

BRIDGING THE CIVIL JUSTICE GAP IN ARKANSAS

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I. CURRENT CHALLENGES FACING ARKANSAS LEGAL AID PROVIDERS

A. High Poverty, High Demand

There are currently 556,346 Arkansans who qualify for legal aid, meaning over half a million Arkansans have income levels that are within 125% of the federal poverty level.⁴ A single person would have to earn less than \$13,538 to qualify; a family of four would have to earn less than \$27,563.⁵ Families who qualify for legal aid often do not have the resources to meet even the most basic needs (safe and habitable housing, adequate food, access to medical and dental care, etc.). Paying *any* amount for legal representation is simply not possible. Those whose resources are just above these eligibility criteria often cannot afford attorneys either, yet they are wholly without any safety net. Often, they end up representing themselves, leading to bad case outcomes and frustrating inefficiencies for already overburdened courts.

In 2010, Arkansas's two legal aid providers received over 30,000 requests for legal assistance from Arkansans with legal problems.⁶ Every year nearly half of these requests are turned away because our two legal aid programs do not have enough attorney staff or pro bono volunteers to take their cases.⁷

1. Executive Director, Center for Arkansas Legal Services.

2. Executive Director, Arkansas Access to Justice Commission, Arkansas Access to Justice Foundation, and Arkansas IOLTA Foundation.

3. Chair, Arkansas Access to Justice Commission; Retired Associate Justice, Arkansas Supreme Court.

4. This number was calculated by cross referencing census information from the year 2000 with household income information, then applying it to the 125% threshold to determine how many Arkansans fell within that income range. See *Why it Matters in Arkansas*, ARKANSAS ACCESS TO JUSTICE COMMISSION, <http://www.equaljusticewatch.org/why-arkansas-demographics.html> (last visited March 29, 2011), for a list of statistics by county. See also *American Fact Finder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited March 29, 2011).

5. *Financial Eligibility Guidelines*, ARKANSAS LEGAL SERVICES PARTNERSHIP, <http://www.arlegalservices.org/Guidelines> (last visited March 29, 2011).

6. See ARKANSAS LEGAL SERVICES, ANNUAL REPORTS 2005–2010, *available at* <http://www.arlegalservices.org/about>.

7. *See id.*

Over 9000 of the cases that come in each year involve family law issues.⁸ This is followed in succession by consumer law, health and housing law, juvenile law, and benefits law.⁹ Many of these cases include very basic legal needs such as child custody, divorce in instances of domestic abuse, guardianship, bankruptcy, access to safe housing, and access to food or health care. In other words, these are *not* cases that are expected to generate fee awards.

B. Limited Attorney Resources

Arkansas is home to two LSC-funded legal aid programs—the Center for Arkansas Legal Services (CALs) and Legal Aid of Arkansas (LAA).¹⁰ Together, these programs have approximately forty-five attorneys on staff with fourteen offices statewide. According to the Legal Services Corporation (LSC), the *minimum* level of legal access should be one attorney for every 5000 low-income Arkansans;¹¹ the current level of access is one attorney for every 12,250 low-income Arkansans. In comparison, there is one licensed attorney for every 400 Arkansans. In 2009, 800 private attorneys statewide handled pro bono cases for legal aid.¹² There are approximately 8700 licensed attorneys in Arkansas.¹³

C. Lack of Predictable Sources of Funding

Despite increases in LSC funding implemented for 2010 and additional increases proposed by President Obama for fiscal year 2012, Congress has passed a 3.8% funding cut for fiscal year 2011, which will be concentrated in the remaining months of the fiscal year.¹⁴ Funding for legal aid from the Arkansas IOLTA Foundation, which in years past has been as high as \$750,000, has been \$0 for the last two years after several years of steady decline. Private fundraising efforts, which have primarily been focused

8. *See id.*

9. *See id.*

10. *See About Us*, ARKANSAS LEGAL SERVICES PARTNERSHIP, <http://www.arlegal-services.org/about> (last visited March 29, 2011).

11. *See* Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* 1, n.1 (June 2007), <http://www.lsc.gov/justicegap.pdf>.

12. *See* ARKANSAS LEGAL SERVICES, ANNUAL REPORT 2009, *available at* <http://www.arlegalservices.org/about>.

13. E-mail from Denise Parks, Office Manager, Clerk of the Courts, (Jan. 27, 2011, 01:56 CST) (on file with author).

14. Legal Services Corporation, *Fiscal Year 2011 Bill Would Cut Legal Aid by \$15.8 Million* (April 12, 2011), http://www.lsc.gov/press/pressrelease_detail_2011_T274_R12.php.

among members of the local bar, have historically comprised only 4 to 5% of total funding for legal aid.¹⁵

D. Other Challenges to Closing the Justice Gap

Seventy-five percent of the Arkansas legal aid budget depends on LSC federal funding. Due to decades of limited funding, salaries for legal aid attorneys are perpetually lower than salaries for their counterparts in government or private practice. With the high student debt of graduating law students, it is hard to attract and retain staff attorneys in legal aid offices. Additionally, the caseloads are high and the legal aid attorneys are spread too thin over large geographic areas, especially in rural areas.

Arkansas's civil legal aid providers must prioritize clients with the most critical legal needs. Case acceptance becomes an emergency room triage of legal problems, which creates access to justice gaps for many people. The justice gap is widened further because there are many hard-to-reach populations: the homeless, institutionalized seniors and the disabled, persons with language barriers, and those in rural areas who lack transportation. Additionally, there are restrictions on LSC funding, which prohibits representation for many types of legal problems and for groups of clients.

Recruiting and retaining pro bono attorneys takes continual efforts by legal aid staff. There is the difficulty of matching clients with volunteers and specialized areas of practice, especially in the rural counties of the state. Less than 20% of the practicing attorneys in Arkansas participate in organized pro bono programs.

II. THE ETHICAL DUTY OF ARKANSAS ATTORNEYS TO PROVIDE PRO BONO SERVICES

When a law school graduate recites the oath to become an Arkansas-licensed attorney, he or she makes the following vow: "I will not reject, from any consideration personal to myself, the cause of the impoverished, the defenseless, or the oppressed." In addition, he or she promises to uphold the Model Rules of Professional Conduct and other standards of ethics proclaimed by the courts of Arkansas. Those standards include Rule of Professional Conduct 6.1, which states that all attorneys should aspire to provide at least fifty hours of pro bono legal services each year.¹⁶ The rule, based on

15. See ARKANSAS LEGAL SERVICES, ANNUAL REPORTS, *supra* note 6.

16. ARK. R. PROF'L CONDUCT 6.1.

the American Bar Association's corresponding model rule, recognizes the tremendous need for legal services among persons of limited means.¹⁷

In light of the great need, attorneys are urged to render the substantial majority of their pro bono service "without fee or expectation of fee."¹⁸ According to the rule's comments, services are *not* considered pro bono if an anticipated fee is uncollected.¹⁹ However, the award of statutory attorneys' fees in a case originally accepted as a pro bono matter would not disqualify such services from being considered pro bono.²⁰

Services should, by and large, be rendered to "persons of limited means" and to "charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means."²¹ In other words, attorneys should provide a substantial majority of their pro bono legal services to individuals whose income qualifies them for services from a legal aid provider or whose income slightly exceeds legal aid eligibility requirements, *or* to organizations that provide for the needs of these individuals.²² Representation of persons of limited means is not restricted to representation in the traditional sense—pro bono services under this section may include other types of advocacy, including legislative lobbying and administrative rulemaking, as well as "free training or mentoring for those who represent persons of limited means."²³

The reach of Arkansas's pro bono rule extends beyond just activities that are strictly designed to address the needs of persons of limited means. For example, an attorney may provide legal services for a substantially reduced fee, or may represent organizations from the social service, medical research, cultural, and religious sectors.²⁴ In addition, attorneys may fulfill their pro bono duty by participating in activities that improve the law, legal system, or legal profession, such as serving on a committee of the Arkansas Bar Association, serving on a state supreme court committee, volunteering for Law Day activities, or lobbying to improve the law or legal system.²⁵

Rule 6.1 and the accompanying comments reflect both the breadth and the flexibility of the attorney's responsibility to provide pro bono services. The fifty-hour aspirational goal is not one that must be met every single year

17. D'lorah Hughes, *Ethics and the Arkansas Pro Bono Lawyer*, THE ARKANSAS LAW., Winter 2011, at 4; *see also* ARK. R. PROF'L CONDUCT 6.1 cmt. 2.

18. ARK. R. PROF'L CONDUCT 6.1(a).

19. ARK. R. PROF'L CONDUCT 6.1 cmt. 4.

20. *Id.*

21. ARK. R. PROF'L CONDUCT 6.1(a).

22. ARK. R. PROF'L CONDUCT 6.1 cmt. 3.

23. ARK. R. PROF'L CONDUCT 6.1 cmt. 2.

24. ARK. R. PROF'L CONDUCT 6.1 cmt. 6.

25. ARK. R. PROF'L CONDUCT 6.1 cmt. 8.

of an attorney's practice, as long as the average over the course of the attorney's career amounts to fifty hours annually.²⁶ Perhaps most importantly, the rule provides no exceptions to this ethical responsibility: judges, law professors, government sector attorneys, and even legal aid attorneys are expected to satisfy their ethical duty under this rule. Where constitutional, statutory, or regulatory restrictions may prohibit or impede certain classes of attorneys from performing some of the pro bono services outlined in this rule, the fact is that Rule 6.1 does offer a variety of ways to satisfy this ethical duty outside of the traditional attorney-client relationship.²⁷

With over 8000 Arkansas-licensed attorneys who are ethically obligated to help meet the needs of over half a million low-income Arkansans, the bench and bar of this state *should* be doing its part to close the justice gap in our state.

III. THE ACCESS TO JUSTICE COMMISSION MODEL FOR ADDRESSING CIVIL LEGAL NEEDS OF LOW-INCOME ARKANSANS

There are currently twenty-three access to justice commissions in the United States, including Arkansas. Nearly twenty other states have coalitions, bar-based committees, court committees, or other entities that have undertaken access-to-justice issues as a primary charge.²⁸ State access to justice commissions have led largely successful efforts in these states to increase resources available to meet the tremendous need for civil legal assistance through broad-based partnerships among the bench, bar, government, and legal services providers.²⁹ These commissions have also acted as catalysts for policy-oriented changes that have served to reduce barriers for low-income citizens in need of civil legal services and helped increase pro bono participation by private attorneys.

Arkansas is no exception. In August of 2003, the Arkansas Bar Association petitioned the Arkansas Supreme Court to create a statewide access to justice commission, the purpose of which was to coordinate efforts to improve access to the civil justice system for low-income Arkansans who cannot afford attorneys to represent them in civil matters.³⁰ The Arkansas Supreme Court adopted the proposal and established the Arkansas Access to

26. ARK. R. PROF'L CONDUCT 6.1 cmt. 1.

27. ARK. R. PROF'L CONDUCT 6.1 cmt. 5.

28. *Resource Center for Access to Justice Initiatives*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html (last visited March 29, 2011).

29. Meredith McBurney, *ATJ Commissions and Resource Development* (Spring 2008), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atj_resourcecenter/downloads/resource_development_mie_2008.authcheckdam.pdf.

30. *See In re Access to Justice Comm'n & Bar of Ark. Lic. Fees*, 2009 Ark. 183, at 1.

Justice Commission on December 18, 2003.³¹ The Commission is comprised of members representing a spectrum of stakeholders, including representatives from the Arkansas Bar Association, the business community, nonprofit sector, both Arkansas law schools, both legal aid providers, state legislators, and judges from district, circuit, and appellate courts. The Commission's work is accomplished through five active subcommittees: Resource Development, Pro Bono, Court Assistance, Education, and Legislative.

Since its establishment, the Arkansas Access to Justice Commission has seen significant success on a number of funding and policy initiatives, including the completion of two circuit judge surveys in 2005 and 2008 that have resulted in the development of widely-used free online legal resources;³² two successful legislative efforts in 2005 and 2009 to secure state legislative funding for legal aid in the form of filing fee increases; regional town hall meetings in 2006 that were hosted by each of the state's four federal congressmen, followed by favorable votes from all delegates on LSC funding measures; the production of a 2006 DVD that was used to highlight specific cases where legal services have positively impacted the lives of Arkansans; the 2009 formation of a private nonprofit foundation, the Arkansas Access to Justice Foundation, to spearhead statewide fundraising efforts for access to justice; and the hosting of a 2009 statewide conference designed to increase awareness among members of the bench and bar about the need for civil legal aid.

In 2010, the Commission's newly-formed sister nonprofit foundation concluded its first annual fundraising campaign, bringing in a total of \$129,353.28. The campaign was completed in conjunction with CALS and LAA, each of which raised \$173,405 and \$69,527.18, respectively, for an overall campaign total of \$372,285.46. This amount exceeded the Foundation's goal of \$350,000 and succeeded in reaching beyond the bench and bar to include corporate donors.³³ This campaign—a first for the Foundation—was actually the second ever statewide campaign. In 2009, a statewide effort led by the Commission—prior to the Foundation's formation—raised just over \$306,000 for legal aid in Arkansas.

In addition to these past accomplishments, the Commission and its sister Foundation currently have a number of additional initiatives that are currently underway or were recently completed. The Commission's Court As-

31. *See In re Ark. Bar Ass'n Petition for Creation of Ark. Access to Justice Comm'n*, 355 Ark. App'x 709, 178 S.W.3d 457 (2003).

32. *See* ARKANSAS LEGAL SERVICES PARTNERSHIP, www.arlegalservices.org. In 2010, this website received over 1 million page views with 9670 automated interviews completed and packets generated.

33. The 2010 campaign total included a \$75,000 gift from Walmart, Inc.'s legal department, as well as a \$45,000 grant from the Walmart Foundation to LAA for the continuation of a medical-legal partnership formed in 2010.

sistance Committee, which works in significant part through the Arkansas Legal Services Partnership (ALSP),³⁴ is engaged in several collaborative efforts among both in-state stakeholders and out-of-state groups. The projects include the development of www.StatesideLegal.org, a website designed to provide legal resources and information to members of the military and their families; an automated petition for order of protection for domestic violence victims; and an automated petition for guardianship of a minor; the development of www.ShareLaw.org, an LSC grant-funded nationwide website where content providers can find and share legal aid resources with participating legal aid programs; and ongoing maintenance and expansion of twelve other automated resources, including a pro se divorce packet.

The Education Committee is planning a conference in conjunction with the Clinton School of Public Service and the William H. Bowen School of Law that will convene representatives from direct service providers who work with low-income Arkansans, policymaking and advocacy organizations, the business community, the legal community, the nonprofit community, and federal and state lawmakers to discuss ways to increase access to civil legal justice for low-income Arkansans. The Committee is also organizing presentations to local bar associations and other attorney organizations, including law firms.

The Resource Development Committee is coordinating efforts to increase and diversify current sources of funding for legal aid and access-to-justice initiatives by coordinating private bar and corporate fundraising efforts, legislative funding initiatives, and grant requests.

The Commission's Legislative Committee succeeded in securing an amendment to Arkansas Code Annotated section 16-22-310 to make clear that certain nonprofit corporations, such as CALS and LAA, may lawfully represent individual clients through their attorneys. Senate Bill 300, which drew support from the Arkansas Bar Association, was introduced on February 14, 2011 and was signed into law on March 31, 2011.³⁵ In addition, the Legislative Committee oversees efforts to coordinate contacts with federal congressional delegates on matters involving funding for legal aid, including the cuts to the LSC fiscal year 2011 budget.

In 2010, the Pro Bono Committee drafted proposed amendments to Rules 5.5 and 6.1 of the Arkansas Rules of Professional Conduct to allow attorneys licensed out of state to provide pro bono services in Arkansas under the sponsorship of a legal aid organization. These amendments, along with a draft petition, were presented to the Arkansas Bar Association Board

34. ALSP is a statewide partnership of the state's two legal aid organizations that provides leadership, coordination and logistical support for both programs.

35. Act of Mar. 31, 2011, No. 858, 2011 Ark Acts 858.

of Governors in December, as well as the House of Delegates in January, and unanimously approved. The petition was filed with the Arkansas Supreme Court on February 25, 2011, and was granted by per curiam order on March 31, 2011.³⁶

The successes of the Arkansas Access to Justice Commission and Arkansas Access to Justice Foundation represent important strides but remain largely overshadowed by the continuing and significant unmet need for civil legal help among low-income Arkansans. Studies like those announced by the World Justice Project's Rule of Law Index—which ranks the United States below some third-world countries in the level of access to the civil justice system it affords low-income citizens³⁷—serve as a stark reminder of the long way we have to go to ensure that *all* Arkansans have equal access to the civil justice system.

36. *See In re Petition Filed by Arkansas Access to Justice Comm'n*, 2011 Ark. 139. In granting the petition, the court implemented the requested change by amending Administrative Order No. 15, rather than amending Rules 5.5 and 6.1. *See id.*

37. WORLD JUSTICE PROJECT, *Rule of Law Index 2010*, available at www.worldjusticeproject.org.