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To: Civil Legal Aid Oversight Committee

From: Jim Bamberger

Re: Quarterly Director's Report: October – December 2005

Date: November 24, 2005

It has been little more than a month since you received my first report. In this report I will discuss some of the matters that have been the focus of my recent attention, with the substantial majority of the report focused on a new matter that has arisen since the Oversight Committee last met.

I. Access to Justice Board – State Plan Review Process

The Office of Civil Legal Aid continues to be actively involved in the Access to Justice Board's process of revising its State Plan for the Delivery of Civil Legal Aid Services. The Director serves on two working committees – (1) a committee developing recommendations relating to the nature, scope, funding and location of infrastructure and support capacities that are necessary to ensure the effective, efficient and coordinated delivery of civil legal aid services to low income people throughout the state; and (2) a committee developing recommendations relating to the overall structure of the delivery system itself, including potential changes in the configuration and relationship between the staffed, volunteer attorney and specialty legal aid providers. These are matters of significant interest to the Office of Civil Legal Aid. The state support system serves the following functions essential to effective and efficient delivery of civil legal aid services: Planning, Advocacy Coordination, Resource Development (governmental and private), Staff Training and Development, Technical Assistance, Technology and Community Relations. The matters under consideration within the Structure Committee will define the contours of the delivery system that is underwritten with funding made available through the Office of Civil Legal Aid. A draft revised State Plan will be published for comment in January 2006. I will forward a copy to the Oversight Committee upon its release and will try to schedule a presentation for the Committee's Spring 2006 quarterly meeting.

II. Supplemental Budget Request

Following up on the presentation that was made by Sara Zier of the Equal Justice Coalition at the October 12th meeting, the Office of Civil Legal Aid consulted with a number of key stakeholders to determine the feasibility of seeking supplemental funding to help mitigate the consequences of the reprogramming of VOCA funds away from civil legal aid, and the impending loss of emergency services to victims of domestic violence. As a result of these conversations, the Office of Civil Legal Aid submitted a $600,000 supplemental budget request for FY 2006. A copy of the request was previously forwarded to the Oversight Committee by e-mail and is attached (Attachment 1). Presentations on this request were made to the Board for Judicial Administration (BJA), the Board of Governors of the Washington State Bar Association, and the Access to Justice Board. Endorsements will be forthcoming from each of these organizations. Additionally, meetings have been held with staff from the BJA, Equal Justice Coalition, as well as key House and Senate committee staff. Key to our success will be the active involvement and support of legislative and other members of the Oversight Committee and close coordination with other institutional stakeholders. I will be asking the Oversight Committee to establish a working group to assist with efforts relating to the supplemental appropriation.

III. Accountability Systems Development

Work is beginning on establishing effective oversight and accountability protocols. Initial focus has been on protocols relating to the handling of complaints and grievances about the use of state-appropriated civil legal aid funding. A memo outlining suggested approaches is in the final stages of development and will be forwarded to the working group established at the October 12th meeting (consisting of Rep. Rodne (Chair), Sen. Kline, Barbara Clark, Tom Brown and Carolyn Estrada) for their advice and counsel. It is my objective that this component of the accountability system be in place prior to the start of the legislative session, and that we can provide members with an understanding that the OCLA will serve as a credible and accountable entity to entertain, investigate as appropriate, and address questions and concerns relating to the proper use of state-appropriated legal aid funding.

In the coming months, I will develop a protocol for conducting on-site and fiscal reviews of state-funded legal aid providers. It is my objective not to create redundant fiscal, administrative and service delivery review capacities, and to take advantage of the comprehensive system for oversight and fiscal monitoring that has been developed by the federal Legal Services Corporation (LSC), the LSC Office of Inspector General and the Legal Foundation of Washington. OCLA's approach will be to identify and fill the compliance and oversight gaps, with particular focus on those matters unique to the state statutory and regulatory scheme. OCLA will work closely with the Legal Foundation of Washington and the Access to Justice Board to ensure effective coordination of monitoring functions and their consistency with applicable Program Performance Standards adopted by the Access to Justice Board.

IV. Contract Administration

The Office of Civil Legal Aid and the Washington State Grange have executed a final contract for the continuation of the alternative dispute resolution program for farmworkers and

agricultural employers (Attachment 2). This contract, which succeeds the interim contract previously provided to the Oversight Committee (Tab 3, Attachment 12), contemplates continued outreach to farmworkers and farm employers with a goal of holding 12 mediations. The contract also requires a third-party evaluation of the effectiveness of the program against its stated goals and objectives.

OCLA is continuing to work with Northwest Justice Project to develop a restated work plan that more effectively articulates performance expectations and expected outcomes. A revised work plan should be completed by December 31st.

V. A New Challenge: Washington Farm Bureau Petition to Extend Provisions of RCW 2.53.030 to IOLTA Funding

"Injustice anywhere is a threat to justice everywhere." Dr. Martin Luther King, Jr.

The balance of this report will provide background on and make recommendations relating to the role of the Office of Civil Legal Aid and the Civil Legal Aid Oversight Committee with respect to a proposed rule submitted by the Washington Farm Bureau (Farm Bureau) and a few other agricultural interest organizations.[1] The Farm Bureau's proposed rule would extend the rules and restrictions that attach to state funding by virtue of RCW 2.53.030 to funds created by the Supreme Court's IOLTA rule.

In a nutshell, I believe that both the Office of Civil Legal Aid and the Civil Legal Aid Oversight Committee should file comments with the Supreme Court vigorously opposing the proposed rule. This belief is grounded in the following observations:

- The proposed rule runs counter to the public interest and, to the extent that it would limit access to the justice system for many of the poorest and most vulnerable residents of this state, compromises the judicial branch's responsibility to administer justice fairly and impartially.
- The proposed rule is a self-serving attempt by special interests to secure unique immunities within the civil justice system at the expense of some of the most isolated and vulnerable low-income people in the state.
- The proposed rule would exclude thousands of Washington families and individuals with serious legal needs from receiving essential legal aid services.
- The proposed rule would effectively deny low income people from asserting or defending legal rights and interests in legal forums most appropriate to the resolution of their legal problem and would also deny them the ability to employ legal tools and procedures available to the general population.
- The proposed rule would extend a set of legislatively crafted restrictions to judicially created funds outside of the Legislature's control in ways not contemplated at the time the Legislature adopted the provisions now codified in RCW 2.53.030.

[1] While some specialized agricultural industry organizations have joined the petition (most of which represent segments of the industry that have little contact with civil legal aid programs), a number of well-respected agricultural industry organizations did not sign onto the petition. These include the Washington State Grange, the Washington Growers' League and the Washington Growers' Clearinghouse.

- The legislation creating OCLA and the Oversight Committee authorizes these entities to comment on rules that affect civil access to justice.
- As judicial branch entities that share responsibility for the fair and proper administration of justice, OCLA and the Civil Legal Aid Oversight Committee have a duty to comment on and oppose initiatives that would operate to limit or deny access to civil justice in Washington state.
- Restrictions attached to funds administered by the Office of Civil Legal Aid are the product of the legislative process and are not intended to define the scope of legal aid services that should be made available to low income people in Washington state. Linking these state restrictions to judicially created funds would enable the Legislature to direct the administration of the civil justice system in ways that undermine separation of powers considerations

A more detailed analysis follows.

A. Background

The Washington Farm Bureau is a private non-profit agricultural industry organization. Its stated purpose is "to make the business of farming more profitable" (WFB Statement of Purpose, http://www.wsfb.com/StateFarmBureau/WaFarmBureauHistory.htm). One means of accomplishing this purpose is to insulate farmers from potential legal liability.

For many years, the Farm Bureau and a few other state and national agricultural industry organizations have tried to limit their members' exposure to legal actions filed by those whom they and their members employ. They have done so by seeking to limit the ability of governmentally funded legal aid organizations to represent low-income migrant and seasonal farmworkers on many of the most important legal issues that they face. This history of efforts to limit the ability of legal aid attorneys to represent farmworkers (a history which I can detail on request) is too long to be chronicled in this report. However, it is historically accurate to say that many of the restrictions that now apply to federally and state-appropriated funding for civil legal aid find their source in proposals promoted by some segments of the agricultural industry.

Under RCW 2.53.030, no state-appropriated funding may be used representation of migrant and seasonal farmworkers on legal matters relating to their employment. This means that state funds cannot be used to represent farmworkers to assert claims for unpaid wages, claims of abusive treatment, claims of illegal employment discrimination, or claims for wrongful or retaliatory terminations. Despite this categorical exclusion, some agricultural industry organizations have sought to use the legal aid appropriations process to substantively limit activities that have been underwritten with federal and other (including IOLTA) dollars. In 1996, for example, the Legislature was persuaded to condition state legal aid funding on terms of a four page budget proviso (Attachment 3) that focused exclusively on the legal aid activities related to farmworkers and established an Agricultural Industry/Legal Aid Relations Task Force. This provision was added even though *no* state funding can be used to represent farmworkers on employment-related matters. In 1997, $1 million in supplemental funding for civil legal aid (to help offset federal cuts) was expressly conditioned on the execution of an agreement between the Washington Growers' League, Columbia Legal Services (then the state-funding recipient) and

Northwest Justice Project on a system for alternative dispute resolution of farmworker employment claims.[2]

But it is also important to observe that Washington State's experience differs substantially from the national experience on matters relating to agricultural industry – legal aid relations. Since 1997, leaders of the state's two largest legal aid programs worked to establish effective understandings and professional relationships with leaders of the agricultural industry organizations that have historically been involved in matters relating to civil legal aid funding – the Washington Growers's League (a Yakima-based statewide organization that provides support, training and related services to agricultural employers), the Washington Growers Clearinghouse (a regional agricultural industry support organization based in Wenatchee) and the Washington Farm Bureau. Maturation of these relationships resulted in the establishment of trust which allowed these programs to work together on matters of common concern and to explore areas of disagreement and develop new approaches to problem solving. As a result of these efforts, antagonism between the agricultural industry and legal aid programs moderated substantially, and there was relatively little controversy on this front for a number of years.

Things began to change in about 2002 when the Farm Bureau voiced its objection to a number of matters in which Columbia Legal Services represented clients against its members. Driven by its objection to this representation and the excesses that it believed was reflected by this representation,[3] the Farm Bureau began to involve itself in matters relating to civil legal aid funding. In the 2004 legislative session (and again despite the fact that state legal aid funding cannot underwrite representation of farmworkers on employment-related matters), the Farm Bureau secured adoption of language directing $100,000 of the supplemental legal aid appropriation "to a general farm organization with members in every county of the state to develop and administer an alternative dispute resolution system for disputes between farmers and farm workers." After this language was adopted, the Department of Community, Trade and Economic Development (which previously administered state-appropriated legal aid funding), undertook a competitive contracting process which led to the execution of a contract with the Washington State Grange on behalf of a consortium of organizations including the Growers' League, the Growers Clearinghouse, the United Farmworkers of America, Columbia Legal Services and Northwest Justice Project. This funding was continued in the 2005-07 biennium, and administration has been transferred to the Office of Civil Legal Aid (see above).[4]

Most recently, the Farm Bureau filed the petition that is the subject of this discussion. In this petition, the Farm Bureau asks the Washington Supreme Court to extend the rules and regulations governing the use of state appropriated funding (codified at RCW 2.53.030) to funding generated by the Supreme Court's IOLTA rule (RPC 1.14). IOLTA stands for interest on lawyers' trust accounts. The rule requires attorneys to deposit client funds that are incapable of earning net interest payable to the client (after deduction of costs and allowable fees) into a

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[2] Despite the assistance of a professional mediator, the parties were unable to achieve an agreement on an ADR system that respected the ethical duties that legal aid attorneys owed to their clients, and the supplemental appropriation lapsed.

[3] I would be remiss not to note that, to the best of my recollection, no adjudicative or regulatory body has ever questioned the propriety or professionalism of IOLTA-funded legal aid representation of farmworkers in any proceeding before it.

[4] The Farm Bureau filed a competing proposal which was not funded.

pooled interest bearing demand account. Interest earned on the account is paid to the Legal Foundation of Washington, a non-profit organization established by the Supreme Court to administer, oversee and use such funding to help underwrite civil legal aid and support other public justice related activities.[5]

As explained at the October 12th meeting, the Access to Justice Board is the Supreme Court's designated planning and policy development body for the delivery of civil legal aid services to low income people throughout the state. The ATJ Board has adopted a set of core values (Hallmarks) and Guiding Principles that define the essential purpose of Washington's civil legal aid system. (October meeting materials, Tab 3, attachment 14; Tab 4). The central and overriding value is that civil justice must be available to *all* – regardless of the nature of their legal problem, the forum most appropriate for the resolution of the civil legal dispute, or the legal tools required to effectively represent the client in that forum. The ATJ Board's State Plan for the Delivery of Civil Legal Aid Services to Low Income People in Washington State (October meeting materials, Tab 3, Attachment 15), is the vehicle through which these values are carried forward into concrete expectations of providers and funders. Recognizing that state and federally-appropriated funds are limited as a result of the political processes that result in their appropriation, the ATJ Board's State Plan looks to IOLTA funding as the source of funding to help ensure that civil legal aid services are available to all clients, especially those whose legal problems fall in areas that cannot be addressed with federal or state-appropriated funding. In sum, IOLTA funding is the glue that holds the civil legal aid system accountable to the ATJ Board's core values and ensures that no one gets written out of the justice system as a result of the political compromises that have, by necessity, been made during the course of the federal and state legislative processes.

B. The Proposed Rule

The language of the proposed rule is misleadingly simple. It says that the provisions of RCW 43.08.260 [now codified at RCW 2.53.030(3)] will apply to funds generated by RPC 1.14 (the IOLTA rule). A copy of the Petition is included in your materials.

RCW 2.53.030 is a statute of inclusion. It represents the Legislature's limited approach to investing in civil legal aid services in Washington State. As is clearly stated in the statute itself:

> [T]o ensure the most beneficial use of state resources, the legislature finds that it is within the authority of the legislature to specify the categories of legal cases in which qualified legal aid programs may provide civil representation with state moneys. Accordingly, moneys appropriated for civil legal representation shall not be used for legal representation that is either outside the scope of this section or prohibited by this section.

RCW 2.53.030(1)(a) (emphasis supplied). Thus, the Legislature has said that it is willing to use state-appropriated dollars to fund some legal aid services, but not others. Those that it is willing to fund with taxpayer dollars are enumerated in the statute.

[5] Oversight Committee member Barbara Clark was the founding Director of the Legal Foundation and will be leaving that organization effective December 1, 2005 after 21 years of service in that capacity.

The Legislature was making a policy choice. Scarce state funds would be used for a limited set of activities that a bipartisan majority of legislators believed should appropriately be funded with state taxpayer dollars. Nowhere does the Legislature suggest that its determination of what state-appropriated funds can underwrite should define the spectrum of legal aid services that should be made available to low income people in this state. Yet, that is the very effect that the Farm Bureau's proposal would have. It would extend the authorizations and restrictions that the Legislature has attached to state-appropriated dollars to sources of funding far outside its ability to control or influence.

In RCW 2.53.030, the Legislature has said that legal aid programs may represent eligible low income clients in the following substantive subject matter areas:

- Domestic relations and family law
- Public assistance and health care
- Housing and utilities
- Social security
- Mortgage foreclosures
- Home protection bankruptcies
- Consumer fraud and unfair sales practices
- Rights of residents of long term care facilities
- Wills, estates and living wills
- Elder abuse
- Guardianships

As the Legislature itself recognized, these categories do not define the scope of potential legal problems that low income people experience. They simply are those that the Legislature is willing to fund legal aid services to address – at this point in time. At the last meeting I circulated a handout comparing the areas of currently authorized civil legal aid services (those listed above) and the areas of civil legal needs detailed in the 2003 Civil Legal Needs Study (Attachment 4). Areas of significant unmet need for which state funding may *not* be used include:

- Discrimination cases
- Employment cases
- Many consumer cases
- Cases involving the provision of public and municipal services other than utilities
- Civil rights cases
- Many education related cases
- Immigration cases
- Abuse and/or neglect of individuals incarcerated in juvenile and adult correctional facilities
- Disability-related cases that do not fall within one of the enumerated subject matter areas

In addition, you will remember that state-appropriated funding may not be used to file or participate in a class action or to represent clients in rule making or legislative proceedings that may directly affect them.

With these limitations in mind, the logical consequences of the Farm Bureau's petition become clear. IOLTA funded representation is critical to the ability of farm workers to secure legal assistance with respect to legal problems relating to the terms or conditions of their employment. Extension of the state legislative restriction would eliminate this capacity and result in many clients with critical problems being unrepresented. Further, no legal aid program would be allowed to file or participate in a class action. And no legal aid program would be allowed to represent clients in rule making proceedings or proceedings before legislative bodies (including school boards, municipal planning bodies, city councils, county commissions and the state Legislature). Because migrant and seasonal farmworkers look almost exclusively to legal aid programs for legal representation on matters relating to their employment, the rule would effectively deny this class of individuals – many of whom are the most isolated and vulnerable residents of the state – from access to the civil justice system altogether.[6]

C. The Interests of the Office of Civil Legal Aid and the Civil Legal Aid Oversight Committee

Both the Office of Civil Legal Aid and the Civil Legal Aid Oversight Committee have legislatively defined powers and responsibilities. Among its enumerated duties is the OCLA's responsibility to report "on the status of access to the civil justice system for low-income people eligible for civil legal aid." RCW 2.53.020(3)(c). The Civil Legal Aid Oversight Committee is charged with making recommendations to the Supreme Court regarding the provision of civil legal aid funded through RCW 2.53.030. This includes recommendations regarding the propriety of extending regulations set forth in that statute to funds not appropriated by the state Legislature.

Further, both the Office of Civil Legal Aid and the Civil Legal Aid Oversight Committee are judicial branch institutions. In this capacity these two bodies share in the judicial branch's responsibility to promote and defend the fair and proper administration of justice for all people. While the Office of Civil Legal Aid is responsible for ensuring effective and accountable use of funds made available by the Legislature – including accountability to the limitations that the Legislature has attached to such funds – the OCLA and the Oversight Committee have a common cause in promoting justice and responding to initiatives that would effectively limit access to the justice system in this state. The Farm Bureau's petition is such an initiative.

In filing a petition to insulate its members from legal claims presented by IOLTA-funded legal aid program clients, the Farm Bureau exercises the very access that it seeks to deny others. It has accessed the civil justice system to petition a legislative body for relief. (The Supreme Court acts in a legislative capacity when it entertains and adopts court rules.) Of course, the Farm Bureau has every right to do so and to be represented by counsel in promoting its interests through this proceeding.

But the justice system cannot be the province of those who have the resources to secure access and pursue their legal interests. The poor and the powerless must also have access. They must

[6] I should note that not even Congress has gone this far. Federally funded legal aid providers may represent farmworkers who are legally present in the state on matters relating to the terms and conditions of their employment.

be able to secure civil justice whether the opposing party is an agricultural employer, a domestic violence abuser, a governmental agency, or anyone else. If the laws that protect the rights of citizens are to mean anything, they must be capable of being enforced in the justice tribunals of this state.

As institutional trustees of Washington State's justice system, and given the potential precedential effect of this initiative (were it to be successful), I believe the OCLA and the Oversight Committee should oppose this effort to limit access to the justice system for a particular class of low income people and to secure special and unique immunities the effect of which will be to limit the right of low income people to seek redress for legal grievances in the civil justice system.