Adapting Without Accepting: The Need for a Long-Term Strategy for "Full Service" Representation of the Poor

Gordon Bonnyman†

A central challenge facing the Equal Justice community is to adapt to the changes of the past two years without becoming reconciled to those changes or the ideological agenda that produced them. To do so, we must restore our institutional capacity to afford poor clients a full spectrum of unrestricted legislative, administrative, and judicial advocacy. That requires the development of a shadow network of organizations that would complement the ongoing work of the Legal Services Corporation (LSC) grantees, by providing services that those grantees can no longer offer their clients. This is a challenge that calls upon our shared vision of a just society. And it is also a challenge that forces us to grapple with the less edifying but inexorable demands of money and funding.

I. CURRENT CIRCUMSTANCES, FUTURE PROSPECTS

Our task has to begin with an unhappy assessment of the damage we have already sustained: although Congress has not succeeded in killing legal services, it has managed to seriously wound the program. The cuts in funding and the imposition of advocacy restrictions are serious setbacks of which everyone is painfully aware. While we inventory the damage, I would add another loss that is of no less importance, even though it is less tangible. We have experienced some loss of our very sense of community, of participation in a national network of colleagues dedicated to a shared ideal of social justice.

I am not referring only to the fact that some of us have moved to different organizations in response to the new LSC restrictions and reductions. Even among LSC programs, the communal ties have been strained, partly because of financial pressures. An example: since the National Clearinghouse for Legal Services lost its LSC funding and was forced to charge for subscriptions to the *Clearinghouse Review*, about half of LSC field programs no longer receive the publication. That is a poignant statistic, not only because the publication is an essential source of informa-

† Managing Attorney, Tennessee Justice Center.

tion needed for the vigorous representation of poor clients. For more than a quarter of a century, the *Clearinghouse Review* has fostered a sense of common purpose, provided a valuable way to recognize and share the expertise of colleagues, and thereby held up a standard of excellence to which we could all aspire. That less than half of all LSC attorneys now have access to *Clearinghouse Review* is a significant measure of the ground we have lost and must now make up.

A realistic appraisal of our circumstances must also weigh dispassionately the threats and opportunities. We have to conclude that any reversal of recent losses is unlikely in the near term. On the contrary, with the future of federal legal services reposing in the gentle hands of congressional leadership, and with the fate of Interest on Lawyer Trust Account (IOLTA) funding to be decided by the Supreme Court, we will be fortunate, indeed, to hold onto our present funding levels and sources and the present scope of permitted advocacy. And, as LSC puts pressure on grantees to merge and consolidate programs, tensions between programs are likely to arise, further fraying the ties that bind our community.

II. THE NEED FOR A UNIFYING STRATEGY

In light of our present circumstances, it is now time, more than three years after the 1994 political realignment, to come up with a long-term blueprint for delivering a full spectrum of civil legal services to the poor. We can no longer comfort ourselves with the illusion that our current makeshift arrangements need only tide us over to the next election, or to some other hoped for deliverance from our present afflictions. For three years, many creative, committed advocates in our profession have worked together and individually to try to maintain our collective capacity to sustain full service representation of poor Americans. We can take pride in those contributions, and should be grateful to the many colleagues—from every sector of the legal community and of all political persuasions—who have participated in that effort. But the whole remains less than the sum of its parts. We must not delude ourselves into believing that our desperate, *ad hoc*, and largely fragmented reaction to external events approximates a real strategy that can serve clients over the long haul.

This is not to ignore the efforts of the American Bar Association, National Legal Aid and Defender Association, or local bar leaders to try to enhance the coordination among LSC, private pro bono programs, and law school-based legal clinics. However, a broader effort is needed, and one specifically that addresses the funding crisis in an important component of the Equal Justice network.

In contrast to the coordinated effort to save LSC, which quite properly was at the top of our agendas, there has not been a coherent national approach to developing, coordinating and guiding the Equal Justice effort as a whole, and especially the "non-LSC" or "LSC spin-off" sector of the Equal Justice movement. Indeed, the fact that those of us in that sector still refer to ourselves as "non-LSC" reflects our continuing grief over our forced separation and our insecurity about where we fit into the tradition that LSC represents—to which many of us have devoted our entire professional lives. The fact that we still describe ourselves reluctantly and dejectedly in terms of what we *are not* shows a collective failure to envision what we can and *must be.*

This failure is a problem, not just for those of us who happen to work in "non-LSC" organizations, but for our entire community. We all have to come to terms with the fact that there is a need—for the integrity of our movement and, most importantly, for the sake of the clients—to define and sustain a long-term role for organizations that can represent poor clients in those matters that LSC programs can no longer handle. Law school clinics and private bar pro bono programs can make an important contribution, but there is still a need to perpetuate the capacity, formerly in LSC programs, to carry on the legislative and administrative advocacy, as well as complex class action litigation that does not easily serve the teaching mission of most law schools or fall within the capacity of volunteers in private practice.

Amid the constructive and necessary emphasis on client self-help and innovative service delivery mechanisms like telephone hotlines, we cannot forget why it is that the particular advocacy activities that Congress prohibited remain so indispensable to the poor. One of my colleagues just won a 55-page class action settlement that will reform Medicaid managed care services for a half million poor children in Tennessee. Another colleague forced the state's welfare reform program to implement quality control measures that have halved the number of poor families losing Temporary Assistance to Needy Families (TANF) benefits each month. In both cases, it was the combination of class action litigation, sophisticated legislative and administrative advocacy, and close collaboration with community groups, that made possible these important gains for our clients. We cannot acquiesce in efforts to deprive the poor of legal tools that remain available to other Americans.

Although it has been two years since LSC programs nationwide lost the capacity to handle these types of matters, the resulting void has been filled only partially in some states and not at all in many others. Thanks to the visionary guidance of bar leaders and the extraordinary willingness of Legal Service programs to give up part of their own IOLTA funding, a

small organization was started in my state to take over prohibited activities. With the full-time equivalent of only four attorneys, the Tennessee Justice Center has worked hard to fill the void in Tennessee, and has won some important victories on behalf of clients. But we are nowhere close to restoring the capacity that previously existed, and that was inadequate even in the best of times. With IOLTA's future in doubt, and with the rest of our budget dependent upon short-term foundation grants, the long term viability of the organization is uncertain.

Still, Tennessee has been more fortunate than many states in crafting a response, inadequate as it is, to the gaps created by the congressional restrictions on LSC. Unfortunately, as was the case before LSC was established in the 1960s, it is the very states and regions where poverty is greatest and the political climate most hostile to the poor, that are the most lacking in advocacy resources. The states that have most effectively responded to the gaps in representation are the more affluent and progressive jurisdictions, where existing resources were greater to begin with. This disparity is a credit to advocates in the more progressive states, but reflects our failure at a national level to develop a strategy that affords a modicum of justice to poor people everywhere.

III. REVISITING THE CASE FOR NATIONAL FUNDING OF LEGAL SERVICES

At the risk of stating the obvious, money—or, more accurately, the lack thereof—is at the root of our problem. This is not an accident. After all, it was the withdrawal of LSC funding for certain politically disfavored forms of representation that created our current crisis. To understand what is now needed we must take into account the benefits that national funding brought to legal services, in addition to the obvious value of the dollars provided:

Assurance of minimum access nationwide. While encouraging local supplementation of its grants in more affluent regions, LSC has ensured that poor people in even the poorest and most politically inhospitable states have some access to justice.

Fostering collaboration. Although local legal services programs have developed as autonomous entities, their common funding source has helped create a sense of common identity. Local organizations need not compete with each other for funding from a narrow array of national foundations. The resulting increase in collaboration has greatly benefited clients.

Promoting efficiency. The availability of stable funding for general support has enabled local programs to use their resources flexibly in response to client needs, rather than having to tailor services to grantmakers' changing tastes. Federal funding has minimized the amount of program resources committed to chasing grants and soliciting contributions.

National funding in the form of federal appropriations for the former LSC activities restricted by Congress is obviously out of the question. But could a private philanthropic response, facilitated by a national organization serving as broker, achieve the same goal?

IV. A POSSIBLE PROTOTYPE: THE STATE WELFARE REDESIGN GRANTS POOL

The potential for a private philanthropic initiative of this type is suggested by the State Welfare Redesign Grants Pool, established to provide policy advocacy around welfare reform, an area now largely off-limits to LSC grantees. The Grants Pool was created in 1996 with a substantial grant from the Open Society Institute. The Grants Pool is administered jointly by the Center for Community Change, the Center on Law and Social Policy, and the Center on Budget and Policy Priorities, all of which are based in Washington. The Grants Pool makes subgrants to local advocacy organizations working on the implementation of welfare reform in their states.

The Grants Pool solicited proposals from a broad array of grassroots organizations, "non-LSC" legal aid programs and other advocates. Selection of grantees was made by the administering agencies, which themselves have substantial expertise in welfare advocacy. The Grants Pool serves several functions akin to those that LSC formerly provided:

Raising funds for local advocates from sources that would not otherwise provide such support. The Welfare Grants Pool administrators provide the credibility and personal relationships with grantmakers that are so essential to successful grantsmanship, and that most state and local advocacy organizations cannot hope to individually replicate. Most of the Grants Pool grantees, like the "non-LSC" advocates generally, are parochial in their focus, and are therefore cut off from big national funders. In addition, most individuals and organizations skilled at advocating on welfare policy do not have the time, knowledge or expertise to be successful grantspeople.

Individually, we lack appeal to many funders; collectively, we appear to be a network whose whole impact is greater than the sum of its parts. For example, the Open Society Institute, with its global perspective, is unlikely to pay attention to the obscure Tennessee Justice Center. But

OSI is willing for TJC to receive some of its money as part of a broader, coordinated effort directed at a number of states. In a world of increased devolution of policy making to the states, it is critically important that local advocates be able to access philanthropic resources beyond their own states.

Some large grantmakers that have traditionally supported national organizations may realize at some level that policy making really is shifting to the states, and that it is important for the poor to have advocates where those decisions are now being made. However, old habits die hard. Perhaps because they do not know who is out there in the states, it is difficult for some funders to act on that realization by directing funding to local advocates. By acting as brokers, the Grants Pool administrators demonstrates how that can be done. They also are able to ensure that funding is distributed to areas where the need is great, but where local philanthropic support for such activities is lacking.

Allocation of grants by "broker" organizations with experience and resulting understanding of advocacy for the poor, which the grantmakers themselves cannot easily duplicate. The Welfare Grants Pool funds are distributed by advocates who know what effective welfare advocacy should look like, understand the advocacy environments of each state, and know personally who is doing good work in the area. This means that grant awards are more likely to turn on an agency's ability to do the work than on the grantsmanship of its director, or whether she happens to know someone at a particular foundation. Small projects with limited administrative capacity do not have to devote as much of their resources to fundraising. Scarce resources thus are used more effectively for the poor.

Building and maintaining community and mutual support. Although the Grants Pool's grantmaking process is highly competitive, it favors applicants that demonstrate a capacity and commitment to collaborate with other advocates. To the benefit of the poor, the program has encouraged advocates to regard each other as colleagues, rather than primarily as competitors for scarce funds. There is a synergy about the work of the different grantees because of the common funding source.

The limitation of the Grants Pool is, of course, that it only supports welfare advocacy. The need for law reform advocacy for the poor extends to many additional areas of the law. These also require funding. A national organization or consortium, playing a broker role akin to that of the Grants Pool administrators, could try to match funders and legal services providers on a broader front. The broker might put together a

package of funding by approaching philanthropies with different grant-making priorities, such as health care or homelessness, to support targeted funding in their respective areas. The broker model could *both* increase the net amount of funding available from national funders *and* improve the effectiveness of funding by ensuring that it is efficiently raised, allocated, and used.

Ideally, the broker would be an organization, such as the National Legal Aid and Defender Association or Center for Law and Social Policy, which has a strong tie to LSC grantees. It could, therefore, encourage collaboration between non-LSC entities aided by the private funding pool and traditional legal services organizations that still receive LSC funding. Such encouragement is needed to combat the inevitable tendency for the two mutually indispensable elements of the Equal Justice network to drift apart over time.

In essence, we must reinvent for the non-LSC components of the Equal Justice network the same sort of stable, predictable and generally unencumbered funding source that LSC once provided (and still provides its grantees, albeit at a relatively reduced level of security). The present individualistic, devil-take-the-hindmost approach to funding is grossly inadequate to meet the need of poor people for representation in law reform and policy advocacy. The possible demise of IOLTA, which supports much of the present fragile effort, only lends greater urgency to the task of developing a coherent, mutually supportive approach.