

**Access to Justice Task Force Report
As Adopted at 11/7/11 Task Force Meeting**

INTRODUCTION AND BACKGROUND INFORMATION

The civil legal system is among our society's great accomplishments. The court system provides a mechanism for the non-violent resolution of disputes ranging from neighborhood quarrels to constitutional controversies affecting the highest levels of government. Differences that might once have been settled with a duel, a revolution, or a war are instead resolved by a neutral third party based on evidence and on statutes and rules that apply equally to all parties coming before the court.

Lawyers play a key role in maintaining access to this system, using their education, skills, and experience to present the positions of their clients for resolution. Because of the importance of lawyers' expertise in the competent representation of clients, lawyers are the only individuals permitted to take this role in leading litigants through the justice system. Some parties cannot access the courts without a lawyer; even those parties that can choose to represent themselves find themselves at substantial disadvantage in navigating a complex procedural system without expert advice, particularly when facing an opposing party that does have a lawyer's assistance.

When admitted to practice in Arizona, lawyers attest to and adopt a creed of professionalism that requires their "devotion to the public good." Nowhere is this obligation to the public good higher than in the area of access to justice. As a defining institution in civil society, the civil justice system must be open and accessible to all members of society, not just lawyers; exclusion of any class or group of citizens risks irreparable damage to our commitment to a society committed to the rule of law.

Recognizing the Bar's unique obligation to improve access to justice, particularly in our current economic circumstances, the Board of Governors of the State Bar of Arizona formed an Access to Justice Task Force and charged it with developing specific proposals to increase access to civil justice for Arizona's indigent and working poor. The Task Force was specifically directed to examine proposals for adoption by the Bar, as well as proposals that would require partnership with the legislative, executive, or judicial branches. In addition, the Task Force was charged with determining how the \$400,000 initially allocated by the Board of Governors for increased access to justice should be distributed for maximum effect.

The Task Force, comprised of lawyers and judges from around the state and from all practice settings, met in the fall of 2011 and adopted the recommendations set forth in this report.¹

Many Arizonans Lack Equal Access to the Civil Justice System

As of 2009, 16.5% of Arizona's population – over 860,000 residents – lived at or below the federal poverty guideline.² A 2007 study by the Arizona Foundation for Legal Services and Education found that approximately 32% of the population living in poverty had a crisis issue within the prior

¹ A list of the Task Force members and the mission statement of the Task Force are attached as Appendix A.

² <http://quickfacts.census.gov/qfd/states/04000.html> .

12 months with which an attorney's help was needed.³ Combined, these statistics suggest that the poorest Arizona residents alone had 276,000 matters needing an attorney's assistance. Given that the federal poverty guideline ranges from \$10,830 in annual income for an individual to only \$37,010 for a family of eight, the number of Arizonans with legal needs who currently cannot afford to hire a private attorney is likely substantially larger. Individuals outside the metropolitan areas of Tucson and Phoenix are also comparatively disadvantaged and underserved, with substantially fewer civil attorneys located in those areas to serve their 1.4 million residents. Varying Tribal Court systems and native languages pose additional access to justice challenges for individuals with disputes arising in Tribal jurisdictions.

Arizona has undertaken many initiatives to increase access to justice for vulnerable populations. These initiatives, described in more detail in Appendix B, include the efforts of the three Legal Services Corporation-funded legal aid agencies (Community Legal Services, DNA-People's Legal Services, and Southern Arizona Legal Aid), a variety of *pro bono* and law school clinical programs, and self-help resources that have been nationally recognized for their innovation and quality of service.

However, despite these efforts, the need for assistance accessing the civil justice system remains unmet for hundreds of thousands of Arizonans every year. Arizona has a large population of residents in or near poverty and a relatively small number of attorneys who practice in the areas of civil law in which individuals and families have the greatest needs. The shortage of available lawyers is also worse in rural counties as compared to urban counties. Legal aid agencies serve as many clients as they can, but funding from the Legal Services Corporation has been reduced by more than \$800,000 in the past two years alone, and the LSC-funded agencies have not yet received adjustments to their funding to reflect the population growth documented in the 2010 census. As a result, LSC-funded agencies must either turn away or offer only reduced services to more than half of the calls for assistance they receive. The lack of equal access to justice for these Arizonans has reached a breaking point, and Arizona is facing a crisis in access to justice.

TASK FORCE RECOMMENDATIONS

Members of the State Bar Should Provide Pro Bono Services

The State Bar's thousands of admitted lawyers are in an ideal position to provide immediate help to meet the need that cannot be covered by the legal aid agencies. Arizona currently encourages all attorneys to complete 50 hours per year of *pro bono* service, but only about 30% of attorneys report that they have done so, and those attorneys spend many of their *pro bono* hours on educational, charitable, and volunteer work other than providing direct services to individual at-risk clients who are unable to afford private attorneys. Lawyers' ability to earn a living in their profession is based in substantial part on the value that the justice system gives to their specialized knowledge and their special privilege to represent clients in that system. If certain individuals are systematically denied access to the justice system, the very legitimacy of the system from which lawyers' professional standing derives is jeopardized.

³ ARIZONA FOUNDATION FOR LEGAL SERVICES & EDUCATION, VOICING A NEED FOR JUSTICE: SURVEY RESULTS ON LEGAL AID ACCESS IN ARIZONA (2007), attached as Appendix C.

The Task Force recommends that the State Bar take the following actions to increase the amount of *pro bono* support provided by Arizona lawyers to increase access to the civil justice system for indigent and working poor Arizonans:

1. *Petition to Revise ER 6.1 and Rule 41, Rules of the Supreme Court to Make Pro Bono Service Mandatory.* The current rules exhort, but do not require, Arizona lawyers to provide 50 hours per year of *pro bono* service. Less than half of Arizona lawyers report providing *any* *pro bono* service. Given the crisis in access to justice in Arizona, exacerbated by the current economy, the time has come to mandate that lawyers affirmatively participate in offering meaningful access to the justice system from which they benefit. To accomplish this change, ER 6.1 of the Rules of Professional Conduct should be amended to remove the word “voluntary,” and Rule 41 of the Rules of the Supreme Court should be amended to add a new subsection (i) stating that active members of the bar have a duty “to render public interest legal service or contribute to organizations that provide legal services to the poor or persons of limited means.” In order to enforce this requirement, lawyers must also be required to report on their annual *pro bono* activities as they do on their continuing legal education.

Recognizing that some lawyers, in some years, may be unable to meet the minimum 50 hour requirement, the revised rule should provide for an option to fulfill the *pro bono* obligation in whole or in part by making a monetary contribution to an organization that provides legal services to the poor. The monetary contribution amount should be set at a level that both provides a meaningful incentive and generates funds that substitute for the service that would otherwise be rendered. Implementation of this requirement should permit partial payments, should take into consideration the years of practice and practice setting of the lawyer, and should make some provision for application of the requirement to lawyers whose paid employment is in public service.⁴

The Task Force does not recommend narrowing the current definition of *pro bono* services, but does recommend that the Bar encourage members to fulfill the 50-hour *pro bono* requirement by providing free or reduced fee legal services to individuals who cannot otherwise afford a lawyer. The Task Force also recommends that the Bar implement reporting requirements that will permit it to monitor compliance with the revised rule and determine the quantity and nature of *pro bono* work being performed by its members.

2. *Petition to Revise Rules 32(c)(5), 38(e), and 38(i), Rules of the Supreme Court to Permit Lawyers Licensed in Other States, Retired Lawyers, and In-House Counsel to Volunteer Pro Bono Legal Services with Approved Legal Services Organizations.* Current rules do not permit lawyers licensed in other states, retired lawyers, and in-house counsel not admitted in Arizona to provide *pro bono* service. Opening up the option of *pro bono* service to these lawyers would increase the number of lawyers available to serve the population in need; requiring them to provide *pro bono* services through an approved legal services organization will provide them with the necessary resources, supervision, and insurance coverage. Proposed language for the rule changes is attached as Appendix D.

⁴ For discussion purposes, the Task Force suggests a baseline of \$1000, which represents \$20 per hour of services.

3. *Develop and Promulgate a Model Public Agency Pro Bono Policy.* *Pro bono* service poses particular challenges for lawyers employed by the government due to statutory restrictions, job requirements, and perceived conflicts with their public employers. Some agencies in Arizona have developed *pro bono* policies to assist government lawyers in identifying and pursuing appropriate opportunities for *pro bono* service. The State Bar, working with the appropriate Sections and Committees, should develop a “model policy” for public agencies and should actively encourage the Supreme Court and public agencies to adopt the policy. Attached as Appendix E is the City of Tucson’s policy, provided as an example of topics that a model policy might cover.
4. *Petition to Revise Ethical and Procedural Rules to Facilitate Limited Scope Representation.* Access to justice for those of limited means would be increased if it was permissible for a lawyer to provide services short of a full representation, such as writing some documents to be filed by an otherwise self-represented litigant or performing certain discrete, agreed-upon tasks. Permitting limited scope *pro bono* representation would also provide additional opportunities for *pro bono* service and encourage such service by lawyers unable to commit to handling an entire case.

Revisions to the ethical rules would encourage and facilitate these types of limited scope representations, which are already permitted by family court rules. Revision of Rule 11 of the Arizona Rules of Civil Procedure might also be appropriate. Attached as Appendix F is a more detailed discussion of the recommended rule changes.

5. *Work with the Superior Courts to Establish a System for Appointment of Counsel in Civil Cases.* For the last four years, the U.S. District Court for the District of Arizona has implemented a pilot program where judges can identify cases of certain types and refer pro per litigants to volunteer *pro bono* coordinators who draw from a list of attorney volunteers willing to accept civil *pro bono* referrals. The U.S. Court of Appeals for the Ninth Circuit has a similar program in which the requests for *pro bono* counsel originate from the litigants rather than the Court. The Arizona Court of Appeals, Division One, has developed a similar pilot program working in partnership with the Volunteer Lawyers Program and the Modest Means Project.

The State Bar should work with the Arizona Superior Courts, the Arizona Supreme Court, and the Administrative Office of the Courts to establish a program for appointment of *pro bono* counsel in appropriate Superior Court cases identified by the judges and should support the existing District of Arizona and appellate court programs. The Task Force also recognizes the importance of the courts’ leadership role in this area and encourages the courts to continue and expand their support and encouragement of *pro bono* service, support for self-represented litigants, and other initiatives that increase access to justice.

6. *Continue to Support the Arizona Foundation for Legal Services and Education in Its Coordinating Role.* The Foundation currently serves a coordinating role between legal services providers, pro bono programs, and supporting firms, agencies, and volunteer lawyers. Because of its federal and state compliance responsibilities and its institutional knowledge of the providers, programs, related agencies, and volunteers, the Foundation is uniquely positioned to provide this assistance. The State Bar should continue to actively support the Foundation in this role and to direct requests for coordination to the Foundation.

The State Bar and Its Members Should Provide Direct Financial Support for Legal Services to the Indigent and Working Poor

While *pro bono* services are essential to addressing the current access to justice crisis, such volunteer services alone cannot meet all of the critical need for indigent legal services in Arizona. As discussed above, hundreds of thousands of Arizonans living in poverty are in desperate need of civil legal services every year. Based on the 2007 estimates, every active Arizona attorney would have to handle at least 19 *pro bono* cases each year to meet the legal needs of the poorest population in the state. Donation of *pro bono* services alone will not be able to handle all of these cases, and infusion of significant monetary support for our existing legal services programs is also necessary.

1. *The State Bar Should Distribute the \$400,000 It Has Set Aside for Increasing Access to Justice to the LSC-Funded Legal Aid Agencies for Programs to Build Infrastructure and Leverage Other Forms of Support.* When the Board of Governors set aside \$400,000 to increase access to justice, it provided that distribution of the funds would be determined by this Task Force. The Task Force therefore evaluated various proposals for use of the money to both maximize its effect and use it to meet the greatest needs.

The Task Force concluded that, given the immediate crisis in legal services funding resulting from funding cuts, population expansion, and economic decline, the best use of the money set aside by the State Bar would be to direct that money primarily to the legal aid agencies. However, the Task Force does not recommend that the money be used to develop programs that will not be sustainable once the State Bar funds are expended. Instead, the funds will be disbursed for programs that build infrastructure, increase efficiency, and leverage other available resources including volunteer assistance and matching funds.

The Task Force recommends the following distribution of funds:

\$10,000	To be expended by the State Bar to investigate means of improving the effectiveness of the voluntary check-off program and other means of increasing voluntary support for legal aid agencies.
\$15,000	To be set aside to fund a future proposal, to be submitted directly to the Board of Governors, to create a central, statewide intake system for civil legal aid services.
\$50,000	To be used to translate existing websites and self-service center materials into Spanish and Navajo. (Described in further detail in Appendix G.)
\$325,000	To be divided proportionately among the three LSC-funded legal aid agencies to support infrastructure and efficiency improvements and to support existing programs that also draw on volunteer support and/or matching funds from other agencies. (Described in further detail in Appendix G.)

The Arizona Foundation for Legal Services and Education, which has an established granting process, has agreed to administer the disbursement of funds and perform recording and monitoring costs without any charge against the funds to be distributed.

2. *Provide Ongoing Financial Support for Legal Aid Programs and for the Foundation.* In addition to distributing the \$400,000 allocated for access to justice as described above, the Task Force recommends that the State Bar continue to provide direct financial support for legal services programs and for the Foundation. Such support includes the existing and longstanding contribution of 1% of all dues revenue to the Foundation, which contribution is used to fund access to justice programs such as volunteer lawyers programs, hotline, and coordination among legal services providers. It also includes the set-aside of 15% of *pro hac vice* fees to the Foundation, which since 2009, per court rule, has been distributed in its entirety by the Foundation to approved legal services organizations. During the 2010 year, the Bar provided to the Foundation approximately \$78,000 through the 1% contribution and an additional \$59,516 in *pro hac vice* fees. To the extent that the Bar identifies additional funds in the future that can be used to support access to justice, it should give those funds to the Foundation or to appropriate legal aid agencies. Particularly, the Task Force encourages the Board of Governors to consider increasing the set-aside of *pro hac vice* fees from 15% to as much as 50% and to raise with the Arizona Supreme Court the possibility of setting aside some portion of bar admission fees to fund legal aid agencies.
3. *Promote Participation in the Dues Checkoff Program.* The State Bar should actively promote increased participation by lawyers in the voluntary dues checkoff program under which lawyers may contribute directly to legal services agencies. As described above, the Task Force recommends that the Bar expend up to \$10,000 investigating possible ways to redesign the checkoff program to increase participation, as well as other avenues of encouraging donations to legal services programs, with a goal of implementing any changes during the 2013 membership renewal process. In the interim, the Task Force further recommends that the Bar distribute literature in print or electronic form, as well as through the *Arizona Attorney*, encouraging lawyers to participate in the dues checkoff program in connection with their 2012 membership renewal.

The State Bar Should Lead Efforts to Increase Financial Support for Legal Services from Other Sources

In addition to providing its own direct financial support, the State Bar should take the lead in working with the legislative, executive, and judicial branches and with other agencies to identify and develop additional sources of funding for legal services agencies.

1. *The State Bar Should Support Efforts to Develop Loan Repayment Assistance Programs for Lawyers Engaged in Public Service.* With recent increases in law school tuition and attendance costs locally and around the country, law school graduates are carrying increasing amounts of student loan debt, which may be incompatible with the salaries paid by public service agencies. The Foundation and Arizona's three law schools have in place and/or are currently developing a loan repayment assistance program to assist recent law school graduates in repaying their loans while working for a qualifying public service entity, described in more detail in Appendix H. The Bar should support this and other efforts to provide loan repayment assistance for public service lawyers.

2. *The State Bar Should Continue Its Efforts to Increase Filing Fees to Support Legal Services Agencies.* The State Bar has undertaken legislative initiatives to increase Superior Court filing fees in the past, and should continue to do so in the future as appropriate, with revenue from the increased fees directed to legal services agencies that increase access to justice. In addition, the State Bar should work with County Boards of Supervisors to increase the special County assessments on civil Justice Court case initiation fees to benefit legal services for the indigent. As described in more detail in Appendix I, a \$5.00 increase in these case initiation fees would generate approximately \$1 million per year in funding to increase access to justice for our most vulnerable population.
3. *The State Bar Should Encourage the Use of Cy Pres Awards to Distribute Class Action Residuals to Access to Justice Initiatives.* As described in Appendix B, *cy pres* awards have been used in other states to generate significant funding for legal services programs. The State Bar should, through its own efforts and in cooperation with the judicial branch, encourage the use of *cy pres* awards to distribute otherwise unclaimed class action funds to increase access to justice. More detailed information appears in Appendix J.
4. *The State Bar Should Encourage Use of the Working Poor Tax Credit to Provide Funding to Legal Services Agencies.* Arizona's Working Poor Tax Credit program permits most taxpayers to donate up to \$200 per year to an approved non-profit entity that serves the indigent and working poor and to receive a commensurate credit toward state income taxes. A.R.S. § 43-1088. This tax credit functions similarly to the school tax credits; taxpayers can receive credit for both types of donations on the same return. Community Legal Services and Southern Arizona Legal Aid are both approved entities; the Morris Institute for Justice has an application in process. The Board of Governors should promote the use of the working poor tax credit among its members and urge Arizona attorneys to direct their working poor tax credit donations to legal services organizations.