

Legal Aid History

By Alan W. Houseman

The civil legal aid system of today evolved from privately funded local bar-sponsored agencies in major cities to a national, government-funded program in every state and territory. Attorneys practicing in civil legal aid or through pro bono programs should understand how we got where we are today and the future legal aid delivery system.

The Early Years: 1876–1965

Civil legal assistance for poor people in the United States began in New York City in 1876 with the founding of the Legal Aid Society of New York. The legal aid movement caught on in urban areas. By 1965 virtually every major city had some kind of program. One hundred fifty-seven organizations employed over 400 full-time lawyers with an aggregate budget of nearly \$4.5 million. There was no national program.¹

Reginald Heber Smith's 1919 book, *Justice and the Poor*, promoted the concept of free legal assistance for the poor. Smith challenged the legal profession to consider it an obligation to see that justice was accessible to all, without regard to ability to pay. "Without equal access to

the law," he wrote, "the system not only robs the poor of their only protection, but it places in the hands of their oppressors the most powerful and ruthless weapon ever invented."

National, state, and local bar associations responded to Smith's call to arms. The American Bar Association established the Standing Committee on Legal Aid and Indigent Defendants; state and local bars sponsored legal aid programs. However, these initiatives made only modest headway. Legal aid generally gave perfunctory service to a high volume of clients. Going to court was rare. Appeals were nonexistent. Administrative representation, lobbying, and community legal education were not contemplated. Legal aid had little effect on those it served and no effect on the client population as a whole. Much of what we know today as welfare law, housing law, consumer law, or health law did not exist.²

The Era of the Office of Economic Opportunity

Not until 1965, when the federal Legal Services Program (legal services) began in the Office of Economic Opportunity,

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¹ The early history of legal services is described in EARL JOHNSON JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* (1974), and John A. Dooley & Alan W. Houseman, *Legal Services History* ch.1 (Nov. 1985) (unpublished manuscript, on file with National Center on Poverty Law).

² See *supra* note 1; Alan W. Houseman, *Political Lessons: Legal Services for the Poor: A Commentary*, 83 GEO. L.J. 1669, 1670–72 (1995).

was a new effort to achieve equal access to justice begun. The Office of Economic Opportunity created a unique structure, building on the civil legal aid model and on Ford Foundation–funded demonstration projects in the early 1960s.³ Based on a philosophy that legal services should be part of an overall antipoverty effort, these demonstration programs were located in multiservice social agencies.

The architects of the new federal program recognized two fundamental propositions:

- That something new was needed—well-funded legal aid alone would not do.⁴
- That the law could be used as an instrument for orderly and constructive social change, as lawyers for the civil rights and civil liberties movements were doing.⁵

The “something new” for legal services had five elements:

First was the notion of responsibility to all poor people as a “client community,” not just individual clients who happened to be indigent.

Second was the right of clients to control decisions about the solutions to their problems. The Legal Services Program was not an agency to give services to poor people but rather an advocate whose use poor people were to determine.

Third was a commitment to redress historic inadequacies in the enforcement of poor people’s legal rights—inadequacies caused by lack of access to the institutions that created those rights. Legal ser-

vices pursued “law reform,” a phrase that Justice Earl Johnson Jr. coined as a goal for the legal services program.

Fourth was responsiveness to legal need rather than demand. Probably the greatest deficiency of the legal aid societies was that they responded only to uninformed demand—to those who walked into the office. The societies addressed only the narrow range of legal problems that poor people recognized. Through community education, outreach, and physical presence in the community, legal services programs assisted clients in identifying critical needs.

Fifth was a full range of service and advocacy tools, as full a range as that offered by private attorneys for the affluent.

Unlike other legal aid systems, the U.S. system used staff attorneys working for nonprofit entities, not private attorneys participating in *judicare* programs. The Office of Economic Opportunity funded full-service providers, each serving one geographic area, with the obligation to ensure access to the legal system for all clients and client groups. The only funds earmarked nationally were those for Native Americans and migrant farmworkers. The Office of Economic Opportunity created a somewhat separate delivery system for these client groups. Funding was expected to continue for each provider unless the provider substantially failed to provide service or to abide by the requirements of the Act. The Office of Economic Opportunity also developed a unique infrastructure—found nowhere else in the world—that, through national and state

³ These are described in JOHNSON, *supra* note 1, at 21–32, and Dooley & Houseman, *supra* note 1, at 2.

⁴ The notion of “something new” came from a speech given by Attorney General Nicholas deB. Katzenbach at the 1964 Conference on the Extension of Legal Services to the Poor: “[The problems of the poor] . . . are not new problems. It is our appreciation of them that is new. There has been long and devoted service to the legal problems of the poor by legal aid societies and public defenders in many cities. But, without disrespect to this important work, we cannot translate our new concern into successful action simply by providing more of the same. There must be new techniques, new services, and new forms of interprofessional cooperation to match our new interest.” See CONFERENCE PROCEEDINGS: THE EXTENSION OF LEGAL SERVICES TO THE POOR 11 (U.S. Dep’t of Health, Educ. & Welfare ed., 1964).

⁵ In the words of Clinton Bamberger, the first director of the Office of Legal Services within the Office of Economic Opportunity, legal services were designed to marshal “the forces of law and the powers of lawyers in the War on Poverty to defeat the causes and effects of poverty.” JOHNSON, *supra* note 1, at 75.

support, training programs and a national clearinghouse, provided leadership and support on substantive poverty law issues and undertook litigation and representation before state and federal legislative and administrative bodies.⁶

As its designers intended, the legal services program quickly effected major changes in the legal circumstances of low-income Americans. Major U.S. Supreme Court and appellate court decisions in cases that legal services attorneys brought recognized the constitutional rights of the poor and interpreted statutes to protect their interests. Administrative advocacy assured effective implementation of laws and stimulated regulations and policies that helped shape programs affecting the poor. Legislative advocacy helped the poor redress grievances that courts could not address. Equally important, representation before lower courts and administrative bodies helped individual clients enforce legal rights and take advantage of opportunities to improve their employment, income, education, housing, and working and living conditions.

Inevitably these successes led to efforts in Congress and within the Office of Economic Opportunity to limit the activities of legal services programs. Congress debated whether to prohibit legal services from suing state governments and to give governors complete veto power over grants in their states. Even more threatening was the continuous political interference in the operation of many local programs. The most serious fight occurred when Gov. Ronald Reagan vetoed the grant to California Rural Legal Assistance, a program known for its advocacy on behalf of farmworkers and its successful challenges to some of the governor's welfare and Medicaid policies. Although the Office of Economic Opportunity retained the power to override the veto, instead it appointed a blue-ribbon commission to investigate the charges of misconduct, most of which came from the California Farm Bureau. The commission's report concluded that the charges were unfound-

ed, and Governor Reagan was persuaded to withdraw his veto in return for a \$2.5 million grant to set up a demonstration judicare program.

The California controversy, along with similar fights in other states, made clear that political interference would continue so long as the program remained within the executive branch. Within the organized bar, the Nixon administration, Congress, and the legal services community, the idea of an independent Legal Services Corporation (LSC) began to take shape. In 1971 a study committee of the American Bar Association and the President's Advisory Council on Executive Reorganization (known as the Ash Council) recommended the creation of a separate corporation to receive funds from Congress and distribute them to local legal services programs. A bipartisan group in Congress introduced authorizing legislation. Pres. Richard Nixon introduced his own version of the legislation; he called the corporation a new direction to make legal services "immune to political pressures . . . and a permanent part of our system of justice."⁷ However, in December 1971, Nixon vetoed the legislation passed by Congress, primarily because it was part of a package of legislation containing a national child care program, but also because the legislation limited the president's power to appoint the LSC board.

The Early LSC Era: Growth and Expansion

The gestation of the Legal Services Corporation Act lasted until 1974. Controversy arose first over whether the president would have unrestricted power to appoint LSC board members. Meanwhile, conflict at the Office of Economic Opportunity escalated. In 1973 Nixon proposed to dismantle the agency and appointed Howard Phillips, a critic of the legal services program, to do the job. However, despite heavy lobbying from Phillips in favor of a revenue-sharing approach that would have delegated control of legal services to the states, Nixon again proposed leg-

⁶ See Houseman, *supra* note 2, at 1682.

⁷ See Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976).

islation authorizing the corporation in 1973. After protracted debate in both Houses, the Legal Services Corporation Act was finally signed into law on July 25, 1974.⁸ Appointing and confirming the board of directors took almost a year. On October 12, 1975, LSC officially took control of the federal legal services program.

The Act created a corporation controlled by an independent, nonpartisan board, appointed by the president and confirmed by the Senate, with no more than six of its eleven members of the same political party. Pres. Gerald Ford appointed the first LSC board. The board's decisions on major policy issues—selecting a staff with experienced legal services advocates, continuing the national back-up centers, maintaining a national training and communications capacity, adopting regulations that permitted full professional representation for the poor, and maintaining the basic staff-attorney structure of the program—all reflected a desire to ensure that the poor received effective legal representation and an appreciation of the merits of the existing delivery system. The delivery and support structure that the Office of Economic Opportunity put in place was carried over fundamentally unchanged.

Expansion. LSC's major accomplishment was the expansion of the federal legal services program from a predominantly urban program to one that provided legal assistance in virtually every county and in most U.S. territories. In 1975 LSC inherited a program that was funded at \$71.5 million annually. By 1981 the LSC budget had grown to \$321.3 million. In 1975 11.7 million out of 29 million poor people had access to no program and 8.1 million had access only to programs that

were inadequately funded.⁹ By 1981 LSC funded 325 programs with 1,450 offices throughout the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Micronesia, and Guam. Poor people in every county of the United States had access to a legal services program.¹⁰

Private Attorney Involvement. Although legal services continued primarily as a staff-attorney system, the program began to include significant involvement of private attorneys. LSC encouraged the development of pro bono programs and subsequently required programs to use the equivalent of 12.5 percent of their LSC funding for private attorney involvement.¹¹ Today over 150,000 private attorneys are registered to participate in pro bono efforts with LSC-funded programs.¹²

Funding Reductions and the Struggle for Survival

Although in most parts of the country legal services had come to be accepted, the expansion of the program into previously unserved areas was sometimes met with suspicion on the part of the local bar, politicians, and community leaders, who feared that the new breed of lawyers would upset the social order. Many of the issues that caused controversies a decade earlier in areas served by Office of Economic Opportunity programs arose again in newly served areas. As a result, congressional scrutiny of the program began to increase.

The Reagan Era. The election of Pres. Ronald Reagan in 1980 ended the expansion and the growth of political independence for the corporation and its grantees. The Reagan administration was openly hostile to legal services and initially sought its complete elimination. In response to

⁸ Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. § 2996 (1994)). The Act does not provide a sunset provision terminating the corporation at a specific date. However, the 1974 Act authorized appropriations only through fiscal year 1977. The Act was reauthorized once in 1977, providing for appropriations through fiscal year 1980. Since 1980, the Act has not been reauthorized; the Legal Services Corporation (LSC) has continued because Congress has appropriated funds to it.

⁹ See LSC, 1976 ANNUAL REPORT 14 (1977).

¹⁰ See LSC, 1981 ANNUAL REPORT 8 (1982).

¹¹ LSC, DELIVERY SYSTEMS STUDY (1980); 45 C.F.R. § 1614 (2001).

¹² LSC, TALKING POINTS BOOK, PROMOTING PRO BONO (2001), available at www.lsc.gov/pressr/pubs/promotin.htm.

Legal Services Corporation Appropriations

The Legal Services Corporation (LSC) has been unable to maintain the level of access achieved in 1981 and has lost considerable ground because of the two significant budget reductions and the inability to keep up with inflation even when funding increased.

Grant year	Annual LSC appropriation in actual dollars	Annual LSC appropriation in 2001 dollars	Percentage change from 1980 (using 2001 dollars)
1980	300,000,000	646,238,000	0.0%
1981	321,300,000	627,401,000	-2.9%
1982	241,000,000	443,290,000	-31.4%
1990	316,525,000	429,864,000	-33.5%
1995	400,000,000	465,879,000	-27.9%
1996	278,000,000	314,500,000	-51.3%
2001	329,274,000	329,274,000	-49.0%

Table prepared by Aaron Bergmark for the National Legal Aid and Defender Association and the Center for Law and Social Policy.

While non-LSC funding has grown considerably and now exceeds LSC funding in terms of the overall system, it has not been evenly distributed. Uneven resources have led to substantially uneven access. Large sections of the South, Southwest, and Rocky Mountain states severely lack resources and depend upon LSC funds for survival.

pressure from the White House, Congress slashed the appropriation for the corporation for 1982 by 25 percent. The cut was an enormous blow to legal services nationwide. Programs were forced to close offices, lay off staff, and reduce the level of services dramatically. In 1980 there were 1,406 local field program offices; by the end of 1982 that number had dropped to 1,121. In 1980 local programs employed 6,559 attorneys and 2,901 paralegals; by 1983 those figures were 4,766 and 1,949, respectively.¹³ Programs cut back on training, litigation support, community education, and a host of other efforts.

In 1981 and 1982 President Reagan replaced the confirmed (Pres. Jimmy) Carter board with new recess appointees.

The Senate refused to confirm the administration's nominees, and for much of the Reagan presidency LSC was governed by a series of boards consisting of recess appointments and holdover members. Many of the new board members expressed outright hostility to the program they were charged with administering and sought to change it into a judicare-based program that did no significant litigation and no policy advocacy. Others professed to support the concept of legal services for the poor but advocated changes that would have eviscerated the system. For example, board members advocated expanding private attorney involvement to 25 percent of funding, eliminating all support funding, narrowing eligibility, and precluding most legislative and administrative advocacy. Some board members expressed open disdain for the organized bar, particularly the American Bar Association, which had emerged as a vigilant supporter of the program.

The corporation's management grew increasingly hostile to local programs. Compliance monitors audited local programs in a highly adversarial manner and frequently demanded information and records that attorneys could not ethically provide. The corporation withheld funds from many programs because of technical violations, such as board vacancies, and attempted to reduce funding for a number of programs.

On the legislative front, corporation staff members actively lobbied and hired others to lobby against appropriations and hired a consultant to write a legal opinion arguing that the corporation was unconstitutional. The board developed a series of new regulations and policies to restrict legal services activities far beyond the congressionally imposed limitations. Congress, led by Senator Warren Rudman, often found it necessary to intercede to block the corporation's actions.

The 1990s. The 1990s began with small but significant improvements for the legal services community. The corporation's appropriation, which had been stagnant for several years, began to move

¹³ LSC, 1981 ANNUAL REPORT 8 (1981); *id.*, 1982 AND 1983 ANNUAL REPORT 16 (1984).

upward, to \$328 million for 1991 and \$350 million for 1992. The (George H.W.) Bush administration, turning away from its predecessor's overt hostility to legal services, consistently recommended continued corporation funding, albeit at constant levels.

With the election of Pres. Bill Clinton, the legal services community anticipated an end to the long period of insecurity and inadequate funding. Congress increased the appropriation to \$400 million. With the majority of Congress continuing to favor a broad role for legal services, and a supportive president, the statutory framework of the program seemed likely to be resolved for the rest of the 1990s.

Clinton's appointees to the board were uniformly supportive of a strong, well-funded LSC. By late 1994 the corporation had developed a new system for monitoring and enforcement of grantees' compliance with congressional requirements and a new peer review program designed to evaluate and improve program quality.

With the 1994 congressional elections, the corporation's political situation changed dramatically. The leadership of the new Congress was committed to ending federal funding for legal services.¹⁴ The House of Representatives adopted a budget that would have cut LSC funding by one-third for fiscal year 1996, two-thirds for fiscal year 1997, and eliminate it thereafter. That the federal commitment to equal justice might be abandoned altogether seemed possible.

Fortunately a bipartisan majority of the Congress remained committed to federally funded legal services. However, key congressional decision makers determined that major changes in the delivery system were required if the program was to survive. Grants were to be awarded through a system of competition. More fundamental, Congress redefined the role of

federally funded legal services, restricting the broad range of program activities that it had mandated in the past. In essence, Congress determined that federal funds should go to programs that focused primarily on individual cases, while some broader efforts to address the problems of the client community should be left to entities that did not receive federal funds. Certain kinds of advocacy previously considered important, such as class actions and most legislative advocacy, would no longer be permitted.

Along with the new restrictions came a major reduction in funding, down to \$278 million. Final 1996 statistics revealed the cost of the funding cuts: the number of cases closed fell from 1.7 million in 1995 to 1.4 million in 1996; the number of LSC-funded attorneys fell by 900; and 300 local offices closed.

High-Quality Legal Assistance

One of the great accomplishments of the federal legal services program, during both the Office of Economic Opportunity and LSC eras, has been the quality and effectiveness of the representation it provided. While it did not end poverty, legal services representation did improve the lives of the poor and prevented other low-income persons from becoming poor.

Legal services representation created new legal rights. For example, legal services attorneys won landmark decisions such as *Shapiro v. Thompson*, which ensured that welfare recipients were not arbitrarily denied benefits.¹⁵ Perhaps the greatest victory was *Goldberg v. Kelly*, which led to the due process revolution.¹⁶ *Escalera v. New York City Housing Authority* required public housing authorities to provide hearings before evictions from public housing; and later decisions such as *Fuentes v. Shevin* required private par-

¹⁴ The congressional leadership sought to eliminate LSC and replace it with a state block grant program. See Legal Aid Act of 1995, H.R. 2777, 104th Cong. The leadership also sought to eliminate funding for LSC in three years. See John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 Tenn. L. Rev. 101, 109–12 (2000).

¹⁵ *Shapiro v. Thompson*, 394 U.S. 618 (1969) (Clearinghouse No. 238).

¹⁶ *Goldberg v. Kelly*, 397 U.S. 254 (1970) (Clearinghouse No. 1799).

ties to follow due process when seeking to recover possessions such as automobiles.¹⁷

Equally significant were judicial decisions that expanded common-law theories on retaliatory evictions and implied warranty of habitability. In *Edwards v. Habib* the court held that the landlord's "right" to terminate a month-to-month tenancy "for any reason or no reason at all" did not include the "right" to terminate because the tenant complained of housing code violations.¹⁸ Today the doctrine of retaliatory eviction is the rule in most states and is endorsed by the *Restatement of American Law of Property*. Legal services similarly developed the doctrine of implied warranty of habitability.¹⁹ This doctrine also has become the norm.

Legal services attorneys enforced rights that existed in theory but were honored in the breach. *King v. Smith* not only led to the enforcement of federal statutory law in the welfare area but also, until recently, set the framework for enforcement of federal law across the board.²⁰ Legal services advocacy in *Sullivan v. Zebley* more recently won Supplemental Security Income benefits for hundreds of thousands of families with disabled kids.²¹

Perhaps most important, sustained and effective representation fundamentally changed public and private agencies and entities that deal with the poor. Legal services representation altered the court system by simplifying court procedures to make them understandable and more accessible to the poor. Legal services representation forced welfare and public housing bureaucracies, schools, and hospitals to act according to rules and laws and to treat the poor equitably. And legal

services programs have been on the forefront of efforts to assist women subject to domestic violence.

Where We Are Today

The legal services program is now in a major transformation. Seven years ago the LSC-funded civil legal assistance system consisted primarily of full-service providers, each serving one geographic area. Today, instead of one full-service provider, in sixteen states two newly organized direct service providers operate statewide, and two organizations provide direct service in over twenty large or medium-size cities. The number of LSC providers has gone from over 325 grantees in 1995 to 172 grantees at the beginning of 2002. The number of local program grantees has dropped from 292 to 168. Because of the new restrictions on advocacy and client eligibility, LSC-funded legal services programs cannot operate fully in all forums.²²

What is emerging in many states is a new delivery system that includes both LSC-funded programs—restricted in their activities—and programs funded with substantial non-LSC funds. In a number of jurisdictions the private bar is becoming significantly more involved in delivering basic legal services as well as undertaking activities forbidden to LSC fund recipients.

The network of federally funded entities that linked all of the LSC-funded providers into a single national legal services program has been substantially reduced and some components dismantled.²³ A separate group of state-level non-LSC funded entities has replaced it in over

¹⁷ *Escalera v. N.Y. City Hous. Auth.*, 425 F.2d 853 (2d Cir. 1970) (Clearinghouse No. 832); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (Clearinghouse No. 4463).

¹⁸ *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968) (Clearinghouse No. 87).

¹⁹ *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (Clearinghouse No. 327).

²⁰ *King v. Smith*, 392 U.S. 309 (1968) (Clearinghouse No. 287).

²¹ *Sullivan v. Zebley*, 493 U.S. 521 (1990) (Clearinghouse No. 43,127).

²² For a detailed discussion of these restrictions, see Alan W. Houseman & Linda E. Perle, *What You May and May Not Do Under the Legal Services Corporation Restrictions*, in this manual.

²³ This network consisted of state and national support centers, a national clearinghouse and poverty law journal, and training programs. The network had a single federal source of funds and quality standards. Also, LSC undertook delivery research and training.

thirty-five states.²⁴ A number of states are beginning to put in place integrated statewide delivery systems which aim for a single entry point for all clients, integration of all providers, and allocation of resources to ensure representation in all forums and accessibility for low-income persons whatever their language, ethnic or cultural group, and location. In short, the civil legal assistance system of the future will be partially state-based, with

funding from state governmental sources, the private bar, interest on lawyer trust accounts (IOLTA), private foundations, LSC, and other federal sources. As more programs operate without LSC funding, how programs are structured, how providers are integrated into an effective whole, and ultimately how assistance for low-income persons is provided will depend as much on actions taken at the state as at the national level.

Legal Aid History Time Line

1876 — New York Legal Aid Society starts.

1919 — Reginald Heber Smith's *Justice and the Poor* is published.

1921 — American Bar Association creates Standing Committee on Legal Aid and Indigent Defendants.

1963 — Ford Foundation begins funding demonstration projects.

1965 — Office of Economic Opportunity Legal Services begins with Clinton Bamberger as its first director. American Bar Association endorses Office of Economic Opportunity Legal Services.

1967 — U.S. Congress first attempts to limit legal aid.

1970 — California Rural Legal Assistance controversy begins.

1971 — President Nixon vetoes first Legal Services Corporation Act.

1973 — Howard Phillips begins to dismantle Office of Economic Opportunity including legal services. President Nixon introduces new version of proposed Legal Services Corporation (LSC)

1974 — Congress passes LSC Act.

1975 — LSC is established.

1977 — LSC Act is reauthorized.

1980 — LSC reaches minimum access funding.

1982 — Congress reduces LSC funds by 25 percent and imposes new restrictions. President Reagan uses recess power to appoint board members.

1990 — President Bush supports increased funding.

1993 — President Clinton's LSC board takes office.

1994 — LSC funding reaches \$400 million.

1996 — LSC funding is cut by one-third. Support funding is eliminated. Entity restrictions are imposed.

²⁴ See ALAN W. HOUSEMAN, THE MISSING LINK OF STATE JUSTICE COMMUNITIES: THE CAPACITY IN EACH STATE FOR STATE LEVEL ADVOCACY, COORDINATION AND SUPPORT (2001), available at www.clasp.org/readingroom.htm. Some of the state entities were formerly LSC-funded state support centers. Currently only twelve previously LSC-funded state support centers remain.