

## August 20, 2016 CECLS Meeting

In attendance: Chief Justice Nathan L. Hecht; Wallace B. Jefferson; William Royal Ferguson, Jr.; Faye Bracey; Luz Herrera; Will Hornsby; Chris Nickelson; Frank Stevenson; Kennon L. Wooten; Nina Hess Hsu; Osler McCarthy. Members of the public were also present.

By phone: Hon. Jane Bland; Darby Dickerson; Eden Harrington; Angelica Maria Hernandez; Hon. Ann McClure; Harry M. Reasoner; Hon. Lee H. Rosenthal; Charles W. Schwartz.

### Opening Remarks

Dean Royal Ferguson remarked that the University of North Texas Law School was started in 2014, and is currently going through the accreditation process. The law school is encouraging students to focus on access to justice (ATJ) and hopes that the students will have an opportunity to solve some of the real ATJ problems that we face in Texas and nationally, in part because they will graduate without a lot of law school debt.

Chief Justice Hecht stated that it was fitting to meet on this campus, as part of its vision is to train lawyers interested in modest means and public interest legal work.

Chair Wallace Jefferson remarked that the ABA Report on the Future of Legal Services in the United States is hot off the press and includes many valuable resources. He wants the CECLS to give the Court the tools that will work for the Bar, the public, and the stakeholders attempting to defend their legal rights with the goal being justice for all.

### Presentation by Will Hornsby

Will Hornsby of the ABA began by stating that he was speaking for himself, not the ABA. His focus is on increasing ATJ to those of moderate income, not low income individuals.

- He presented a PowerPoint presentation on the Legal Landscape for Personal Legal Services
  - Just under 60% of law graduates, nine months after graduation, have long-term/full-time employment.
  - Unemployment among new graduates is almost twice the national average.
  - Incubators: Most incubators are law-school based, others are Bar-organization based, and others are legal-aid based. Recently admitted lawyers participate, and participant numbers range from 2 to 30. Incubators first started in 2008, and there are about 60 today.
  - Professor Luz Herrera said they are not always law-school funded but may be. She participated in a program of the Practising Law Institute (PLI), focused on getting lawyers into solo and small-firm practice. She also said contract attorneys are frequently being paid \$25/hour and that they may be interested in moving into their own practices.
  - Frank Stevenson said at least four incubators are underway in Texas.
- There are tens of thousands of un- and under-employed lawyers. There are hundreds of thousands of paralegals, who work under the direction of lawyers. Government agencies are part of the supply of legal services (legal assistance to military personnel, AG offices, etc.).

- Civil Legal Landscape – created by Paula Hannaford; available online
  - Contracts – dominant percentage of cases, taking family law out of the equation; two thirds of the cases are debt collection, eviction, or foreclosure. People are in court because they cannot afford not to be: they cannot pay their debts. 95% plaintiffs are represented and only 23% of defendants are represented. Here the compensation system is suitable for plaintiff-side work but not defense work.
  - Why? Lawsuits are part of the cost of doing business for landlords and they build it into their budget, but individual tenants cannot feasibly get cost-effective representation. 75% of the cases have judgments under \$5,000.
- One solution is simplifying the process.
  - In Alaska, they did this with family law. By isolating people who were in default, they reduced the steps significantly and simplified the process.
- We also need to think about 1:1 representation, which is not feasible for many people.
- Myth of Unaffordable Services
  - How do we price our services?
    - Contingency fees are a good option. There is often a payoff if the lawyer screens well.
    - Fee shifting is another option (loser pays). There are hundreds to thousands of statutes that provide for fee shifting.
    - Fixed fees.
    - Reduced fees. For example, groups and prepaid plans; modest means limited scope representation (LSR) panels; non-profit, sliding-scale, co-pay clinics; and unbundled/LSR services.
      - LSR inherently makes legal services less expensive and more available.
      - 2010 ABA national survey of 1,000 people. 70% not at all familiar; two thirds wanted to discuss an unbundling option, two thirds would weigh it when selecting a lawyer, even higher for younger people with less income. There is a demand here; if people know about LSR, they want it.
      - Advantages for the lawyer include a full hourly rate or set flat fee; few, if any, receivable accounts; a larger pool of clients who can afford the services; and clients who may later choose to convert to full service.
- The Value Proposition
  - Average people can afford average legal fees.
  - Billable hours are the enemy of value because when a lawyer cannot tell someone how much their services will cost overall, how can that person determine the value of the service and whether it is worth it to spend their money on it?
  - Affordability should not be measured by cost, but by value. Value equals outcome divided by cost.
  - Bar associations can create databases of how much time certain legal activities usually take so it can be translated into fixed-fee costs. Solo practitioners are more adept at this. A bracket set of fees per service can also work.
    - Of course some variables are outside your control in litigation (e.g., opposing counsel, judges).

- The Role of Technology
  - There is a continuum which goes from commoditized work to bespoke work. Commoditized work is compliance and bespoke work is problem-solving work. A simple divorce (compliance) to a custody dispute (problem-solving).
  - Adding in technology can make the process more efficient. In certain contexts, a techno-touch will be ill-suited. In others (e.g., tax creation), a techno-touch is good.
- The Engagement Deficit
  - Affordability is not the fundamental impediment we sometimes think it is.
    - How do you find a lawyer? Every time the question is asked, the trusted-resource category is about 80%.
    - Upper left-hand segment is the people who know they have a problem but don't associate it with a legal solution.
      - The medical-legal partnership can be effective here.
      - A small nonprofit in Minnesota works with United Way to direct people to legal help. In one year they referred out 30,000 cases in Minneapolis.
      - The UK has a Citizens Advice Bureau, online and in brick and mortar form. Our post offices could provide the infrastructure for this in America.
    - Lower right-hand quadrant – Where people recognize there is a legal solution, but they have not taken action to address their problem. For example, estate planning and latent guardianship issues (e.g., grandparents trying to enroll kids in school without being guardians).
      - Will-signing parties were referenced. A host family invites other families to a social event and a lawyer is present to assist with executing and notarizing wills.
    - Lower left-hand quadrant – Those people who don't recognize a problem and also don't recognize there is a legal solution to it.
      - Intellectual property issues, business exit strategies, and prenuptial agreements.
      - Legal checkups could help in this segment.

#### Q&A with Will Hornsby

Tom Vick, President-Elect of the State Bar, asked how long Will Hornsby expected for the State Bar Incubator Program to get off the ground and be functional. Mr. Hornsby said he believed a program could be set up in as little as 16 months.

- Chicago's program consists of three six-month modules and lasts for 18 months with a maximum of 30 participants. There were 10 participants in the first class, 10 more six months later, etc.
- There is a listserv of incubator programs, annual conferences, and many resources now.

Professor Luz Herrera noted that schools have developed curriculums to facilitate this (e.g., Law Practice Management, solo practice concentration). In Los Angeles, there is an incubator program pulling from a few schools, and participants are zero to six years out of law school. The idea is to fill in the gaps – to represent the people who need services and learn how to run a business and eventually sustain themselves in the profession.

Hornsby said that in incubators, participants eventually launch into their own practices. The first focus is teaching skills to practice law (e.g., through pro bono opportunities and with practice management overlay), then various other paths like LSR. Client development comes later.

Frank Stevenson, President of the State Bar, said Texas A&M School of Law has an incubator program and Baylor Law School has a Legal Mapmaker program. The San Antonio Bar Foundation is also working on a program. The State Bar's incubator program is called the Texas Opportunity and Justice Incubator (TOJI), and they are in the process of hiring an Executive Director right now. Stevenson said that these types of programs actually are working quite well.

#### Professor Luz Herrera Remarks

- What led her into academia was the number of people calling her for help. Many of her clients qualified for legal aid but were not being served; others were people of modest means, near poor, or poor. Fifty percent of people who qualify for legal aid do not receive services. She made a decent living doing this work in California without meaningful help from her law school or bar associations.
- LSR worked for her. A lot of clients paid \$75/hour for consultations (e.g., ghostwriting).
- We need to be more aware of the messages we send to law students regarding our profession. It is very important for the CECLS and Bar leadership to engage law students in the discussion. We need to educate and prepare lawyers on these issues (e.g., by offering ATJ courses, including in ethics training, etc.). We must prepare lawyers for the changes happening in the profession and how to address them. ATJ isn't just a problem; it is an opportunity (e.g., we could train lawyers to be better business people).
- There is a lot of room between free and \$300/hour. At least 75% of our US population probably fits into this market.
- What has helped the most to advance middle-income legal services?
  - Self-help legal centers in courts.
  - Online legal services (in multiple languages). This does not necessarily drive away clients from the office; in some cases, it brought in the clients she wanted. They knew it was a process and understood her value. A lot of the work she did was unbundling/LSR. A client would fill out the form and bring it in, and she would look at it and fix it for \$75/hour and then may go to court for up to three hours for \$500 with a fixed rate for each additional hour.
  - How to advance things here?
    - Think about more self-help centers and more court-based resources.
    - LSR: provide documents for the client to fill out so that everyone understands what you will and will not do. There is a lot of literature out there about client-centered lawyering and who should make decisions. LSR is probably one of the most client-centered approaches.
      - Example – uncontested divorce and in need of a settlement agreement drafted by an attorney.
      - Other contexts – e.g., represent a client in a deposition, preparing documents for small claims cases, putting together parts of an operating agreement.
  - Incubators
    - Part of changing of the conversation with law schools and the profession.
    - Investment in solo and small-firm practice is forward-looking.
    - Data: it would be great to collect more information from the courts about filings in order to help focus efforts on the areas with the greatest need.
    - At Texas A&M they are focused on reaching out to underserved communities.

- Be more intentional about the things that exist and how we create partnerships.
- Most of the incubators are sponsored by law schools. Some are supported by private firms (in NY), but those are generally run as residency programs or fellowships. Firms are also doing incubators internally to increase their own capacity. Some large companies have in-house incubators (but these are less focused on serving people of modest means).
- Most of the incubator programs require pro bono work; most require 50 hours per year. Through the pro bono work, there is engagement with legal-aid centers and law libraries. They are doing legal checkups and other things.
- Think about legal services as a continuum from preventative law to problem-solving. Where do we want to make the most impact and where do we have the most ability to make the biggest impact?
- Faye Bracey referenced a post-graduate internship program, like a residency program to get lawyers out there solely to serve low-income and modest means people. Herrera referenced fellowships at the law schools that are doing this very sort of thing. She identified the high costs that can be associated with them and the fact that many of the people do not get long-term employment through them. Bracey suggested private funding of fellowships. Hornsby said that the ABA has referred this to other committees focused on pro bono.
- Stevenson referenced the pro bono component of the State Bar incubator program.
  - In first six months, requirement to contribute 20 hours per week to pro bono work. Over time, the emphasis shifts to serving their own clients on a paying basis. This wanes only when the program is working. But the hope is that participants will become pro bono advocates long-term.

Dean Ferguson circled back to self-help centers. The Dallas Bar is meeting with Dallas County to set up a navigator to assist people who are unrepresented. Everyone is in favor of it, but money is an impediment. He suggested that maybe 25 cents could be added to the filing fee to fund this. Travis County uses self-help centers to great advantage. He likes the idea of getting law schools involved. The Baylor program as a good example of an opportunity for collaboration. Maybe there could be a task force within the law schools to work on this.

Kennon Wooten asked about incorporating LSR into the self-help centers. Hornsby stated the research indicates that self-help centers aren't doing a good enough job serving as a pipeline to lawyers providing LSR. There are different ways of staffing: contract with legal-aid organizations; contract with law school clinics/programs; engage private practitioners with modest-means panels or set fee structures.

Chris Nickelson asked about the funding availability/capability.

- California funds their self-help centers via the State's Judicial Council funding. Each court district handles the setup on a county-by-county basis. Bonnie Hough oversees the practice throughout the state. She provides support for all of the counties to get their self-help centers off of the ground.

- Allocation of resources referenced by Hornsby. What the self-help centers provide the court personnel do not need to provide. In one county, they just reassigned court personnel.
- Some counties fund some of this work (e.g., small claims court).
- Herrera mentioned that when California adopted new rules they provided training for lawyers and for consumers. About 40 states have implemented ABA Model Rule of Professional Conduct 1.2(c). Arkansas may have revised their rules most recently, with the knowledge of what other states have done.

Brian Webb stated concerns about LSR – in an area where things are so interrelated, how does it really work? If he gets an agreement that has been prepared already, is he obligated to raise issues he spots therein? The other side is the client’s expectation – paying the lawyer to take care of him/her in general. It sounds simple, but it is hard to think of an area where it truly runs smoothly. Judges may not be willing to let lawyers out of the case when the agreed-upon representation is complete but the case is still going. He said he cannot imagine adequate informed consent.

Chairman Jefferson said the CECLS itself is unlikely to draft rules. This is not to say that it should not recommend to the Court that it look into LSR rules, if appropriate. Chief Justice Hecht agreed.

- A former Manager of Legal Aid
  - He asked about profit possibilities for incubators. He also mentioned the spectrum of cases, from simple to very complex (with costs that cannot be controlled, including costs of experts).
  - Herrera mentioned relationships that help – e.g., relationships with court reporters and translators. She also mentioned creative sources of funding, like Kickstarter.

Vick asked if there was a possibility of big law sponsorship of incubators. In the report, there is a reference to funding of nonprofit legal firms. There could be sliding scale and low-cost work almost immediately. Herrera stated that there absolutely could be, but the issue is funding. For example, it will take about three years to get the nonprofit off the ground.

Hornsby suggested there would need to be a tweak of the ethics rules about directors of incubators/nonprofits not having to be lawyers.

Chairman Jefferson designated the following committees: Incubators; LSR; Navigators/Pipelines; Uber for Lawyers/Technology Solutions; State Bar of Texas and Other Referral Services; and Publicity. He tasked the committees to come up with pinpointed recommendations for the CECLS to make to the Court. Some concepts will take longer to roll out, for example, the pipeline concept. We should also address programs that are doing well and how they can be expanded. Committee reports are due by the end of September 2016.

#### Public Comments

- A Former Manager at Legal Aid
  - Rejection of people because of over-income/over-asset. At the times legal aid could not refer people to private lawyers. The question is how people can find out who can represent them.

- Stevenson is discussing this with the State Bar's Executive Director. He referred to Lawyer Referral Services and the potential issues with them. He said there is only one track for finding a lawyer. There are some states with a modest means group or section. Ideally, we would have a statewide LRS available to legal-aid providers and offer through that people who are willing to handle modest-means cases. Right now it's essentially full-freight cost or nothing.
  - Bracey referenced opting in as lawyers for modest-means services (e.g., on the My Bar page).
- Gary Nickelson commented that navigators are very helpful to get people through the system, but self-help is different. Where do people go when they need help? We need a place to market these services.
- Charlie Hodges referenced a requirement in the past that referral had to be to someone with malpractice insurance. Someone needs to address that requirement and be able to provide some level of insurance. Chief Justice Hecht asked what he thought about permitting people to have less insurance. He stated that he was for it. Faye Bracey referenced that malpractice insurance for new lawyers is very cheap.
- Harry Reasoner suggested the CECLS should consider making clear in its report that this is a societal problem. He would like to think more about utilizing navigators because it involves a trivial amount of money and makes the court process more efficient for everyone including business litigants. We should also consider a committee of some type to review the laws of unnecessary complexity for people of modest means. He referenced the legislation about the transfer-on-death deed.
- Chief Justice Hecht stated that he would like for the Court to be able to report to the Legislature in the upcoming 2017 Session on the CECLS's findings.

The meeting adjourned.