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LEGAL AID AND LEGAL SERVICES: AN OVERVIEW

The Honorable Howard Dana

LEGAL AID AND LEGAL SERVICES: AN OVERVIEW

*The Honorable Howard Dana**

You have asked me to summarize in under ten minutes the entire history of civil legal aid and civil legal services to the poor since the beginning of recorded history. I hope in this undertaking not to slight the substantial contributions of many in this room.

Legal aid to the poor for all but the last fifty years has been almost exclusively the responsibility of the private bar.¹ Dating back to at least the fourteenth century it was understood that in exchange for the privilege of being a compensated advocate in court, a lawyer had the responsibility to devote some time to those who could not pay.² This English common law tradition was transplanted in the American colonies and continues today.³ In addition to these pro bono efforts, in the late nineteenth century, legal aid offices with full-time lawyers, paid for through charitable contributions, opened in many American cities.

In any society that permits personal wealth there will always be gradations thereof, and those citizens with the least wealth will inevitably be regarded as poor. In a society of laws, we require that everyone accept where they temporarily find themselves on the economic ladder of life even as they work within our society to improve their lot. However, we must never expect the poor to tolerate the inability to enjoy equal treatment under the law. "Nothing," wrote Reginald Heber Smith, "rankles more in the human heart than a brooding sense of injustice [I]njustice makes us want to pull things down."⁴

In the period before 1965, the men and women of the American Bar, motivated by the highest ideals of professional responsibility, gave their time and resources to the task of representing the poor in their civil disputes with each other and with the non-

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1. Hon. Frank M. Coffin, *Introduction: Accessing Justice—Its Past, Present, and Future*, 62 ME. L. REV. 421, 422 (2010).

2. *Id.*

3. *Id.*

4. Reginald Heber Smith, *Introduction* to EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* xiii, xiii (1951).

poor.⁵ However, no one suggests that as of 1965 the American Bar was doing much more than scratching the surface of the need. The task then, as today, is immense,⁶ and it is extremely difficult to accomplish a huge task without full-time paid staff.

For many years prior to the death of President Kennedy one of the planks in the liberal agenda had been federally funded legal services for the poor. Federally funded programs were finally authorized in 1965 as part of Senator Muskie's and President Johnson's War on Poverty. As a part of the Office of Economic Opportunity, federally funded staff-attorney programs were established around the country to provide legal services to the poor.⁷ Pine Tree Legal here in Maine is such a program.⁸

Prior to 1965, legal aid had focused on volunteer and some paid legal resources in the courts. However, federally funded staff attorneys divided their time between the courts, Congress, state legislatures, and state and federal administrative agencies. As they began to achieve victories in these various forums, those whose oxen were being gored started to scream.

Some objected to the federal funding for lobbyists for the "liberal agenda." Some objected to federal money being used to espouse unpopular causes typically resulting in larger and larger federal and state budgets. Some objected to class actions resulting in the same thing.

Between 1965 and 1980, the federally funded staff-attorney approach almost preempted the field. The staff-attorney model had the unintended and, in my view, disastrous side effect of separating the American private bar from its responsibilities to the poor. Private lawyers were seen as tied too closely to the "establishment." During this period, providing legal representation to the poor became a "movement." It sometimes developed a "bunker" mentality, in large measure because its natural allies, the private bar, had been cut off and discarded as an irrelevant relic from the past. Legal services for the poor became an essential part of both a War on Poverty *and*, for some, a War Against the Establishment.

Between 1965 and 1975, annual federal funding for this aspect of the War on Poverty increased from \$20 million to \$75 million. It was during this period that Governor Ronald Reagan of California and his legal counselor, Edwin Meese (later to become Attorney General), first attempted to defund California Rural Legal Assistance, rural California's equivalent of Pine Tree.⁹ Counselor Meese had made 135 charges of inappropriate advocacy in support of his Governor's attempt to defund CRLA. President Nixon was between a rock and a hard place, so he did what every good politician does in such a situation: he appointed a committee.¹⁰ The committee, a three-judge panel headed by Maine's then Chief Justice Williamson, was appointed to investigate the Meese charges.¹¹ After an extensive investigation, the three-judge

5. See Coffin, *supra* note 1, at 422.

6. See Coffin, *supra* note 1, at 423 (only one in four people with legal problems receive assistance, according to 1990 report).

7. Coffin, *supra* note 1, at 422.

8. Coffin, *supra* note 1, at 422.

9. *History of Civil Legal Aid*, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, (2011), http://www.nlada.org/About/About_HistoryCivil.

10. Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO-LATINO L. REV. 1, 53 (1972).

11. *Id.* at 56.

panel unanimously concluded that Attorney Meese had failed to prove any of his charges.¹² As a result President Nixon overruled the California Governor's veto.¹³ Legal services was to hear again from Attorney Meese.

In 1974 as one of his last official acts, President Nixon signed into law the Legal Services Corporation Act.¹⁴ The Legal Services Corporation (LSC) is controlled by an eleven-member board of directors appointed by the President with the advice and consent of the Senate.¹⁵ One of its functions was to insulate legal services from the political process. In that regard it has been only partially successful. However, between 1976 and 1981, annual Congressional funding for legal services increased from \$92 million to \$321 million.¹⁶

On the morning after the election of 1980 the legal services programs woke up and realized they were alone, cut off from their family and friends. Like a glorious cavalry charge they had been separated from their troops, the men and women of the American Bar. Some even felt they were behind enemy lines with no hope of escape. A call for aid went out and the private bar responded.¹⁷

Over the next two years the American Bar rescued the legal services programs and reasserted itself in both a leadership and a support role.¹⁸ With the prodding of Congress, the LSC fostered and facilitated this development.¹⁹ All across the country, the private bar and LSC staff attorneys "buried the hatchet." They started to work together towards the common goal of providing high quality legal services for the poor.

After initially attempting to abolish the LSC, President Reagan and Counselor Meese had to settle for a twenty-five percent cut in funding and a board of their choosing.²⁰ Someone once said that everyone gets fifteen minutes in the sun. I received more than my share during 1982 as a member of that first Reagan board. I was described by some as a "wolf in sheep's clothing" and by others as "a lamb in wolf's clothing." Maybe both groups were right. Before the Senate voted on our confirmation, however, the President withdrew our nominations because, as Larry Speaks said, we were too *liberal*. However, I have always agreed with Senator Muskie's colleague who said, on accepting the Republican Nomination for President in 1964, "moderation in pursuit of Justice is no virtue."²¹

As I indicated, in 1982 Congressional funds for legal services were cut from the previous year's high water mark of \$321 million to \$241 million.²² Since that time, Congress has gradually increased funding to its current level of \$365 million.²³

While the war over legal services was being waged in Washington, a concerted

12. *Id.* at 71-72.

13. *Id.* at 75.

14. *Id.*

15. Coffin, *supra* note 1; 42 U.S.C. § 2996c(a) (2012).

16. Coffin, *supra* note 1, at 422.

17. Coffin, *supra* note 1, at 423.

18. Coffin, *supra* note 1, at 423-24.

19. Coffin, *supra* note 1, at 422-23.

20. Coffin, *supra* note 1, at 423.

21. Barry M. Goldwater, Acceptance Speech in San Francisco, California (July 17, 1964).

22. Coffin, *supra* note 1, at 423.

23. *FY 2014 Grantee Budget Allocations*, LSC: AMERICA'S PARTNER FOR EQUAL JUSTICE, <http://www.lsc.gov/media/news-items/2014/fy-2014-grantee-budget-allocations> (February 7, 2014).

effort across the country and here in Maine was launched to mitigate the situation.

- In 1983 the Maine Bar established the Maine Bar Foundation and its child, the Volunteer Lawyers' Project.²⁴ Over 1,100 Maine lawyers immediately volunteered to take up to three cases per year from the poor, and Maine lawyers voluntarily imposed surcharges on their registration fees to help pay for the program.²⁵
- The Maine Legislature began in 1984 to annually make direct appropriations to Pine Tree and Legal Services for the Elderly.
- The Maine Supreme Court authorized the use of interest on pooled lawyer trust accounts for charitable purposes and almost seventy-five percent of Maine lawyers immediately designated the Maine Bar Foundation as the recipient of that interest.
- The Maine Supreme Court has made explicit (in our Bar Rules) something that was always implicit: that all Maine lawyers should help the poor obtain justice.
- In 1989, Senator Muskie led a Legal Needs Study in Maine that revealed that if you were poor and needed help, your chances of getting a lawyer to help you were about twenty-three percent.²⁶
- About this same time, I worked my way out of the Republican dog house and was given another opportunity to serve on the LSC board.
- In 1992, with the election of President Clinton, the legal community relaxed. They had a good friend in the White House. The First Lady had been Chairman of the Board of the Legal Services Corporation during the Presidency of Jimmy Carter. While certainly understandable, the legal services community should not have relaxed.
- In the election of 1994, the Republicans gained control of Congress and as part of their Contract with America, put a contract out on the LSC.²⁷ Through the heroic efforts of the organized bar, however, the effort to destroy the LSC was again frustrated. Its foes had to settle for another substantial cut in funding (Pine Tree's funding was reduced by over \$1 million). Perhaps worse than the loss of money, however, the legal services programs were saddled with some crippling restrictions on the kinds of services they could provide.²⁸

Yet with all this effort we are left with the belief that the legal needs of Maine's poor still are not being adequately tended to. There is a Maine lawyer for every 300 Maine citizens who are not poor, but less than one full-time legal

24. Coffin, *supra* note 1; Hon. Kermit V. Lipez, *Reflections of an Access to Justice Chair*, 62 ME. L. REV. 585, 589 (2010).

25. *About VLP*, MAINE VOLUNTEER LAWYERS PROJECT, <http://www.vlp.org/about> (last accessed February 21, 2015).

26. *See* JUSTICE ACTION GROUP, JUSTICE FOR ALL: A REPORT OF THE JUSTICE ACTION GROUP, STATEWIDE ACCESS TO JUSTICE PLANNING INITIATIVE 3 (2007) (stating that the 1990 Legal Needs Study revealed that "roughly 75% of the litigants in the civil justice system are not represented by counsel. Virtually all of these individuals are unable to pay for an attorney . . .").

27. *History of Civil Legal Aid*, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, http://www.nlada.org/About/About_HistoryCivil (last visited Feb. 19, 2015).

28. *Id.* ("More fundamentally, Congress redefined the role of federally funded legal services, restricting a broad range of program activities it had mandated in the past.")

services lawyer for every 3,400 poor citizens.²⁹

Alarmed by this bleak prospect, Chief Justice Wathen, together with the Maine Bar Foundation and the Maine State Bar Association, organized the 1995 “Fall Forum” to address the crisis.³⁰ Sixty-five people, including many of those in this room—judges, lawyers, senators, representatives, and providers—gathered here in Augusta.³¹ Participants in that forum volunteered for a series of task forces to deal with the consequences of a gradual federal withdrawal from the field. To coordinate these efforts, the Chief Justice created a group called the Justice Action Group (JAG), with the Honorable Frank Coffin of the United States Court of Appeals appointed its first chair.³² From those beginnings, through the dedicated work of Judge Coffin, Chief Justice Wathen, Judge Lipez, Justice Mead, and many others, JAG has evolved into Maine’s access to justice entity, with a mission of helping to coordinate the provision of civil legal services state-wide and increasing the resources available for those programs.³³

Among JAG’s more notable accomplishments, achieved through the hard work of its stakeholders, are the following:

1. The creation of the Maine Equal Justice Project which provides representation to low income citizens before the legislature;³⁴
2. The creation of the Maine Equal Justice Partners, an organization that uses primarily pro bono litigators to engage in administrative advocacy, class actions, and other systemic advocacy prohibited by Congressional restrictions;³⁵
3. The enactment of legislation to surcharge court filing fees and traffic fines to provide additional funding for legal services for the poor;³⁶
4. The establishment, by Portland law firms, of two public interest fellowships named in honor of Judge Coffin, to help low income families in crisis;³⁷
5. The institutionalization of resource sharing among, and coordinated access to, the providers;³⁸ and
6. The promotion of systemic changes within the court system to increase the likelihood that those citizens who still can’t afford to obtain a lawyer will receive *justice*.

We are blessed to live in a State where routinely the leaders of government and the private sector come together to solve problems.

29. Presently, there are 3,840 active resident Maine lawyers, according to the Board of Bar Overseers. Although the numbers fluctuate, the November 2013 Report of the Justice Action Group determined there were 49.6 full-time legal aid staff attorneys in Maine. Maine’s population is currently approximately 1.33 million people. From the 1990 Muskie study, learned that approximately one-eighth of Maine citizens live in poverty. If this continues to be the case, approximately 170,000 Maine citizens still live in poverty. Therefore, there is approximately one Maine lawyer for every 300 Mainers not living in poverty, and one full-time legal aid lawyer for every 3,427 Mainers living at or below the poverty level.

30. LEGAL SERVICES CORPORATION, MAINE STATE PLAN 6.

31. *Id.*

32. *Id.*

33. *Id.* at 7-8.

34. *Id.* at 8.

35. *Id.* at 3.

36. *Id.* at 32.

37. *Id.* at 33.

38. *Id.* at 19-20.