Client/Matter/Case Selection

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REPORT OF THE WORKING GROUP ON CLIENT/MATTER/CASE SELECTION

I. INTRODUCTION

THE Group,[1] using as its starting point Paul Tremblay's article,[2] recognized that there are at least four levels at which determinations of case and client selection play out. At the top, there is the level, which we named "Meta-Allocation," where decisions may be made on a state or regional basis, taking into consideration all providers of legal services in the area. Next is the level of the individual program in its making of policy concerning which cases to take and on what basis; we called this "Macro-Allocation." The next level down is the decisionmaking about which of the cases to take, assuming that not all clients who meet the program's eligibility criteria can be served; we called this "Micro-Allocation." Finally, we noted that even after a decision was made to serve a particular client, there could be decisions about the scope of the service; we called this "Mini-Allocation."

We decided that this was a helpful framework for discussing how to make limited resources work best to respond to the needs of clients. While there was some discussion about examining some of the assumptions about the delivery of legal services (for example, the assumption that it is always most desirable for an individual to have a lawyer), and about recognizing the potential of new technologies, the consensus of the Group was that some rationing of legal services is and will continue to be a reality. The "100% access" model of legal services presumably does not mean that the system has capacity to provide all clients with every legal service they wish.

Accordingly, a basic question is who makes the rationing decisions (the funders, the program directors, the program staff) and on what basis? How do programs determine what people need and want? How much should programs allow the availability of funding to dictate case selection? What principles should individual lawyers apply in deciding to take a case, or a client? Is the model of providing lawyers to individuals the best or only one, or would programs be more effective by considering themselves counsel to the community as a whole? Should representation of the working poor and individuals involved in micro-enterprises have more priority?

These questions led to a discussion of the goals of legal services for poor people: merely access to the legal process, or also empower-

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2. *See* Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 Fordham L. Rev. 2475 (1999).

ment—giving individuals or the community more political power, more control of their lives. Are these really separate goals? It was noted that "empowerment" could be illusory and "access" misleading and disempowering.

The questions include how to define the group to be provided "access" to justice. Are we trying to reach all people who cannot afford a lawyer, or just people in certain defined income categories? Are we trying to meet dire needs or to act for social change? What is a just system of distribution of legal services, recognizing that access to courts is not always access to justice. Or is the primary concern only to make sure that people have access to the system?

A. *Narrowing and Organizing*

After the initial discussion, the Group identified some more specific questions:

1. Who decides on the allocation of services and how do they decide?

2. Meta-allocation angle: How should the larger delivery system function?

3. Triage issues: What are the flaws of the current system? How to avoid wasting resources on the process of determining whether or not to accept cases? What to give people who would otherwise be turned away? Should more service resources be directed to hotlines or other mechanisms so that everyone gets something?

4. Scope of representation: When to limit representation? When and how do clients consent to limited representation (one-shot advice sessions/hotlines or other consumer advice models using various technology)?

5. How do funding requirements, particularly making funding turn on the number of clients serviced, affect case and client selection, and what are the ethical, political, and practical results of the pressure to increase the number of clients served?

6. How useful is litigation for poor clients? Should we really give up on the law reform model? What does "winning" mean? What is productive? How should law reform cases be selected, and by whom? What role should the potential availability of legal fees have?

7. Who should make ultimate decisions on case and client selection? The staff? What role does and should the community have? How much decisionmaking can be delegated? What hoops must clients be made to jump through (for example, having to submit to community training) in order to get services? How to deal with paying clients? What is the proper role of a

Legal Services Corporation ("LSC") board? What role do nonlawyers such as paralegals or intake staff play?

B. *Issues to Focus on More Systematically*

1. Meta-allocation: What are the available resources and what should be the goals of the whole system of providing legal services? What is the process of coordination among the programs?
2. Macro-allocation: How should programs identify strategies and goals, taking account of other service providers, funding sources, and community needs?
3. Micro-allocation: What considerations apply when selecting cases? What weight should be given to the question of who will be sued (e.g., other poor people), or to any obligation to the constituent community (e.g., not taking cases that would harm the community or that create positional conflicts)? Is it ethical to consider the interests of the community outside of the client? What weight should be given to the degree of emergency, as contrasted with the desirability of preventive interventions at earlier, but less urgent, stages? Must (or should) disclosure of the considerations in client selection be made to potential clients and the community?
4. Mini-allocation: What considerations apply in representing clients on certain issues but not others? When is withdrawal, abandonment, or representation appropriate and ethical? What are the problems in group representation, including the question of ongoing responsibilities to the group after the "resolution" of the case, or when circumstances change?
5. Viable alternatives: What should be done for individuals who cannot be represented?

I. MICRO-ISSUES

A. *What Are the Considerations for Picking Cases*

In general, the staff will decide what cases to take, although a board of directors may establish general standards for case selection. We discussed what should or should not be considered in making the selection:

1. Factors that Should Be Considered

What impact would the representation have on the individual client? Here, we consider the probability of the client winning or losing without representation, and disfavor cases where the client will probably lose, even with representation, or probably win, even without representation.

How important are the interests at stake, considering not only the client's physical well-being and safety (avoiding physical harm, protecting shelter) but also the client's fundamental values (keeping families intact, protecting decisionmaking autonomy)?

What will be the result if the representation is successful? Should cases that will result in more long-term solutions be preferred?

Will the case further the interests of the client constituency or community? Will the case permit elimination of a systemic harm or provide a collective benefit, even if the actual harm in the individual case is not that significant?

Cost-benefit analysis: How much of the program's resources will be have to expended to receive what degree of success? A principle of conservation may apply: If two things are equally beneficial, choose the one that uses less resources.

It is appropriate for programs to leave room for "other" cases that may not fit any criteria, but allow for serendipitous important cases to develop and, by leaving some discretion to staff lawyers, help morale.

Programs may consider whether the prospective client is a former client (this may reinforce community connections and relationships) or whether the client is referred by a community organization, where developing ties to the organization is part of the program's strategic plans.

Programs should consider alternative resources that may be available if representation is not provided.

2. Factors that Should *Not* Be Considered

A factor that should not be considered is the attorney's moral judgment about a client's "worth" as an individual. We had some difficulty articulating what we meant, because while we agreed it would be wrong to turn away a client merely because the client was disheveled, or difficult, programs routinely decide not to represent "batterers," "slum landlords," "gang members," etc. Such decisions should be made on policy grounds by the program as a whole, not by the individual attorney, and should not be based on moral judgments about the client's individual worth, but whether representation would present positional conflicts for the organization, hurt the community, or involve the program is representations that did not have much underlying merit.

Another factor is the client's success at surmounting arbitrary access rules. Programs should not use survival-of-the-fittest techniques to select clients who can wait the longest, be most persistent in dealing with phone intake rules, etc. Programs should try to ensure equal access to the disabled and not discriminate based on improper criteria (race, gender, or ethnicity). We agreed that it would not be improper for a program to limit representation to particular groups (e.g., a pro-

gram for the elderly) but disagreed about whether a program, in order to build support in particular communities, could emphasize providing services to certain ethnic groups rather than others.

Another factor involves objectionable funding sources. Programs should refuse funding rather than accept restrictions that violate program objectives.

Programs should not reject a case merely because of unpopularity of the case, the client, or the cause.

3. Other Considerations

We did not agree on what weight to give, in accepting or declining a case, to the question of whether acceptance of the case would be good for the staff's professional training and fulfillment. There was recognition that meeting these needs of the attorney or paralegal would lead to increased professional satisfaction, potentially improve the quality of work, and help prevent burn-out. However, some group members were concerned that by explicitly recognizing the legitimacy of considering staff interests, the Group would be granting programs license to make decisions principally based on the interests of staff. Others believed that staff development should at least be a "tie-breaker" in the event other considerations did not determine the issue of whether the case should be accepted. In the end, the Group did not make a recommendation on the issue.

We agreed that programs should only make meaningful referrals.

II. META-ALLOCATION

We discussed the new issues and restrictions arising from funding sources, including the new LSC concept requiring a state wide plan. How do programs respond to a client community served by a number of different organizations, and how, at a time of increased centralization, do we protect local community and neighborhood concerns?

We discussed some of the new models, including centralized intake and telephone intake and services. These have the potential to avoid expending disproportionate resources on making the decision on whether to take a case, and may permit more meaningful or useful referrals, as well as avoiding duplicative intake procedures by various offices. On the other hand, there are many dangers to this model: providing even more hoops for clients to jump through to get representation, permitting fragmentation of services, a loss of community orientation, and a risk of inadequate services. One suggestion was to rotate staff from each office through the central intake system, to retain the local flavor and community data. There was consensus that the positive aspects of using technology should not be disregarded, such as using the phone to give faster services, or having one toll-free number for services.

Individuals who seek only brief information should be able to use the intake system to get their referral or help right away, but there is a risk the individual (or the intake person) will get it wrong so that individuals would not get appropriate service. There may be ways of solving these problems through better training, or by having individuals check back later. There are also problems having to do with documents, since these are generally not explainable over the telephone. Some programs have been experimenting with video conferencing from rural offices to the central office. Quality and rationing issues about balancing the desire to help the maximum number of individuals with the desire to do the best possible work for the client remain. At the least, a telephone information/intake system will help the client and interviewer to be better prepared for the initial interview and will avoid unnecessary returns to the office to provide documents or information. Improved technology in the courts may lead to increased efficiencies, as lawyers increasingly are able to retrieve court documents by computer.

Although the Group saw the potential to use new technologies to extend the reach of legal services programs, it was concerned about the risk that programs will become only providers of various consumer products rather than lawyers providing representation to clients.

We summed up as follows:

1. Providers should collaborate in providing a full range of services that are not duplicative and allocating available resources efficiently. At least aspirationally, programs should collaborate to ensure that available resources are used to provide a full range of services including: legislative and administrative advocacy at the state and local level; class, group, and individual representation; and counseling, advice, and community education.

2. While there are many different ideas (means tested programs; universal entitlement programs; vouchers), the collaboration among programs should be informed by local priorities and input at the community level and should likewise reflect local priorities and input on the community level.

3. Local offices should be able to decide not to participate in the state-wide collaborative system or central intake system, and we should retain the possibility of renegade offices or independent foundations funding special focused work.

4. While it is fine for the legal services delivery system to attempt to serve the greatest number of individuals, there still has to be room for lawyers to be lawyers, at least for some clients. Therefore, we endorsed experimentation with centralized entry-point or referral systems, as long as there were sufficient quality safeguards, but the possibility of providing full, traditional representation must be preserved, with quality and effectiveness a

priority. Similarly, the use of "brief advice" or hotline models should not lessen services to those who would have received full representation otherwise. The proper goal of a centralized intake and advice model is to free up resources for representation, and we do not endorse a system that does not provide some clients with full representation.

III. MACRO-ALLOCATION

We discussed proper eligibility criteria. There was consensus that legal services should serve the working poor, as well as welfare recipients, and should adjust intake hours and income standards to make more services available to the working poor. Similarly, offices should reach out to those who cannot come into the office, and should work to avoid barriers based on language, disability, or arbitrary income eligibility rules that may result in important community issues being excluded.

The consensus was that programs should clearly identify and state their mission, goals, and criteria used for selecting cases, although several participants pointed out the need for flexibility and discretion. There was also consensus on the importance of mobilization work and help for grassroots efforts to decrease poverty.

Programs have affirmative responsibilities to consult with the members of the client community in setting goals and priorities, and to develop mechanisms to maximize community input. A constant dialogue is essential, since advisory boards are frequently useless and time consuming. Priorities should be periodically revised to reflect community demand.

Possibilities for getting community input include: circulating reports in the community; having focus groups with targeted discussions; informal networking; and having an ongoing informal dialogue with the community members.

How should strategies be chosen? As programs cannot serve everyone directly, programs have an obligation to do strategic work to help the whole community. This includes impact work that will establish more rights and change procedures or eligibility rules, will provide collective benefits for the community, and will have long-term impact. It also includes efforts to improve what Peter Margulies calls "social access,"[3] enabling the community to form institutions and organizations.

Do lawyers know how to solve economic problems, or just legal problems? We decided that lawyers play an essential role in economic processes as counsel. But, some offices waste resources on this be-

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3. Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 Fordham L. Rev. 2339, 2339 (1999).

cause they do not know how to do this well. There is a need for appropriate training for people who do this kind of work, so that programs can assist individuals, institutions, and community groups in promoting economic opportunity. Important as this is, however, we should not mandate that every office should have every kind of service.

Offices should make an effort, however, to set some time aside to prevent emergency problems from using all of the program's resources. Programs should reserve some part of their resources to address longer term and systemic solutions to problems of poverty.

A. *Who Should Be on Boards?*

Many of us thought the current LSC restrictions on boards are artificial and constraining, and there should be more nonlawyers, bankers, and real estate developers. The client component rarely works; community leaders may be preferable. Further study is needed of the role and composition of boards, including how to use them to get more information from the community, for political and business connections, and for fund-raising.

B. *Representing the Working Poor*

The poverty guidelines are overly restrictive and should perhaps be increased. Programs should be more flexible, and should not be limited to LSC income-eligibility standards. Again, further study is needed on the role of the income level bars.

C. *The Portfolio Concept*

Programs should have a mixed portfolio of work dealing with their share of unpopular clients such as the mentally ill. Except to the degree restricted by specialized funding, priority should be given to cases involving food, shelter, and health, but this is not an exclusive list.

D. *Funding*

We should let boards know that it is sometimes acceptable or even desirable to turn down funding. Funding issues should not divert present resources or distort the program's priorities. Funders should be encouraged to respect programs' priority processes, and to provide funding from on-going programs, not just novel and experimental programs.