

Narrowing the Gap:
Access to Justice in Today's Realities

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I am flattered, honored – but very humbled – by your invitation to be with you today to begin this important annual conclave. Two years ago, you heard from Martha Minow, Dean of the Harvard Law School. Last year, you heard from Jim Sandman, President of the Legal Services Corporation. On my way in this morning, I stopped in the men’s room, where I saw a custodian – a janitor – replacing paper towels. I went up to him and suggested that he start thinking about access to justice because he might well be invited to speak to you next year. In all seriousness, it really is an honor to follow such distinguished and knowledgeable speakers, but I am as surprised as you, that Bob LeClair and the other organizers of this event, asked me to share some thoughts with you this morning, but they did and I am pleased to be with you today.

Mark Twain said that “to do good is noble, to advise others to do good is also noble and far less trouble for yourself.” You need no encouragement from me to do good. You are here because that is a message you already accept and live out in your work, in your dedication to equal justice, and in your efforts to narrow the justice gap.

Your kindness has provided me with an opportunity to reflect on my 40 plus years of effort, trying to provide high-quality representation to the indigent in Colorado. Not long ago, I was on a panel at the University of Denver Graduate School of Social Work with a number of other executive directors of non-profit agencies. We were asked to discuss a variety of difficult issues of leadership and management of non-profit organizations. Late in the session, we were asked to each comment on a single accomplishment of which we were most proud. I was not the first of the several panelists to address the issue, and in those few moments before I spoke, I thought of many things over the years in which I take much pride.

I thought of our efforts with the Chicano community to extend water and sewer lines, which they never had, to a very poor barrio in an unincorporated area, literally on the other side of the tracks, in the small rural town of Eaton in Northeastern Colorado. Indoor plumbing and clean water were worth our time and effort and, ultimately, resulted in our successful efforts with the Farmer Home Administration.

I thought of the many specific cases and litigation in which I was personally involved, beginning with a challenge to the Colorado landlord’s lien statute in the early 70’s which had provided a lien on all possessions of a tenant who was at all delinquent in his or her rent, including a possessory lien on the tenant’s personal papers and even their medications. The statute now is much better – not great, but much better. I thought of my work with Jean Dubofsky, who later became the first woman appointed to the Colorado Supreme Court, and our efforts to ensure compliance by the Weld County General Hospital with its legal

obligation, at that time a yet unenforced and undefined obligation, to provide a reasonable volume of free medical care to those in need which accompanied the hospital's receipt of federal funding.

I thought of our successful challenge to an unconstitutional 35-year residency requirement imposed by the State on the poor and disabled between the ages of 60 and 65 seeking the benefits of the Colorado Old Age Pension. A successful challenge – which has helped many in need of basic assistance.

I thought of one of the first cases brought while I was Director of the Legal Aid Society of Metropolitan Denver in the early 1980's seeking to enforce the obligation of the City of Denver and the State of Colorado to provide adequate mental health services to the homeless mentally ill, a challenge that, unfortunately, one way or another is still ongoing to this day.

I thought of many other cases – from local Municipal and State Courts to the U.S. Supreme Court, and the literally tens of thousands of individuals, maybe even more, who have come through our doors, victims of domestic violence, individuals and families facing eviction or home foreclosure, sometimes through their own fault, frequently not, parents who have lost or have been improperly denied Medicaid with sick or disabled children or spouses in need of essential medical care, of nursing home residents whose income exceeds the Medicaid eligibility level, but whose income is far from adequate to pay the private rate for nursing homes who had nowhere else to go and nowhere to turn, but to us.

I reflected on those cases, but also on the opportunities our offices provided for very able young attorneys, particularly women and minorities, and all of us in legal services, to grow and develop our professional skills to receive terrific supervision, at least some times, and work with models of professionalism, more experienced practitioners and leaders who understood the value of diversity and nurtured our growth and respected our differences, not just our commonalities. Women and minorities who have now served on the highest Court in the State of Colorado, as I said, who have been, and are now, trial court and appellate court judges and members of the Cabinets of Governors and Presidents of the United States, those who became the Mayor of Denver, district attorneys, leaders of the Bar, well-respected members of our community, all of whom stretched their wings and found their initial professional strength early in their careers in legal services offices, and I thought of those many who are yet to follow. I have always thought that an important part of my job – a part of all of our jobs – is as a farmer – planting for the future – never quite sure what will grow, what, if nurtured, will sprout and blossom. Many of our ranks have gone on to great things. I thought of them.

But, though I thought of all of these wonderful experiences, I shared none of them with the students. No, I shared a simple telephone call I received many years ago from a colleague and good friend who was then the Director of the Youngstown, Ohio legal services program. He went on to be the director of the Interest on Lawyer Trust Account program in the State of Ohio. Bob Clyde called me one day and said that he was at home that morning watching the Today Show, or one of the other morning talk shows – I guess he got to the office a little later than I do – but he said that he had been watching TV and had seen our then Governor Dick Lamm on television. It was the time during which our then Governor had raised the issue of the exorbitant and accelerating cost of health care and the extent to which, according to him, we inappropriately used scarce resources for futile heroic, but very expensive measures, to provide medical care in the last days of peoples’ lives. He went so far as to suggest that the elderly had a duty to die, so as not to be a financial drain on the rest of the younger public. I was on a panel with Governor Lamm during this period and he described in detail the indefensible costs spent in the last 30 days of life, as I said, on heroic and futile medical care. I told the Governor that I thought he was right, and if he would let us know when his 30 days began to run, we would stop all of his health care. I was never asked to be on a panel with him again.

Well, Bob Clyde told me that he was watching Governor Lamm present his concerns with the costs of health care and his notion that we had to make difficult decisions and prioritize the provision of health care. He said Governor Lamm stated, however, that he knew he had to ration health care in such a way that was fair and consistent with and according to law and regulation, because, otherwise, Denver Legal Aid would sue him. What greater compliment can be paid to a poverty law office than that the Chief Executive Officer of the State knew that there were limits on his authority and that if somebody felt abused or unfairly treated by the system or by the State that he or she might know of Legal Aid, or a friend or neighbor might know, or he or she might have been previously helped by Legal Aid and might even call the office, that somehow he or she could navigate our still barbaric telephone system, that a volunteer or someone on staff would gather the facts of the situation well enough, that somebody might be able to analyze the problem and figure out that there was a legal claim, that we might even have the resources to do something to help that client, and that despite all the difficulties and our lack of resources, that the Governor of the State of Colorado would recognize that, due to our existence, he might be held accountable before the law. What could any lawyer do that would be more important than to defend and assert the legal rights of the poor and most vulnerable among us and help reign in the excesses of government when it violates, rather than protects, the civil rights of its residents. It was terrific. It is that which I shared.

I also remember a statewide training event on welfare issues at which we had asked the Director of the State Department of Human Services to speak. He shared his priorities and plans for the Department and was quite complimentary of our work on behalf of public assistance applicants and recipients – those whose benefits were denied, reduced or terminated. He said he respected our work, even if we were always nipping at his heels. After his presentation, I thanked him for making time for us, and for his compliments and respect for the work of our staff, but I told him I was disappointed that he thought we were nipping at his heels, because we were aiming somewhat higher.

But as Coach John Wooden said “When your past becomes more significant than your future, you’re done.” Well, I’m not quite done this morning.

This conference is sponsored by the Hawaii Access to Justice Commission. I am, and since its inception in the early 2000’s, have been, a member of the Colorado Access to Justice Commission, and I have seen firsthand the incredible progress made in the support of legal services and improvements in the courts and the legal system resulting from the work of Commissions from here in Hawaii, to Washington State, to California, through Texas and all the way to New York and Massachusetts, with now more than 30 other stops along the way. Much of the success of the Commissions is the result of the ownership of the effort by Chief Justices, such as your Chief Justice Recktenwald, now a most well-respected national leader in the Access to Justice community and the significant involvement in the work of the Commissions by the judiciary in each of the states.

In my more than 40 years in legal services, we have moved from a heavily federally influenced system, if not federally dominated system from 1965 until 1980, to a more diversely-funded, heavily state based legal aid system from 1980 until the late 1990’s, in large part due to the funding and influence of IOLTA programs and new and increasing state funding and appropriations, to what is now an increasingly State Supreme Court and judiciary influenced system. This has served to insulate legal aid programs politically and frequently increase their resources, but this influence by the judiciary comes with some risks and concerns. In an article in the Management Information Exchange Journal, a national publication for legal services managers, Jim Bamberger, a former legal services attorney and program director and now the Director of the Washington State Office of Civil Legal Aid, a judicial branch agency, and, I believe, a prominent thinker in the field, stated that his work in the court system enhanced his understanding, I quote,

“...of the many tensions inherent in a branch of government that is focused primarily on maintaining a system for the public adjudication of disputes...rather than on the full spectrum of

justice needs experienced by low income and vulnerable people, especially those that do not present as matters attached to a judicial case....”

He said,

“I am reminded time and again that a judicial branch sponsored or managed legal aid movement is exposed to risk of ‘mission recalibration’ – that is, reorientation of civil legal aid efforts away from a client-centered, justice-oriented focus to one where the relevant outputs and outcomes are grounded in consideration of case processing timelines and court system efficiencies. The former approach drives decisions about case service priorities and resource allocation and when operating at its best, is informed by the full spectrum of client-specific justice outcomes. In contrast, the latter orientation leads to initiatives focused on processing more court cases and achieving efficiency through expanded access, triage and referral systems (e.g., legal aid hotlines), redirection of legal aid staff priorities to cases that present in court (e.g., dedicated family law and landlord tenant attorneys), creation of new types of limited practitioners in areas characterized by high numbers of self-represented litigants (e.g., Washington Limited Licensed Legal Technicians, New York State Courthouse Navigators) and expanded infrastructure focused on the needs of self-represented litigants (e.g, self help centers; simplified and automated court forms).

Housed in courthouses and filtered by the types of cases filed and presented before them, judges and other judicial branch leaders have a much more narrowly focused lens through which they see the access to justice world than do community based legal aid practitioners...”

To paraphrase Jim Baumberger, it is not always obvious that less than 20% of civil legal problems experienced by low-income people are presented before courts and the vast majority of civil legal problems experienced by low-income people are resolved outside of the formal adjudicatory system. The court’s perspective, appropriately, reflects what the judiciary sees each day. Legal aid programs see different things – from the denial of

Medicaid and Medicare, SNAP benefits, still Food Stamps to me, denials of TANF, Childcare Assistance, securing State IDs now required to receive virtually any state benefit, and challenging denials of Unemployment Compensation and the like – these issues almost never reach the court, neither do matters concerning housing conditions, in Colorado at least, and real estate issues, and issues of elder and consumer law, which, if handled well, will never reach the court.

In addition, legal aid programs frequently have the responsibility to challenge as well as support court initiatives, rules and procedures. These challenges can create tensions within the evolving access to justice community.

I do not mean this to be the least bit critical of the judiciary, but I am reminded of the young lawyer who was asked by a judge whether he was showing his contempt for the court. He replied “No, your honor, I am trying very hard to conceal my contempt for the court.” My comments, even to me, sound a touch harsh or even critical. They are not at all intended to be. It is simply to observe the different roles and perspectives. I believe only that the roles of the judiciary and that of good legal aid programs are different, both vitally important, but different.

In Colorado, as here in Hawaii, the Supreme Court and the judiciary have been leaders in improving the justice system for those in need. In Colorado, the Supreme Court has mandated the acceptance by local courts of state approved uniform forms essential to efforts to systematize materials for pro se litigants and the training of pro bono attorneys willing to help those in need. The Colorado Supreme Court has simplified many court proceedings. The Court has adopted rules to facilitate and support discrete task unbundled representation, and when the rules were not widely used, the Court revised them again, easing a lawyer’s withdraw after the limited service was provided, making withdrawal automatic, in the hope that more lawyers would start to provide limited scope service. The court approved revisions to Rule 6.1 specifying and encouraging pro bono representation and adopted a well-received Supreme Court recognition program for lawyers who meet the aspiration set out in the Rule and as a Comment to the Rule, the Court adopted a model law firm pro bono policy. The court adopted Rules to provide continuing legal education credit for attorneys doing or mentoring pro bono work, adopted Rules allowing retired, inactive or single client practitioners to more easily engage in pro bono representation of indigent clients through a formal pro bono program. The Court amended the Rules of Judicial Conduct to more clearly allow judges to encourage and facilitate pro bono representation and to allow judges to assist pro se litigants in navigating the rules of evidence and obtaining a just result and not have to tolerate in silence, the unrepresented litigant’s frustration with legal technicalities. We now have over 50 Self Represented Litigant Coordinators in Colorado and

a SRLC (Sherlocks) and Self Help Center in every State Courthouse. We are working with the Commission and local courts on a required advisement of rights in civil cases, similar to the advisement required in criminal cases. In landlord tenant and consumer cases, defendants would be, at least, shown a video, and advised of their basic rights and responsibilities, their right to file an answer, not just have a court clerk refuse to accept an answer until the defendant has met with the landlord or collection agency's attorney, that is now all too frequently the actual practice. The video would explain what a stipulation is, detail the timelines for the process and the like. Here in Hawaii, Cy Pres Rules were changed to mandate that a portion of remaining unclaimed funds go to access to justice efforts. Without judicial leadership, such efforts would not be possible. All of these are important and appreciated initiatives. Courts should, must, assume a leadership role on Access to Justice issues. The judiciary is absolutely essential to these efforts. It's just that more needs to be done to ensure justice, not just access to justice and efficiencies within the courts.

Let me interject that many of these initiatives were heavily criticized by members of the Bar, as anything new will be. Some believe that judicial leadership on equal justice issues conflicts with judicial neutrality, that judges should sit back and not advance any cause. As Laurence Tribe, the first Senior Counsel for Access to Justice at the US Department of Justice said in 2010 "...there is a basic and often ignored difference between neutrality and judicial inactivity, between judicial objectivity and judicial passivity." He shared that:

"Perhaps the greatest image we can conjure of a wise judge is that of Solomon. We all remember his creative, pre-DNA test, solution to the problem of adjudicating the contested issue of maternity between two women making competing parental claims to the same infant. The wise king's proposed solution, which he sprang on the women when he suggested splitting the baby in two while he watched the reactions of both claimants to motherhood, was the very essence of neutrality and objectivity,"

but, Tribe said,

"...it was hardly passive. It was as active as all-get-out. Solomon's wisdom sprang from making justice an active verb."

I encourage all of you, members of the Court, the judiciary, the Bar, the Law School and those of you who simply care about these issues, to be as active as all-get-out.

But I don't think that being active is enough. I encourage you, in your efforts to expand access to justice, to reflect on the difference between access to justice and justice itself.

I have been asked by last year's speaker, Jim Sandman, President of the Legal Services Corporation, my program's largest single funding source, isn't something better than nothing? And was emphatically told by him, as were all of you last year, that the perfect should not be the enemy of the good. Certainly, something is almost always better than nothing and we should not wait for the perfect to continue to improve the current state of affairs, but the good should not blind us to what is even better and that, while certainly we should obtain something for everyone, we should not settle for something when the objective is justice for all. I worry that as Gerry Singen, a longtime legal aid guru, has said, in 50 years we have moved from a War on Poverty to a campaign for less unfairness. It is a campaign worth waging, but falls short in our quest for equal justice.

We should not accept what, I fear, is increasingly two tiers of justice – one for those who can afford counsel and another for those who can't.

I will feel that things are more equal when we tell the CEO of a major corporation that you are pretty bright, you speak English well, so you should go to a website and it will walk you through how to fill out a form and respond to the other party's patent infringement or trademark claim. No. Only those without means are triaged and told that legal information and an interactive website is all that you will get. Some may make the choice that that is all that they need or want – just information. But while that is fine for those who chose it, we should not accept it for those who have no choice, when we make the choice for them.

Of course, 100% of those in need should get something, but the goal isn't something – the goal is justice – not just access to the courts – opening the door to the courthouse. As Chief Justice Lippman of New York said, there is no point in opening the door if you can't get justice once you are inside – the goal is not increasing judicial efficiency, it is ensuring the right response to someone's legal need, it is the pursuit of justice, not just access.

Technology is a helpful tool, but it is not the end, it is not justice. A computer can, if programmed well and used wisely, help move us in that direction, as it should, but that is all it can do.

We need to test, and then implement, new and broader strategies, beyond just additional resources for legal aid programs – as important as that is – we must help meet the full range of legal needs of low-income people and communities and that those needs, whether within or outside of the court system, should be considered and addressed.

But, I do not believe that the prophet Amos, whose words were later captured and used so eloquently by Martin Luther King, Jr., inspired us with the thought that if only we cared enough, if only we worked hard enough, if only we were creative enough, that someday websites and accurate and well-populated forms would flow down like a mighty stream. Our constitution does not begin with a preamble justifying our constitutional construct with in order to establish access to justice. It simply proclaims “to establish justice.” So, too, the Pledge of Allegiance does not end with liberty and access to justice for all, and our Supreme Court is not emblazoned with the words Equal Access to Justice Under Law. No, the guiding principle is not access but, as it always has been, and must continue to be, is justice. That must be our bedrock concern as well.

I do not believe that the governor of Colorado would have acknowledged that he had to act fairly and according to law if he felt those affected by his rationing of health care, would only have access to a self help center providing only legal information, were told to find forms on a State Supreme Court or legal services website, or would be provided with a courthouse kiosk or computer terminal. I believe that his concern was that an energetic, committed and knowledgeable legal aid lawyer might be available to those aggrieved by the policy and would bring legal action ensuring that no one, not even the Chief Executive Officer of the State, is above the law.

A Greek philosopher, when asked when justice would come to Athens, stated that justice would only come when those who are not injured are as indignant as those who are. I believe that I am in the company of the indignant and that Hawaii will be well served by your thoughtful concern and indignation.

J. Paul Getty, a wealthy industrialist and oil baron, when asked his secret of success, stated “Rise early. Work hard. Strike oil.” I certainly struck oil when, in my first year of law school, I met Bob LeClair, and all of you struck oil when he committed his professional life to the State of Hawaii and the underserved here. He has spent his life toiling to increase access to justice by training and expanding the use of paralegals and, more recently, as a most well-respected leader in the national IOLTA community. No one is better, nor could anyone serve you with greater ability, commitment or generosity of spirit than does Bob. So, too, I struck oil when I met Victor Geminiani in the late 1970s, and you struck oil when he came to the Islands from Northern California, and more recently, returned here from

Southern California. No one brings greater energy, passion or vision to his work and to the cause than does Victor. I have learned much from him and respect him immensely. More recently, I struck oil when I met, and have had the opportunity to work with, my friend and colleague, Nelani Fujimori Kaina. While I have not known her as long, I have come to respect her greatly, as well, and I know you struck oil when she decided to commit her professional life to the Legal Aid Society of Hawaii. We have all been fortunate to strike oil in so many ways.

An African proverb frequently used by the staff of the Bill and Melinda Gates Foundation is something like “if you want to go fast, go alone. If you want to go far, go together.” I encourage you who are a large portion of the cadre of those in Hawaii who value justice, to use today to create new ideas and new ways together to help bridge the justice gap.

I have come a long way to be of little help, but, unfortunately, I don't have easy answers to share. I don't even have hard ones, but I do know that we can spend the day together working to find them and I look forward to doing that with all of you. An old saying reminds us that the best time to plant a tree is 30 years ago. The second best time is now. The time for all of us is now.

Thank you. Mahalo.