



Somewhere Along the Line We Fell Off Track: One Step Up and Two Steps Back

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It wasn't supposed to be this way when the modern version of legal services for the poor was reinvented during the 1960s. We were recruited to be troops in



our nation's War Against Poverty fueled by both funding and direction supplied by the federal government. After almost fifty years of fighting, we are fast approaching a declaration of unconditional surrender in the paradise of our island state. I

doubt it is much different where you are working.

Hawaii now has the third highest homeless rate in the country. The number of households who are without a home has doubled in the past four years despite more than 50% of homeless households having an adult member employed. More than 75% of our poor families must spend in excess of 50% of their household income on shelter. Over the same four year period, the number of households dependent on food stamps and food banks for survival has also doubled. We have more poor people in our state than at any time since the early 1960s. Nearly 75% of the eighth graders in our public school are reading below their grade level. For an equally depressing view from Washington State, read Pat McIntyre's companion article in this MIE *Journal* special feature.

At the same time that basic survival has become the norm for so many desperate people, wealth has geometrically expanded. We have the highest percentage of millionaires in paradise than in any other state in America. Our poor people pay a higher percentage of their income in taxes than any other income group. In fact, their rate is almost twice that of those earning in excess of \$173,000 per year. Our state's income disparity of income between the rich and the poor is as bad as Nigeria. That is not a joke.

As I said, it wasn't supposed to be this way. The mission of our work was clear when I joined legal services as a Vista Volunteer in 1969. Legal Services for the poor was one of an assortment of programs including the Job Core, Community Action, Head Start and the Community Health Services that were created under initiatives of the federal Office of Economic Opportunity's "War on Poverty." OEO's Director Sargent Shriver clearly stated the goal of the war to be ending poverty in America. Each of the four initiatives had parts to play in that ambitious effort. Legal Service's part was to use the law to empower the poor to overcome the many barriers to social and economic justice in America they faced every day.

The early architects of the Legal Services program knew well that the poor were engaged in a civil rights struggle to gain fair treatment and equal opportunity for self-achievement in their lives. Legal services lawyers were charged with effectively using the law, the political process and the media to aggressively establish legal rights and protections for the poor that were critical to achieving their aspirations. As with most successful civil rights struggles, they envisioned the law being used to call public attention to the violation of basic legal and moral rights of the poor in America. Recipients of OEO Legal Services funding were required to make systemic litigation (usually called "law reform") a primary component of their delivery system. Gary Smith, in the 2010 Winter MIE *Journal* article entitled "Poverty Warriors," described OEO Legal Services' charge to program lawyers to "give entire poor communities a legal voice. That voice was intended to sound not only on the courts but also in the various corridors of power where decisions were made that affected the poor." The mission was clearly one of ensuring that the courts and the political process would consider the basic rights of the poor when policy or the law was

being considered or implemented.

To support these directives, OEO separately funded independent programs in most states that were created to provide support to staff lawyers in field programs as they often, for the first time, aggressively enforced the rights of poor clients in their communities. These independent programs were called “state support” programs. Their mission was to implement sophisticated complex advocacy training programs for advocates, coordinate communication among them about systemic barriers being confronted by clients, and lead/co-counsel/support systemic class action litigation. The plan worked for quite well some time. Basic constitutional rights of poor people were established in numerous court decisions. Access to institutions and programs critical to the poor was significantly improved throughout much of the country.

Things changed dramatically in 1981 with the election of President Ronald Reagan. One of his top priorities soon became the total elimination of all federal funding for legal services programs. The fiercely fought battle to preserve some funding was successful but the price paid was significant and included a 33% reduction in funding, a host of restrictions against programs engaging in systemic advocacy, and a clear message that legal services lawyers end “law reform” activities and concentrate on providing just individual representation. To enforce this mandate, the Legal Services Corporation (LSC) began a series of “gottcha” monitoring visits to recipients to remind anyone who had not heeded the new direction from Washington to “get with the program.” Many did.

During the next fifteen years, a multitude of innovations in program delivery design were introduced and programs were encouraged to use these innovations to expand individual representation. These innovations dramatically changed most programs’ delivery designs by including such models as intake hotlines, self-help centers and clinics, websites and web-based materials, etc. Programs began adopting a mission of providing “access to justice” and began partnering with the courts and local bar associations in these efforts. These innovations and new partnerships provided help to beleaguered court systems and the pro bono interests of bar associations but did little, if anything, to continue the dwindling law reform ambitions some programs still nurtured. Almost all of the rhetoric on the components of the emerging delivery systems avoided any discussion about the place that systemic advocacy should play in legal services or the methods and techniques that program advocates could use to successfully

implement complex class action litigation.

The dramatic trend away from systemic advocacy by programs was further reinforced by the 1995 restrictions passed by the Gingrich Congress. They prohibited LSC recipients from engaging in most lobbying and collecting attorneys fees, as well as engaging in any class actions and/or individual representation involving challenges to the new welfare “reform” act. The same Congress also dealt a crippling blow to the comprehensive state and national support system by immediately defunding all support programs. The defunding marked the slow death of many of these programs that had been so effective in partnering with local advocates in their local efforts to preserve the diminishing influence that the poor and their advocates had in the corridors of power.

There has been a historic tension between seemingly opposite philosophies underlying possible program missions. In his article, Smith describes the tension as a “debate within our community between two conflicting legal services missions, each struggling for prioritization, a dialectic once characterized as ‘law reform v. individual service’ and more recently as ‘alleviating poverty v. equal access to justice.’” Over time, most informed advocates accepted the tension as inevitable and favored a balanced approach resulting in program missions that included both of these ends as critical components of any legitimate delivery system. Over the past three decades, the balance has tilted severely towards the politically acceptable mission of “access to justice.” Since that shift, systemic advocacy has become a declining if not invisible part of the missions of too many programs. It is time for programs to re-evaluate their current activities and consider whether they should readjust the balance between these two valid but competing needs in poor communities.

Through this same time period, support for legal services programs has floundered. Twice during the past fifteen years, programs have suffered significant reductions in funding while facing steadily increasing demand for their help. The insatiable demand to provide “access to justice” dominates program delivery while the daily lives of our clients continue to dramatically deteriorate. As funding is slashed on the state and national level, programs find it harder to identify true champions for our work who will do everything in their capacity to secure stability for our efforts. Including successful activities aimed at achieving social and economic justice in program work will more easily stir the passions of our potential supporters than will one focused exclusively on resolving the infinite dilemma of

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“access to justice.”

Too many of sectors and/or whole communities of the poor have suffered from the loss of their talented advocates whose work was focused on demanding systemic change. Most of the poor today have little real access to the corridors of power where significant decisions affecting their lives are made every day. Almost no new legal precedents have been won protecting their interests in a threatening world. Many more poor individuals may have increased access to McJustice self-help advocacy opportunities and a few might actually receive individual quality representation. However, the issues critically affecting the daily denial of basic economic and social justice too often go unattended.

Clients and programs alike would both significantly benefit from a return to a more balanced approach of delivery that includes significant efforts to engage in visible and productive systemic advocacy. Such expanded activities would call to the continued attention of the courts, the political forces and the public the deteriorating and socially threatening conditions in poor communities. Properly selected issues that focus on the inequities of opportunity and treatment for the poor would strongly appeal to our nation's basic value of fairness. The message would be even more powerful if poor communities themselves could be enlisted in the struggle much as the client-driven national welfare rights movement did forty years ago. Most importantly, the critical place that legal services programs have historically played in progressive social change would be re-established and well-placed, committed champions found to preserve our stability and our work.

So how do we escape from the world that others encouraged us to enter with their offers of legitimacy, stability and permanency? It is complicated. Although a few programs have succeeded in maintaining a healthy balance, the local and national funding streams that have been established by most programs would not encourage nor likely accept program missions that included significant levels of aggressive systemic advocacy. In most communities, partners have grown to expect a high volume of brief services to be provided. Changing program direction is a complex undertaking and resistance from vested program interests is inevitable.

The barriers often appear daunting but are almost all surmountable. For example, current grant conditions prohibiting LSC recipients from engaging in class

action litigation do not restrict program staff from identifying systemic needs in poverty communities through their community outreach or intake systems and conducting the research necessary to find legitimate and winnable solutions to some. They can also work closely with unrestricted programs to finalize the work needed to begin litigation. Program staff can also be encouraged to work part time with an unrestricted program that is committed to bringing the required litigation.

An underutilized opportunity for programs to fund otherwise restricted activities was established in the federal court ruling in *Legal Aid Society of Hawaii v. LSC*. The ruling resulted in modifications to 45 CFR 1610 which protect the constitutional rights of LSC recipients to use any of their unrestricted funds to provide financial support to another program engaged in any restricted LSC activity including class action litigation. This exception gives virtually all programs the opportunity to participate in and fund important systemic advocacy efforts in their community, regardless of funding source or their restrictions.

Some programs may decide that internally adjusting the current balance of activities to increase meaningful systemic advocacy may be problematic because of cultural, political, or community expectations. Such programs that nevertheless wish to support these efforts elsewhere in their local communities have a number of proven alternative models to choose from. Those options include, but are not limited to, providing direct grants to another program that provides restricted activities; creating and financially supporting, if required, a separately incorporated program affiliate; or establishing interlocking corporations that segregate restricted activities. These efforts do not necessarily require much additional funding since successful implementation will result in new funds often not accessible by restricted programs. The most important new and significant funding stream is attorneys fees awarded by courts for successful class action litigation. Another source is donations from progressive individuals (hear mostly non-lawyers) who are committed to supporting successful systemic advocacy efforts. A third is foundations that are interested in supporting non-litigation strategies which often may create the foundation for future litigation by issue spotting, conducting research and outreach to clients.

Although our experience in Hawai'i is unique and the model we have chosen not adaptable everywhere, it may provide help to some elsewhere. After our successful constitutional federal court challenge to

the enforcement of the LSC regulations, we created a stand-alone program that we called Lawyers for Equal Justice (LEJ). LEJ's specific mission was focused on aggressively representing the needs of poor communities throughout the state for systemic advocacy. Initial funding came from grants from our local LSC recipient and the Hawaii Community Foundation. Our first case was brought against the Hawaii Public Housing Authority for its failure to provide required utility subsidies to tenants who paid their own utility bills. The litigation was staffed by two lawyers normally employed by the local LSC recipient but who agreed to work part time for LEJ to litigate the case. The other partners were the National Housing Law Project and a local litigation pro bono law firm. The litigation took three years to complete but resulted in awards of \$2.3 million in rebates to tenants and \$325,000 in fees to LEJ. With this "massive" infusion of new funding, our programs hired full and part time staff to expand our work.

Within the past three years, LEJ has achieved important victories for poor communities in Hawaii including:

- Successfully resolving a class action lawsuit against the Hawai'i Department of Education (DOE) for its failure to permit children who had become homeless to continue attending their home school as required by the federal McKinney-Vento Act.
- Successfully resolving two separate class action lawsuits against the Hawai'i Department of Human Services (DHS), ending the department's attempt to impose severe cuts to health care services for Micronesians legally residing in the state under the Compact of Free Association (COFA). One case is currently under appeal by the state to the 9th Circuit.
- Successfully resolving class action lawsuits against the Hawai'i Public Housing Authority (HPHA) for its long-standing failure to properly maintain two separate housing projects, Kuhio Park Terrace and Kuhio Homes and provide reasonable accommodations for disabled tenants.
- Successfully resolving a class action lawsuit against the HPHA for its continuous failure to properly respond to requests from disabled tenants for reasonable accommodations under the requirements of the Americans with Disabilities Act.
- Successfully resolving cases against the County of Honolulu and a private Section 8 project owner for failure to properly subsidize utility costs of tenants.
- Pending litigation includes class actions against the

DHS for its failure to process food stamp applications within the federally required thirty days; against the HPHA for its failure to properly maintain the premises and provide reasonable accommodations to disabled tenants living in the state's second largest housing project; and a utility subsidy case against a private owner of a 165 unit Section 8 complex.

This is not to suggest we have yet become financially stable and institutionalized in our state. Fees for our work usually comes in well after the expenses have been paid and they are always less than we had requested. For almost all of this past year, our staff has been on deferred compensation. At one point our bank account held less than \$2000 in reserves, hardly enough to cover our next month's office expenses. The good news is that fee awards are finally arriving with some predictability and private donations will triple this year to a projected \$50,000. Our stability is assured for at least the next few years.

We have become affiliated with the national Appleseed network and changed our name to the Hawaii Appleseed Center on Law and Economic Justice. The affiliation has provided us with a network of peers to work with in the seventeen other states with Appleseed centers. It has also given us access to mainland foundations that are interested in our non-litigation based systemic advocacy efforts to help immigrants and improve housing opportunities for poor families.

Within our program, we have been forced to learn a lot of lessons about case selection and preparation. Even more challenging has been the difficult task of accurately projecting and collecting fees and other income along with the absolute necessity of building a healthy reserve fund sufficient to "guarantee" staff stability. Our work would not be possible without pro bono partners who do much of the actual litigation. All of our cases have involved partnerships with local and national law firms including national back up centers, large mainland firms and small boutique firms with specialized expertise. Our role has evolved into issue spotting and case selection, research and case preparation, formulation of pro bono partnerships for each case selected for litigation, securing media attention, conducting all required contact with client and experts throughout the litigation, and monitoring compliance with settlement agreements or court orders.

As with most evolutions in program development, some changes in our national legal services community came slowly and many with a bang as political winds



shifted. Our programs have implemented some of the changes voluntarily while others have been forced upon us. It is time we recapture our independence by reducing our dependency on funding provided by the various local, state and national political systems. I do not suggest that programs end those funding relationships but rather that they not allow those sources to so dominate our program delivery designs, mission philosophies and creativity.

We fell off track when we slowly allowed that to happen. We fell off track when we slowly abandoned our role as poverty warriors in the everlasting war against poverty. Unconditional surrender in that ongoing war is unacceptable when we had so much hope for our work in the beginning and have achieved so much success since then. We fell off track when we lost the balance between providing individual assistance and pro-active, aggressive systemic advocacy for our clients. Let's start to get it right again and gain control over our legitimacy as an unfettered advocate for the poor in all of our communities. In the process we may find ourselves taking two steps forward and then two steps more again. Wouldn't that be amazing?

Aloha from Hawaii.

1 Victor Geminiani began his legal services career as a Vista Volunteer lawyer with the Atlanta Legal Aid Society. He has served as Executive Director of the Legal Services of Western Massachusetts, the Legal Services of Northern California, the Legal Aid Society of Hawaii, the Legal Aid Foundation of Los Angeles and the Hawaii Appleseed Center for Law and Economic Justice. He has also worked with the Legal Services Corporation (LSC) as Associate Director of Support and Finances responsible for LSC funding policy and as the South East Regional Director overseeing the seventy-five legal services programs located in the ten Southern states.

Victor has served on a variety of volunteer boards and committees including the Executive Committee of the National Legal Aid and Defenders Association, as founding board member and President of the Management Information Exchange and as a board member of the Litigation Section of the American Bar Association (ABA), as well as the ABA's Standing Committee on the Delivery of Legal Services and its Standing Committee on Pro Bono and Public Service. He has been a recipient of the Litigation Section's John Minor Wisdom Award. Victor may be reached at Victor@lejhawaii.org.
