foster coordination within the civil legal services delivery system and between legal aid organizations and other legal and non-legal organizations.

(4) Increase resources and funding for access to justice in civil matters and ensure both are applied to the greatest need so that all possibilities for additional state, local, and other non-Legal Services Corp. funding are examined, the most feasible options analyzed, and a strategy for pursuing such funding implemented.

(5) Ensure wise and efficient use of available resources through collaboration among legal aid and other organizations (such as other legal advocacy groups, non-legal advocacy groups, providers of social services, law schools, the court system, corporate and government law departments, and other state and local agencies) and through the use of local, regional, and statewide coordination systems.

(6) Develop and implement other initiatives designed to expand civil access to justice, such as increasing community education, enhancing technology, developing assisted pro se programs, and encouraging greater voluntary participation of the private bar in pro bono legal assistance to low-income people in North Carolina.

(7) Monitor the effectiveness of the statewide system and services provided, as well as periodically evaluate the progress made by the Commission in fulfilling the civil legal needs of low-income North Carolinians.

(8) Consider the legal needs and access to the civil justice system of persons whose income and means are such that they do not qualify under existing assistance programs and whose access to civil justice is limited either by the actual or perceived cost of legal services; and develop and implement initiatives designed to meet these needs, such as limited representation and limited appearances by attorneys and identification of types of services that could be provided by non-lawyers.

To carry out these goals, 25 members were to be appointed. These must be people who reflected the diversity of ethnic, gender, legal, and geographic communities of North Carolina. The Chief Justice or her designee would serve as Chair of the Commission and an Executive Director would report to her.

Members must include representatives of each of the four levels of the judiciary in North Carolina and the Administrative Office of the Court or Clerks of Court; eight practicing lawyers, with designated positions for the North Carolina State Bar; the North Carolina Bar Association/Foundation (NCBA), the North Carolina IOLTA Board of Trustees; and members of voluntary bar organizations; representatives of legal aid organizations, including Legal Aid of North Carolina, the North Carolina Justice Center, and an “unrestricted” legal aid program that does not receive federal funds; a law school representative; public members representing the Governor, the President of the Senate, and the Speaker of the House; a representative of the philanthropic community; a client representative; and two members of the business community.

The 25-member Commission was structured to include representative stakeholders from across the state, to reflect the diversity of ethnic, gender, legal, and geographic communities of North Carolina and to be chaired by the Chief Justice. Commission members included representatives of the judiciary, practicing lawyers, legal aid programs, law schools, general public, state government, philanthropic organizations, business communities, and client communities.

Chief Justice Lake began appointing members of the Commission before his retirement, and early in her tenure, new Chief Justice Sarah Parker completed the appointments to the new Commission. The list of Commission members appears as Appendix I.

In addition to making various oral reports to the North Carolina State Bar and the NCBA, the Commission is charged with filing an annual report. This is the first report of the Commission. The Commission is also charged with meeting quarterly.

The first meeting of the Commission was held on April 27, 2006 at the North Carolina Bar Center in Cary, North Carolina. In June 2006, the Commission held an open house at the annual meeting of the NCBA in Atlantic Beach, North Carolina. Subsequent meetings of the Commission have been held as follows:

August 11, 2006	Duke Law School, Durham
November 9, 2006	Poyner & Spruill, Charlotte
January 26, 2007	Womble, Carlyle, Sandridge & Rice, Winston-Salem
April 27, 2007	Kilpatrick Stockton, Raleigh
June 22, 2007	Grove Park Inn, Asheville
August 29, 2007	North Carolina Bar Center, Cary
October 12, 2007	The Equal Access to Justice Summit, Cary
April 9, 2008	North Carolina Bar Center, Cary

At the November 2006 meeting, the Commission defined its mission, set priorities in areas of education and resources, and established Working Groups to address each of the priority issues, as follows:

Mission: It is the mission of this Commission to expand access to the civil justice system for people of low income and modest means in North Carolina.

EDUCATION: Commission member Carol Spruill chairs this working group.

- 1. Educate Stakeholders.** The Commission places a high priority on educating the stakeholders about the need for legal services for the low-income and modest-means people in North Carolina. These stakeholders include members of the legal community, the legislature and other governing bodies, the business community, and the community at large.
- 2. Address Systemic Issues through Systemic Change.** In order to expand access to the civil justice system for low-income and modest-means people in North Carolina, it is important to address systemic issues with real, systemic change to afford more opportunities to access justice.
- 3. Evaluate Assistance to Pro Se Litigants.** More and more litigants in North Carolina, and across the country, find that they are compelled to represent themselves because of their inability to afford to pay an attorney to represent them. This group of litigants, many of whom are ineligible for assistance through a legal services provider (either financially or by case type), often struggles to find assistance to navigate the court system.
- 4. Encourage and Support Pro Bono Emeritus.** Retired or inactive attorneys can be a bountiful source of pro bono assistance if afforded the opportunity through training and coordination through a legal services provider. Pro bono emeritus rules have been enacted in several states and have met with success.
- 5. Implement a Plan to Foster an Understanding and Appreciation of the Rule of Law for the Public.** Through the development and support of educational programs for the public about the rule of law in the elementary, middle, and secondary schools, students will begin to formulate a deeper respect for the law.
- 6. Evaluate the Need for a Statewide Legal Needs Assessment.** Recently, Legal Services Corporation (LSC) published a legal needs assessment reporting on unmet needs throughout the country. North Carolina's most recent legal needs study was completed in early 2003.
- 7. Support Pro Bono Legal Assistance.** Expand pro bono assistance opportunities for attorneys and paralegals in North Carolina in order to increase the capacity to serve more eligible clients.

RESOURCES: Commission member George Hanna chairs this working group.

- 1. Explore Mandatory IOLTA.** Currently, approximately 75 percent of eligible attorneys participate in IOLTA. North Carolina is among the largest (in income) of the voluntary IOLTA programs in the country. Moving towards mandatory IOLTA would make more money available through IOLTA for its grant-making purposes.
- 2. Increase State Funding by \$1.00 per Case Filed.** Currently, the legal services community receives \$2 per case filed (\$0.95 is earmarked for work in the area of domestic violence, and \$1.05 is distributed generally, according to a legislative formula).
- 3. Educate the Judiciary on Cy Pres and Legal Services.** We need to inform judges about the opportunity to distribute unclaimed class action funds to worthy organizations such as legal services (a court procedure known as making cy pres awards).
- 4. Implement Pro Hac Vice Registration Fees.** In some states, pro hac vice registration fees are contributed, in part, to legal services providers. This is a potential source of revenue for the legal services community.

II. Accomplishments of the Commission to Date

A. Achieved Mandatory IOLTA

The Resource Working Group of the Commission initially identified the level of attorney participation in the IOLTA Plan as a major issue. Participation in IOLTA has been voluntary in North Carolina since 1983 and has produced more than \$50 million in grants. Approximately \$4.5 million was generated by IOLTA in 2006 alone.

Approximately 75 percent of eligible attorneys participate in IOLTA. The IOLTA Plan's board and staff reported that there was a range of reasons why attorneys do not participate. These reasons include: a lack of understanding of the plan, philosophical disagreement with the plan or the use of the funds, confusion between IOLTA participation and the Client Security Fund or other Bar programs, an incorrect belief that IOLTA participation requires additional accounting for the firm, or simple inertia.

On January 11, 2007, the Resource Working Group recommended that the Commission formally support a change in the IOLTA Plan from voluntary to mandatory, and the Commission adopted a resolution supporting such a change on January 26, 2007. The State Bar Council then approved a petition to the North Carolina Supreme Court to order such a change. On October 11, 2007, the North Carolina Supreme Court ordered the North Carolina State Bar to implement a "comprehensive" (i.e., mandatory) IOLTA program for North Carolina lawyers effective January 1, 2008. Lawyers must be in compliance with this requirement no later than June 30, 2008.

As a result of the Supreme Court's order, North Carolina will join 35 other states with mandatory IOLTA programs. States that changed from voluntary to mandatory IOLTA programs experienced between a 57 percent and a 200 percent increase in IOLTA funds. South Carolina's IOLTA income, for example, rose over 60 percent in the year after it converted to a mandatory program. Because high levels of eligible North Carolina attorneys voluntarily participate in IOLTA, our state's initial increase may not be as high as other states that had a lower level of voluntary participation.

Commission and IOLTA Plan Board member Jim Talley reported that the IOLTA board has a strong relationship with the banking community and that the Bankers Association is represented on the IOLTA board. The Commission has also worked to support the IOLTA Board's efforts to improve the returns on existing accounts within the IOLTA program. Commission member Michael Rizer, Director of Community Relations for Wachovia, has worked on the bank side of IOLTA to improve returns, resulting in significant increases in revenue from IOLTA accounts held by that bank.

B. Increased Funding for the Access to Civil Justice Act (ACJA)

The Resource Working Group also identified increased funding for the Access to Civil Justice Act (ACJA) as a high Commission priority. More than 3.1 million people, about one-third of the state's population, qualify for legal services' assistance. Legal services programs in North Carolina provide assistance to over 25,000 clients each year, but the demand is much greater than the need that is currently being met. For example, approximately 40,000 cases of domestic violence are heard in North Carolina courts each year, and the number of foreclosures increased 300 percent between 1998 and 2005.

In 2007, North Carolina ranked thirtieth in the nation in funding for civil legal assistance, according to data compiled by the ABA Project to Expand Resources for Legal Services. Florida has almost twice as much funding from state sources for civil legal aid per poor person as North Carolina. Maryland has almost three times as much. The total amount of public and private funding for civil legal services in North Carolina was \$23.7 million in 2008. The per capita amount of funding available for all legal aid agencies in North Carolina is \$7.58 per eligible person. Currently, funds are available for only about

200 attorneys employed by legal aid agencies, or one legal aid attorney for every 15,500 low-income clients. Overall, there is one attorney for every 442 North Carolinians.

The Commission set as a goal an increase in the amount of court costs that are allocated to the ACJA from the current level of \$1.05 to at least \$5 per case. The Domestic Violence Victims Assistance Act provides an additional \$.95 per case filed to legal aid agencies. During the 2007 legislative session, the North Carolina General Assembly adopted, and the governor signed, a state budget for the coming year that includes provisions which increase court fees and the portion of each court fee allocated to the ACJA from \$1.05 to \$2.05 per case. The recurring budget also includes \$1 million in general funds for the ACJA. Senator Dan Clodfelter, representing the North Carolina Senate as a member of the Commission, sponsored these provisions and led the negotiations for their adoption. Representative Martha Alexander, as a member of the Commission, also played a key role in supporting these changes.

The Resolution of the North Carolina Equal Access to Justice Commission Regarding Essential Funding for Indigent Civil Legal Services passed on January 27, 2007 and is available at Appendix III.

C. Revitalized Pro Bono Emeritus

Following a national effort by the ABA to tap the expertise and energy of the estimated 40,000 lawyers who retire each year, the Commission identified retired attorneys as a valuable resource for civil legal assistance. Under previous State Bar rules, lawyers who take inactive status are prohibited from practicing law, including handling pro bono cases. The Commission proposed changes in Bar Rules to permit retired lawyers to handle pro bono cases under the auspices of a legal services provider.

To enable the State Bar to make these changes, Representatives Dan Blue and Paul Stam sponsored House Bill 1487, titled “Pro Bono Emeritus Lawyers.” This bill was passed in the 2007 legislative session, amending G.S. §84-16 to carve out a narrow exception permitting inactive Bar members “to solely represent indigent clients on a pro bono basis under the supervision of nonprofit corporations,” including each of the existing civil legal assistance providers in North Carolina.

Although pro bono emeritus attorneys do not have to pay active bar dues or take Continuing Legal Education courses, they still have to comply with the Rules of Professional Conduct and remain subject to discipline. The State Bar adopted amendments to its rules to implement the program. Commission member Jerry Parnell was a principal advocate for this change and drafted the proposal. Commission Vice-Chair Cal Adams, then Chair of LANC, said: “This is a great idea whose time has certainly come. There is an overwhelming need for volunteer lawyers to help poor people in North Carolina. We’re only serving a small portion now.”

“These pro bono practice rules make it easier to give back and stay involved in the access to justice movement,” said Holly Robinson of the ABA Commission on Legal Problems of the Elderly. “If we can harness all of these retiring lawyers and have them do some pro bono, everybody wins.” Robinson said emeritus rules by themselves are not enough. “If you don’t also have some sort of organized effort at the state level, then the rule doesn’t get implemented,” she said. “You need somebody at the State Bar owning it and at least doing some marketing and PR and establishing connections with legal services providers.”

D. Helped Improve Civil Rights Protections for the Disabled

Protection and Advocacy (P&A) is a federally mandated and federally funded program established to protect the “legal and human rights” of people with developmental disabilities, mental illness, and other disabilities. Congress gave authority to the governor of each state to designate a P&A agency to implement the Act. In North Carolina, the governor designated the Governor’s Advocacy Council for Persons with Disabilities (GACPD), located in the North Carolina State Department of Administration, as the P&A agency.

In most states (41), P&A responsibilities are transferred out of state government to the nonprofit sector to avoid potential conflicts of interest between P&A activities and other state agencies. Governance is by a board representing the needs of people with disabilities. After long discussion, the disability community in North Carolina reached consensus that the governor should re-designate the P&A from GACPD to a nonprofit organization. Every statewide organization of people with disabilities and their families in North Carolina (as well as the governing boards of GACPD, NCBA, and others) has endorsed re-designation to the private sector.

After reviewing this issue, the Commission concluded that the designation of a private, nonprofit organization as the P&A agency would provide a better system for protecting and enforcing the civil rights of individuals in North Carolina with disabilities. The Commission further concluded that Carolina Legal Assistance (now Disability Rights North Carolina), a nonprofit legal services agency with a long track record in North Carolina for legal advocacy on behalf of people with disabilities, was best suited to serve in this role. Based on this assessment, the Commission adopted a resolution formally asking the governor to designate Carolina Legal Assistance as the P&A agency as soon as possible. In 2007, the governor did re-designate the P&A agency from state government to Disability Rights North Carolina.

III. The Equal Access to Justice Summit

On October 12, 2007 in Cary, North Carolina, the Commission held an Equal Access to Justice Summit, the first such meeting of its kind in North Carolina. The Commission invited a large and diverse group of people, including judges, bar leaders, business and nonprofit leaders, legal advocates, lay advocates, and community members to attend an all-day forum to examine the legal needs of low-income people in North Carolina and develop solutions to address their needs, specifically the lack of access to the courts. This section summarizes the Summit.

A. Purpose

Six members of the North Carolina Supreme Court, led by Chief Justice Sarah Parker, several members of the North Carolina Court of Appeals, Superior and District Court Judges, lawyers, bar leaders, business leaders, legal aid attorneys, law school representatives, lay advocates, grassroots activists, and low-income clients came together on October 12, 2007 to address the crisis in the civil justice system, review many of the problems of poverty and access to the civil courts, and investigate solutions. Chief Justice Parker presided. For a list of the specific topics covered, see the Summit agenda at Appendix X.

Bringing together a wide variety of stakeholders to a summit has been a primary focus of the North Carolina Equal Access to Justice Commission. The NCBA joined in sponsorship of the event.

This section summarizes the key points made by speakers during the day—from client representatives to court officials and from practical details to sweeping aspirational statements.

After Chief Justice Parker opened the Summit, NCBA President Janet Ward Black presented the NCBA “4ALL” campaign. She has devoted her entire year in office to the issue of improving access to the civil court system for low-income people and people of modest means. President Black started by quoting the Preamble to the Rules of Professional Conduct of the North Carolina State Bar:

All lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot secure adequate legal counsel.

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.

President Black reviewed the extent of need in North Carolina and the disproportionate number of lawyers serving those who can afford to pay versus the number serving those who cannot. She then reviewed the NCBA 4ALL Campaign, which includes activity groups entitled Educate, Legislate, Donate, and Participate.

In an effort to educate North Carolina’s attorneys about these issues, President Black reported that LANC’s video, “Waiting for Justice,” will be shown at all NCBAF continuing legal education programs. The NCBA will develop an omnibus Access to Justice bill that will help lead efforts in the General Assembly. She is also asking each NCBA member to support the legal services community by giving locally and by supporting the NCBAF’s newly established Legal Aid Fund. Another group of volunteers will make recommendations on loan repayment opportunities to help legal services lawyers who have the same law school debt but lower salaries than attorneys in private practice. President Black, for the first time in NCBA history, proposed a statewide service day featuring an Ask-a-Lawyer hotline in eight centers around the state. This event took place on April 4, 2008. President Black believes that: “Justice denied to one North Carolinian diminishes all North Carolinians.”

B. Why is Access to Justice Important?

Tom Lambeth, Senior Fellow and Former Director of the Z. Smith Reynolds Foundation, set the tone for the event by asking those who were attending the Summit to “go forth and pursue justice, equal justice; do not fear to defend the weak because of the anger of the strong; do not fear to defend the poor because of the anger of the rich.” For a full transcript of his presentation, see Appendix V. Lambeth said that, “To give credibility to that idea of liberty; to make believable that ideal of ‘we the people’ in the 21st century, that realization of the ‘goodliest land’ must belong to all of us; it must be liberty for all, it must be a shared destiny in which both the sacrifice and the celebration belong to all of us.”

Lambeth cited religious, philosophical, and historical reasons for his belief that justice at its core is for all people and not just for some:

There is no more powerful component of that idea of liberty than the idea that within our free land, justice is there for all and that it is accessible and applicable to all equally and in the same measure of impact and outcome. When we fail to realize that ideal, when we deny justice to any, when we deny the protection of the law because of wealth or power or position or class or religion or race, we diminish it for all. More than that, we rend the fabric of the compact that we have made as citizens of a free land—a compact between all of us for the protection of all of us. Justice becomes less than it should be.

The law should be empowering and redeeming in a democracy. If it empowers only some, if it redeems for only some, it loses its value to all.

My Jewish friends read in the Talmud that “justice, equal justice shalt thou pursue” and in subsequent commandments define equal justice as exactly the same justice for the immigrant as the native born, requiring a civil and criminal process that gives not the slightest preference to the rich and powerful over the poor and powerless. Those who are of that ancient faith are ordered to pursue a relentless, never-ending quest for evidence that might tend to exculpate the accused.

Lambeth stressed that we diminish respect for law and our own protection by extending the protection of the law to some and denying it to others.

We need to remember that equity in the access to justice and equity in its enforcement are not only protective of those who seek such access and who are the targets of its enforcement, it is protective of those we have charged with the responsibility of enforcement.

The law enforcer is strengthened in that role when he or she serves a community which believes that the law belongs to all of them and that it is applied in equal measure to all.

Lambeth put access to justice in the context of North Carolina’s relationship to the global economy and stressed that to deny justice is to affect our state’s economic prosperity.

I believe the work of insuring equal access to civil justice is fundamental to our larger effort to bring the benefits of a global economy to all the people of North Carolina. . . . The fact is that in North Carolina we are not ready for prime time. Each hour, our state adds 21 people to its population. If we are to meet the needs that this tsunami of population increase represents, the public investment will be as little as \$19 billion, perhaps more than \$60 billion. We cannot achieve that kind of public commitment with a population that is divided by inequitable access to the benefits of democracy. So, if you do not believe in equal access to justice as a matter of common humanity, believe in it as essential to economic development.

[D]enial of access to civil justice imprisons those denied in a situation that prevents them from being all that they might be. It prevents them from contributing all that they might contribute to the common good. Yet they are not the only prisoners when such a condition prevails. All of the community in which they live is to some extent imprisoned. We are all denied the benefits that would come from a society in which equality of access and opportunity prevail.

C. Overview of Civil Legal Needs— the Problem of Access to the Civil Justice System

1. Summary of Organizational Structure

North Carolina has a system of civil legal services providers, which together offer a wide range of services to a spectrum of client groups. These groups have formed the North Carolina Equal Justice Alliance to coordinate services. The main providers are described in Appendix IX. While these providers cover all areas of the state, and a wide range of services and clients, the resources available to them are far short of what is needed to provide assistance to all low-income people who need help with legal problems affecting basic human needs.

LEGAL AID OF NORTH CAROLINA (LANC) is the statewide, general civil legal services program funded by the federal Legal Services Corporation (LSC). Serving all 100 counties, LANC is North Carolina's largest provider of civil legal services. It was organized in 2002 and is a successor to Legal Services of North Carolina, which was formed in 1976 by the NCBA. As the recipient of LSC funds, LANC is prohibited from accepting certain types of cases, including criminal matters, evictions from public housing involving drugs, personal injury, class actions, and fee-generating work. LANC attorneys cannot seek attorney's fees in any case and cannot assist persons with undetermined or ineligible immigration status.

LANC has a staff of 145 attorneys, 50 paralegals, and 55 support staff. With these resources, it served over 25,000 clients in 2006. It has 24 offices across the state, seven general substantive law practice groups, and six statewide projects: the Farmworker Unit, Advocates for Children's Services, the Domestic Violence Prevention Project, the Environmental Poverty Law Project, the Mortgage Foreclosure Project, and the Battered Immigrants Project.

Other statewide programs include the following:

THE NORTH CAROLINA JUSTICE CENTER works to reduce and ultimately eliminate poverty in North Carolina by ensuring that low-income, working poor, and minority individuals and communities have the resources and services they need to move from poverty to economic security. The Center pursues a multi-forum advocacy model including litigation, research and policy development, public policy advocacy, and grassroots action. The Center runs a number of specialized projects, including the Budget and Tax Center, the Health Access Coalition, the Immigrants Legal Assistance Project, the Education and Law Project, and the Consumer Action Network.

DISABILITY RIGHTS NORTH CAROLINA (formerly Carolina Legal Assistance) is a disability advocacy program that creates and improves access to appropriate services and treatment for children and adults with mental disabilities through individual and systemic advocacy. Disability Rights North Carolina now serves as the state's P&A Agency for both mental and physical disabilities.

NORTH CAROLINA PRISONER LEGAL SERVICES works to ensure humane conditions of confinement in prisons and jails and to challenge illegal convictions and sentences.

LAND LOSS PREVENTION PROJECT, established by the North Carolina Association of Black Lawyers in 1982, provides assistance to all limited-resource and financially distressed North Carolinians who face legal issues that affect the use and retention of their land.

Regional general provider agencies include the following:

LEGAL SERVICES OF SOUTHERN PIEDMONT (LSSP) works in partnership with LANC to serve the Charlotte area and mid-western North Carolina. LSSP's programs include Immigrant Justice Project, Family Support and Health Care Program, Consumer Protection Program, Western North Carolina Low Income Taxpayer Clinic, Employment Law Program, and Legal Services for the Elderly.

PISGAH LEGAL SERVICES serves the Asheville area and western North Carolina through its Homelessness Prevention Project, Mountain Violence Prevention Project, Children's Law Project, Elder Law Project, Justice for All Project, Disability Assistance Project, and Health Education and Legal Support Project.

Several programs focus exclusively on serving children, including the following:

THE COUNCIL FOR CHILDREN'S RIGHTS (CCR) in Charlotte provides legal representation and advocacy for children involved in administrative or court proceedings. The organization primarily provides services in Mecklenburg County, but it also serves some surrounding counties. The CCR represents children in contested custody disputes, when confined to mental health facilities, when in need of special education, and/or when charged with offenses in juvenile court.

THE CHILD ADVOCACY COMMISSION in Durham provides legal services to children from predominantly low-income families in Durham County who are at risk of abuse, neglect, dependency, or committing delinquent acts. Cases are referred from the public schools, the North Carolina Department of Social Services, legal aid offices, family and juvenile courts, mental health departments, and medical providers.

THE CHILDREN'S LAW CENTER OF CENTRAL NORTH CAROLINA in Winston-Salem provides legal representation and advocacy for children in legal and administrative proceedings. The Center works to promote the improvement of these processes (as well as the families' understanding of the processes) and represents children in domestic violence, custody, juvenile court, and education cases.

The provider organizations also operate pro bono programs in conjunction with state and local bar organizations.

Several additional programs provide support to legal advocacy organizations:

THE NORTH CAROLINA STATE BAR IOLTA PLAN works with lawyers and banks across the state to coordinate income generated from participating lawyers' pooled trust accounts for the purpose of funding grants to providers of legal services for the indigent and to programs that further the administration of justice.

THE NORTH CAROLINA LEGAL EDUCATION ASSISTANCE FOUNDATION (NC LEAF) provides loan repayment assistance to attorneys engaged in public service work.

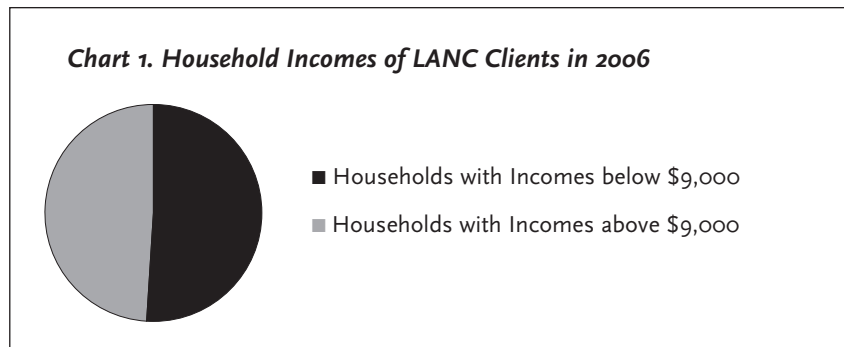
THE PUBLIC SERVICE AND PRO BONO ACTIVITIES DEPARTMENT OF NCBAF helps recruit attorneys, provides training to the pro bono coordinators and volunteer lawyers, and provides awards and recognition to the volunteer lawyers and advocates within the NCBA and NCBAF on behalf of the legal services community.

THE NORTH CAROLINA CLIENTS COUNCIL is comprised of present and former legal aid clients who provide guidance and direction in setting program priorities and help identify emerging issues.

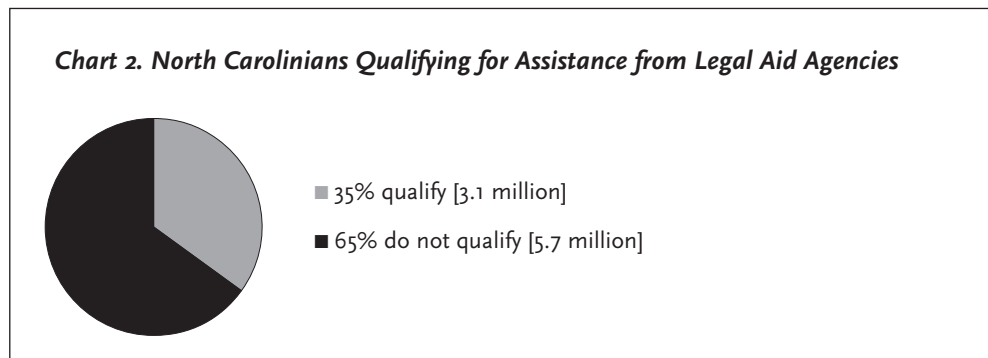
2. *Limited Resources for Representation*

The income eligibility guidelines for the legal services programs vary to some extent but are generally based on a threshold of 125 percent of the federal poverty level, with a maximum of about 200 percent of the federal poverty level. For a household with one member, 200 percent of the federal poverty level is \$20,420 per year or \$393 per week. For a family of four, 200 percent of the federal poverty level is \$41,300 per year or \$794 per week.

Slightly more than half of the households served by LANC in 2006 had annual incomes below \$9,000, including income received from welfare payments. This is less than the income that a single individual would earn working full-time at the minimum wage for an entire year. Other legal aid providers have comparable ratios.



Speaking at the Summit, former LANC Board Chair Cal Adams, a partner in the law firm of Womble, Carlyle, Sandridge & Rice, pointed out that an enormous number of people in North Carolina are eligible for legal aid—3.1 million of North Carolina’s 8.8 million people qualify for legal services.



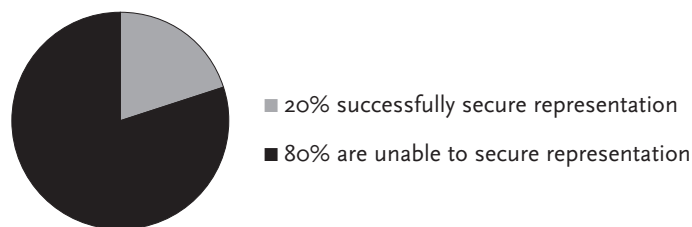
Although there are more than 20,000 lawyers in North Carolina, only about 200 legal aid lawyers are available to provide civil legal assistance to the one-third of the population that is eligible for legal aid. The attorney-to-client ratio in North Carolina is one private attorney for every 442 people, as opposed to one legal aid attorney for approximately every 15,500 low-income people.

Table 1. Ratio of Attorneys to Clients in North Carolina

1 private attorney	:	442 people
1 legal aid attorney	:	15,500 low-income people

In many national and state studies, approximately 80 percent of those eligible for legal aid are found to be unable to receive legal representation due to the small number of attorneys.² Surveys in North Carolina have found a similar ratio.

Chart 3. Ability of Low-Income North Carolinians to Secure Representation in Civil Legal Matters



Legal services programs undertake their work with very limited resources; this hurts both clients who cannot be served and the staff attorneys who are trying to work with low salaries and high law school debt. The starting annual salary for LANC attorneys was raised recently to \$39,000, where it stays for the first three years. After 10 years of experience, the annual salary rises to only \$47,000 on average. Other legal services agencies have similar scales. In contrast, some large law firm salaries start as high as \$130,000 annually and rise quickly. Most recent law school graduates have substantial school debt. LANC's recent survey found that the average law school debt load of starting legal aid attorneys in North Carolina was \$100,000.

3. Economic Needs of Clients

Overall, 32 percent of all households in North Carolina earn less than \$25,000 per year. Approximately 239,000 families with a total of 330,000 children fall below the poverty level. Poverty is increasing at an alarming rate in many parts of the state. From 2000 to 2005, the number of people living in poverty increased by 35 percent in Cabarrus County, by 26 percent in Fayetteville, by 41 percent in Greensboro, by 31 percent in Henderson County, by 35 percent in Raleigh, by 39 percent in Wayne County, and by 26 percent in Winston-Salem.

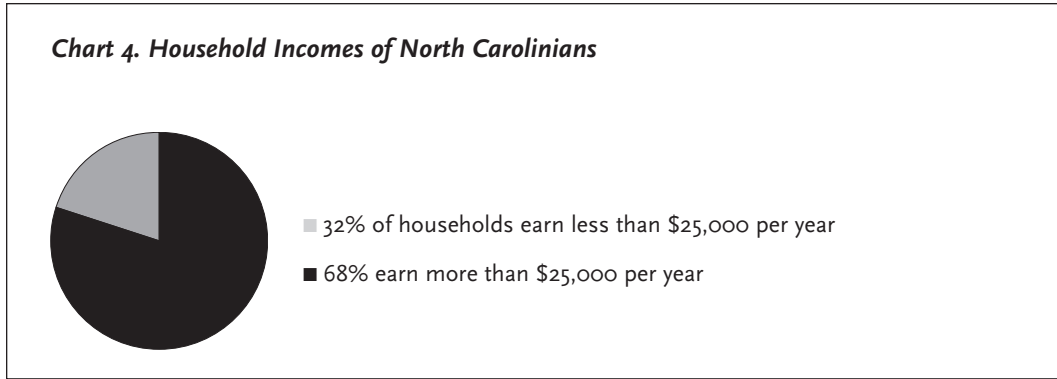
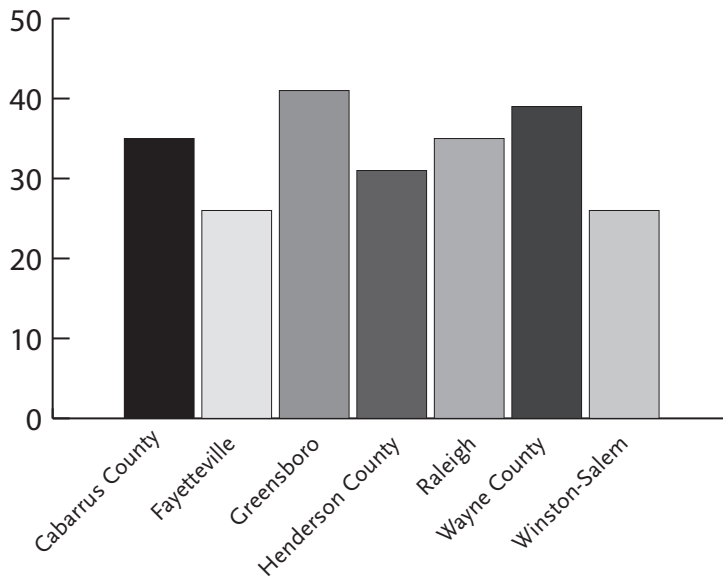


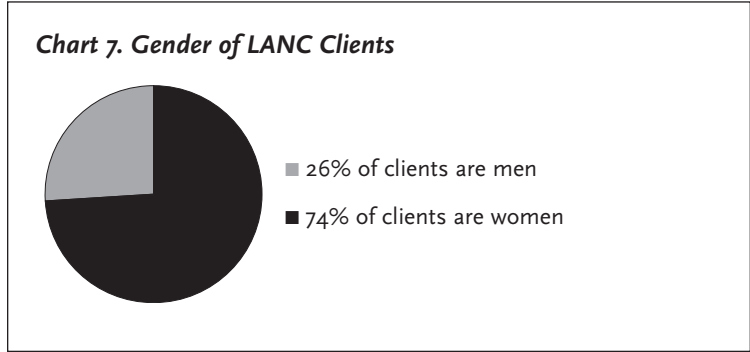
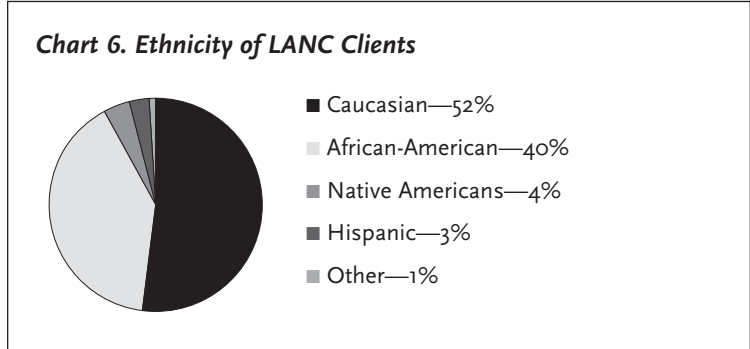
Chart 5. Percentage Increases in Poverty Rates in Different Areas of North Carolina from 2000–2005



The “working poor” also have unmet legal needs. Before North Carolina enacted its first minimum wage law of \$6.15, many employers in North Carolina paid the federal minimum wage of \$5.15. A full-time, year-round minimum wage worker made only \$10,712 per year. The new North Carolina minimum wage now yields \$12,792 for a full-time, year-round worker.

About 125,000 North Carolina seniors (11.6 percent) fall below the poverty level. If not for Social Security and SSI (and annual cost-of-living increases), far more would fall below it. Nationally, almost 50 percent of seniors would be in poverty without these programs.

A majority of clients served by legal services agencies in North Carolina are Caucasian, with African-American clients constituting about 40 percent of the total. Only about 3 percent of LANC clients are Hispanic, due to restrictions on assisting immigrants. Hispanics make up a larger proportion of clients in other programs; for example, about one-third of the clients of LSSP are Hispanic, as this organization has a program that focuses on serving immigrants. Native Americans make up 4 percent of LANC’s clients, with a smaller proportion of “Other.” Women make up 74 percent of all LANC clients and a similar majority for most of the other legal services programs.



4. *Legal Needs of Clients (Typical Types of Cases)*

Cal Adams described LANC's priorities as falling in five major areas:

1. Family Law: In 36 percent of LANC's cases, the emphasis is on preventing the pervasive problem of domestic violence. LANC assigns 25 attorneys to work full-time on domestic violence matters. However, the North Carolina Coalition Against Domestic Violence reported that there were over 40,000 incidents of domestic violence last year. Legal Aid offices must make difficult decisions about which cases can be handled.

2. Public Benefits: This type of case represents 20 percent of those handled by LANC. The most common type of assistance is ensuring that clients receive benefits for which they are eligible (mainly Food Stamps, Temporary Assistance to Needy Families [TANF], and SSI benefits for the disabled, aged, and blind). Government benefits are crucial when people cannot work, usually because they are disabled, partially disabled, or caring for small children or disabled family members. Approximately 58,000 households receive cash from public assistance programs. TANF, the most basic welfare program that usually goes to single parents with small children, pays only if you work. The annual payment is less than \$3,000, an amount far below the poverty line. Approximately 220,000 North Carolina households receive food stamps. Yet, 50 percent of those eligible for food stamps do not receive them.

3. Housing: One of the many survival problems faced by the poor is simply putting a clean, safe, and affordable shelter over their heads and the heads of their children. In North Carolina **two million people** cannot afford decent housing. Over 40 percent of renters spend at least 30 percent of their income on housing, and 797,500 North Carolinians pay more than 50 percent on housing. The average cost of a two-bedroom rental unit in North Carolina is \$603. The minimum income necessary to afford the average home price is \$60,000 per year.

There are only 36,661 units of subsidized housing—far less than is needed in North Carolina. These units are occupied by 74,401 residents, 48 percent of whom are children. The average income of a family in public housing is \$8,238, and 80 percent of those who live in public housing have incomes below 30 percent of the median income in the state. Of those in subsidized housing, 32 percent are working and 20 percent receive welfare. The average monthly rent for subsidized housing is \$192, which is far below rents on the unsubsidized private market.

Some North Carolinians also receive vouchers to pay for housing, but again the number available falls far below demand. The state has 53,038 voucher units that provide housing for 127,561 residents, 52 percent of whom are children. The average yearly income of these families is \$9,599, and 76 percent are below 30 percent of the state's median income. Of these families, 35 percent are working and 17 percent receive welfare. The average monthly rent is \$220.

4. Predatory Lending: As difficult as it is for people to accumulate enough expendable income through a combination of wages and benefits, many low-income people face additional problems because of predatory lenders. Foreclosures have increased over 300 percent in many parts of the state, with over 44,000 foreclosures filed statewide last year (compared with 15,000 foreclosures in 1998). Nationally, foreclosures in July 2007 were up 93 percent from July 2006. The decline in manufacturing jobs has contributed, but predatory lending is a significant factor as well. LANC defended approximately 300 cases in 2004–06 and extinguished and renegotiated nearly \$13 million of debt equity for its clients.

5. Employment: Another type of case that clients often present to legal aid attorneys is in the area of employment, especially complaints of unlawful termination and discrimination. Often clients cannot protect their jobs due to the “employment at will” doctrine, and some discrimination cases are too expensive and labor intensive for legal aid to be able to accept. Most employment cases handled involve representing clients to protect their unemployment benefits.

D. A Look at Real Client Stories

Jim Barrett, Executive Director of Pisgah Legal Services in Asheville, North Carolina, spoke from his experiences as an attorney and executive director. His agency has 34 staff, including 16 attorneys, and works with about 300 private attorneys who handle cases pro bono that are screened and referred to them by the agency’s staff. In 2006, the program and its volunteers helped more than 10,000 people meet their basic needs; 4,500 of these were children.

Barrett explained that very low-income people need attorneys to secure housing, health care, subsistence income, protection of their essential assets, and safety from domestic violence. He described three of the most common and urgent problems facing low-income people, with examples of how attorneys solve those problems:

Domestic violence is stopped when attorneys help victims obtain legal remedies that enable them to live apart from and independent of abusers. Without legal representation, victims are very unlikely to obtain statutory protections, such as custody of children, possession of the home, child support, and access to family vehicles. Without the means to live independently and when threatened with loss of custody of their children, women will often return to their abusers again and again. Legal aid programs have the resources to serve only a fraction of victims who seek the courts’ protection—despite the fact that representation can be essential to the survival of abuse victims.

Legal representation to stop **unnecessary evictions and foreclosures** prevents homelessness. Evictions under North Carolina law can occur in three weeks. Legal representation can often stop unjust eviction actions or resolve the problems that lead to eviction or foreclosure actions. Abrupt dislocation of families from their homes causes severe stress. Children who have to change schools midyear can lose four months of educational progress, according to at least one study. It can cost as much as \$7,000 to move from homelessness back into housing. Families can lose their life savings when they lose the equity in their homes in foreclosures. As little as \$200 worth of legal advice and negotiation at the right moment can stop the downward slide toward homelessness and put a family back on the road to residential and financial stability.

Disabled North Carolinians often cannot access **health care or disability income** without legal representation to prove that they are disabled according to complex federal regulations. Of the more than 10,000 people who are homeless in the state on a given night, national studies show that more than 50 percent are disabled. With attorney representation, these most vulnerable people can prove eligibility for Medicaid so that they can get necessary medical care and SSI or Social Security Disability cash assistance. People who are disabled sometimes die waiting the two years it takes for a hearing, even if they have representation. But with legal assistance they could be receiving medical treatment while they wait for the Social Security Administration determination that they are disabled. This income could enable them to afford subsidized housing. Many other people could avoid homelessness with legal representation.

The legal problems of the poor are interconnected, and one legal or economic problem leads to others. Attorneys who are knowledgeable in the intricacies of state and federal benefit programs and statutory schemes that the poor depend upon for survival are needed so that more North Carolinians can achieve a decent quality of life.

E. Concerns for Special Client Populations

Many low-income people can be categorized in specific groups around special legal needs. The Summit planners focused on three areas where need has been especially high in North Carolina. These are the needs of:

- (1) Immigrants, especially those with a limited command of the English language, who have been arriving in North Carolina in large numbers in the last decade;
- (2) Children, who remain the poorest of any age group and who face educational, economic, and health barriers; and
- (3) People who have been victims of predatory lending, especially as foreclosures in North Carolina and around the country have been rising exponentially.

Many other special client populations could have been added to this list of concerns, such as older adults and the rural poor. However, limited English-speakers, children, and victims of predatory lending all serve as examples of how our legal system needs to address special client populations.

1. The Changing Ethnicity of North Carolina and its Impact on the Court System

Milan Pham, the Director of North Carolina Lawyers for Entrepreneurs Assistance Program (NC LEAP), a program of the Public Service and Pro Bono Activities Department of the NCBAF, illustrated the plight of those facing the court system without an interpreter by beginning her presentation in her native Vietnamese language. She then invited the audience to stand and asked all those who spoke only one language to take their seats. Only a handful remained standing as she called out other languages and asked people to indicate which languages they could speak. In a room full of people concerned about access to justice, she pointed out that very few of them could help clients with limited English proficiency.

Pham reviewed the explosion of the immigrant population in North Carolina in recent years. The influx has been comprised mainly of Latinos, followed by Asians. She said that immigrants face barriers to justice at many levels—in their dealings with the criminal justice system, in their lack of representation to gain meaningful access to the civil justice system, and in the growing public hostility to immigrants.

Pham reviewed the federal civil rights laws that were created to ensure that everyone has access to the courts. She indicated that the rights are clear but the implementation is very poor, especially in some local areas. She said this is due to a small supply of proficient interpreters, the special problems of interpreting in a legal setting, and confusion that arises out of cultural differences.

Although the problem of access to the civil court system is generally massive, equal access to the courts is an even greater problem for people who have limited English proficiency.

2. Child Poverty and Legal Solutions

Greg Malhoit, Clinical Professor of Law at North Carolina Central University Law School, addressed the special problems of North Carolina's children in fighting poverty and seeking relief in the civil court

system. He pointed out that of the two million children living in North Carolina, nearly one in two live below or near the official federal poverty level. The percentage is even higher for Blacks, Hispanics, and Native-Americans. He said that child poverty is cyclical. Children are poor because their parents are poor. People who grow up poor are likely to live in poverty as adults. When the next generation is born, the poverty cycle is completed.

Malhoit pointed out that children do not enter this world expecting or wanting to live in poverty. Likewise, low-income parents want the same things that middle- and upper-income parents want for their children: a good education, a decent job, the ability to raise a happy and healthy family, and economic security. The notion that there is potential in all children was best expressed by James Agee in his seminal work on poverty in the South, *Let Us Now Praise Famous Men*. He observed: "In every child who is born, the potentiality of the human race is born again." Malhoit stated that if we believe this potential exists in every child, it is our moral duty to act.

Malhoit stated that the conditions that poor children endure because of their parents' poverty and societal neglect are scandalous. Many live in unsafe and substandard housing. They have a high infant-mortality rate. Forty years after the creation of the federal Food Stamp Program, a substantial number of poor children suffer from malnutrition. Poor children lack access to health care, which leads to significant health problems as adults.

Malhoit said that there is a high social and economic cost for our failure to address child poverty in areas such as prison and jail overcrowding, health care inequality, welfare program retraction, a loss of economic productivity, and a weakening of our democratic system of government. Conversely, if North Carolina reduces the rate of child poverty, the benefits are substantial: better educated and informed citizens, enhanced economic competitiveness of North Carolina in the national and global economy, reduced prison and juvenile justice populations, less welfare dependency, lower health care costs, improved family stability, and increased per capita and family income. Malhoit stated that one study found that a substantial reduction in child poverty would add over \$5 billion a year to the economic output of North Carolina.

Malhoit said that in the face of clear advantages in reducing child poverty, our society continues to allow poor children to languish. Our collective neglect of children in poverty has produced a litany of deplorable statistics. For example, last year, there were 118,000 reports of child abuse, neglect, or dependency. Poor and minority children are over-represented in the child welfare system with more than 10,000 living in foster care. There are 23,000 children in our juvenile justice system, and each year 8,500 juveniles are sentenced to high-cost detention facilities that are often a training ground for a life of crime. In our schools, one in three students (most with low incomes) drops out of school before graduation. Poor children have lower test scores while having a higher risk of repeating a grade. These same children are far more likely to be excluded from school because of discipline problems, and it is less likely they will attend college.

Malhoit stated that despite the pervasive conditions and barriers facing poor children, they can still succeed. Researchers have found that life outcomes for poor children can be substantially improved if they are given access to health care, better housing, quality early childcare, preschool, and a high quality education targeted to meet their unique needs. He conceded that lessening poverty's grip on the lives of children is a formidable and complex challenge and said that it will take collective action by government, the nonprofit sector, the faith community, business, and, of course, families.

Malhoit said that lawyers and the legal community can and must play a central role in this effort, and he set forth five ways that lawyers and the legal community can affect child poverty and protect the legal interests of children.

1. Because child poverty is directly related to the poverty of parents, the legal community must expand access to basic legal services for low-income adults in matters such as housing, consumer rights, family law, and public assistance. This includes substantial increases in funding for community-based legal services

programs. It also means adequate funding for statewide legal assistance programs as well as juvenile attorneys, guardians ad litem, and other organizations focused on the legal needs of children.

2. The pathway from poverty to economic security leads through the schoolhouse door. In 1997, the North Carolina Supreme Court held, in *State v. Leandro*, that all children—especially poor children—have a constitutional right to a “sound basic education” that prepares them for citizenship and economic independence. A decade after the court’s landmark ruling, schools are still failing hundreds of thousands of low-income students. Lawyers can play a pivotal role in providing representation for individual children to ensure that their constitutional rights are meaningfully realized.

3. Each year thousands of children are excluded from school because of discipline problems. These children have a constitutional right to due process of law before their right to an education can be terminated. However, most are not represented by lawyers. Lawyers can represent individual children in school discipline proceedings, thereby ensuring their fair treatment. Lawyers may also assert claims in the courts or proposals in the legislature, establishing the right to appointed counsel in such cases at state expense.

4. Although individual legal assistance is essential for poor children, the legal community must also ensure that there are policy advocates working in the legislature for reforms that promote children’s well-being and mitigate child poverty. An excellent example of the power of policy advocacy is the recent passage of the Children’s Health Insurance Program (CHIP) by the legislature. It now provides health care access to thousands of previously uninsured children.

5. Children have unique legal needs, and currently there are few legal advocacy programs dedicated solely to meeting these needs. The legal community should consider establishing and adequately funding a new network of community-based legal organizations that focus exclusively on the full range of children’s legal needs. The legal community, including government lawyers, the private bar, and law schools, must substantially expand their efforts for children.

The facts about child poverty are sobering and the challenges of overcoming it daunting. Yet, there is reason for optimism that North Carolina will respond to this challenge. Malhoit asked Summit attendees to consider what has happened in just the last 75 years:

We have ended child labor through passage of child labor laws. We have created a system of universal and free public schools. We ended the stain of de jure segregation in our public education system. Forty years ago, in *In re Gault*, the U.S. Supreme Court required legal counsel for children in delinquency cases. In 1997, [our] Supreme Court established a child’s right to a “sound basic education” under our constitution. And, most recently, we have seen substantial progress in providing children with quality childcare, preschool, and access to health care.

Finally, Malhoit stated, “[I]t has been written that the most fundamental measure of the character of a nation is how it treats its children. Likewise, I suggest, that the most fundamental measure of the character of our profession is what we choose to do to help lift children from poverty.”

3. Predatory Lending and its Impact in our State

Martin Eakes, Co-Founder and CEO of the Center for Community Self-Help and the Self-Help Credit Union, and the founder of the Center for Responsible Lending (CRL) and other affiliated groups, spoke on the current national crisis of loss of home ownership through foreclosure. He stated that this crisis was due to a drastic increase in subprime lending accompanied by widespread predatory lending practices.

Eakes said that the percentage of all mortgages in America that are subprime grew from 3 percent in 1995 to 25–29 percent in 2006. Correspondingly, foreclosures on these subprime loans grew across

America over this time period. Currently, foreclosures on subprime loans are in excess of 60 percent of all foreclosures, even though subprime mortgages represent only 13 percent of the outstanding mortgage loans in America. As a result, subprime loans create a lost home 10 times as frequently as a regular home loan.

A subprime mortgage loan is a loan made to a family or borrower with credit blemishes that do not allow them to qualify for a conventional mortgage loan. Increasing the capacity of low-income people to afford home ownership would be desirable. Instead, over the last four to five years, the market has developed a product mix that Eakes said is fundamentally predatory and indeed corrupt in its very issuance of a loan. He said these loans take the form of “adjustable rate mortgages” (ARMs). Seventy-two percent of these ARMs are what Eakes termed “exploding ARMs”; the industry calls a loan of this type a “228.” In these loans a borrower has a fixed payment for the first two years of the loan, normally at an 8 1/2 percent interest rate. At the end of 24 months, the interest rate jumps by 30 to 40 percent during the third year, to 12 1/2 percent and then to 14 1/2 percent. As a result, the loan is utterly unsustainable for virtually any family that has it. Eakes said that 70 to 80 percent of all subprime loans are of this type and are what he calls a foreclosure machine. Self-Help did a study of \$6 billion in loans of this type and found a 72 percent greater risk of foreclosures that resulted in loss of the home among borrowers with these loans.

Eakes identified other predatory methods and the resulting increase in foreclosures. Balloon payments make it 36 percent more likely that homeowners will lose their homes than if they had a fixed rate mortgage. A prepayment penalty, which over 70 percent of all subprime loans contain, increases the risk by 50 percent. If the lender does not document the borrower’s income, the increased risk of losing the home is 29 percent. Adding all these predatory practices together creates a 10 times greater magnitude of borrowers losing their homes.

Nationally, as of the beginning of 2007, there were 7.5 million borrowers with 1.4 trillion dollars of subprime loans outstanding, as a result of roughly 3 to 4 million subprime loans made for each of the years 2005 and 2006. CRL completed a study in November 2006 that predicted that one in five of these subprime loans would end up in a lost home. They were wrong—the ratio was much worse. One in three of these loans will result in a lost home by the time this cycle runs its course.

Foreclosures are not only a tragedy for the individuals losing their homes; they also create a loss for neighbors. Eakes cited a study which demonstrated that, for every house in a one-eighth mile radius of a foreclosure (which is a one-city block drawn in a circle), \$3,000 of value is lost. In a low-density area like Charlotte with 50 houses within that one block area, the amount is \$150,000 of lost wealth to the neighbors. In a Chicago neighborhood with 100 units in that same area, neighbors lose \$300,000 of value.

Neighborhoods can and are being destroyed. These foreclosures are concentrated; subprime loan sales were targeted to low-income homeowner neighborhoods, not evenly spread across America. Cleveland was especially hard hit. Even in Charlotte, some neighborhoods have five or 10 foreclosures in the same area, and, as a result, home values drops by so much that no one in the neighborhood can sell their home and move. The result is homeownership as a prison. The effect on neighborhoods in terms of the loss of taxes to support schools and other social services is devastating.

Eakes said that, as a civil rights attorney, he is very aware of the impact of subprime lending on the African-American community. Almost 400,000 African-Americans have high cost subprime home loans, and 52 percent of all first-mortgage loans received by African-Americans in the United States in 2005 and 2006 were exploding ARMs. Latinos were also hit hard, with 40 percent of all loans made to Latinos being exploding ARMs. In contrast, exploding ARMs were 19 percent of all home loans made to Caucasians—a much lower, but still alarmingly high, percentage.

America has two systems of lending today. The first is predominately focused on 81 percent of white borrowers and revolves around a conventional loan that has no prepayment penalty, is sustainable, and is meant to be in place for 10–20 years. The second is for families of color and modest means and is utterly

un-survivable. People receiving these loans will face a crisis no matter what happens in their normal family circumstances.

Foreclosure normally occurs because of one of four major trigger factors: death, illness, job loss, and divorce. In this case, however, the loan itself is so disastrous and reckless that it induces foreclosure no matter what the family circumstances are.

Normally houses appreciate in value. If homeowners have a problem and face foreclosure, they can sell their homes. Starting in August 2006, however, the United States saw the first decline in home prices in 16 years; 2007 was the first year since 1930 in which we experienced an actual decline in the price of the median house. Self-Help's November 2006 study found that if house prices were only appreciating 2 percent, then the foreclosure rate would jump to as high as 20 percent.

In North Carolina, about 50,000 families per year will lose their homes, many of them unnecessarily, because of the subprime lending crisis. Borrowers are often too "wealthy" to qualify for legal services but do not have the liquid assets to hire an attorney. Eakes believes that in almost every case, if there is an attorney helping the homeowner negotiate with the lender service, a foreclosure can be averted. He asserted that the cost is about \$2,000 per case in legal fees to avoid the foreclosure and loss of a home. Lack of access to attorneys causes catastrophic results: separating the structure from the family, a boarded-up home that is a magnet for crime, a homeless family, \$300,000 of neighborhood destruction, and, on average, between \$60,000 and \$70,000 of lost wealth for the family.

This crisis is not just one of loss of shelter but of loss of wealth, especially in the African-American community. Right now, African-Americans as a group in this country face the greatest threat to family wealth and neighborhood wealth of any time since the Great Depression. This is the greatest single crisis facing families (and not just the poorest families), in that 60 percent of all family wealth for all demographic groups is held in home equity. This crisis is about hollowing out the middle class, making them homeless, and leaving in place vacant structures that will destroy the neighborhoods where they were located.

There is a very simple solution to this crisis—except that the entire lending industry is opposed to it—a change in the Bankruptcy Code. A Bankruptcy Code provision states that every secured asset can be protected in bankruptcy by someone who files for Chapter 13 by having a bankruptcy judge review and modify a loan after looking at all the circumstances of the case. However, the Code has one big exception to this rule: "other than a claim secured only by a security interest in real property that is the debtor's principal residence." Eakes reiterated that the only exception to asset protection in bankruptcy is one's personal residence. He pointed out that if one is wealthy enough to own a second home, investment property, an RV, or furniture, then all of those can be protected in bankruptcy. If, however, you own only a single home, the law now does not allow the loan to be modified in bankruptcy.

Eakes concluded by saying that through Self-Help and its affiliated organizations, he has spent his whole life helping people own homes, but that a lender like Countrywide has been able to undo in one month's lending through subprime loans all that human development groups have spent their entire lifetimes building in communities. He said his group has raised \$15 million that it will distribute to legal service organizations and law school clinics that will provide foreclosure defense work all across the country, but that \$15 million is just a drop in the bucket when five million families face this kind of trouble.

F. Call to Action

Gene Nichol, then President of the College of William and Mary and former Dean of the University of North Carolina School of Law, delivered the keynote address. For a full transcript of his presentation, see Appendix IV. Nichol told Summit participants that equal justice is the great challenge of those who are lawyers and even, perhaps, the great challenge of the nation:

We carve “equal justice under law” on our courthouse walls. It is the literal cornerstone of our system of adjudication. We swear fealty to it every day. For decades, we’ve announced as a fundamental principle of our constitutional law “there can be no equal justice when the kind of trial a person gets depends on the amount of money he has.” But the framework in which we operate has little in common with what we say.

Nichol pointed out that legal representation costs money, which many do not have. The United States has not recognized a general right to representation in civil cases as some industrial nations have done, and this country spends far less on legal representation in civil cases. He said that less than 1 percent of the United State’s total expenditures for lawyers goes toward services for the poor. “Legal aid budgets are capped at levels making effective representation of the poor a statistical impossibility. Even at that, they’ve been cut by about a third over the last dozen years.” He continued:

We have one lawyer for every 400 people generally, and only one legal services lawyer for every 18,000 people who are eligible for assistance. Our legal services lawyers turn away eight out of 10 clients with actionable claims. We fence folks out even further by creating categories of unworthy poor and placing restrictions on the most efficient avenues for representation. Study after study shows about 80 percent of the legal need of the poor is unmet—in North Carolina, in Virginia, in the country. The circumstance is almost as bleak for middle income Americans.

As every person in this room knows, neither the billable hour nor the possibility of a significant contingent fee covers the waterfront of American legal disputes. New York’s State Bar study a couple of years ago found that we leave the poor unrepresented on the most crushing problems of life—divorce, child custody, domestic violence, housing, benefits. We think it natural that a commercial dispute between battling corporations takes six months to try, while the fate of a battered child is determined in only a few minutes. What passes for civil justice among the have-nots is breathtaking.

After reviewing serious problems that also exist in the criminal court system, Nichol stated:

[W]e enthuse about access and equality rhetorically. But we don’t make serious efforts to give them practical content. Average citizens are effectively priced out of the justice system. They’re also typically barred from participating in the closed regulatory scheme that excludes them. The system we have is powerfully, dramatically, and fundamentally at odds with who we say we are.

He criticized lawyers for not doing more pro bono and law schools for marginalizing the plight of the poor in their curricula and in their research:

Our curriculum takes the present deployment of legal resources as a given. Who uses the system is unexplored. Law firms are not topics of study or critique. Despite the marvelous clinical programs expanding across the country, unequal access to justice has not made it to the core of legal education. Only 10 percent of schools have pro bono requirements—and fewer than that apply them to faculty. The greatest shortcoming of American law schools may be the failure to explore and articulate a theory of the just deployment of legal resources.

He talked about the soaring costs of attending law schools and the high debt facing young lawyers who seek to serve the public but who face debts of \$100,000 or more and salaries of about \$40,000.

He lamented that “[W]e’ve gotten used to things we should never have gotten used to. And we’ve apparently been satisfied.” He challenged that satisfaction “[W]hen the richest nation on earth, the richest nation in human history, allows almost 37 million of its citizens to live in stark, unrelenting poverty. A quarter of black Americans. A fifth of Latinos. Almost one in five of our children—13 million—even

higher percentages in North Carolina—one in four—as if any theory of justice or virtue could explain the exclusion of innocent children from the American dream.”

Nichol further lamented the acceptance of lack of access to health care for low-income Americans and North Carolinians.

And how can we be satisfied when 47 million Americans have no health care coverage of any kind—16 percent of North Carolinians—leaving us alone among the industrial nations in failing to provide some form of universal coverage, when, as Dr. King proclaimed, inequality in access to health is the most pernicious discrimination of all?

Nichol remembered those who “fall prey to domestic violence—most of them with no access to lawyers—though the legal system may be the only effective avenue to save their lives,” and he reminded the attendees that some people pay for this lack of legal representation with their lives.

He expressed concern about the re-segregation of schools and two systems of education—one for the rich and one for the poor—even within the public school system. He said, “[O]ur religions teach that all children are equal in the eyes of God. We operate our schools as if we didn’t believe it.” He also talked about how difficult it is for lower-income children to obtain a college degree, “[a]s if intellect and character and commitment, and worth, were hereditary.”

Nichol concluded:

The frank truth is that if the exclusions and indignities of American race and poverty are right, then the Constitution is wrong.

If the debilitations of those locked at the bottom are acceptable, then our scriptures are wrong.

If these denials of equal citizenship and equal dignity are permissible, then we pledge allegiance to a cynical illusion, not to a foundational creed.

So that’s why your work triggered here—to make the promises of justice real—in the bar, in the courts, at legal services, in the law schools, in the state house, is so crucial, so defining. I hope that, together, we’ll begin to insist upon a higher calling of public obligation—a more demanding and optimistic vision of professionalism, of citizenship—one born in, dependent on, dedicated to—the foundational American aspiration of equal justice. I hope that we will declare our commitment to it. We’ll enroll our hearts. We’ll enlist our spirits. We’ll mark our lives. We’ll enlist because:

Somewhere we read, “We hold these truths to be self-evident that all are created equal.”

And somewhere we read, “[The] central purpose of America is that the weak would gradually be made stronger and ultimately all would have an equal chance.”

And somewhere we read that “Injustice anywhere is a threat to justice everywhere.”

And somewhere we read, “History will judge us on the extent to which we use our gifts to lighten and enrich the lives of our fellows.”

And somewhere we read, “The arc of the moral universe is long, but it bends toward justice.”

And somewhere we read, we have “to believe the things we teach our children.” Believe them, and make them real.

And somewhere we read that “Whenever you did these things to the least of these, you did them to me.”

And somewhere we read, “You reap what you sow.”

And somewhere we read that “The pursuit of justice and the pursuit of happiness march not in opposite directions but hand in hand.”

And somewhere we read, “No, we are not satisfied, and we shall not be satisfied ‘til justice rolls down like waters and righteousness like a mighty stream.”

G. Solutions to the Gaps in Access to Justice

1. *Right to Counsel in Civil Matters*

George Hausen, Executive Director of LANC, reported on the national movement to seek a right to assistance of counsel in civil cases, patterned on the constitutional right to representation in criminal cases. Based on that presentation, Anita Earls, Director of the Southern Coalition for Social Justice, provided the following information:

“If you are unable to afford a lawyer, one will be appointed for you.” This guaranteed right to counsel, established for all indigent persons in *Gideon v. Wainwright*, is fundamental to the American criminal justice system. The Court in *Gideon* reasoned that an indigent person cannot be assured a fair trial unless he is provided legal counsel. However, there is no analogous right in the nation’s civil justice system. As a result, members of nearly 80 percent of America’s low-income families with a civil legal problem face high-stakes court procedures—including eviction and child custody proceedings—without the assistance of counsel. The failure to ensure access to lawyers in these cases puts the United States at odds with the large number of countries that guarantee a right to counsel in civil cases.

In 2006, the ABA House of Delegates unanimously approved a resolution urging federal, state, and territorial governments to assure that poor people have a right to legal counsel in cases where basic human needs, such as shelter, sustenance, safety, health, or child custody, are at stake. Michael S. Greco, the then-president of the ABA, called the resolution “historic in the realm of an extraordinarily meaningful action by the ABA.” Other state bar associations are considering similar resolutions. The Conference of Delegates of California Bar Associations passed its own resolution in the fall of 2007, calling for free legal representation in cases dealing with sustenance, shelter, safety, health, and child custody for people unable to afford to pay for counsel.

Low-income people in several states are asserting a state constitutional right to counsel in various kinds of cases involving family issues. There are also efforts underway around the country to persuade state and local legislatures to pass legislation guaranteeing a right to counsel in civil cases concerning basic human needs. The California Commission on Access to Justice recently released a model civil right to counsel statute, providing a boost to these efforts.

In recent years, states have passed dozens of laws and court rules guaranteeing the right to counsel in a wide variety of specific civil cases.³ These laws cover many different types of cases, including family law matters, involuntary commitment proceedings, and other medical treatment matters. North Carolina, for example, provides a right to counsel for parents in proceedings to terminate parental rights or where a juvenile is alleged to be abused, neglected, or dependent. Many civil right-to-counsel statutes do not address compensation beyond requiring that it be “reasonable.” In practice, funding falls short of need almost everywhere. Many of the statutes that do specify how much counsel should be paid provide for an hourly rate that is far below what most attorneys in private practice receive. Moreover, the fees are often capped at an extremely low rate. Other statutes expressly permit or require courts to appoint uncompensated counsel.

The impetus for these statutes varies. In some instances they are implementing state court decisions establishing a constitutional right to counsel in a specific type of proceeding; others flow from policy choices made by the legislature about the desirability of providing counsel to indigent litigants in certain civil cases. For more information about the state of the right to counsel in civil cases and the movement to expand it to all cases concerning basic human needs, see the July/August 2006 edition of the *Clearinghouse Review: Journal of Law and Policy*, which is dedicated to this issue.

2. Legislative Activity

North Carolina State Representative Angela Bryant and State Senator Dan Clodfelter presented their ideas regarding what the North Carolina General Assembly is doing and what it might do to improve access to the civil justice system.

Representative Bryant pointed out that some people in positions of power formerly were attorneys for low-income people and are well aware of the need and the importance of providing access. She added that people need to hold on to their principles once they achieve power and provide access as best they are able. She felt that all legislators who are lawyers should use their unique perspective to advocate for and support issues related to justice.

Representative Bryant stated that even within the justice system, there are many funding needs, and these needs compete with each other. However, in the area of access to justice funding, the legislature already has taken several steps. The General Assembly has:

- Funded and almost doubled the previous funding that goes to NC LEAF in order for the organization to provide loan repayment assistance to public interest lawyers (including legal aid lawyers, assistant Public Defenders, and assistant District Attorneys).
- Increased court costs and increased the portion of court costs that fund legal aid programs. Bryan pointed out that this increase in court costs has been controversial even among those who support legal services programs in that the increased court costs for low-income criminal defendants is causing the number of probation violations to increase (because failure to pay court costs is a violation of the terms of probation), resulting in increased imprisonment.
- Funded attorneys designated for representation of domestic violence victims.

Other than the controversy regarding raising court fees, Representative Bryant does not think that increasing funds for legal aid has been controversial, but it is not high on the agenda of most legislators. She does believe that the issue of increasing funding needs to be raised at both the state and the federal level.

Senator Clodfelter thanked the other legislators in attendance and pointed out that nothing gets done in the General Assembly through the efforts of one person alone. He said that funding for legal services from the General Assembly was now about four times what it was only four years ago—increasing from about \$1 million dollars to about \$4 million dollars a year.

He said that other fundamental needs of low-income people are pressing, and one of the most important is health care. North Carolina is putting 1,000 times more into health care for low-income citizens than it gives to legal services—close to \$3 billion dollars of state money, and this is in addition to the federal money coming to North Carolina for Medicaid. Senator Clodfelter asked people to put the gains of going from \$1 million to \$4 million dollars for legal aid in perspective: A increase of \$3 million does not seem like a big jump when compared to the \$3 billion dollars spent on health care.

Senator Clodfelter said that no one has yet put together a grand strategy that would be successful in asking the General Assembly for the amount of money actually necessary for a major boost in resources to provide lawyers for low-income people. Thus far, the strategy has been opportunistic and has been

successful in finding smaller amounts of funding to do part of the job. He said that it is crucial to be able to move beyond these small opportunities for funding.

Senator Clodfelter said that the Summit's morning program on mortgage foreclosures and predatory lending suggested an opportunity to seek another increase in funding, because these are issues that affect middle-income North Carolinians as well as low-income people. This was the reason that domestic violence funding had been successful. The General Assembly had already exhibited leadership on the issue of predatory lending by preventing some abuses in mortgage brokering. A strategy for moving forward in 2008 and maybe 2009 might be to focus on predatory lending and work it from the funding end as well as the substantive end. For example, mortgage brokers' fees could have a charge added for providing representation.

Senator Clodfelter concluded that adding money for predatory lending abuses would not meet the aspirational goal of justice for all, but it might keep funding increasing for another session or two until a grand strategy is conceived.

3. Pro Se Litigants and the Court System

The Honorable Joseph Buckner, Chief District Court Judge for Judicial District 15B (made up of Orange and Chatham counties), addressed the topic of pro se litigants. Judge Buckner is immediate past president of the chief district court judges, president-elect of the judges' association, and chairman of crime victim services for the Governor's Crime Commission, which deals mainly with sexual assault and domestic violence victims.

Judge Buckner observed that district courts have broad jurisdiction and more volume than any other level of courts. He added that when a pro se litigant comes into district court, "It's like playing tennis with someone who doesn't know how to play."

He praised Chief Justice Parker for putting together a critical \$37.5 million personnel package that improved personnel resources substantially, and he thanked the legislators who voted for it.

First, he addressed what is working in the court system. He said that, although districts may differ in what each covers well, he believes that overall parents in abuse and neglect petitions are getting attorneys to represent them, and the attorneys are doing a good job. He added, however, that the guardian ad litem program does need an increase in funding. He praised the child support collection system through the IV-D Program (short for Title IV-D of the Social Security Act, which provides for the child support enforcement program), and he pointed out that both sides—enforcement to get the support order and defense of the non-paying parent—are doing a good job. He praised legal aid for doing a good job with family violence situations. He said that the indigent criminal defense program is providing good representation. He said law school clinics make a valuable contribution. Outpatients at UNC Hospitals who are there for involuntary commitment hearings and substance abuse hearings are getting good representation. He concluded that there are some good programs in place, and the legislature has given us those opportunities.

Judge Buckner then concentrated on areas where there are deficits: family violence needs more attorney representation, despite increased funding of legal aid attorneys for domestic violence; the area of collections—he was especially concerned about the impact of car collections on military service people, even though the Servicemen and Sailors Act provides some protection; and the subprime mortgage issue.

He said that George Hausen and Ty Hunter made a presentation to the chief district court judges regarding the limitations of both of their agencies, LANC and the North Carolina Office of Indigent Defense Services, respectively. The chief district court judges and senior resident judges, as internal court managers, need to ensure effective communication with these agencies so that the courts use the resources that they already have. The other project is court programming alternatives that do not necessarily require a lawyer. The custody mediation program is rated by the chief district court judges as the best program that the district courts have. It requires the parties to participate in the custody mediation without lawyers

to figure out what the co-parenting agreement is going to be. The parties take the agreement back to their lawyers if they are represented; the lawyers sign off on it without litigation, and the parties have a good parenting agreement.

Magistrate's court, if managed correctly, is an effective forum that is available to people with disputes of \$5,000 or less. District-by-district, there may be some performance issues, but structurally magistrate's courts are in pretty good shape. The arbitration program, which costs about \$500,000 to administer statewide and is largely self-paid, does not require parties to have a lawyer and reduces caseloads when the lawyers who serve as arbitrators make sound decisions.

In summary, Judge Buckner said the largest deficits in appropriate civil legal representation occur when individuals represent themselves in child custody cases, domestic violence matters, and debt collection cases. Furthermore, these three types of cases constitute about 99 percent of the total court filings in district court. Buckner said that no one knows how much it will cost to address these issues. He supports expanding legal services to address these deficits, combined with strategies like increasing pro bono and engaging the business community. He said that district court judges try to explain to their business friends that victims in domestic violence cases are their employees—who are losing time from work having to go to court, increasing health care costs and dental bills, and not doing their best work due to the circumstances they are facing. He said that when we start to think about solving our problems in this broader context, we realize we have got a lot to gain.

4. Self-Serve Centers

Todd Nuccio, Trial Court Administrator for the 26th Judicial District, described his judicial district's novel approach to enhancing access to justice for a large group of unrepresented litigants. The Self Serve Center was established in Mecklenburg County in 1999. The idea had been under consideration for long time, and the opportunity to create the center came when they were able to join forces with the new family courts.

Nuccio stressed the value of a single portal of entry for access to a range of services related to justice issues. The Self Serve Center has built multi-dimensional services incrementally over the years. The Center started simply by just offering a couple of forms, in particular forms for divorce and custody. The staff then built on their services by providing instructions and procedures to go along with the forms. They added a third set of forms and instructions in the area of child support. Then they provided answer and counterclaim forms for custody visitation; forms for motions in the cause for visitation; and forms and instructions for contempt, domestic violence, name changes, small claims actions, expungement, limited driving privileges, and motions to appoint a guardian ad litem. The staff continually works to determine the needs of those who come to the courthouse and be proactive in serving them. Nuccio said that the Self Serve Center was developed not only in response to the large number of pro se litigants who did not have the money to hire an attorney, but also as a result of the growing number of people who were "do-it-yourselfers."

The Center staff recognized that 60 percent of their domestic cases had at least one side proceeding pro se, and they needed a way to address this high number of pro se litigants. He has found that the percentage has not changed that much. On average between 60 percent and 65 percent of litigants are pro se, depending upon the year. He concluded that developing a self-serve center does not create more pro se litigants.

Nuccio said that the Center distributed approximately 6,600 form packets to individuals in 2006 and that another 46,000 people have downloaded forms from their web-based service at a rate of about 10,000 forms per year. Additionally, 1,000 people walk into the Center each year seeking some sort of assistance.

The Center has formed partnerships and linkages to the community and to services offered by numerous entities, including the Mecklenburg County Bar, the Department of Social Services, a private

group that helps individuals in the community with legal services, and the two legal services programs. The Center has gone beyond forms to making referrals to services elsewhere; offering instructional videos that go along with each of their forms; providing free legal clinics that are associated with the different topic areas; and coordinating an attorney-for-the-day program with the Mecklenburg County Bar. Individuals can sign up for a 30-minute consultation with an attorney after they have attended the clinics to demonstrate that they have significant interest and are committed to the process.

The Center offers “unbundled legal services” in the form of advice, document preparation, and appearances in court. It maintains a partnership with a family law facilitator and the Department of Social Services for relatives or friends who have physical custody of children and need legal action so they can put services in place for those children. Future projects in development include converting all of their static forms to interactive forms—a TurboTax model that asks questions and prompts people through the process.

The demographics of the primary clientele served are between the ages of 26 and 35 with an education level between high school and some college, primarily African American, and with an income level between \$10,000 and \$25,000.

5. Pro Bono Attorney Participation

One of the breakout groups at the Summit addressed ways to increase pro bono participation and was led by Cal Adams, Chair of Womble Carlyle Sandridge & Rice’s Firm Pro Bono Committee and the immediate past-President of LANC. The goal is to get more lawyers to perform pro bono legal services for poor people. The group reviewed the barriers to attorneys doing pro bono and summarized them as follows:

Some attorneys:

- Do not believe in pro bono.
- Do not think they should do pro bono.
- Have never done pro bono.
- Do not have pro bono opportunities.
- Do not have the necessary expertise to handle the types of matters for which poor people need pro bono representation.
- Do not have the time.
- Do not have the resources.

There are several ways to encourage attorneys to perform pro bono legal services for poor people:

1. NORTH CAROLINA CAN ADOPT ABA MODEL RULE 6.1, WHICH STATES:

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:
 - (1) *persons of limited means or*
 - (2) *charitable, religious, civic, community, governmental, and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and*

(b) provide any additional services through:

- (1) *delivery of legal services at no fee or substantially reduced fee to individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights; or charitable, religious, civic, community, governmental, and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;*
- (2) *delivery of legal services at a substantially reduced fee to persons of limited means; or*
- (3) *participation in activities for improving the law, the legal system, or the legal profession.*

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

2. PRO BONO CAN BE MADE MANDATORY.

3. DISTRICT AND SUPERIOR COURT JUDGES CAN CALL UPON ATTORNEYS TO ASSIST IN PRO BONO MATTERS.

4. NORTH CAROLINA CAN ADOPT MANDATORY REPORTING OF PRO BONO HOURS.

5. INCREASE RECOGNITION FOR ATTORNEYS WHO PERFORM PRO BONO LEGAL SERVICES FOR POOR PEOPLE.

It is important to make sure that lawyers get started on the right foot when it comes to doing pro bono. The best place to start is in the law schools. Accordingly, the Commission recommends that each law school in North Carolina put special emphasis on pro bono. Each law student should also be given the opportunity to take on a pro bono case, and some believe that each law student should be required to handle a pro bono case before graduation. Then, upon graduation, experienced members of each local Bar Association should partner with new lawyers on pro bono cases. Some law schools, such as Harvard and Columbia, require students to perform a certain amount of pro bono work in order to graduate. Law schools in North Carolina should consider this as well.

The Commission also recommends making pro bono as easy as possible. This goal can be realized by making sure there is procedural and substance assistance available in every county and online. It is also easier to handle a pro bono case with another attorney. The Commission should encourage lawyers to partner with other lawyers, law students, or in-house counsel of their clients. Not only does partnering make pro bono easier, it also allows an attorney without expertise in a certain area to partner with an attorney with that expertise, and it also doubles the resources of the attorneys involved.

If the Commission can foster the notion that pro bono is something that every lawyer should do; if it can begin with law students and with new lawyers; if it makes it easy for them to handle a case; and if it provides them with plenty of opportunities, the number of pro bono attorneys should increase dramatically.

6. Role of the Business Community

Steve Mayo, Associate General Counsel with Bank of America in Charlotte, spoke on the role of the business community. He said that most businesses want to be good corporate citizens and support the communities in which they do business. Businesses also have employees who live in those communities who are impacted by the lack of access to the civil justice system.

The difficult question is not whether the business community has a role but what that role should be. Mayo named three roles: to provide financial support, to use its influence, and to encourage its employees to participate.

Mayo said that many people look to the business community only for financial support. Within this category, businesses sponsor events, and he could envision an event where LSSP Director Ken Schorr presented the story of his organization to community leaders in hopes of broadening support of LANC and LSSP beyond the legal community. The business community can provide direct financial support to legal aid organizations and organizations like the Council for Children's Rights. In addition, just as businesses encourage their employees to give to United Way and cultural organizations, they can also encourage employees to support legal aid organizations. The corporations that have matching gift programs should be sure to include legal aid organizations as beneficiaries.

Mayo suggested that a new way for the business community to provide financial support would be to endow an internship or attorney position within legal aid organizations, just like businesses endow faculty chairs at colleges and universities. He imagined a Bank of America Family Law Practitioner position and a Wachovia Disability Benefits position.

A second way for the business community to help would be to use its influence and set an example. Businesses can be community leaders and publicly support legal aid organizations and encourage their business partners to do so. Most businesses have law firm relationships and can encourage their outside legal partners to support legal aid organizations with their dollars and volunteer time. They can encourage their outside legal partners to loan a lawyer to a legal aid partner. Mayo said this would be a great way to invigorate an experienced lawyer in his career or to give a young lawyer experience—client experience, not just research experience.

Another way for businesses to use the influence of their large organizations (Bank of America has 14,000 employees in North Carolina and about 200,000 worldwide) would be to encourage their employees to e-mail their state senators and representatives, as well as their Congressional representatives, about the importance of funding for legal aid needs. Employees assisting in this way would not have to be lawyers.

Mayo said that the third and probably most forgotten role the business community can play is in the volunteer area. Many of these business organizations have legal departments, and the businesses can encourage their legal staff to give back through pro bono work. Mayo said that lawyers at the Bank of America and Wachovia have the same obligation to do good—in addition to doing well—as the lawyers at Parker Poe Adams & Bernstein and Womble Carlyle Sandridge & Rice have done. Bank of America, for example, has 90 lawyers that are in-house in Charlotte and 270 in-house lawyers around the world; it also employs 500 legal associates, many of them paralegals. This is a tremendous force of legal expertise that can make a difference in legal aid organizations.

He explained that the way to do this, and the way that Bank of America has done it, is first to get the clear support from the General Counsel or the head of the company; identify projects with a specific time commitment; allow pro bono work to be done during the workday; and allow company resources to be used. Another good technique is for the company's attorneys to partner with legal aid and experienced pro bono attorneys so that they can combine their legal skills.

Mayo said that, over the last two years, Bank of America has gone from having a handful of lawyers and legal professionals doing pro bono work to 74 last year and 164 this year. He urged other businesses to increase the amount of pro bono work done by their legal teams as well.

7. Law School Debt and Loan Repayment Assistance

Another breakout group at the Summit addressed the problem of retention of newer legal aid attorneys who are burdened by a high amount of law school (and undergraduate) debt. The session was led by Carol Spruill, Associate Dean and Senior Lecturing Fellow at Duke Law School and Chair of the 4ALL Campaign's Subcommittee on Loan Repayment Assistance, and Luke Largess, attorney with Ferguson Stein Chambers in Charlotte and founder and President of NC LEAF, a statewide nonprofit that makes grants for debt relief to new public interest attorneys.

Law school debt is one of the most serious obstacles legal aid organizations face in terms of retaining experienced attorneys. Debt also affects whether a sufficient number of qualified attorneys apply for legal aid positions, and it certainly keeps many attorneys from starting their careers in the public sector. Reportedly, however, despite the debt problem, many strong applicants continue to apply to be legal aid attorneys. The problems begin when they face the reality of paying huge law school and undergraduate debts on a salary that is very low for professionals.

The average law school debt for legal aid attorneys in North Carolina is \$100,000 and rising. The starting pay for legal aid attorneys in North Carolina was recently raised from \$37,500 to \$39,000. The salary stays the same for three years (unless the statewide pay scale is revised) and moves slowly after that. A survey in 2006 found that the average legal aid attorney's pay after ten years was only \$47,000. This figure contrasts starkly with the \$130,000 (or more) starting salary for associates in private law firms.

LANC could use some of its money for debt relief, but its budget is torn between paying some of the loans of its attorneys, raising their salaries, or suppressing salaries so that as much money as possible goes to hiring the greatest number of lawyers possible in order to meet the overwhelming demand for services. Despite this dilemma, George Hausen, LANC's Executive Director, decided that law school debt is having such a huge effect on retention that he allocated some funds to NC LEAF to provide loan assistance payments for legal aid attorneys. NC LEAF raises money from the General Assembly and elsewhere to provide loan relief. The funds the organization raises must go to other public interest attorneys as well, including a huge number of assistant district attorneys and assistant public defenders. Money appropriated so far for debt relief has therefore been woefully inadequate to fund all low-paid, debt-burdened public interest attorneys.

North Carolina is fortunate to have several sources of funding that help with this problem. NC LEAF is the first statewide program established to address law school debt for public interest attorneys and one of the first and few to receive state appropriations. Duke University School of Law developed one of the first Loan Repayment Assistance Programs (LRAP) and one of the most generous in the country among law schools. The program allocated \$250,000 this year for alumni who do public interest work all over the country. Each eligible alumnus can receive up to \$80,000 in total benefits over their first 10 years of practice. Wake Forest University School of Law started an LRAP program several years ago; its alumni can seek Wake Forest funds or apply for funds from NC LEAF. All other North Carolina law schools have relied on NC LEAF exclusively for their loan repayment assistance, but the University of North Carolina School of Law is considering starting an LRAP program.

Two other initiatives are underway that are addressing the problem of law school debt. First, NCBA President Janet Ward Black has made loan repayment assistance a focus of her 4ALL Campaign. It is anticipated that the report of the LRAP Subcommittee will call for much more funding for NC LEAF to provide debt relief for legal aid attorneys, and hopefully the NCBA will make such a request part of its legislative agenda in the next session.

Second, in the fall of 2007, the United States Congress passed the College Cost Reduction and Access Act; it will bring much needed relief. For new attorneys who are certain that they will work long-term in public interest, this new legislation will solve much of the problem. Debt-burdened public interest attorneys can have their loan repayment amount suppressed to a workable level, but the interest continues to accumulate. If they work in public service for 10 years, the rest of a qualifying individual's federal student loan debt will be forgiven, including the accumulating interest. The problem at this point is that the forgiven debt amount is treated as taxable income. If they leave public service before 10 years is up, they have to pay the rest of the debt, including the accumulated interest. Other gaps remain that keep this legislation from being the total solution, and all of its provisions do not take effect until July 2009. In the meantime, NC LEAF and law school LRAP programs will be addressing the difficult task of figuring out how to take advantage of the federal funds without putting new attorneys in the precarious situation of letting interest build, facing a tax burden, or otherwise putting themselves at risk by reliance on the Act.

The effort to maximize available funds by adjusting existing systems to the new federal debt relief program is worthwhile. Legal aid organizations need to spend their limited funds on paying higher salaries and hiring more attorneys. Yet, in the meantime, they must address the turnover problem that this debt is causing. The estimated cost of turnover is 1.4 times an annual salary, or \$55,000 for a \$39,000 salary. Since \$39,000 is an artificially low salary for the skills of an attorney, the real cost of turnover is much higher. Turnover costs include: recruitment, training, ramp-up, and assimilation, as well as loss of knowledge, skills, and contacts. (Commission member Mike Rizer of Wachovia Bank gathered these facts from Sashacorp.com and Claiperonline.com.)

Once the problem of debt is addressed—through a combination of state appropriations, NC LEAF, law school LRAP programs, and federal debt suppression and forgiveness—legal aid organizations can get back to addressing the problems of low professional salaries and the need for using as much of the budget as possible to hire more attorneys.

IV. Initiatives in Other States

The Commission also met in November 2006 with representatives from other states to discuss their access to justice initiatives and best practices. This section, drafted by Robert Echols, State Support Consultant at the ABA Resource Center for Access to Justice Initiatives, focuses on these efforts by other states. For a list of access to justice resources on the Internet, see Appendix VIII.

A. Funding for Legal Aid

Increasing funding for civil legal assistance is the bottom line for expanding access to civil justice. With a major increase in federal funding unlikely in the short term, increasing state-level funding has been the major focus of most state access to justice commissions. Most have task forces or committees devoted to resource development.

In 2002, Maine's access to justice entity, the Justice Action Group (JAG), created a resource development task force. This task force reviewed all basic funding sources for civil legal assistance and considered Maine's current and potential performance in each area, using the information compiled by the ABA Project to Expand Resources for Legal Services. Following the issuance of the task force's report, JAG convened a resource development retreat involving key players in the bar, legal services, and the judiciary, as well as other stakeholders. The group reviewed all the data and options, heard various recommendations, and devised a plan that led to the creation of the Campaign for Justice. This campaign is a two-phase effort to increase contributions and buy-in from the private bar, followed by a legislative campaign. The campaign has been highly successful in increasing funding and support for the state's legal aid programs.

A number of state access to justice commissions have developed state plans or similar documents that set out a series of initiatives to be pursued to expand legal aid funding. An example is the 2007 *Action Plan for Justice*, a report of the California Access to Justice Commission. Among its recommendations are:

- Increase appropriation for civil legal services from the legislature.
- Pursue an IOLTA comparability rule to increase the yield on IOLTA accounts (since adopted).
- Fund local pilot projects to provide a continuum of services, including full representation for high priority needs.
- Pursue strategies to create a formal structure to use cy pres funds to support legal services.
- Pursue increased contributions by attorneys to legal aid programs.

In addition, a task force of the California Access to Justice Commission has developed model legislation creating and defining a statutory right to counsel in civil cases under particular circumstances. The task force has now turned its attention to how the right to counsel might be implemented on a step-by-step basis.

Other specific resource development strategies being pursued by state access to justice commissions include:

- Use of pro hac vice fees to fund legal aid (currently in use in six states).
- Use of attorney registration fees or bar dues to fund legal services (voluntary check-off/add-on or mandatory).
- Educational campaigns for judges and attorneys about dedicating cy pres awards to legal aid.

B. Pro Bono

Because they bring together representatives of the judiciary, the organized bar, legal aid providers, and other stakeholders, state access to justice commissions are ideally situated to explore the need for policies and rules to promote and support pro bono services. Among the rules that commissions have considered or recommended are:

- ABA Model Rule 6.1, which quantifies the average amount of pro bono work to be performed annually, setting a goal of 50 hours per year.
- Pro bono reporting rules, including mandatory pro bono reporting, now required by six states.
- Emeritus/pro bono practice rules.
- Rules or clarification of policies relating to limited scope representation (“unbundling”), which can facilitate pro bono service in a clinic or “Lawyer of the Day”-type setting.
- ABA Major Disaster (“Katrina”) Court Model Rule, allowing out-of-state lawyers to provide pro bono legal services in affected jurisdictions.
- Judicial ethics rules or commentary clarifying the ability of judges to engage in efforts to support pro bono service (as provided by recent amendments to the ABA Model Code of Judicial Conduct).

The New Mexico Access to Justice Commission developed a plan, adopted by the state Supreme Court in 2006, to create local district court-based pro bono committees charged with developing initiatives at the local level to expand access to justice through pro bono service. Similar local committees have also been developed in Colorado under the auspices of the Access to Justice Commission. Typical initiatives of these committees include:

- (1) Court-based recruitment efforts.
- (2) Coordination of screening and intake with legal aid programs.
- (3) Clinics.
- (4) “Lawyer of the day” and other types of support for self-represented litigants.
- (5) Training and continuing legal education for pro bono attorneys.

In New Mexico, a full-time staff person working out of the state bar supports the local committees.

Some commissions have been exploring (and realizing) the potential for pro bono contributions by other professionals. The Texas Access to Justice Commission’s Technology Committee is composed of the chief information officers of leading law firms. They spent more than a year surveying legal aid organizations about their technology programs, creating a technology plan to address the deficits, and researching the costs associated with the plan through a bid process. Committee members donated more than 1,000 hours of their time for the project, amounting to more than \$120,000 worth of pro bono assistance. As a result of the committee’s research and recommendations, the Texas Access to Justice Foundation purchased \$680,000 worth of equipment in bulk and donated it to the state’s legal aid offices.

C. Corporate Counsel

The Texas Access to Justice Commission has created a Corporate Counsel Committee to promote both funding for legal aid and volunteer efforts by corporate counsel staff. The committee coordinates corporate counsel efforts on behalf of the Commission with initiatives in local communities and provides ongoing input to the Commission concerning its overall legislative program. The committee is chaired by Exxon Mobil General Counsel Charles Matthews, who has made regular presentations about the Commission's mission and initiatives. The Commission and the Texas Justice Foundation have recently created a video highlighting the pro bono efforts of corporate legal departments in Texas. The video is titled *Pro Bono: A Corporate Effort* and is narrated by state Supreme Court Justice Harriet O'Neill.

D. Communications and Public Awareness Events

One of the major challenges to be overcome in expanding access to civil justice is the lack of understanding by the public, legislators, and even members of the legal community about the civil legal needs of low-income people and the importance of civil legal assistance. Many state access to justice commissions are engaged in high-profile efforts to draw attention to these issues, some of them involving state bar leadership and the judiciary at the Supreme Court level.

Several commissions have created videos (10–15 minutes in length) about the civil legal needs of low-income people and the services provided by legal aid. The videos focus on several individual client stories and are used at presentations on access to justice. The first of these was created for the Texas Access to Justice Commission for bar events, and it is narrated by Bill Moyers, with a special lead-in by Texas Supreme Court Justice Harriet O'Neill. The Arkansas Access to Justice Commission has since created a similar video, and the Mississippi Access to Justice Commission is currently creating one.

To raise awareness about the need for civil legal aid, state access to justice commissions regularly conduct sessions at bench and bar events and include articles and columns in bar and other relevant publications. Commissions have also developed media plans to reach a broader group of opinion leaders, though initiatives such as visits to editorial boards.

Several commissions have regular events at the state legislature to promote awareness of the need for increased funding for civil legal aid. For example, the Texas Access to Justice Commission has initiated an "ATJ Day" at the legislature during which commissioners visit key state legislators. This event is modeled on ABA Day in Washington. Maine's JAG regularly conducts informational events about legal aid services for state legislators.

Washington and Oregon conduct biennial "Open Houses" at legal aid offices, featuring Supreme Court justices, elected officials, and other prominent leaders, to draw attention to the benefits provided by legal aid programs and continuing unmet legal needs.

E. Access to the Courts/Self-Represented Litigants

In a number of states, access to justice commissions have assumed responsibility for leading and overseeing efforts to make the courts more accessible and user-friendly. In particular, commissions are addressing the challenges posed by the growing number of self-represented litigants. In other states, such efforts are on a separate, parallel track, such as a court or bar-based task force or standing committee. Some state groups are still at the planning stage, while others have already developed comprehensive plans and begun major initiatives.

An example of such a group working within the context of a state access to justice commission is the Self-Represented Working Group of the New Mexico Access to Justice Commission, which submitted a report and recommendations to the New Mexico Supreme Court in the spring of 2007. The Court accepted the plan in August of 2007.

The Court authorized the Commission to pursue its recommendations, which included the following:

- Implementation of self-help centers in every court in the state.
- Institution of a full-time position at the Administrative Office of Courts to develop and support self-help centers and develop training for court staff, judges, and the private bar.
- Adoption of a rule defining the role of court staff who work with self-represented litigants.
- Development of user-friendly forms and procedures, with special attention to the needs of non-English-speaking litigants.
- Development of risk management tools, such as forms, fee agreements, case management procedures, initial representation letters, and closure letters that satisfy the insurance industry's concerns about limited scope representation by attorneys for self-represented litigants.
- Development of a specific plan to educate the bench, bar, and insurance industry about the value and propriety of limited scope representation for self-represented litigants.
- Authorization of and support for pilot projects using limited scope representation for self-represented litigants to expand access to justice.

Many of these recommendations have already been implemented in other states and jurisdictions. For example:

- Maryland has self-help centers in all of its counties. Nationally, there are over 130 programs listed in the Directory of Self-Help Centers, available from the Self-Represented Litigation Network (among them is one in Mecklenburg County).
- Many self-help programs provide extensive one-on-one assistance by staff or pro bono attorneys to self-represented litigants, especially for non-routine cases. Particularly noteworthy are those in Hennepin County 4th District Court in Minneapolis, which provides such assistance at the desk and through pro bono attorneys, and the Contra Costa (California) Family Law Expansion Project, which provides individualized help as part of its standardized court intake process in all aspects of family law, from initial filing through final judgment.
- A number of self-help programs provide workshops or clinics, often combined with individual support, as a cost-effective way of walking individuals through complex paper procedures and preparing them for relatively common and simple court proceedings. The design of these programs varies widely, from a simple general presentation to a multi-part series that includes line-by-line support for filling in forms and preparing testimony. New York civil courts provide workshops for self-represented litigants.
- California courts have experimented with a courtroom-based support program for both self-represented litigants and the judicial staff. Attorneys review the case files of the self-represented litigants before the case is called, triage the case, answer procedural questions when referred by the judge, assist in completing or updating the required court forms so the case may go forward, provide referrals to services outside the courtroom, and when needed, prepare the orders after hearing or assist in settlement.

- There are a variety of models of pro bono involvement in serving self-represented litigants. The San Francisco Self-Help Center uses private attorneys to generate material, conduct workshops, and engage in community outreach. The Hennepin County program uses pro bono attorneys to provide unbundled consultations. Also in Minnesota, the Dakota County law library uses pro bono attorneys recruited by the legal aid program to provide assistance. In some states, legal advice programs use space in the courthouse or self-help center and also provide “attorney of the day” services. At the Alameda County Collaborative Family Law Day of Court Program, volunteer attorneys assist bench officers at dedicated pro per calendars.
- A number of states have implemented “unbundling” or limited scope representation programs. The New Hampshire Bar operates an award-winning program. The New York City Civil Court is operating a pilot pro bono discrete service attorney of the day program in housing cases. Massachusetts is operating a multi-county evaluated pilot in family cases. In California, the Access to Justice Commission’s Limited Representation Committee released a “risk management” packet, containing instructional materials for clients and attorneys, sample fee agreements, checklists, and forms.
- California and Idaho have rules that mandate the use of the state-approved forms. Idaho has been experimenting with rule simplification.
- Many states have rules or guidelines specifying how court staff can help self-represented litigants. These include California, Florida (Supreme Court Rule), Iowa, Michigan, Missouri, New Jersey, New Mexico, New York, North Dakota, Utah, and Wisconsin. Many are available on www.selfhelpsupport.org.
- Montana, Alaska, and Utah have implemented significant educational programs for courthouse staff for dealing with self-represented litigants.
- California, Minnesota, and Massachusetts have developed guidelines for judges in cases involving self-represented litigants. Recent educational programs have been conducted in Arizona, California, Massachusetts, New Hampshire, New York, and Oregon and by the National Judicial College.

Maine’s JAG and the California Commission on Access to Justice have both issued comprehensive reports on access to the courts for people with limited English proficiency. In both states, the reports and their recommendations are being used by the state’s judiciary to guide its efforts in this area.

Since 1999, California’s prestigious Aranda Access to Justice Award has honored a judge who has demonstrated a long-term commitment to improving access to the courts, and who has significantly improved access for low- and moderate-income Californians. The Judicial Council, the State Bar, and the California Judges Association co-sponsor the award in association with the California Commission on Access to Justice.

F. State Administrative Agency Fairness

Maine’s JAG has been in the forefront of developing techniques to increase access to justice at the state agency administrative level. The JAG’s Administrative Law Task Force, which includes representatives of the private bar, the Attorney General’s office, and legal aid providers, has sponsored an administrative law training conference for state agency hearing officers and other administrative staff. The conference reviewed current laws and procedures and suggested best practices for customer service. The training builds on a report by the task force identifying potential barriers to justice in the state at the administrative level. JAG has also presented awards to state agencies for practices that promote access to justice.

G. Long-Term Planning

State access to justice commissions are ideally situated to convene long-term planning efforts for the state's justice system as it relates to low-income people and others facing barriers to accessing the civil justice system.

Maine's JAG has recently concluded a long-term planning initiative (launched in March 2006) with a report setting out the recommendations resulting from its broad-based planning process. More than 100 individuals from around the state participated in work groups in the following areas: reducing the need for crisis intervention; ensuring a consumer-friendly system; assisting self-represented litigants; utilizing lawyers to expand access to justice; expanding resources; sustaining and ensuring quality; and promoting leadership. The report identifies a broad range of strategies to address these goals, including those strategies that will have the biggest impact and that can be implemented with little or no new funding.

Priority strategies are:

- (1) An increased state appropriation for legal aid.
- (2) Implementation of mandatory IOLTA with interest rate comparability (adopted September 2007).
- (3) Creation of a Division of Self-Represented Litigant Services within the Judicial branch, overseeing a Courthouse Assistance Program.
- (4) Creation of a Legal Aid Technology Resources Center.
- (5) Study of a civil right to counsel in adversarial proceedings where basic human needs are at stake.

The report also identifies ten strategies that require little or no new funding.

Among the more innovative recommendations included in the report are the following:

- Intervening “upstream” to solve problems before they become legal crises by creating processes and tools that can be used to identify the types of client problems that will benefit from early intervention and creating collaborations with various service providers and other stakeholders to develop strategies that can solve client problems before legal intervention is required. The goal is to reduce the disruption in clients' lives as well as the likelihood that they will need to engage the civil justice system.
- Sustaining and expanding leadership for justice through such strategies as the development and implementation of a comprehensive, coordinated program to educate the public about the connection between legal justice and social and economic justice and building a broader “coalition for justice.” The goal is to elevate the profile and prestige of a public commitment to justice and recruit participation in access to justice programs from a diverse audience, including business, social services organizations, the faith community, and minority and immigrant communities.

V. Moving Forward

A. Right to Counsel in Civil Matters

The Commission believes that representation by qualified advocates is necessary to ensure fair and adequate resolution of disputes in our legal system. As such, the Commission strongly supports a right to counsel in civil matters affecting basic human needs.

Reliable studies, nationally and in North Carolina, consistently show that approximately 80 percent of the civil legal needs of the poor go unaddressed each year. These include problems that low-income people face in obtaining the basic necessities of life: food, shelter, health care, freedom from violence, and family stability. It is unacceptable that legal processes are sometimes used to deny these basic necessities to our fellow citizens without our state providing them any legal help. It is imperative that the justice system provides a fair and level playing field for all of those using the legal system to address fundamental problems relating to basic human needs.

In August 2006, the ABA adopted a resolution urging each state:

[T]o provide counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as determined by each jurisdiction.

The full executive summary of the ABA's resolution is available at Appendix VI; the Report to the ABA House of Delegates recommending adopting the resolution is available at Appendix VII. The Commission fully supports this principle and urges all members of the community to play a role in making legal representation available to everyone in all cases where basic human needs are at stake.

B. Legislative Solutions

The most direct method for providing legal assistance in civil matters is public funding of existing civil legal assistance organizations:

- Increase funding under the Access to Civil Justice Act (ACJA).
- Increase other existing funding for civil legal assistance organizations.
- Examine other sources of dedicated funding.
- Expand the statutory right to paid court-appointed attorneys in specified civil cases.
- Amend the North Carolina State Constitution to provide right to civil representation in certain matters.
- Explore tax deductions for individual legal expenses.

C. Pro Bono Legal Assistance

It is the professional obligation of all lawyers to support the provision of legal assistance to those who cannot afford to pay by supporting legal services programs and by personally providing pro bono legal assistance to individual clients. To this end, the Commission supports initiatives and activities to increase the amount of pro bono assistance available to low-income litigants:

- Legal services agencies should provide substantive and procedural assistance to pro bono attorneys in every county and on the Internet.
- The North Carolina State Bar should adopt ABA Model Rule 6.1, as requested by the NCBA.
- Judges should support pro bono by calling attorneys to request their participation in pro bono programs, to the extent permitted by Judicial Standards, and standards should be reviewed to accommodate this initiative.
- State bar organizations should explore mandatory pro bono participation and mandatory pro bono reporting, and the NCBAF should continue its work on this issue.
- State and local Bar organizations and legal services agencies should continue to recognize pro bono contributions.
- Law students should be encouraged and given opportunities to participate in pro bono legal work.
- Lawyers should be given diverse opportunities and training to participate in pro bono activities, individually or in partnership with other lawyers.

D. Pro Se Litigants and Self-Serve Centers

Although representation by qualified advocates is necessary to ensure fair and adequate resolution of disputes in our increasingly complex legal system, some litigants may choose to proceed without representation (pro se) even if representation is available, and many litigants will continue to appear pro se until representation is available to all. Pro se litigants are a large and increasing reality in our court system.

Representation by qualified advocates is necessary to ensure fair and adequate resolution of disputes in our legal system—and is the first goal of equal access to justice—but the court system must be more accessible to and supportive of pro se litigants, while the goal of full representation is pursued. To this end, the Commission supports initiatives and activities to improve access and success for pro se litigants in the court system:

- Expand the resources available to support pro se litigants and improve the uniformity in pro se resources across the state; the NCBAF should continue its work on this issue.
- Create a full range of high-quality self-help materials and develop a process for distributing them to pro se litigants throughout the court system.
- Develop appropriate alternative dispute resolution (ADR) mechanisms available to pro se litigants in all areas of civil law.
- Train judges and court employees about issues that impact pro se litigants.
- Involve law schools, law school clinics, and law students in supporting pro se litigants.
- Assess pro se litigation, by type and by district, with outcomes.
- Study the use of alternative forums for high volume pro se cases in specific areas such as domestic violence, education, health care, and employment.
- Continue to study pro se needs, practices, and resources by area to determine impact and focus resources.

E. Educate the Public

It is critical that the general public understand the need for representation of low-income people in certain civil matters and that broad public support be developed for increasing the availability of legal representation and pro se programs. The Commission supports a range of activities to achieve this goal:

- Present the stories of real people in the mass media.
 - Frame basic needs stories.
 - Illustrate consequences of not having legal representation.
 - Use evocative visuals.
- Target specific audiences, including the business community, educators, and nonprofit coalitions such as the United Way.
- Involve faith communities by working through ministerial organizations and emphasizing the link to eliminating poverty.
- Hold local Equal Access to Justice events directed at local needs, stakeholders, schools, colleges, churches, and civic leaders, and coordinate with local pro bono legal services.
- Hold an Equal Access to Justice Summit at the legislature.
- Involve state bar organizations in preparation of “The Law and You” columns for local papers.
- Include low-income people in the decision-making processes.

F. Involve the Business Community

The business community should understand the business case for increasing the availability of representation for low-income people in certain civil matters. The Commission supports a range of activities to achieve this goal:

- Work through General Counsel and legal departments to engage and educate corporate leaders.
- Ask corporate leaders to provide direct support, support legislative initiatives, and leverage vendor firms.
- Identify and align with focus areas for specific industries and corporations, e.g. health care advocacy and hospitals.

G. Include People with Limited English Proficiency in the Justice System

The court system must be open and accessible to persons with limited English proficiency to ensure fair and adequate resolution of disputes:

- Study the extent of the needs of the limited English proficiency population and evaluate current procedures for interpretation in the mediation process and in the court system.
- Expand resources for interpreters, including additional appropriations.
- Explore use of volunteers, foreign language teachers, students, and others to fill the interpreter gap.
- Expand and improve training for judges, magistrates, and court administrators.

H. Loan Repayment Assistance Programs

Recent law school graduates have to pay off very large school loans, which are difficult to repay given the modest salaries paid to attorneys in legal aid programs. This debt affects both the willingness and ability of new students to start in public service, as well as the retention rate for legal aid attorneys in their early years of practice. New federal legislation may provide some relief but is not yet fully operational and will not cover everyone. The Commission supports the continuation and expansion of current law school and statewide loan repayment assistance programs and state appropriations to reduce the debt of legal aid attorneys.

VI. Commission Priorities

The Commission finds that North Carolina must address the lack of access to the civil justice system for the poor by:

- ⊗ Increasing state funding for legal aid organizations.
 - ⊗ Providing a statutory right to counsel for specific types of cases.
 - ⊗ Taking new measures to increase pro bono representation.
 - ⊗ Combining the efforts of lawyers with leadership in the business community, the religious community, the government community, the nonprofit community, the academic community, and the client community.
 - ⊗ Establishing clear guidelines for the courts and providing more assistance for those representing themselves in the courts pro se.
 - ⊗ Providing more support for legal aid attorneys, especially through debt reduction.
 - ⊗ Improving access to the courts for those with limited English proficiency.
 - ⊗ Educating the public about the realities of poverty and barriers to access to the civil justice system.
-

Appendix I: Members of the Original Commission

The Honorable Sarah Parker, Chair

Reid Calwell Adams, Jr., Vice-Chair

Representative Martha Alexander

Victor J. Boone

Senator Daniel Clodfelter

Reginald Combs

Anita S. Earls

James Nicholas Ellis

Catherine Graham

George V. Hanna, III

The Honorable A. Robinson Hassell

George R. Hausen, Jr.

The Honorable Paul L. Jones

Melinda Lawrence

The Honorable James Long

The Honorable Linda M. McGee

E. Fitzgerald Parnell

Michael P. Rizer

Barbara Roole

Kenneth Schorr

E. Carol Spruill

James M. Talley, Jr.

Richard M. Taylor, Jr.

Willis Williams

Michelle Cofield, Executive Director

Appendix II: Original Order Establishing and Charging the Commission
IN THE SUPREME COURT OF NORTH CAROLINA

BY ORDER OF THE COURT

In recognition of the need to expand access to civil legal representation for people of low income and modest means in North Carolina, the Court hereby creates the **EQUAL ACCESS TO JUSTICE COMMISSION**.

BY THIS ORDER, the Court charges this Commission with the following goals, purposes, and responsibilities:

- (1) Identify and assess current and future needs of low-income North Carolinians for access to justice in civil matters by conducting a study to determine the full range and volume of such unmet legal needs. The study shall: (a) determine and document how unrepresented people with legal disputes are attempting to meet these needs without attorneys, the extent to which these efforts are successful, and the consequences of the lack of attorney representation; (b) recognize the enormous efforts currently being made by attorneys to serve low-income North Carolinians; (c) analyze the need for funding and other resources to close the gap; and (d) address any other matters related to the delivery of equal access to justice in civil matters to all North Carolinians.
- (2) Develop and publish a strategic plan for delivery of civil legal services to low-income North Carolinians throughout the state that will (in part) educate the public about the large gap between the ideal of equal access to the legal system and the reality of lack of representation.
- (3) Foster coordination within the civil legal services delivery system and between legal aid organizations and other legal and non-legal organizations.
- (4) Increase resources and funding for access to justice in civil matters and ensure both are applied to the greatest need so that all possibilities for additional state, local, and other non-Legal Services Corp. funding are examined, the most feasible options analyzed, and a strategy for pursuing such funding implemented.
- (5) Ensure wise and efficient use of available resources through collaboration among legal aid and other organizations (such as other legal advocacy groups, non-legal advocacy groups, providers of social services, law schools, the court system, corporate and government law departments, and other state and local agencies) and through the use of local, regional, and statewide coordination systems.
- (6) Develop and implement other initiatives designed to expand civil access to justice, such as increasing community education, enhancing technology, developing assisted *pro se* programs, and encouraging greater voluntary participation of the private bar in *pro bono* legal assistance to low-income people in North Carolina.
- (7) Monitor the effectiveness of the statewide system and services provided, as well as periodically evaluate the progress made by the Commission in fulfilling the civil legal needs of low-income North Carolinians.

- (8) Consider the legal needs and access to the civil justice system of persons whose income and means are such that they do not qualify under existing assistance programs and whose access to civil justice is limited either by the actual or perceived cost of legal services; and develop and implement initiatives designed to meet these needs, such as limited representation and limited appearances by attorneys and identification of types of services that could be provided by non-lawyers.

The Equal Access to Justice Commission shall consist of twenty-five members who reflect the diversity of ethnic, gender, legal, and geographic communities of North Carolina. The Chief Justice or his or her designee shall serve as Chair of the Commission. The day-to-day management and operation of the organization shall be conducted by an Executive Director who works with and reports regularly to the Commission. Members shall serve three-year staggered terms. A member may not be reappointed to serve a successive three-year term.

Members will be appointed as follows:

- (1) **Judiciary:**

The Chief Justice will appoint the following representatives of the judiciary:

- (a) The Chief Justice or an Associate Justice;
- (b) A Judge from the North Carolina Court of Appeals;
- (c) A Judge from the Superior Court;
- (d) A Judge from the District Court;
- (e) A representative of the North Carolina Administrative Office of the Courts (AOC) or from the North Carolina Clerks of Superior Court.

- (2) **Practicing Lawyers:**

- (a) The North Carolina State Bar president will appoint two members;
- (b) The North Carolina Bar Association/Foundation (NCBA) president will appoint two members;
- (c) The North Carolina IOLTA Board of Trustees chair will appoint one member;
- (d) The Chief Justice will appoint three members from voluntary bar associations.

- (3) **Legal Aid Programs:**

In consultation with the North Carolina Legal Services Planning Council, the Chief Justice will appoint four members to represent the interests of legal aid programs as follows: one board member from Legal Aid of North Carolina, Inc. (LANC), one LANC staff member, one board or staff member from the North Carolina Justice Center, and one board or staff member from another unrestricted legal aid program that either serves a particular geographic area or provides specific services or serves a particular client base.

(4) Law Schools:

In consultation with the deans, the Chief Justice will appoint one representative from the accredited law schools in North Carolina.

(5) Public Members:

- (a) Governmental Representatives: The Chief Justice will invite the Governor, the President of the Senate, and the Speaker of the House to serve on the Commission or to recommend someone to serve in his or her stead.
- (b) North Carolina Philanthropy Community Representative: In consultation with the North Carolina Network of Grantmakers, the Chief Justice will appoint one member to the Commission.
- (c) Client Representative: In consultation with the North Carolina Clients Council and the North Carolina Legal Services Planning Council, the Chief Justice will appoint one client representative member to the Commission.
- (d) North Carolina Business Community Representatives: The Chief Justice will appoint two members to the Commission from the business community in North Carolina.


The terms of Commission members shall be:

To implement a staggered term system, Commission members will be appointed in classes, designated Class I, Class II, and Class III. The initial appointments of Class I members will end one year from the date their terms begin; the initial appointments of Class II members will end two years from the date their terms begin; and the appointments of Class III members will end three years from the date their terms begin.


- (1) Class I members are: one appointee each from the NCBA, voluntary bar associations, IOLTA, the Court of Appeals, and the business community; the representatives from the LANC board and the North Carolina Justice Center.
- (2) Class II members are: one appointee each from the NCBA, the North Carolina State Bar, the Superior Courts, voluntary bar associations, the business community, and law schools; the representative from the unrestricted, undesignated legal aid program, and the client representative.
- (3) Class III members are: one appointee each from the North Carolina State Bar, the District Courts, voluntary bar associations, and the AOC or Clerks of Superior Court; the LANC staff member, and the philanthropy community representative.
- (4) Governmental representatives will rotate by the terms of their offices.

The Commission will meet quarterly and will file an annual written report on the status and progress of its activities. The Commission will send a copy of the report to this Court, the North Carolina State Bar, and the North Carolina Bar Association. The Commission will provide oral progress reports to North Carolina Bar Association board meetings and to North Carolina State Bar Council meetings.

Adopted by the Court in Conference this the 3rd day of November, 2005.


I. BEVERLY LAKE, JR.
Chief Justice
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2005.


CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

NC Equal Access to Justice COMMISSION

A COMMISSION OF THE NORTH CAROLINA SUPREME COURT

P.O. BOX 3688 • CARY, NORTH CAROLINA 27519-3688 • 800-662-7407

A RESOLUTION OF THE NORTH CAROLINA EQUAL ACCESS TO JUSTICE COMMISSION

Whereas, the North Carolina Equal Access to Justice Commission (the Commission) established by the NC Supreme Court is a body that includes representatives from bar organizations, the judiciary, legal aid providers, the legislature, the business, philanthropic and client communities and the law schools united in a vision to create deeper understanding and support within the bar, the judiciary and the public for access to justice throughout North Carolina and to assist that effort through leadership, planning and financial support in a variety of arenas;

Whereas, the Commission has studied the legal needs of the indigent population in North Carolina in obtaining basic necessities and learned that no more than 20% of the legal needs of the poor are being met, and that North Carolina lags behind the national average in dollars per poor person provided for these needs from almost every funding source;

Whereas, the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts (NC IOLTA) is a vital source of funding for the provision of civil legal service to the poor through grants made to staffed legal services programs and volunteer lawyer programs that serve every county in the state and for other programs that work to improve the administration of justice;

Whereas, with 75% of eligible North Carolina lawyers participating in NC IOLTA, that program will be administering \$3.7 million in grants for 2007, using funds generated from the interest on pooled client trust accounts;

Whereas, in 32 of 52 United States jurisdictions in which IOLTA programs operate the program is comprehensive, *i.e.*, all attorneys who keep general client trust accounts are obliged to participate in the program, and, according to information provided by the ABA Commission on IOLTA, all programs that have moved to comprehensive or mandatory status have shown significant income increases;

Whereas, the Commission believes that moving NC IOLTA to a comprehensive or mandatory IOLTA program is an excellent way to provide additional support for North Carolina's access to justice community and programs;

Chief Justice Sarah Parker, Chair

Michelle Cofield, Executive Director

Reid Calwell Adams, Jr. • Representative Martha B. Alexander • Victor J. Boone • J. Donald Cowan, Jr. • Anita S. Earls • Mel J. Garofalo
James F. Goodmon • Catherine P. Graham • George V. Hanna, III • Judge A. Robinson Hassell • George R. Hausen, Jr. • Judge Paul L. Jones
Judge James M. Long • Judge Linda M. McGee • E. Fitzgerald Parnell • Rhonda G. Raney • Barbara E. Roole • Michael P. Rizer
Kenneth L. Schorr • Associate Dean E. Carol Spruill • James M. Talley, Jr. • Richard M. Taylor, Jr. • Willis Williams

NOW, THEREFORE, the North Carolina Equal Access to Justice Commission recognizes and thanks the North Carolina State Bar for its efforts to advance the concept of mandatory IOLTA and for its work to prepare appropriate rule revisions for consideration by the Council at the appropriate time, and it adopts the following resolution:

The North Carolina State Bar is urged to adopt provisions to implement a comprehensive IOLTA program providing that all North Carolina attorneys who hold general client trust accounts are obliged as a part of their professional responsibilities to the public to participate in the program and thereby increase significantly funds available to improve the provision of legal services to indigent persons in North Carolina, to increase access to our justice system and otherwise to improve the administration of justice throughout the State of North Carolina.

This the 23 day of February 2007.



Sarah E. Parker, Chief Justice
North Carolina Supreme Court
Chair, The North Carolina Equal Access to Justice Commission

APPENDIX IV: Presentation by Keynote Speaker, Gene Nichol, then President of William and Mary University and Former Dean of the University of North Carolina School of Law

Thank you, Madame Chief Justice. That's a phrase I've always wanted to say, by the way. And never been able to. I'm particularly heartened it's Madame Chief Justice Sarah Parker. Congratulations—and congratulations to the people of North Carolina.

I'm honored and beyond happy to be here. In the state, and in the university community, and legal community that I think of as home. Though I was able to sneak back here for the first time—in too long—last weekend, to help the Carolina community pay tribute to my friend Marion Cowell. And also see the Tar Heels whip up on the University of Miami—which is God's work if ever there was. A sort of reverse hurricane. The first time in a while, I'd imagine, that the near sellout crowd was still in the stadium at the end of the game. Not talking about waiting for basketball. It's been a tough year for the new faces—but things are, I'd venture, looking up. Though I used to be friends with Steve Spurrier. Though I wouldn't want to make predictions there.

I'd be lying if I didn't concede that I love to come back to Chapel Hill and drink of the waters—they don't actually need a fountain at the Old Well—talking to Bill Aycock and Bill Friday and Dickson Phillips and Henry Frye and Dan Pollitt and Julius Chambers—and so many here—it's quite an elixir. Having heroes is a marvelous thing. And even when you know you can't live up to their standards—it at least helps to be certain from which direction the sun does rise.

I'll admit too that I've been reading one of America's great new works of non-fiction—William Blythe's "To Hate Like This is to be Happy Forever." It's a remarkable source of unbiased straightforward reporting. And it reminds me that I should begin, as I still frequently do, by saying that I hope your future skies are of that perfect, ennobling, encompassing Carolina blue—not the dark and menacing shade seen just eight miles up the road in Durham County. I'm honored to be here.

I love my present job—the College of William & Mary was a national treasure even before there was a nation to treasure it. I promised myself three years ago, when I left Chapel Hill, that I was going to get myself out of the newspapers for a change. That hasn't really worked out. I have been honored to win such hearty support from folks like Bill O'Reilly and Newt Gingrich. I've been listening to Bruce Springsteen's new album—and he has a line "you'll take comfort in knowing you've been roundly blessed and cursed." I find some reassurance in that.

I'm happy, as well, to have the assignment I've drawn—exploring the call to equal justice. Our greatest challenge as a profession. Perhaps our greatest challenge as a nation. But I will say, thankfully, to sketch out these concerns before this legal community—here in Carolina—that in my experience believes more fully, more potently, in the challenges of equal justice than others, in what is now a long career, others I have known. I'm not surprised, though I am heartened, that Janet Ward Black has pushed access to justice so hard in her presidency. It is, for this bar—in the blood, the sacrifices, the demands, the struggles of justice. You have seen, first hand, the darkness and the light. And you have taught much, in what Dr. (Frank Porter) Graham called, the charge to build "a nobler and fresher civilization in this ancient commonwealth." I'll try not to preach—especially from a distant academic perch. Reminded of Mark Twain's claim that "to do right is noble. To advise others to do right is also noble, and much less trouble to yourself."

So let me start with the obvious. We carve "equal justice under law" on our courthouse walls. It is the literal cornerstone of our system of adjudication. We swear fealty to it every day. For decades, we've announced as a fundamental principal of our constitutional law "there can be no equal justice when the kind of trial a person gets depends on the amount of money he has." But the framework in which we operate has little in common with what we say.

Think about a set of facts that we all know to be true. Lawyers cost money. Some have it. Lots don't. Yet unlike some industrial nations, we recognize no general right to representation in civil cases. We spend far less than other Western democracies on subsidized legal representation. Less than 1 percent of our total expenditure for lawyers goes toward services for the poor. Legal aid budgets are capped at levels making effective representation of the poor a statistical impossibility. Even at that, they've been cut by about a third over the last dozen years.

We have one lawyer for every 400 people generally, and one legal services lawyer for every 7,000 persons living in poverty; in North Carolina reportedly one legal services lawyer for every 18,000 eligible citizens. Our legal services lawyers turn away 8 out of 10 clients with actionable claims. We fence folks out even further by creating categories of unworthy poor and placing restrictions on the most efficient avenues for representation. Study after study shows about 80% of the legal need of the poor is unmet—in North Carolina, in Virginia, in the country. The circumstance is almost as bleak for middle income Americans.

As every person in this room knows, neither the billable hour nor the possibility of a significant contingent fee covers the waterfront of American legal disputes. New York's State Bar study a couple of years ago found that we leave the poor unrepresented on most crushing problems of life—divorce, child custody, domestic violence, housing, benefits. We think it natural that a commercial dispute between battling corporations takes six months to try, while the fate of a battered child is determined in only a few minutes. What passes for civil justice among the have-nots is breathtaking.

On the criminal side, we trivialize the right to counsel we have declared. Across the country, public defenders can have crushing caseloads. Rates of compensation for appointed lawyers are often absurd. Competitive bid schemes can make them worse—leading to what has been described as “meet 'em, greet 'em, and plead 'em” defense regimes.¹ We've developed laughable rules of constitutional effectiveness—what Deborah Rhode calls a “jurisprudence of dozing”—ruling not only inexperienced lawyers, but drunk lawyers, drugged lawyers, mentally ill lawyers, and sleeping lawyers can pass muster. One court explained that “the constitution does not say a lawyer has to be awake”; another ruled that sleeping “might have been a strategic ploy to gain sympathy from the jury.” This must have provided only modest consolation to the convicted client.

We enthuse about access and equality rhetorically. But we don't make serious efforts to give them practical content. Average citizens are effectively priced out of the justice system. They're also typically barred from participating in the closed regulatory scheme that excludes them. The system we have is powerfully, dramatically, and fundamentally at odds with who we say we are.

In studying the literature—as best a university president can do—I learned that “the best available research indicates that the American legal profession averages less than half an hour of work per week on pro bono services.”² Most lawyers do no pro bono work at all. Recent affluence has eroded rather than expanded support for pro bono programs. Over the past fifteen years, the average revenue of the country's most successful firms increased by over 60%. Pro bono hours dropped by one-third.

In law schools, issues of access to justice are either missing or marginalized in our curricula. Relatively little of our research focuses on what passes for justice among the poor. Our curriculum takes the present deployment of legal resources as a given. Who uses the system is unexplored. Law firms are not topics of study or critique. Despite the marvelous clinical programs expanding across the country, unequal access to justice has not made it to the core of legal education. Only 10 percent of schools have pro bono requirements—and fewer than that apply them to faculty. The greatest shortcoming of American law schools may be the failure to explore and articulate a theory of the just deployment of legal resources.

And, without intending to, we've added to the problems of access by our own patterns of decision-making. Tuition has risen, particularly in public law schools, many multiples of inflation. Private school tuition dramatically exceeds that of the publics. Costs per student have soared in the past two decades—with institutions competing feverishly—for star faculty and deans, supremacy in facilities, in technology, in expensive brochures sent across the land to convince unwilling recipients how terrific the schools are—

and thus, against all odds, improve their rankings in *US News*. None of which add much, or perhaps anything, to the quality of educational experience.

Then young lawyers graduate owing \$100,000 or more, while public sector jobs around the country average starting salaries of about \$40,000. Further taxing a legal system that already excludes the poor and the near-poor from voluntary access to civil justice. Law schools, of course, didn't cause all this. But I'm loathe to think that, completely without justification, we're guilty of piling on.

When we survey this landscape, I think we're compelled to say that we would have hoped for more from our nation's justice system. More from our country. And I think we'd say as well that these are but components of a set of much larger problems—larger betrayals of the command of equal justice. Denials that we've gotten used to—that have become commonplace—betrayals from which we have chosen to simply turn our gaze away. We've gotten used to things we should never have gotten used to. And we've apparently been satisfied.

1. But how can we be satisfied? When the richest nation on earth, the richest nation in human history, allows almost 37 million of its citizens to live in stark, unrelenting poverty? A quarter of black Americans. A fifth of Latinos. Almost one in five of our children—13 million—even higher percentages in North Carolina—one in four—as if any theory of justice or virtue could explain the exclusion of innocent children from the American dream.

2. And how can we be satisfied, when 47 million Americans have no health care coverage of any kind? Sixteen percent of North Carolinians. Leaving us alone among the industrial nations in failing to provide some form of universal coverage. When, as Dr. King proclaimed, inequality in access to health is the most pernicious discrimination of all?

3. How can we be satisfied when over 40,000 North Carolinians every year fall prey to domestic violence—most of them with no access to lawyers—though the legal system may be the only effective avenue to save their lives? As if the most endangered of us somehow don't count. And so sometimes don't survive.

4. And how can we be satisfied when, 50 years after the majestic phrases of *Brown v. Board of Education*—all over the country schools are rapidly re-segregating. Removing meaningful racial integration from our national agenda. Ignoring Thurgood Marshall's claim before the Supreme Court that “these plaintiffs seek the most vital right that can be claimed by children—the right to be treated as entire citizens of the nation into which they have been born.”

5. And how can we be satisfied when in Virginia and North Carolina and across much of the country we allow rich and poor public schools—not just private schools mind you, but rich and poor public schools. As if it were thought acceptable to treat some of our children as second and third class citizens. Our religions teach that all children are equal in the eyes of God. We operate our schools as if we didn't believe it.

6. And how can we be satisfied when a new study concludes higher education is more economically polarized today than at any time in the last three decades? So that if you come from a family making over \$90,000 a year, your chances of getting a college degree by age 24 are better than one in two. If your family makes \$35,000 or less, the odds are one in 17. One in 17. As if intellect and character and commitment, and worth, were hereditary.

7. And how can we be satisfied when my own institution, and other distinguished universities across the nation, still have so much to do to demonstrate, in our Chancellor, Justice O'Connor's words, that these distinctive paths to leadership are "visibly open" to all segments of society.

The frank truth is that if the exclusions and indignities of American race and poverty are right, then the Constitution is wrong.

If the debilitations of those locked at the bottom are acceptable, then our scriptures are wrong.

If these denials of equal citizenship and equal dignity are permissible, then we pledge allegiance to a cynical illusion, not to a foundational creed.

So that's why your work triggered here—to make the promises of justice real—in the bar, in the courts, at legal services, in the law schools, in the state house, is so crucial, so defining. I hope that, together, we'll begin to insist upon a higher calling of public obligation—a more demanding and optimistic vision of professionalism, of citizenship. One born in, dependent on, dedicated to—the foundational American aspiration of equal justice. I hope that we will declare our commitment to it. We'll enroll our hearts. We'll enlist our spirits. We'll mark our lives. We'll enlist because. . .

1. Somewhere we read, "We hold these truths to be self-evident that all are created equal."
2. And somewhere we read, "[The] central purpose of America is that the weak would gradually be made stronger and ultimately all would have an equal chance."
3. And somewhere we read that "Injustice anywhere is a threat to justice everywhere."
4. And somewhere we read, "History will judge us on the extent to which we use our gifts to lighten and enrich the lives of our fellows."
5. And somewhere we read, "The arc of the moral universe is long, but it bends toward justice."
6. And somewhere we read, we have "to believe the things we teach our children." Believe them and make them real.
7. And somewhere we read that "Whenever you did these things to the least of these, you did them to me."
8. And somewhere we read, "You reap what you sow."
9. And somewhere we read that "The pursuit of justice and the pursuit of happiness march not in opposite directions but hand in hand."
10. And somewhere we read, "No, we are not satisfied, and we shall not be satisfied 'til justice rolls down like waters and righteousness like a mighty stream."

Thank you.

1 Deborah Rhode, "Access to Justice," 69 *Fordham L. Rev.* 1785 (2001).

2 *Id.* at 1810.

Appendix V: “Why is Access to Justice Important?”

Opening Address by Thomas Lambeth, Former Director of the Z. Smith Reynolds Foundation

An early agenda listed my remarks as “The Moral Imperative.” That is a pretty heavy load to lift. It sounds a little like preaching and I am no preacher. I am not even a lawyer. Yet if I were a preacher and this were my sermon for the day, I would not turn for my inspiration to the scriptures—although they are an important and inspiring source for a discussion of justice and equity.

Instead I would turn to the words of a North Carolina journalist, an English explorer, and a Pennsylvania founding father. I think what all of them wrote and how the years have embraced their words speaks to the purpose of your work. My understanding of that work, as a layman, is that you are determining whether we as North Carolinians and we as Americans will live up to our promise and the promises of our past.

My concern about whether we achieve that is driven by my own 300 years of North Carolina roots, by the two public servants whom I spent an important part of my years serving, and by my involvement in a family philanthropy—someone else’s money I would note—which committed itself many years ago to helping the people of North Carolina improve the quality of their lives.

In that latter pursuit, the Reynolds Foundation learned from its first grant forward that access to the benefits of citizenship was essential to that goal of a better life for Tar Heels and their families. I know that will continue under the leadership of Leslie Winner who has a lifetime of commitment to such values.

Now, to my eloquent trio: The journalist is the late Jonathan Daniels who decades ago wrote of North Carolina the following:

The State, good, beautiful, varied, is a long way from perfection; but more than any other State in the old America, it is as it was in the beginning—with the same high hope in it, the same free people, and the will to possess the same free chance. Other states possess the houses, the capitals, the preserved places, the restored buildings, but the North Carolina continuity is of peoples, not of buildings, of the pioneer possibility of equality and comradeship in equality. That belief in that possibility is more than anything I know the mark of North Carolina.

The English explorer is Ralph Lane who in September some 422 years ago, in the first letter written in the English language from the New World to the old, reported the following: “Since Sir Richard Grenville’s departure from us...we have discovered the mainland to be the goodliest land under the cope of heaven.”

And finally the words of Gouveneur Morris of Pennsylvania who was successful in taking the words in the original draft of the preamble to the United States Constitution which were “We the delegates of the sovereign states of Delaware, Georgia, etc.” —and substituting for them the words that are there today: “We the people.”

Three sets of words: A belief in the pioneer possibility of equality; the goodliest land under the cope of heaven; We the people.

Now when Daniels wrote those words, all North Carolinians did not share the same pioneer possibility of equality; it was a possibility deferred; and when the founders settled upon “We the people” it was clearly we—only some of the people—it was, essentially, we the white males and not all of them; and the goodliest land spoke of a geography, not a people. Yet over the years North Carolina has moved towards the expansion of those pioneer possibilities: that the nation and North Carolina have come close to making we the people, all of the people; and we in North Carolina have done much to create out of that 16th century description of the land and water and climate a new notion of what we could as a state become for all of our people.

So what of this matter of ideas and equality? Of people and possibilities? We have had cause to look at them again in our greatest modern tragedy as a nation. Soon after the planes crashed into the Twin Towers, the Pentagon, and the Pennsylvania countryside, people began to speculate why the planners of that monstrous crime did not select flight times that would have had the planes hit their targets when they were at their maximum human capacity.

We have learned through the 9/11 Commission that the reason the planes that day headed for their collisions without regard to what hour would find the maximum number of people in the buildings targeted was that in their evil calculations the terrorists did not care how many people were there. They saw the buildings without regard to the human equation that proved so deadly. They saw them as symbols of our democracy. They saw them as somehow essential to what made us who we are.

They made a mistake. They sought to bring down a nation by bringing down buildings, thinking that such an act would somehow destroy us. Yet, even if their worst designs had prevailed—for example, if they had hit the Capitol—the nation would not have collapsed. It is not the symbols of our nationhood, sacred as they may be to most of us, that make us what we are. It is the idea of freedom that does that. The idea was there before the buildings. It will be there if they are ever gone.

We sometimes forget that the founders of our nation were most often scholars. Jefferson, Adams, Rush, Madison, Franklin were men for whom liberty emerged as a great idea.

To give credibility to that idea of liberty; to make believable that ideal of “We the people” in the 21st century, that realization of the goodliest land must belong to all of us; it must be liberty for all, it must be a shared destiny in which both the sacrifice and the celebration belong to all of us.

And it must work in the lives of real people with real problems and real opportunities.

There is no more powerful component of that idea of liberty than the idea that within our free land, justice is there for all and that it is accessible and applicable to all equally and in the same measure of impact and outcome. When we fail to realize that ideal, when we deny justice to any, when we deny the protection of the law because of wealth or power or position or class or religion or race, we diminish it for all. More than that, we rend the fabric of the compact that we have made as citizens of a free land—a compact between all of us for the protection of all of us. Justice becomes less than it should be.

And in a time when there are many enemies of our democracy, we weaken our resolve in meeting those forces at home and abroad.

The law should be empowering and redeeming in a democracy. If it empowers only some, if it redeems for only some, it loses its value to all.

Judge Learned Hand once asked of his law clerk, “To whom am I responsible? No one can fire me; no one can dock my pay. Even those nine bozos in Washington, DC can’t make me decide as they wish. Everyone should be responsible to someone. To whom am I responsible.” Then he turned to the law books in his library and said, “To those books on the shelves there above us. That’s to whom I am responsible.”

It is that idea of the written law and its majesty that lifts up all of us. To deny that empowerment to any is not only a travesty, it is a travesty that is dangerous in times which demand that we stand together in a common conviction of the worth of our nation.

It is not an easy thing that you propose to do through the work of this commission. Not an easy thing to stand for justice accessible and equitable. Those of us in the Methodist church sing a hymn that calls us to show “the courage to do justice,” that commands us to “not be afraid to defend the weak because of the anger of the strong” nor “be afraid to defend the poor because of the anger of the rich.”

My Jewish friends read in the Talmud that “justice, equal justice shalt thou pursue” and in subsequent commandments define equal justice as exactly the same justice for the immigrant as the native born, requiring a civil and criminal process that gives not the slightest preference to the rich and powerful over the poor and powerless. Those who are of that ancient faith are ordered to pursue a relentless, never-ending quest for evidence that might tend to exculpate the accused.

Cicero said that the law “is the highest reason. It is implanted in Nature, which commands what ought to be done and forbids the opposite.” When we have taken from the law by denial of access or equal application, we have violated Nature, we have done damage to reason.

In North Carolina in 2007 we worry much about whether we are becoming two North Carolinas; one prospering and expanding, one declining. Today the control of our legislature rests in the hands of the representatives of 15 counties; not because of any conspiracy; just because of dramatically changing demography.

Into this dramatically changing environment we add a series of gaps: an achievement gap, an income gap, a transportation gap, a mushrooming infrastructure gap, and a political power gap. Will we compound an already dangerous division with a justice gap?

We need to remember that equity in the access to justice and equity in its enforcement are not only protective of those who seek such access and who are the targets of its enforcement, it is protective of those we have charged with the responsibility of enforcement.

My own experience in law enforcement—in the military police—was brief and largely uneventful, but one only has to walk once with an unholstered 45 into a darkened building with strange noises or patrol a narrow alley behind a commissary to have some sense of the awesome burden of those for whom law enforcement is a career. The law enforcer is strengthened in that role when he or she serves a community which believes that the law belongs to all of them and that it is applied in equal measure to all.

Finally, I believe the work of insuring equal access to civil justice is fundamental to our larger effort to bring the benefits of a global economy to all the people of North Carolina. In that effort, in this century we as North Carolinians and as citizens of the United States confront awesome odds. The numbers against which we compete —when we look at such nations as India and China—are staggering. Nine cities in the US with a population over one million; more than 60 in China. How can we possibly overcome such an advantage? Our best hope is just to be very smart, very strategic and integral to that is making our democracy work, so that no part of our state or nation will think that the outcome is less important to them because they are less important to the rest of us. To go into such a competitive world without the support of all is to invite disaster.

The fact is that in North Carolina we are not ready for prime time. Each hour our state adds 21 people to its population. If we are to meet the needs that this tsunami of population increase represents, the public investment will be as little as \$19 billion; perhaps more than \$60 billion. We cannot achieve that kind of public commitment with a population that is divided by inequitable access to the benefits of democracy.

So, if you do not believe in equal access to justice as a matter of common humanity; believe in it as essential to economic development.

The ABA in its mandate to the Task Force on Access to Civil Justice uses language that captures your challenge best for me. It mentions “problems that can imprison one in poverty or discrimination.” That is, of course, the reality with which you—we—must deal. That denial of access to civil justice imprisons those denied in a situation that prevents them from being all that they might be. It prevents them from contributing all that they might contribute to the common good. Yet they are not the only prisoners when such a condition prevails. All of the community in which they live is to some extent imprisoned. We are all denied the benefits that would come from a society in which equality of access and opportunity prevail.

What you are about is important work. It is consistent with the noblest traditions of your profession and with the deepest values of our democracy. In the best Tar Heel spirit, go forth and pursue justice, equal justice; do not fear to defend the weak because of the anger of the strong; do not fear to defend the poor because of the anger of the rich.

I wish you well, and I thank you for letting me be a part of this summit.

Appendix VI: Executive Summary of the ABA Resolution on Providing Counsel as a Matter of Right at Public Expense to Certain Low-Income Persons

The ABA *Presidential Task Force on Access to Justice in Civil Cases* has issued a Report to the House of Delegates dated May 10, 2006 recommending that the following resolution be adopted by the Delegates at their August 2006 meeting:

RESOLVED: That the American Bar Association urges state, territorial, and federal jurisdictions to provide counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody.

The report contains the following Executive Summary:

SUMMARY OF THE RECOMMENDATION. The Resolution urges state, territorial, and federal jurisdictions to provide counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceeding where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody.

SUMMARY OF ISSUE WHICH THE RECOMMENDATION ADDRESSES. Reliable studies consistently show that 70–80% of the legal needs of the poor go unaddressed each year. These include problems that poor individuals face in obtaining the basic necessities of life: food, shelter, health care, protection from violence, and maintaining family stability. It is unacceptable that in the world's wealthiest nation legal processes are sometimes used to deny these basic necessities to its citizens without providing any legal help. This resolution would urge creation of a fair and level playing field for all those using the legal system to address fundamental problems relating to basic human needs.

EXPLANATION OF HOW THE PROPOSED POLICY WILL ADDRESS THE ISSUE. The policy position articulates a minimum framework for a civil right to counsel. The accompanying report provides each jurisdiction with guidance on how such a right might be implemented, what it might cost, etc.

SUMMARY OF ANY MINORITY VIEWS OR OPPOSITION WHICH HAS BEEN IDENTIFIED. To date, no minority views or opposition has been identified.

The report emphasizes that “the proposed resolution offers a careful, incremental approach to making effective access to justice a matter of right, starting with representation by counsel in those categories of matters in which basic human needs are at stake,” and provides the following explanation of “basic human needs:”

The basic human needs identified in this resolution as most critical for low-income persons and families include at least the following: shelter, sustenance, safety, health, and child custody.

Unanimously Approved by ABA House of Delegates August 7, 2006

AMERICAN BAR ASSOCIATION

**TASK FORCE ON ACCESS TO CIVIL JUSTICE
SECTION OF BUSINESS LAW
COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS
COMMISSION ON LAW AND AGING
SECTION OF LITIGATION
STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
COMMISSION ON IMMIGRATION
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
KING COUNTY BAR ASSOCIATION (WASHINGTON)
MAINE STATE BAR ASSOCIATION
NEW YORK COUNTY LAWYERS' ASSOCIATION
THE PHILADELPHIA BAR ASSOCIATION
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
WASHINGTON STATE BAR ASSOCIATION
BOSTON BAR ASSOCIATION
COLORADO BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION
CONNECTICUT BAR ASSOCIATION
MINNESOTA STATE BAR ASSOCIATION
LOS ANGELES COUNTY BAR ASSOCIATION
THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
SECTION OF LABOR AND EMPLOYMENT LAW
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 **RESOLVED**, That the American Bar Association urges federal, state, and territorial
2 governments to provide legal counsel as a matter of right at public expense to low income
3 persons in those categories of adversarial proceedings where basic human needs are at stake,
4 such as those involving shelter, sustenance, safety, health or child custody, as determined by
5 each jurisdiction.

REPORT**This Resolution is the Logical Next Step in the ABA’s Long History of Support for Achieving Equal Justice in the United States**

The ABA has long held as a core value the principle that society must provide equal access to justice, to give meaning to the words inscribed above the entrance to the United States Supreme Court – “Equal Justice Under Law.” As one of the Association’s most distinguished former Presidents, Justice Lewis Powell, once observed:

“Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.”

The ABA also has long recognized that the nation’s legal profession has a special obligation to advance the national commitment to provide equal justice. The Association’s efforts to promote civil legal aid and access to appointed counsel for indigent litigants are quintessential expressions of these principles.

In 1920, the Association created its first standing committee, “The Standing Committee on Legal Aid and Indigent Defendants,” with Charles Evans Hughes as its first chair. With this action, the ABA pledged itself to foster the expansion of legal aid throughout the country. Then, in 1965, under the leadership of Lewis Powell, the ABA House of Delegates endorsed federal funding of legal services for the poor because it was clear that charitable funding would never begin to meet the need. In the early 1970s, the ABA played a prominent role in the creation of the federal Legal Services Corporation to assume responsibility for the legal services program created by the federal Office of Economic Opportunity. Beginning in the 1980s and continuing to the present, the ABA has been a powerful and persuasive voice in the fight to maintain federal funding for civil legal services.

These actions are consistent with and further several of the ABA’s key goals including:

GOAL II To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.

When the ABA adopted this Goal, the following objectives for achieving it were listed:

1. Increase funding for legal services to the poor in civil and criminal cases.
2. Communicate the availability of affordable legal services and information to moderate-income persons.
3. Provide effective representation for the full range of legal needs of low and middle income persons.
4. Encourage the development of systems and procedures that make the justice system easier for all persons to understand and use.

The ABA Has Adopted Policy Positions Favoring a Right to Counsel

The ABA has on several occasions articulated its support for appointing counsel when necessary to ensure meaningful access to the justice system. In its amicus brief in *Lassiter v. Dept of Social*

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Services of Durham County, 425 U.S. 18 (1981), the ABA urged the U.S. Supreme Court to rule that counsel must be appointed for indigent parents in civil proceedings that could terminate their parental rights, “[I]n order to minimize [the risk of error] and ensure a fair hearing, procedural due process demands that counsel be made available to parents, and that if the parents are indigent, it be at public expense. *Id.* at 3-4. The ABA noted that “skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. . . . Pro se litigants cannot adequately perform any of these tasks.”

In 1979 the House of Delegates adopted Standards Relating to Counsel for Private Parties, as part of the Juvenile Justice Standards. The Standards state “the participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.” These standards were quoted in the *Lassiter* amicus brief. Also, in 1987, the House of Delegates adopted policy calling for appointment of counsel in guardianship/conservatorship cases.¹

The ABA stated these positions some years ago, but its continuing commitment to the principles behind the positions was recently restated when it championed the right to meaningful access to the courts by the disabled in its amicus brief in *Tennessee v. Lane*, 541 U.S. 509 (2004). The case concerned a litigant who could not physically access the courthouse in order to defend himself. In terms that could also apply to appointment of counsel, the brief states, “the right of equal and effective access to the courts is a core aspect of constitutional guarantees and is essential to ensuring the proper administration of justice.” ABA Amicus Brief in *Tennessee v. Lane* at 16.

Echoing the Association’s stance in *Lassiter*, the brief continued “the right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights . . . [W]hen important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires *meaningful* access. . . . To ensure meaningful access, particularly when an individual faces the prospect of coercive State deprivation through the judicial process of life, liberty, or property, due process often requires the State to give a litigant affirmative assistance so that he may participate in the proceedings if he effectively would be unable to participate otherwise.” *Id.* at 17-18 (internal citations omitted).

Despite 130 Years of Legal Aid in the United States, Existing Resources Have Proven Inadequate to Fulfill the Promise of Equal Justice for All.

The right to representation for indigents in civil proceedings goes back to the earliest days of the common law when indigent litigants had a right to appointment of counsel so they could have access to the civil courts. Most European and Commonwealth countries have had a right to counsel in civil cases for decades or even centuries, entitling all poor people to legal assistance

¹ See House of Delegates Resolution adopted in August, 1987 offered by the Special Committee on Legal Problems of the Elderly: “BE IT RESOLVED, That the American Bar Association supports efforts to improve judicial practices concerning guardianship, and adopts the following Recommended Judicial Practices and urges their implementation for the elderly at the state level: . . . I. Procedure: Ensuring Due Process Protections . . . C. Representation of the Alleged Incompetent . . . 1. Counsel as advocate for the respondent should be appointed in every case...”

when needed. The United States, in contrast, has relied principally on supplying a fixed number of lawyers and providing representation only to however many poor people this limited resource is able to serve. As of today, the level of resource does not approach the level of need² and only a fortunate few of those unable to afford counsel enjoy effective access to justice when facing serious legal problems

For the first 90 years of legal aid in this country, the only financial support for civil legal aid came from private charity. It started in 1876 with a single legal aid society serving German-American immigrants in New York City. Bar associations and social service organizations later established legal aid programs in a few cities elsewhere in the country. Starting in 1920, prompted by the publication of Reginald Heber Smith's landmark expose of injustice in America, *JUSTICE AND THE POOR*, and under the leadership of Charles Evans Hughes, the ABA, as noted above, sought to nurture development of such programs and managed to foster legal aid societies in most major cities and many smaller communities around the nation. But those societies were grossly underfunded and understaffed.

It was not until 1965 that government funding first became available for civil legal aid as part of the War on Poverty. In 1974, the federal Legal Services Corporation was established as the central funding entity for legal aid programs nationwide. During the early years the federal government expanded legal aid funding considerably. But the expansion of federal appropriations soon stalled, when LSC proved vulnerable to political attack. Thus, local legal aid agencies began to more aggressively seek diversified funding from other sources including Interest on Lawyers Trust Accounts (IOLTA), state and local governments and private sources.³ Despite these innovative and often heroic efforts, however, taking account of inflation and the growth in numbers of poor people civil legal aid funding is no higher today in real terms than it was a quarter century ago.⁴

Given this persistent shortage of legal aid resources, it is not surprising to find a vast and continuing unmet need for the services of lawyers among those unable to afford counsel. While the nationwide Legal Services Corporation-funded system for providing legal services assists as many as one million poor people with critical legal problems each year, a recent survey shows that the legal aid programs within that system have to turn away another million people who come to their offices⁵. Millions more are discouraged and don't bother seeking legal aid because

² See *Documenting the Justice Gap in America, A Report of the Legal Services Corporation* (2005) documenting the percentage of eligible persons that LSC funded-programs are unable to serve due to lack of sufficient resources.

³ Some of these funding sources also have come under attack. See, e.g., *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Wieland v. Lawyers Trust Fund of Illinois*, Docket # 5-03-0419, App. Ct. of Ill, 5th Jud Dist. (2003).

⁴ Expenditures of public resources to address the legal needs of the poor in the United States compare poorly with funding in many other industrialized nations. At the lower end, Germany and Finland invest over three times as much of their gross domestic product as the United States in serving the civil legal needs of lower income populations. At the upper end, England spends 12 times as much of its GDP as the U.S. does to provide civil legal aid to its citizens. In between, New Zealand spends five times more than the U.S and the Netherlands over seven times as much. Even Hong Kong, now a part of the People's Republic of China, invests more than six times as much as the U.S.

⁵ See n. 1, *Documenting the Justice Gap* at p. 5. It also should be noted that many of the cases in which local programs reported they provided services were ones where limited resources meant they only were able to supply

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they know help is not available. Despite all the efforts of legal aid programs and pro bono lawyers, an ABA nationwide legal needs study in 1993 showed that legal help was not obtained for over 70% of the serious legal problems encountered by poor people.

More than ten years have passed since that ABA research, and matters have only gotten worse. Poverty has not significantly abated and indeed has increased since the 2000 census. Similarly, the civil legal needs of the poor remain substantially unfulfilled. For example, a September 2003 report by the District of Columbia Bar Foundation estimates that less than 10% of the need for civil legal assistance is being met in that jurisdiction. A similar study in Washington State, also released in September 2003, found that 87% of the state's low-income households encounter a civil legal problem each year, and that only 12% of these households are able to obtain assistance from a lawyer. In Massachusetts - a state with significant legal services resources - the occurrence of civil legal problems among the poor increased significantly in the period 1993-2002. By 2002 at least 53% of the poor households in the state had at least one unmet civil legal need and only 13% of those households were able to resolve all the problems they experienced.⁶

Both Constitutional Principles and Public Policy Support A Legally Enforceable Right to Counsel to Achieve Effective Access to Justice in Many Civil Cases

In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) the U.S. Supreme Court held:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries....From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

It appears just as difficult to argue a civil litigant can stand “equal before the law . . . without a lawyer to assist him.” Indeed just a year after *Gideon*, the Supreme Court made a similar observation about civil litigants. “Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries....” *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). Yet, in 1981, the Supreme Court, in a civil matter, said that there is no absolute right to court appointed counsel for an indigent litigant in a case brought by the state to terminate parental rights. *Lassiter v. Department of Social Services*, 425

self-help assistance, but believed full representation would have led to a better outcome for the clients. (*Id.* at p. 6, fn 8.)

⁶ Seven additional states have recently examined the kinds of legal problems experienced by low-income residents of the state and what they do about them: Oregon (2000), Vermont (2001), New Jersey (2002), Connecticut (2003), Tennessee (2004), Illinois (2005) and Montana (2005). These studies, too, demonstrate that only a very small percentage of the legal problems experienced by low-income people (typically one in five or less) is addressed with the assistance of a private or legal aid lawyer.

U.S. 18 (1981). While the Court recognized that the complexity of a termination of parental rights proceeding might “overwhelm an uncounseled parent,” the Court found--by a 5-4 vote--that the appointment of counsel was not required in every case. *Id.* at 30. Instead, trial courts were instructed to balance three factors to determine whether due process requires that a parent be given a lawyer: “the private interest at stake, the government’s interest and the risk that the procedures used will lead to erroneous decisions.” *Id.* at 27. The court went on to apply the standard in such a way that it virtually excluded the appointment of counsel except in the most extraordinary circumstances, in particular by overlaying on the three-part due process test an additional presumption against appointed counsel where there is no risk of loss of physical liberty.

It is to be hoped that the U.S. Supreme Court will eventually reconsider the cumbersome *Lassiter* balancing test and the unreasonable presumption that renders that test irrelevant for almost all civil litigants. There would be precedent for such a reversal, as seen in the evolution of the criminal right to counsel from *Betts v Brady*, 316 U.S. 455 (1942) to *Gideon* in 1963. In *Betts*, the Court said the appointment of counsel was required in criminal cases only where, after a case-by-case analysis, the trial court determined that counsel is necessary to ensure that trial is not “offensive to the common and fundamental ideas of fairness and right.” *Id.* at 473. But by 1963, the Court realized that the *Betts* approach was unworkable, and overturned it in *Gideon*.

Powerful common law, constitutional, and policy arguments support a governmental obligation to ensure low income people are provided the means, including lawyers, to have effective access to the civil courts. These arguments have equal and sometimes greater application at the state level than they do at the federal level.

Common Law Antecedents Support a Right to Counsel in Civil Matters

The common law has a long history of granting indigent litigants a right to counsel in civil cases. As early as the 13th and 14th centuries English courts were appointing attorneys for such litigants, a right that Parliament codified in 1495.⁷ Several American colonies imported this statute and its right to counsel as part of the common law they adopted from the mother country and, it has been argued, this nascent right continues to the current day.⁸ But at a minimum the venerable age and persistence of this right⁹ in the common law tradition suggests the fundamental importance

⁷ The critical language from the Statute of Henry VII, which also relieved indigent civil litigants from the obligation to pay fees and costs, reads as follows: “[T]he Justices...shall assign to the same poor person or persons counsel,...which shall give their counsel, nothing taking for the same;...and likewise the Justices shall appoint attorney and attorneys for the same poor person or persons....” II Hen VII, c. 12 (1495), An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, reprinted in 2 Statutes of the Realm 578 (1993). .

⁸ See, e.g., Brief for Appellant, *Frase v. Barnhart*, 379 Md. 1000 (2003) at pp. 33-42, arguing the Statute of Henry VII is part of the English common law the colony and later the state of Maryland adopted as its own and this right to counsel remains part of Maryland law in the current day. Nor is this common law argument limited to the original 13 states. Many if not most other states expressly incorporated the English common law as it existed at the moment of their statehood as the common law of those states. See Johnson, *Beyond Payne: The Case for A Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOYOLA OF LOS ANGELES L. REV. 249, 251-259 (1978) for an explanation why the Statute of Henry VII the California Supreme Court used as the basis for finding a common law right to waiver of fees and costs also appears to justify the provision of free counsel to those same indigent litigants.

⁹ The Statute of Henry VII was not replaced until 1883, when it was succeeded by a law designed to make the right more effective. In 1914 the English Parliament passed another reform of legal aid. Then in 1950 it enacted a

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that tradition, which is the basis of American law, accords guaranteeing poor people equality before the law and furnishing them the lawyers required to make that guarantee a reality.

Other European and commonwealth countries also have come to recognize a statutory right to counsel in civil cases. France created such a statutory right in 1852, Italy did so when Garibaldi unified the country in 1865, and Germany followed suit when it became a nation in 1877. Most of the remaining European countries enacted right to counsel provisions in the late 19th and early 20th century. Several Canadian provinces, New Zealand and some Australian states have provided attorneys to the poor as a matter of statutory right for decades, although the scope of the right has changed in response to legislative funding and priorities.¹⁰

As of this time, no American jurisdiction has enacted a statutory right to counsel at public expense nearly as broad as these other countries. But many states have passed laws conferring a right to counsel in certain narrow areas of the law. The most common are those guaranteeing counsel to parents – and sometimes children -- in dependency (often called neglect) proceedings, and to prospective wards in guardianship and similar proceedings in which interference with personal liberties are at stake. A handful of states also have extended a statutory right to counsel in other situations. It is encouraging that state legislatures have recognized the truth that poor people cannot have a fair hearing in these particular adversarial proceedings. Yet many other proceedings that threaten loss of basic human needs are equally adversarial and often more complex. In those cases, just like dependency proceedings, no civil litigant can be “equal before the law...without a lawyer.”

Courts perhaps more than legislatures are familiar with the truth of this principle embodied in the common law right to counsel and implemented, to a limited degree in many state statutes in the U.S., and to a broader extent, in the laws of many other countries. On a regular basis, the judiciary witnesses the helplessness of unrepresented parties appearing in their courtrooms and the unequal contest when those litigants confront well-counseled opponents. Judges deeply committed to reaching just decisions too often must worry whether they delivered injustice instead of justice in such cases because what they heard in court was a one-sided version of the law and facts. Nearly a decade ago, one trial judge, U.S. District Court Judge Robert Sweet, gave voice to this concern in a speech to the Association of the Bar of New York, and also tendered a solution. “What then needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society under a rule of law? . . . To shorthand it, we need a civil *Gideon*, that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system.”¹¹

State and Federal Constitutional Principles Support a Civil Right to Counsel

sophisticated civil legal aid program that remains the most comprehensive and generously funded legal aid system in the world.

¹⁰ These developments in other countries are surveyed in Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 Loyola of Los Angeles Law Review 341 (1985). Several of the foreign statutes are translated in Cappelletti, Gordley and Johnson, *TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES* (Milan/Dobbs Ferry: Giuffre/Oceana, 1975, 1981).

¹¹ Sweet, *Civil “Gideon” and Justice in the Trial Court (The Rabbi’s Beard)*, 42 THE RECORD 915, 924 (Dec. 1997).

In the years between *Gideon* and *Lassiter*, a few state supreme courts took some promising steps toward a constitutional right to counsel in civil cases. The Maine and Oregon Supreme Courts declared the constitutional right to due process required that their state governments provide free counsel to parents in dependency/neglect cases.¹² The Alaska Supreme Court ruled that counsel must be appointed at public expense to an indigent party in a child custody proceeding if the other party was provided free representation.¹³ The California Supreme Court found a due process right to counsel for defendants in paternity cases¹⁴ and an equal protection right for prisoners involved in civil litigation.¹⁵ The New York Court of Appeal fell only one vote short of declaring a constitutional right to free counsel for poor people in divorce cases.¹⁶

During that era, between *Gideon* and *Lassiter*, academic articles also frequently appeared discussing the many legal theories which would support a constitutional right to counsel in civil cases.¹⁷ In common with the state supreme court decisions mentioned above, these articles usually articulated arguments based on the due process clauses found in the federal and state constitutions and their implicit guarantees of a fair hearing in civil proceedings. But they carried the argument beyond the narrow categories of cases covered by the then existing state court decisions to embrace a far broader range of civil litigation. They emphasized the serious consequences losing litigants face in many other civil cases poor people commonly experience – and the empirical and other evidence suggesting the lack of counsel virtually guarantees these people in fact would lose those cases.

Some of these articles likewise found strong support for a right to counsel in the equal protection clauses common to the federal and most state constitutions. Some pointed to the fundamental interest all citizens have in enjoying “like access to the courts” for the protection of their rights – as the essential handmaiden of the right to vote without which laws enacted to give them substantive rights cannot be enforced. As a fundamental interest, it warrants the “close scrutiny” to which the courts are to subject any policies denying that access. It also was observed that some states have made “poverty” a “suspect class.” This again would mandate close scrutiny of a state’s denial of counsel to poor people in judicial proceedings structured in a way that requires a lawyer if one is to have effective access to those courts.

Over the years after *Gideon*, lawyers continued to pursue litigation seeking to establish the right to counsel in civil cases, with considerable success, initially on traditional notions of due

¹² *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794 (Me. 1973); *State v. Jamison*, 444 P.2d 15 (Ore. 1968).

¹³ *Flores v. Flores*, 598 P. 2d 893 (Ak, 1979).

¹⁴ *Salas v. Cortez*, 24 Cal.3d 22, 593 P.2d 226 cert. den. 444 U.S. 900 (1979).

¹⁵ *Payne v. Superior Court*, 17 Cal.3d 908 (1976).

¹⁶ *In re Smiley*, 369 N.Y.S.2d 87, 90 (N.Y. 1975).

¹⁷ See, e.g., Note, *The Right to Counsel in Civil Litigation*, 66 Colum.L.Rev. 1322 (1966); O’Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 5 (1967); Note, *The Indigent’s Right to Counsel in Civil Cases*, 76 Yale L.J. 545 (1967); Note, *The Indigent’s Right to Counsel in Civil Cases*, 43 Fordham L. Rev. 989 (1975), Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U.Mich.J.L. Ref. 554 (1976), Comment, *Current Prospects for an Indigent’s Right to Appointed Counsel and Free Transcript in Civil Litigation*, 7 Pac. L.J. 149 (1976), Johnson, *Beyond Payne: The Case for a Legally Enforceable Right to Representation for Indigent California Litigants*, 11 Loyola of Los Angeles L.Rev. 249 (1978).

process. In Michigan and other states, a detailed blueprint was developed to take a series of cases through the appellate courts to establish the right to counsel in various circumstances. After several victories, the initiative was set aside in part because of the *Lassiter* decision.

After *Lassiter* and its narrow construction of due process, most of the possible constitutional theories remain untested in either the federal or state courts. But they have been reinforced by constitutional decisions abroad. As early as 1937, a quarter century before *Gideon* and over four decades before *Lassiter*, the Swiss Supreme Court found the analog of our constitution's equal protection clause, the "equality before the law" provision of that nation's Constitution, mandated appointment of free counsel for indigent civil litigants.¹⁸ Then in 1979 the European Court of Human Rights issued a historic decision, *Airey v. Ireland*¹⁹, based on an analog of due process--a provision in the European Convention on Human Rights and Fundamental Freedoms which guarantees civil litigants a "fair hearing."²⁰ In a decision that now applies to 41 nations and over 400 million people, the court held indigents cannot have a "fair hearing" unless represented by lawyers²¹ and required member states to provide counsel at public expense to indigents in cases heard in the regular civil courts.²² As a direct result of this decision, the Irish legislature created that nation's first legal aid program which is now funded at three times the level of America's. The *Airey* decision and its progeny also have influenced the scope of legal aid legislation in several other European countries.²³

Policy Considerations Support Recognition of a Civil Right to Counsel

Underlying all the constitutional theories are several undeniable truths. The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the primary and costly responsibilities of finding the controlling legal principles and uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in a cogent fashion to the judge or jury. Discharging these responsibilities ordinarily requires the expertise lawyers spend three years of graduate education and more years of training and practice acquiring. With rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position

¹⁸ *Judgment of Oct. 8, 1937*, Arrêts du Tribunal Fédéral (ATF) 63, I, 209 (1937), discussed in O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 5 (1967).

¹⁹ *Airey v Ireland*, 2 Eur. Ct. H.R. (ser.A) 305 (1979).

²⁰ "In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, para.1, 213 U.N.T.S. 222.

²¹ As the court explained: "The Convention was intended to guarantee rights that were *practical and effective*, particularly in respect of the right of access to the courts, in view of its prominent place in a democratic society....The possibility of appearing in person before the [trial court] did not provide an *effective* right of access. . . [I]t is not realistic...to suppose that...the applicant could effectively conduct her own case, despite the assistance which...the judge affords to parties acting in person...." (*Id.* at p. 315, emphasis supplied.) .

²² A constitutional "fair hearing" guarantee likewise formed the basis for the Canadian Supreme Court's recent declaration of a right to counsel at public expense for indigent litigants, in this instance parents involved in dependency/neglect cases. *New Brunswick v J.G.* 177 D.L.R. (4th) 124 (1999).

²³ See, e.g., *Steel and Morris v. The United Kingdom*, Eur.Ct.H.R. (Judgment of Feb. 15, 2005) which found England's legal aid statute denying counsel to indigent defendants in defamation cases violated the right to counsel required to satisfy the European Convention's guarantee of a "fair hearing."

may be, especially if opposed by a lawyer. Not surprisingly, studies consistently show that legal representation makes a major difference in whether a party wins in cases decided in the courts.²⁴

There are other problems, too, when parties lack counsel in civil proceedings. In seeking to insure that justice is done in cases involving pro se litigants, courts must struggle with issues of preserving judicial neutrality (where one side is represented and the other is not), balancing competing demands for court time, and achieving an outcome that is understood by pro se participants and does not lead to further proceedings before finality is reached. Meantime large numbers of pro se litigants lose their families, their housing, their livelihood, and like fundamental interests, losses many of them would not have sustained if represented by counsel. Furthermore, the perception the courts do not treat poor people fairly has consequences for the system itself. As California Chief Justice Ronald George recently observed, “[E]very day the administration of justice is threatened...by the erosion of public confidence caused by lack of access.”²⁵

Whether cast as a constitutional imperative or a policy finding compelling a legislative remedy, when litigants cannot effectively navigate the legal system, they are denied access to fair and impartial dispute resolution, the adversarial process itself breaks down and the courts cannot properly perform their role of delivering a just result. Absent a systemic response, access to the courts will continue to be denied to many solely because they are unable to afford counsel. Considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a right of meaningful access to the courts.

Current Efforts to Establish a Civil Right to Counsel

For over two decades, the *Lassiter* decision appeared to paralyze serious consideration of a right to counsel in civil cases. But in the last few years advocates around the country have taken up the challenge with renewed vigor and strategic thinking.²⁶ Some are exploring state law common law

²⁴ See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 Hofstra L.Rev. 533 (1992); Seron et al, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of A Randomized Experiment*, 35 Law & Soc'y Rev. 419 (2001).

²⁵ Chief Justice Ronald George, State of Judiciary Speech to California Legislature, 2001.

²⁶ This renewed interest also is reflected in the academic literature. Marvy, Paul and Gardner, Debra, *A Civil Right To Counsel For the Poor*, 32 Human Rights 8 (Summer 2005); Boyer, Bruce, Justice, *Access to the Courts, and the Right to Free Counsel For Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 Loy. U. Chi. L.J. 363 (2005); Nethercut, John, *'This Issue Will Not Go Away...': Continuing to Seek the Right to Counsel in Civil Cases*, 38 Clearinghouse Review 481 (2004); Smith, Jonathan, *Civil Gideon*, 18 MIE Journal 4:3 (2004); Perluss, Deborah, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 Seattle J. for Soc. Just. 571 (2004); Klienman, Rachel, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 Fordham Urb. L.J. 1507 (2004); Johnson, Earl, *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 Seattle J. for Soc. Just. 201 (2003); Johnson, Earl, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 Fordham Int'l L.J. 83 (2000); Sweet, Robert, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503 (1998); Sweet, Robert, *Civil Gideon and Justice in the Trial Court (the Rabbi's Beard)*, 52 The Record of the Ass'n of the Bar of the City of N.Y. 915 (1997); Young, Rosalie, *The Right to Appointed Counsel In Termination Of Parental Rights: The States' Response to Lassiter*, 14 Touro L. Rev. 247 (1997); Scherer, Andrew, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv. C.R.-C.L. L. Rev. 557 (1988); Werner, F. *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, 17 Housing L. Bull. 65 (1987). Estrelle, Mark, *Gideon's Trumpet Revisited: Providing Rights of Indigent Defendants in Paternity Actions*, 29 J. Fam. L. 1, 9 (1985);

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rights and constitutional guarantees of open courts and access to the courts as well as due process and equal protection, through appellate advocacy and litigation. Others are pursuing a range of legislative approaches. In each of what is already a significant number of states, a local broad-based team of advocates has determined the route they believe is most likely to achieve success.

Many of those advocates have come together as the National Coalition for a Civil Right to Counsel (NCCRC). The coalition provides information-sharing, training, networking, coordination, research assistance, and other support to advocates pursuing, or considering pursuing, a civil right to counsel. It includes well over a hundred advocates from legal services programs, private law firms, state bar associations, law schools, national strategic centers and state access to justice commissions, representing over 30 states. At present, there are active civil right to counsel projects underway in at least eight jurisdictions and discussions are taking place in a number of others.

Courts are also now being asked to revisit the issue. For example, a nonprofit poverty and civil rights program and two major private firms in Maryland are actively pursuing recognition of the civil right to counsel through an appellate strategy raising claims under the state's constitution as well as the common law this state imported from the mother country. In 2003, in the case of *Frase v. Barnhart*, 379 Md. 1000 (2003), they brought the question whether a poor person has the right to appointed counsel in a civil case before Maryland's highest appellate court. As part of a coordinated effort, the state bar association and legal services programs filed amicus briefs in support of the appellant's right to counsel. The court avoided ruling on the issue by a 4-to-3 vote, finding in favor of the unrepresented litigant without reaching the issue. But an impassioned 3-judge concurrence would have declared a civil right to counsel for the indigent mother who faced a contested custody dispute without the assistance of counsel.

In Washington, advocates from the private bar, legal services, the state's three law schools, and others have joined together to pursue judicial recognition of the civil right to counsel under the state's constitution. To date, the group has litigated two cases. One involved a local city seeking to remove a 77-year old disabled man from the home he built nearly 50 years earlier for alleged building code violations. The other case involved an abusive husband asserting false allegations through his attorney in order to obtain sole custody of his children. Both cases were ultimately resolved in the appellate courts in ways that did not result in rulings on the right to counsel issue.

In Wisconsin advocates have filed appeals on behalf of indigent mothers seeking to retain custody of their children from their abusive estranged husbands, contending the Wisconsin state constitution guarantees them the right to counsel to defend their custodial rights. In Georgia, the federal District Court, relying in part on the Georgia state constitution's due process clause, recently held that foster children have a right to counsel in all deprivation cases (elsewhere known as dependency cases, abuse and neglect proceedings, etc.).²⁷ And, in a recently filed test case the Canadian Bar Association is seeking to establish a national right under their Constitution to obtain civil legal aid in certain types of cases and challenging British Columbia's current legal aid plan as inconsistent with required standards for legal aid delivery for low-income Canadians.

Besharov, Douglas, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After Lassiter v. North Carolina*, 15 Fam. L. W. 205, 219, 221 (1981).

²⁷ *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (D. Ga. 2005).

In other states, new focus on legislative recognition of a right to counsel has emerged. In California an effort is underway to draft a “model” statute, with alternative provisions regarding certain key issues, which creates and defines the scope of a statutory entitlement to equal justice including a right to counsel in appropriate circumstances. Recently, the State Bar of Texas sought legislation providing a civil right to counsel for low income tenants in certain eviction appeals cases. In New York this past June, the City Council appropriated \$86,000 for a study of the need for counsel in eviction proceedings and the costs and benefits of providing counsel to tenants facing eviction. In addition, the New York State Equal Justice Commission has made advocacy for a civil right to counsel a prominent part of its agenda.

The effort to establish a right to court appointed counsel is a part of the struggle to make justice a matter of substance over form. More than 50 million people have incomes so low that they are eligible for legal services from Legal Services Corporation-funded programs²⁸ and millions more survive on incomes so low they cannot afford lawyers when in serious legal jeopardy. Many also have physical or mental disabilities or experience other barriers to navigating the legal system without a lawyer. Yet over the past quarter century the federal government has reduced its commitment to legal services by over 50%.

There is a crisis in equal justice, as documented above, and advocates are pursuing litigation and legislative strategies that might force a change in prevailing practices. The resolution voices the ABA’s support for these primarily state-law-based approaches. While it remains important to look for the right in federal due process and equal protection law as the ultimate objective, the resolution seeks to foster the evolution of a civil right to counsel on a state-by-state basis, rooted in the unique provisions of each state’s constitution and laws. This approach is likely to achieve significant results and provide doctrinal support for a future reconsideration of the right to civil counsel under the federal constitution.

The Proposed Resolution Offers a Careful, Incremental Approach to Making Effective Access to Justice a Matter of Right, Starting with Representation by Counsel in those Categories of Matters in which Basic Human Needs Are at Stake.

The right proposed in this resolution is long overdue and deeply embedded in the nation’s promise of justice for all. But it also represents an incremental approach, limited to those cases where the most basic of human needs are at stake. The categories contained in this resolution are considered to involve interests so fundamental and critical as to require governments to supply lawyers to low income persons who otherwise cannot obtain counsel.

The resolution does not suggest that jurisdictions should limit their provision of counsel and other law-related services to these high-priority categories. Rather it indicates that in these categories they should *guarantee* no low income person is ever denied a fair hearing because of their economic status. In other categories of legal matters, it is expected that each jurisdiction will continue to supply legal services on the same basis as they have in the past. This includes jurisdictions where courts have the constitutional, statutory, or inherent power to appoint counsel in other categories of cases or for individuals who suffer impairments or unique barriers which

²⁸ “CPS Annual Demographic Survey, March Supplement,”
http://pubdb3.census.gov/macro/032005/pov/new01_125_01.htm

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make it impossible for them to obtain a fair hearing in any cases unless they are represented by lawyers.

The right defined in this resolution focuses on representation in adversarial proceedings; it does not propose a generalized right to legal advice or to legal assistance unrelated to litigation in such forums. “Adversarial proceedings” as defined in the resolution are intended to include both judicial and some quasi-judicial tribunals, because many of the disputes involving the basic human needs described below are, in one jurisdiction or another, allocated to administrative agencies or tribunals. Indeed the label is often arbitrary. Cases a forum labeled a court would hear in one jurisdiction will be heard by a tribunal labeled an administrative agency or hearing officer or something else in other jurisdictions. The emphasis of the right articulated here is on the adversarial nature of the process, not what the tribunal is called. Some courts as well as some tribunals bearing another name function in an inquisitorial manner and without legal counsel. (In many states, for instance, parties in the small claims court are not allowed to be represented by lawyers and judges are expected to take an active role in developing the relevant facts. Similarly, some states have created pro se processes through which litigants can quickly and effectively access legal rights and protections without the need for representation by an attorney, for example in simple uncontested divorces.)

The basic human needs identified in this resolution as most critical for low income persons and families include at least the following: shelter, sustenance, safety, health and child custody.

- “Shelter” includes a person or family’s access to or ability to remain in an apartment or house, and the habitability of that shelter.
- “Sustenance” includes a person or family’s sources of income whether derived from employment, government monetary payments or “in kind” benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers’ wage or employment disputes where counsel is not realistically available through market forces.
- “Safety” includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise.
- “Health” includes access to appropriate health care for treatment of significant health problems whether that health care is financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an employee benefit, through private insurance, or otherwise.
- “Child custody” embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.²⁹

The above categories are considered to involve interests so fundamental and important as to require governments to supply low income persons with effective access to justice as a matter of right. There is a strong presumption this mandates provision of lawyers in all such cases. Trivial threats, however, even to a basic human need would not warrant such an investment of legal

²⁹ See generally, ABA Standards of Practice for Lawyers Representing Children in Custody Cases (2003) which includes suggested criteria to decide when counsel should be appointed for children in custody cases.

resources. Nor need counsel be supplied at public expense in cases where a lawyer is available to the litigant on a contingent fee basis. Furthermore, in some instances, there are informal proceedings, such as welfare fair hearings, in which government expressly permits trained and supervised non-lawyer advocates to represent both sides and where providing such representation is often sufficient. In still other instances, jurisdictions have redesigned a few select proceedings so they are not adversarial and also furnish self-help assistance sufficient to permit a litigant to have a fair hearing without any form of representation before the court. In such proceedings, the test is whether it can be honestly said the litigant can obtain a fair hearing without being represented by a lawyer. With rare exceptions, this will be true only when certain conditions are met: the substantive law and procedures are simple; both parties are unrepresented; both parties are individuals and neither is an institutional party; both parties have the intellectual, English language, and other skills required to participate effectively; and, the proceedings are not adversarial, but rather the judge assumes responsibility for and takes an active role in identifying the applicable legal standards and developing the facts.

This resolution focuses the right on “low income persons,” but leaves to each individual jurisdiction the flexibility to determine who should be considered to fit within that category. Rather than being bound by the current national LSC eligibility guidelines (which are widely considered to be under-inclusive), it is anticipated jurisdictions will create their own criteria taking account of the applicant’s income, net assets (if any), the cost of living and cost of legal services in the state or locality, and other relevant factors in defining the population to which this right attaches.

Because a civil right to counsel is likely to evolve in different ways in different jurisdictions, and also because states presently invest at very different levels, it is difficult to estimate how much a given jurisdiction will have to spend in additional public resources in order to implement such a right. It is possible to estimate the maximum possible exposure at the national level, however, from two sources – legal needs studies in the U.S. and the experience in other countries which have implemented a right to counsel in civil cases. Although there are major disparities among states, the United States is estimated to provide on average less than \$20 of civil legal aid per eligible poor person. Most needs studies conclude the U.S. is already meeting roughly 20 percent of the need. This suggests the full need could be met if the U.S. raised the average to \$100 per eligible person. But the right advocated in this resolution is substantially narrower and thus could be funded for substantially less than that. This conclusion is reinforced by the experience in England which has a much broader right to counsel than proposed in this resolution and the most generously funded legal aid program in the world, and furthermore uses a more costly delivery system than the U.S.³⁰ Yet it only spends in the neighborhood of \$100 per eligible poor person. Thus, it is reasonable to anticipate the narrower right advocated in this resolution at the worst would result in a tripling of a jurisdiction’s current investment in civil legal aid – although it might require somewhat more for states well below the national average and somewhat less for those presently above that average.

³⁰ England provides partially-subsidized counsel to those above its poverty line. But completely free civil legal aid is available for the approximately 26 percent of the population below its poverty line, which amounts to approximately 13.5 million people. The English legal aid program currently spends about 1.36 billion dollars providing civil legal services to those in this lowest income stratum who are entitled to free legal services. That amounts to slightly more than \$100 per eligible person in this income category.

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In any event, put in perspective the increase would be a comparatively minor budgetary item in most states. Compared to Medicaid, for example, which nationally costs over \$200 billion a year and spends nearly \$4,200 per eligible person,³¹ devoting even as much as \$60 to \$100 per eligible poor person in order to give them meaningful access to justice in their most urgent cases appears to be a minimal and justifiable investment. Funding this right also would only bring the total civil legal aid investment to about 1.5 percent of what American society currently spends on lawyers in this country, about the same share as they had in 1980.³²

It is often difficult to obtain clear public understanding of the needs of the justice system. The third branch has historically struggled to obtain sufficient resources to fulfill its constitutional mandates.³³ Yet a peaceful and orderly society depends upon the effective functioning of the justice system. Within the sphere of justice system funding, there is a hierarchy of poor and poorer agencies. The courts are frequently under-funded. Even more resource starved are systems for providing constitutionally-mandated services to indigent persons accused of crimes. Last on the list are programs supplying civil legal aid. Implementation of a civil right to counsel as proposed herein is not intended to set up a struggle for the crumbs of finite resources between deserving, but oft-ignored constituencies. The result should not be a diminution of current or future funds allocated for public defense, which is an area that has all too often been inadequately supported by states and counties. Rather, it will be necessary for bar and judicial leaders to assist in educating the public and policy-makers about the critical functions of these parts of the justice system, and the need for our society to guarantee true access to justice for all.

Conclusion

In a speech at the 1941 meeting of the American Bar Association, U.S. Supreme Court Justice Wiley Rutledge observed:

“Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion.”

If Justice Rutledge’s self-evident statement required proof, the past 130 years of legal aid history have demonstrated its truth. Not only has equality before the law remained merely a matter of charity in the United States, but that charity has proved woefully inadequate. The lesson from the past 130 years is that justice for the poor as a matter of charity or discretion has not delivered on

³¹ 2006 Statistical Abstract of the United States, Table 136, reflecting Medicaid alone provided \$213 billion in health care to low income people. (This does not include the Medicare funds devoted to elderly poor in addition to their Medicaid benefits. Nor does it include other public funds used for health clinics and other special health care programs for low income patients. In 2003, a total of \$279 billion was spent on the combination of Medicaid and other health care for the nation’s low income residents. Table 122. This figure still did not include Medicare payments for the elderly poor, however.)

³² According to the Statistical Abstract of the United States, Table 1263, individuals and institutions spent \$194 billion on the services of lawyers in 2002. \$3 billion would represent only 1.5 percent of that total societal expenditure on lawyers. This 1.5 percent would be about the same share of total legal resources as low income Americans had in FY 1980. That year the LSC budget was \$321million with other public and private resources supplying several million more in civil legal aid, while the total societal investment in lawyer services was \$23 billion. This gave civil legal aid roughly 1.5 percent of the nation’s legal resources in that year.

³³ See *Funding the Justice System*, A Report by the American Bar Association Special Committee on Funding the Justice System (August, 1992).

the promises of “justice for all” and “equal justice under law” that form the foundation of America’s social contract with all its citizens, whether rich, poor, or something in between. The Task Force and other proponents of this resolution are convinced it is time for this nation to guarantee its low income people equality before the law as a matter of right, including the legal resources required for such equality, beginning with those cases where basic human needs are at stake. We are likewise convinced this will not happen unless the bench and bar take a leadership role in educating the general public and policymakers about the critical importance of this step and the impossibility of delivering justice rather than injustice in many cases unless both sides, not just those who can afford it, are represented by lawyers.

Respectfully submitted,

Howard H. Dana, Jr., Chair
Task Force on Access to Civil Justice

August 2006

Appendix VIII: Access to Justice Resource Links on the Web

<http://www.abanet.org/legalservices/sclaid/atjresourcecenter/resourcematerials.html>

Appendix IX: Summary of North Carolina Organizations Providing Legal Assistance to Low-Income People (Members of the North Carolina Equal Justice Alliance)

Information provided below has been submitted by the organizations and edited by the North Carolina Bar Association Foundation's Public Service and Pro Bono Activities Department, April 2008.

The Executive Director of each of the following organizations serves on the North Carolina Equal Justice Alliance (formerly named the Legal Services Planning Council). The Alliance is a council made up of the legal services providers listed below. Located across North Carolina, the members of the council facilitate collaborative efforts to serve indigent clients and the North Carolina IOLTA.

Disability Rights North Carolina (formerly Carolina Legal Assistance)

The mission of Disability Rights North Carolina (DRNC) is to create and improve access to appropriate services and treatment for children and adults with mental disabilities through individual and systems advocacy. DRNC is a nonprofit legal assistance program which practices exclusively in the field of mental disability law. DRNC's clients reside in the community with their families, in their own apartments, or in group homes and other settings, as well as in state institutions. DRNC's services include representation of clients with mental disabilities, public education and training on issues affecting people with mental disabilities, technical assistance to lawyers and lay advocates, and contracts with advocacy and service organizations for training, referrals, technical assistance, litigation, and special projects. Executive Director: Vicki Smith. www.disabilityrightscnc.org

Land Loss Prevention Project

Land Loss Prevention Project (LLPP) is a nonprofit, public interest law firm established in 1983 by the North Carolina Association of Black Lawyers to stem the overwhelming loss of land by limited resource farmers and the low-income and minority residents of North Carolina. Land preservation and tenure remain the focus today as the firm continues to serve its clients from the mountains to the coast. The LLPP accomplishes its mission by providing free legal assistance, performing community education, coordinating demonstration projects on methods designed to protect land, conducting attorney and advocate training, disseminating public policy analysis, and establishing environmental and rural economic development initiatives. Executive Director: Savi Horne. www.landloss.org

Legal Aid of North Carolina

Legal Aid of North Carolina (LANC) is a statewide, nonprofit, 501(c)(3) law firm that provides free legal services in civil matters to those in North Carolina whose income falls below 125% of the federal poverty guidelines. LANC operates in all 100 counties from its 24 geographically-based offices. The organization also operates five statewide project units that focus on special areas of the law: Advocates for Children's Services; Domestic Violence Prevention Initiative; Environmental Poverty Law Project; Farmworker Unit; and Mortgage Foreclosure Prevention Project. The NCBA President-Elect is a member of the LANC board; the Director of Public Service and Pro Bono Activities is the NCBA liaison to this organization. Executive Director: George Hausen. www.legalaidnc.org

Legal Services of Southern Piedmont

Legal Services of Southern Piedmont (LSSP) provides legal assistance in civil matters to low-income persons in the Charlotte area and in west-central North Carolina. Its mission is to assure a full measure of justice for those in need. LSSP accomplishes its mission through a variety of legal advocacy strategies, including: individual advice and representation, community education and outreach, representation of groups, self-help remedies, collaboration with other agencies, community economic development, legislative and administrative advocacy, and impact litigation. Executive Director: Kenneth Schorr. www.lssp.org

North Carolina Justice and Community Development Center

The North Carolina Justice and Community Development Center (Justice Center) is a statewide organization whose mission is to reduce and ultimately eliminate poverty in North Carolina by ensuring that low-income, working-poor, and minority individuals and communities have the resources and services they need to move from poverty to economic security. To achieve its mission, the Justice Center uses four primary strategies: research and policy development; public policy advocacy; litigation; and grass roots empowerment/community capacity building. Executive Director: Melinda Lawrence. www.ncjustice.org

North Carolina Prisoner Legal Services

The North Carolina Prisoner Legal Services (NCPLS) is a nonprofit, public service law firm that provides legal advice and assistance to people incarcerated in this state. NCPLS addresses matters involving inhumane conditions of confinement or illegal criminal convictions and sentences. Providing North Carolina inmates with information about their legal rights and responsibilities, NCPLS works to reduce frivolous litigation and resolve legitimate problems through administrative channels. When serious problems cannot be resolved administratively, NCPLS offers legal representation in all state and federal courts throughout North Carolina and beyond. Acting Executive Director: Phil Griffin. www.ncpls.org

Pisgah Legal Services

The mission of Pisgah Legal Services, located in Asheville, is to provide high-quality, effective legal services to help low-income people meet basic needs, ensure equal justice for all, and advance and protect legal rights of low-income people. Through the provision of free, civil legal services to low-income people who cannot afford to pay for a lawyer, Pisgah is able to help people meet their most basic needs, such as access to stable housing, safety from domestic violence, access to health care and prescriptions, protection from predatory creditors, access to subsistence income, and access to education. Executive Director: James Barrett. www.pisgahlegal.org

Appendix X: Summit Agenda

The Summit on Civil Access to Justice in North Carolina is set for Friday, Oct. 12. It will be held at One Eleven Place in Cary, which is one mile away from the N.C. Bar Center. The day's agenda will feature:

9–9:30 a.m.	Registration and continental breakfast
9:30–9:45 a.m.	Welcome and introductory remarks
9:45–10:15 a.m.	“Why is Access to Justice Important?” Thomas W. Lambeth, Senior Associate, Z. Smith Reynolds Foundation
10:15–10:30 a.m.	“Overview of Civil Legal Needs: The Problem of Access to the Civil Justice System”
10:30–10:50 a.m.	Break
10:50–11:25 a.m.	“A Real Look at Client Stories”
11:25–11:55 a.m.	“Plenary Session: Concerns for Special Client Populations” Changing ethnicity of N.C. and its impact on the court system Child poverty and legal solutions Predatory lending and its impact in our state
11:55–12:05 p.m.	Small group discussion
12:05–12:25 p.m.	Open forum
12:30–1:30 p.m.	Lunch and keynote address by Gene R. Nichol, president, The College of William & Mary (former dean of UNC Law School)
1:30–2:30 p.m.	“Panel: Solutions to the Gaps in Access to Justice” Legislative activity Self-serve centers Civil Gideon Role of the business community Pro bono Pro se litigants and the court system
2:30–3:00 p.m.	Solutions and next steps (breakout groups)
3–3:30 p.m.	Reports back and next steps

Notes

- 1 Legal Servs. Corp., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 4* (2005).
- 2 See, e.g., *id.*
- 3 Laura K. Abel and Max Rettig, “State Statutes Providing for a Right to Counsel in Civil Cases,” *Clearinghouse Rev. J. Poverty L. & Pol’y*, July–Aug. 2006, at 245.