WisTAF Report-APPENDIX P

WISCONSIN LAWYERS
STATE BAR of WISCONSIN® | EXPERT ADVISERS. SERVING YOU.

MEMORANDUM

To: George Brown, Executive Director

From: Jeff Brown, Pro Bono Coordinator
John Dougherty, Funds Development Director
Dan Rossmiller, Public Affairs Director

Date: October 29, 2004

Re: Funding Access to the Civil Justice System

At your request, we have prepared the following summary of the status of funding for access to justice for low-income Wisconsin residents as well as some of the available options for remedying this situation. In sum, we see the current difficulties in funding for civil legal services to the indigent as a serious public policy issue that merits the continued involvement of the Bar in coordination with a sustained effort and contributions from all of the major stakeholders in Wisconsin.

I. The Need for Legal Assistance

The available research suggests that the need for legal representation among Wisconsin's low income population is substantial and unmet. Using the results of the ABA's Comprehensive Legal Needs Study (CLNS) as a guide, approximately 220,000 low income Wisconsin residents experienced a need for legal help in 2003. Of that number, approximately 29% (63,800 people) would have been expected to turn to the civil justice system for help on their own or through a representative. Wisconsin's two federally funded legal services programs were able to handle 10,352 cases in 2003 (including cases handled by their volunteer lawyers). An additional number of those who sought help were assisted by one of the nonprofit legal advocacy groups or by a pro bono attorney but many more went unrepresented.

In another key finding from the CLNS, low-income households that were able to turn to some part of the legal system for help were significantly more likely to be satisfied with the outcome than those who had a need but did not (for whatever reason) turn to the justice system (48% vs. 29%). Maintaining public confidence in our civil justice system as a viable option for the resolution of meritorious legal disputes without regard to one's economic station in life is obviously quite important to more than just those in the legal profession. It appears that efforts to enhance access to lawyers and the legal system for low-income residents could pay significant dividends for Wisconsin as a whole in terms of public confidence.

The 2003 case closure data provided to the Legal Services Corporation (LSC) by Wisconsin's two grantees, Legal Action of Wisconsin and Judicare, provide one guide to the types of legal needs that exist. Because there are significant eligibility restrictions on LSC grantees that are based on income, client-type and case-type, there may be other, more systemic needs that are not captured by this data:

- The greatest needs in the Legal Action of Wisconsin service area were: Family (32%), Housing (31.1%), Income Maintenance (21.8%) and Consumer/Finance (5.1%).

- In the Judicare service area, the greatest needs were: Family (54.1%), Consumer/Finance (21.7%), Income Maintenance (9.9%), and Housing (5.4%).

II. Current Funding

Like most states, Wisconsin is operating in a challenging funding environment for the provision of legal services to low and moderate income residents. Federal, state and local government budget decisions as well as broader economic challenges in the state and the country have resulted in years of, at best, flat government funding for legal services. At the same time, the population in need of such assistance has steadily grown. According to an analysis prepared by the Wisconsin Council on Children & Families of the data released by the U.S. Census Bureau on August 26, 2004, the number of Wisconsin families living in poverty rose from 74,930 in 2000 to 101,140 in 2003. Over the same time period, they report that 35,000 additional Wisconsin children slipped into poverty, an increase of 24%.

Table 1

Wisconsin Individuals in Poverty 2002 (below 100% of poverty threshold)	467,943
LSC Funding	
2004 State Total Funding:	$4,103,878
2003 State Total Funding:	$4,257,408
2002 State Total Funding:	$5,016,020
2001 State Total Funding:	$4,629,210
2000 State Total Funding:	$4,316,470
1999 State Total Funding:	$4,322,342
1998 State Total Funding:	$4,103,981

Source: Legal Services Corporation.

In Wisconsin, years of flat LSC funding combined with a precipitous drop in IOLTA funding has resulted in substantial cutbacks in the numbers of lawyers and support staff who are able to serve Wisconsin's poorest residents at these programs. According to WisTAF's recent fee petition, IOLTA revenue for 2004 is projected to be $850,000, which is down from $2.1 million in 2000-2001.

The following table provides additional information on existing funding for legal services and compares the financial resources available to Wisconsin with those available in other Midwestern states:

Table 2. Midwest Region & LSC Program Profiles

State	Poverty Percent 2001-03	Poverty Pop.	LSC Funds	Non-LSC Funds	Staff Attorneys	Total Cases Closed	Volunteer Attorney Cases Closed	Active Attorneys in State[1]
Wisconsin	8.8%	451,538	$4,257,408	$4,253,433	47	10,352	2,554[2]	13,715
Indiana	9.2%	559,484	$4,850,023	$2,391,755	45	9,169	460	12,581
Iowa	8.5%	258,008	$2,428,097	$2,641,427	45	17,225	1,771	7,543
Minnesota	7.1%	380,476	$3,715,267	$10,679,785	101	22,479	2,766[3]	23,728
Illinois	11.8%	1,291,958	$11,209,038	$10,873,101	175	44,744	2,159	58,811
Michigan	10.8%	1,021,605	$9,749,743	$22,610,237	192	30,511	1,435	31,032
Ohio	10.4%	1,170,698	$10,708,687	$21,198,422	158	33,352	3,925	33,888

Source: Legal Services Corporation and U.S. Census Bureau. Poverty percentage is calculated at or below 100% of poverty threshold. Data covers only LSC-funded programs. Wisconsin data, for example, does not include organizations such as Legal Aid Society of Milwaukee (LASM) and other programs that serve primarily or partially low income clients but receive no LSC funding. LASM is the largest non-LSC funded legal services program in the state. They have roughly $3 million in funding and 29 lawyers who close approximately 6000 cases per year.

[1] Source: Assembled from various court, bar and state sources.

[2] LSC data includes 2,239 cases that were handled by Judicare volunteer attorneys who are paid a maximum of $45/hour. In 1993 data collected by Sara Clarenbach on behalf of the Legal Assistance Committee, the surveyed legal services programs had 4,108 volunteer attorneys and 2,970 of those attorneys accepted a referral that year. The survey included groups that do not receive LSC funding (e.g. ACLU & CWAG). LSC data on volunteer lawyer cases closed includes 2,239 cases that were handled by Judicare volunteer attorneys who are paid a maximum of $45/hour.

[3] Includes 251 eligible cases handled by Minnesota lawyers through a Judicare-model program.

III. A Profile of Wisconsin's Legal Services Providers

Legal Action of Wisconsin serves 39 southern counties containing over 4,000,000 people (78% of the state's population of approximately 5.4 million people). At least 374,000 people are living below the poverty threshold in its service area, but the program has only 35 attorneys to provide services. The ratio of 10,680 low income residents per legal services lawyer understates the gap in service because there are tens of thousands of other people in LAW's service area who live only marginally above the poverty threshold and who are financially eligible for legal representation under LSC guidelines.

Wisconsin Judicare has 5 staff lawyers to support the work of 200-300 private attorneys on the program's volunteer list who are paid, at most, $45/hour when they serve one of the more than 97,620 low income citizens in that program's northern Wisconsin service area.

Legal Aid Society of Milwaukee has a staff of 29 full and part-time attorneys who are able to resolve approximately 6,000 cases per year for indigent Milwaukee residents. Its annual budget is roughly $3 million, none of it from LSC funding.

The University of Wisconsin-Madison Law School maintains a number of important legal assistance programs for low income individual under the umbrella of its Economic Justice Institute. The Law School supports, and law students staff, the Neighborhood Law Project, which provides full legal representation in an area of concentrated poverty in Madison. Law students also staff the Law School's Consumer Law Litigation and the Elder Law Clinics.

Marquette University Law School provides an additional source of legal assistance for low income residents in the Milwaukee area. Through its Legal Clinic at House of Peace in Milwaukee, law students, supervised by practicing lawyers, provide brief legal advice to needy city residents on a broad array of issues.

Centro Legal por Derechos Humanos provides low, fixed fee service to a client base in the Milwaukee area that is primarily indigent.

Community Justice provides free or sliding scale legal services to indigent and non-indigent clients in the Madison area.

Other Providers serving some low income residents include programs such as ABC for Health, Coalition of Wisconsin Aging Groups (Elder Law Center), Wisconsin Coalition for Advocacy, the AIDS Network and the AIDS Resource Center of Wisconsin. This is not a comprehensive list.

Although there are a significant number of formal legal services organizations in Wisconsin, they tend to be concentrated in Southeastern and South Central Wisconsin.[4] This reflects the distribution of Wisconsin's lawyers unevenly across the state and may worsen the problem of access to lawyers for low income residents. Overall, there are 13,752 lawyers residing in Wisconsin who are licensed to actively practice law but 8,724 (63%) of those lawyers are concentrated in only three southeastern counties (Dane,

[4] In 2001, the most recent year for which figures were available for comparison purposes, Legal Action closed 6,593 cases, Legal Services of Northeast Wisconsin closed 2,079 cases and Western Wisconsin closed 987 for a combined total of 10,027 cases by the staffed LSC programs with VLP's. Judicare closed 2,447. Legal Aid Society closed 5,610 cases in 2001, more than twice as many as Judicare and more than the combined total of Judicare, Legal Services of Northeast Wisconsin and Western Wisconsin. Together, Legal Action and Legal Aid Society closed more than 78% of all cases in 2001.

Milwaukee & Waukesha) that contain 33% of the state's population. Access to legal aid is particularly difficult in rural communities, where poverty is often hidden, but substantial, and lawyers are scarce.

IV. The Bar Responds

Pro Bono Support: The State Bar employs a full-time Pro Bono Coordinator who acts as a resource and advocate for pro bono legal work by Wisconsin lawyers. The Pro Bono Coordinator also refers callers to appropriate legal resources and matches a limited number of client requests for assistance with volunteer attorneys. The Board of Governors has approved and funded the Pro Bono Initiative, which is modeled in part on the effort undertaken by Indiana's Pro Bono Commission. Using a partnership between the judiciary, bar organizations, practicing attorneys and clients, the Initiative has begun to create the momentum and organization needed to increase the amount of pro bono legal service provided to needy clients in Wisconsin. District pro bono committees based on the court system's judicial districts will be created, where none exist, to increase the organization and impact of our members' pro bono efforts. We will also use the Pro Bono Initiative to increase information sharing within the state on the successes and needs of our members' pro bono projects. The Initiative is overseen by the Bar's Legal Assistance Committee (one of only four permanent State Bar committees). The overall allocation of State Bar resources for pro bono support activities in Wisconsin in the fiscal year ending June 30, 2004 was approximately $132,000 and the budgeted amount for the current fiscal year is approximately $141,000.

To support its pro bono program, the Bar also recently: (1) activated a statewide pro bono email listserv for interested lawyers and judges; (2) implemented a new central, searchable database of attorney volunteers that is capable of tracking pro bono referrals; and (3) requested and received a new grant of $9,000 in legal research time from LexisNexis to be allocated to pro bono lawyers in Wisconsin. The Bar is also actively searching for professional liability coverage to cover volunteer attorneys who take qualified referrals and is working to build a comprehensive pro bono resource center for the new Wisbar.org web site.

The Board of Governors of the Bar adopted a resolution on April 15, 1989 in support of the provision of increased civil legal services to low income persons. The resolution sets an aspirational goal for members of the bar to contribute at least 25 hours per year (or the dollar equivalent) in pro bono or reduced fee service to low income clients.

Additional support for pro bono is provided by sections and divisions of the State Bar. The Appellate Law Section has a pro bono project that handles civil and criminal appeals. The Business Law Section organized a Nonprofit Business Assistance Program that donates the first two hours of the representation pro bono. Our Young Lawyers Division has recently adopted the ABA's model One Child, One Lawyer project as its pro bono initiative in addition to supporting the FEMA pro bono project organized by the ABA's YLD. The Senior Lawyers Division of the Bar is in the process of organizing a pro bono mentoring program for younger lawyers who need assistance with aspects of their cases that fall within the expertise of the senior lawyer. Finally, although it does not do income screening of callers, our Lawyer Referral & Information Service operates a Hotline project that offers access to lawyers who will return calls to provide free legal advice to brief questions.

Government Relations: The Bar devotes additional professional staff time and money for government relations efforts in our Supreme Court and Legislature that support access to justice issues. For example, the Bar used its government relations resources to lead an intensive (and successful) lobbying campaign for a state appropriation for legal services as part of the Temporary Assistance to Needy Families program. In the 1999-2001 and 2001-2003 state budgets, WisTAF, our IOLTA program, received appropriations of $200,000 over each biennium to distribute to grantees for the provision of civil legal

services for low-income families. Unfortunately, that funding was discontinued as part of resolving a structural deficit in the TANF program. The Bar also lobbied Wisconsin's Congressional delegation for additional funding (an increase of $9.5 million in FY 2004) for the Legal Services Corporation so that states, such as Wisconsin, were able to mitigate half the anticipated loss of LSC funding that would have resulted from census adjustments in the poverty population relative to other states. Congressman David Obey, a ranking member of the House Appropriations Committee was instrumental in this effort and was recognized by the ABA for his efforts in this regard.

Unbundling: Wisconsin is making progress in the area of unbundling as an avenue to increase the availability of lawyers for people of modest means. The Unbundling Committee of the State Bar, made up of practicing attorneys and judges, has proposed modifying Wisconsin's ethics rules to allow lawyers to offer unbundled legal services to clients. To support low-income legal assistance clinics, the State Bar's Unbundling Committee has also proposed a new ethics rule, modeled on ABA Model Rule 6.5. The new rule would make it easier for lawyers to provide short-term pro bono assistance as part of a legal assistance clinic sponsored by a nonprofit legal services organization, bar association, accredited law school or court.

Training: Recently, the Bar agreed to provide a free CLE seminar for lawyers who take criminal cases referred by the State Public Defender and who have never signed up before or who have not taken such cases for at least two years. This effort is one measure the Bar is taking to help alleviate the financial impact on lawyers who agree to take such cases. The Bar is also exploring a mechanism to extend a similar sort of benefit to volunteer lawyers who take pro bono matters referred by the Bar or an approved legal services program.

Grants: The State Bar donated $75,000 in start-up funds to the Equal Justice Fund (EJF) and the Bar's Pro Bono Coordinator at that time spent a substantial portion of her time on the start-up process for the EJF. The State Bar also makes annual grants directly to local and specialty bar associations, most of which support the provision of crucial legal information to needy Wisconsin residents. For example, recent grants have funded the creation of videotapes on pro se representation, child custody issues, divorce and domestic abuse. Other recent grants have funded translation of landlord-tenant booklets, numerous family law materials and a legal dictionary into Hmong.

V. Other Stakeholders Respond

WisTAF. Recently, Wisconsin's IOLTA program, the Wisconsin Trust Account Foundation (WisTAF) petitioned the Wisconsin Supreme Court to assess a $50 annual fee on all Wisconsin attorneys as a way of counteracting the financial impact of the decline in interest rates. The reason given for the petition is WisTAF's projection that its IOLTA revenue will decline from a level of $2.1 million in 2000 to $850,000 in fiscal year 2004. The decline will force drastic cuts in grants, with corresponding cutbacks in the availability of legal representation for indigent Wisconsin residents. WisTAF hopes the fee will raise approximately $850,000 in new revenue each year for legal services for low income Wisconsin residents.

Equal Justice Fund seeks to raise money for legal services to the indigent. Start-up funds of $75,000 from the Bar were provided to EJF. EJF reports raising over $1.3 million for legal services since its inception in 1997 but has experienced difficulties with sustained fundraising in more recent years. Decreased fundraising results recently led to the organization releasing its staff and office space.

The Supreme Court. The Wisconsin Supreme Court has undertaken a major effort to expand the availability of self-help resources in Wisconsin. Currently, there are a number of court-based self-help centers and clinics in the state, with the most well developed being in the counties of Waukesha,

Milwaukee, Dane and St. Croix. The Court's Pro Se Working Group has developed an online tool that will allow most Wisconsin residents to prepare the necessary forms for most initial divorce/custody/support filings. The system will be deployed to all court houses in early 2005 and, since it will be web-based, will be accessible from any web browser.

The Supreme Court's Ethics 2000 Committee has proposed an explicit authorization of limited legal representation in its draft report. This proposal and that of the State Bar's Unbundling Committee will likely be merged in the near future.

The Wisconsin Law Foundation (WLF). WLF, a charitable foundation affiliated with the Bar, has also worked to increase its support for legal services. Currently, a full-time Development Director campaigns year-round for support of the Foundation and its annual grants program. This campaigning is being done with personal approaches to individual Wisconsin-licensed lawyers, bar associations, law firms, corporations and their counsel, and several Wisconsin foundations. One main priority is developing annual donors to the general fund of the WLF. This effort combined with improved investment returns is designed to be sufficient to support the Foundation's annual grants program, a full-time Development Director, a half-time Administrative Assistant, marketing and printing costs and other administrative/overhead expenses. The annual budget of the Foundation is currently $135,000 and its endowment and fund balance are currently valued at approximately $700,000.

WLF regularly makes grants to programs that focus on legal services to the indigent, including funding the creation of educational materials for pro se litigants, and, most recently to Centro Legal por Derechos Humanos to assist with the expansion of their services. To increase the efficiency of giving to legal services, the Foundation has also established new, donor-advised funds (described more fully below) that are capable of supporting a sustained fund raising campaign for civil legal services.

VI. Legal Services Fundraising – The Possibilities

A. Generating Donor Motivation

Charitable giving is most successful when donors believe in the organization they are supporting, understand how to give, trust the recipient of their gift and see, as close to first hand as possible, the benefits of their giving. In addition, donors must be regularly assured their gift is making a difference and helping to carry out the mission of the charitable organization.

The question then becomes, how does one go about developing trust among prospective donors? The answer, for most donors, is that building a positive relationship is key. Perhaps it is just a prompt thank you letter once a year. Perhaps it is an informative newsletter. Perhaps it is an annual personal visit or a phone call from a good friend or business peer. Some donors have to volunteer some of their time for the program they are helping to fund. Each individual is different. Each situation is different. To maximize fundraising for any worthy cause, donor relationships must be carefully monitored and managed. By understanding our donors' giving and their respective relationships we capture opportunities to turn their good intentions into major support for our mission.

It is not enough for a charitable organization to look around at their Board of Directors or committee members and say, "Whom do we know that could make a gift?" Comprehensive planning that focuses on an effort to serve and connect with current and prospective donors is needed. WLF has utilized this type of donor philosophy over the past eighteen months. As a result, it has seen an increase in the dollars contributed, surpassing its revenue goals handsomely this past fiscal year. Looking for the moment at only one donor group: the annual dues statements sent out by the State Bar now include a check-off for

donations to the WLF. Approximately 700 lawyers currently donate to the Foundation each year and these donors have been very loyal in their support. However, they represent only 3% of the members of the State Bar of Wisconsin. There exists a tremendous opportunity for an increase in participation from the lawyers of Wisconsin and the kind of loyalty that they show to WLF is an example of the kind of donor devotion that needs to be developed to support fundraising efforts for legal services to the indigent.

Charitable giving opportunities for law-related programs exist throughout Wisconsin from lawyers and other public-spirited parties. However, to this point these opportunities have not been fully tapped. WLF's focus in the past year has been to try to coordinate various efforts that previously operated independently at the Bar to and to minimize the amount of overlap in the appeals to actual or potential donors. There is still much more that can be done.

B. The Potential of WLF's New Fund Structure

On May 5, 2004, WLF established new Donor Advised Funds to increase the range of programs it could support. The plan is that these Funds will broaden the Foundation's ability to focus on law-related fund raising needs, including support for civil legal services to the indigent. In turn it is expected that these Funds will raise the profile of the Foundation across Wisconsin. With an increased public presence the Foundation looks to significantly increase the support it annually receives. Three types of Donor Advised Funds were established:

(1) Named Funds which offer law firms and other groups the opportunity to establish funds to support a particular program or project. These funds are established with a minimum gift of $25,000 and are made in perpetuity. The intent of these funds is to support the donor's desired programs through the investment earnings of the fund.

(2) Restricted Funds which offer the opportunity for donors to make specific gifts to Bar programs like the annual Wisconsin High School Mock Trial Championships. This type of fund could be used to address other particular programs as long as they are charitable in nature.

(3) Special Project Funds which offer law-related groups the opportunity to establish a depository for specific charitable programs. There are several groups interested in this type of fund because it offers 501(c)3 status to gifts for their program and they can gain the benefit of having the Foundation process donor letters and helping to maintain their donor relationships.

All of these funds can support a sustained, coordinated fund raising campaign for one or more aspects of the need for more funding for legal services. With the establishment of one or more legal services funds, WLF could raise or assist with raising significant new dollars for legal services and help to establish long-term giving programs.[5]

Additional ideas that have been implemented in other states to raise new resources for legal services to the indigent are shown in **Tables 3 and 4** along with relevant Wisconsin activities. A number of these ideas are discussed in detail in Section VII of this Memorandum.

[5] A review of WLF resources would be required, including an assessment of the staff time currently required to support the Foundation's general fund. It would be important to consider what would be required to properly develop, manage, evaluate, and distribute funds in a major campaign for legal services while still maintaining current Foundation activities. There are also resource implications for the Bar's Finance Department.

Table 3. Alternative Resource Strategies for Legal Services

Source or Strategy	Examples In Other States	In Wisconsin
Planned & special event fundraising from lawyers	OR, UT, WV	Equal Justice Fund Wisconsin Bar Foundation Legal Aid Society of Milwaukee
Attorney registration or dues increases	MN, OH, IL, MO, TX	WisTAF Petition
Voluntary bar dues add-on or opt-out	AK, CO, DC, FL, GA, HI, LA, MS, NH, NM, SC, TX, UT, WY	Annual dues statement includes line for contribution to WLF and for 2005 it included an insert with contribution request EJF
Pro hac vice fees	OR, MS, TX	
Court filing fees and fines	26 states, incl. MI, PA, NM, NE,	
State Bar grants and support activities	OH, WV, TX	Pro Bono Coordinator Pro Bono Initiative Wisconsin Law Foundation
Matching grant programs	UT, MD, NV	
Fellowship program to fund new staff attorneys	MT, ME, Skadden Fellows	
Use cy pres doctrine- direct portions of punitive damage awards, class action fund remainders, etc. to legal services	IL, WA	
Lawyer referral service grants	TX, CA	Not in WI but Centro Legal has inquired about the possibility
Donated attorneys fee awards in pro bono cases	CO, LA, GA	
Increased general fundraising	MS, Sargent Shriver Nat'l Ctr on Poverty Law	Wisconsin Law Foundation Legal Aid Society of Milwaukee Legal Action of Wisconsin
Endowment funds	MA, GA	
United Way or Community Shares designated giving	IL	Legal Aid Society of Milwaukee Legal Action of Wisconsin
Fee for service contracts	NC, TX, PA, AK, HI	Legal Aid Society of Milwaukee Centro Legal

		Community Justice
Legislative appropriation	29 states, incl. MN, AZ, LA-	
Non-LSC federal funds	TN	The Bar assisted with obtaining TANF funding for legal services
Other state grants or contracts	VT, IL	Legal Action of Wisconsin Legal Aid Society of Milwaukee Wisconsin Judicare
City and county contracts or funds	PA, VA, NY	Legal Action of Wisconsin Legal Aid Society of Milwaukee Community Justice

Source: Innovative Fundraising Ideas for Legal Services – 2004 Edition, © American Bar Association

Table 4. Additional Ideas

Strategy	Examples in other states	In Wisconsin
Expanded use of volunteer attorneys, clinics and incentives	IN	Pro Bono Initiative has been approved and is underway
Expanded access to pro se resources		Supreme Court's Pro Se Working Group; county bar, courthouse and law school self-help centers/clinics
Expanded LRIS service for modest means (sliding scale)		
Integrated statewide telephone client intake and referral system for full-fee, reduced fee and pro bono	NH	Pro Bono referrals for individuals are now done informally on a limited basis.

VII. The Role of Government & Society

A. Assumptions About Legislation

In preparing this memo it is assumed that state general purpose revenues (GPR)—monies raised from taxes such as income and sales taxes that are channeled into the state's general fund—will be unavailable to fund any new initiatives. At a time when the State Bar and the Counties Association have been unable to convince the legislature to fund updating of State Public Defender indigency standards or private bar reimbursement rates to address constitutionally-mandated obligations, it seems wholly unrealistic to assume policy makers would dedicate resources to provide of legal services that the state is not constitutionally obliged to provide.

Based on current estimates, Wisconsin will enter the next biennial budget debate with a "structural deficit" of more than $750 million per year. That means a shortfall between state revenue and the cost of promised programs. If state revenues grow by 5%, enough additional revenue (between $1.5 and $1.6 billion) will be generated to fund the spending commitments already made by the state. That is, all the money coming in to the state's treasury will go to fund programs already promised, leaving virtually no money to fund new programs.

In the current 2003-05 biennial budget cycle, lawmakers and the Governor were able to address a potential $3.2 billion revenue shortfall without resorting to raising general taxes. In large part, the budget was kept in the black by relying on "one-time" money that won't be available after 2005.

Absent a significant economic upturn that restores job growth to Wisconsin's economy and substantially increases tax revenues, lawmakers are going to have to cut existing programs or raise new revenue to fund new programs. Wisconsin has pretty much exhausted the so-called "painless" ways of increasing spending – i.e., raiding the tobacco settlement and the transportation fund, deferring obligations, "creative accounting" – that have been utilized in the past. While possible, it is not likely that many new programs will be initiated in the coming biennium.

It will be a very challenging and difficult task for the State Bar to lobby the Legislature and Governor to create a new spending line in the state budget to use general tax revenues to fund civil legal services in the absence of a comprehensive civil legal needs study. The support of the Supreme Court would be needed.

Indeed, to be successful, any effort to attract tax dollars to fund civil legal services will require the Bar to work cooperatively with and obtain the support of all three branches of government.

The Legislature and Governor will want to know what they are buying with their investment of dollars and whether they can be assured they will receive value for their investment. They will need to be convinced that the benefits to our state exceed the costs and that the payback will be not only short-term but long term. One benefit of securing a state investment in civil equal justice is that it may cause lawmakers to consider more carefully the ramifications of the decisions they make. Consider for example, the trend to impose driver's license sanctions for a wide variety of offenses, including unpaid parking tickets. The result of this trend can be seen readily in Milwaukee County where there is currently a backlog of over 8,500 OAR cases.

The judiciary, and particularly the Supreme Court in its supervisory role over the court system, will be interested in judicial economy as well as justice. The court will want to be assured that the provision of funding will not result in an influx of new cases that will clog the courts and that cases are not unnecessarily strung out because of the involvement of lawyers.[6]

The legal services providers will also have a keen interest in any discussions with the Legislature and Governor, as money from Madison seldom comes without significant strings attached.

An attempt to obtain significant funding from the tax dollars is likely to be a lengthy process. That process could be hastened if a complete and accurate assessment of the problem is completed. The value of a conducting civil legal needs study like the study conducted in Washington State is that it identifies the scope of the problem, the nature of the problem and may point out solutions that are not readily apparent. It could also give State Bar policy makers a handle on the amount and value of the substantial

[6] It should be noted that cooperation between the branches of government is necessary for a variety of reasons. The Legislature controls the purse strings. For example, the number of court branches (judges) is statutorily determined. Given the state's financial condition, no new circuit court branches have been created since a branch was added in Milwaukee County in 1999.

pro bono work currently being performed by Wisconsin lawyers. By helping the Bar to present the contributions of Wisconsin lawyers in definitive, it could also be a valuable tool in helping to bring the three branches of government together in support of funding for civil legal services.

The foregoing discussion aside, present state finance discussion is tilted strongly toward spending cuts, not revenue increases. Only a tiny minority is saying we should and must raise revenue - through tax increases, base broadening or charging more in fees. Most Wisconsin legislators running for re-election fear that even raising the "T" word or the "R" word will doom their chances. The debate is exceptionally one-sided. For that reason, the rest of the discussion herein focuses on raising new non-GPR revenues that would be earmarked specifically for civil legal services.

B. Assessment of Legislative Options

1. Specialty license plates

Challenges:

a) Would have to be passed by the Legislature.
b) Unclear how much revenue could be generated.
c) Law enforcement has generally opposed the proliferation of specialized license plates because it makes identification of vehicles more complicated and thus more difficult.

In the past the Legislature has required the first $"X" in proceeds from the sale of specialized license plates go the Department of Transportation (DVM) of reprogramming of the computer system. It is possible, but unlikely, that the Legislature would consider waiving this policy precedent. (During the 1999-200 session of the Legislature, legislation was enacted to create a special license plate to benefit Ducks Unlimited, Inc. Between $131,000 and $172,000 was needed to repay the DOT's programming costs associated with setting up the new plates. From my discussion with Legislative Fiscal Bureau staff it is not clear whether the DU plate is generating net proceeds for the organization at this point or not.)

The annual cost for an automobile license registration is currently $55. In the case of a specialized license plate, there is a $15 issuance charge and then an annual charge –ranging from $20-25 for most specialized license plates. The first year charge is $90-95, depending on the annual charge, and $70-75 each year thereafter. (The annual charge is effectively an ongoing donation as no additional costs are incurred by DOT once the initial programming has been completed.)

Assuming reprogramming charges of $130,000 and a $25 annual charge, in order to break even in the first year, at least 3,715 plates would have to be sold. If only 2,000 plates were sold, no net proceeds would be generated until the third year of the plate's issuance.

2. Income tax check-off

Challenges:

a) Would have to be passed by the Legislature.
b) Couldn't be implemented until tax year 2005 at the earliest.
c) Taxpayer participation in check-offs is limited. Unless taxpayers alert their tax preparer that they wish the check-off option to be utilized, many tax preparers ignore the check-off as a way to reduce the taxpayer's net liability. (After all, many taxpayers hire an "expert" for the express purpose of minimizing what they owe.)

Because legislation is necessary to implement an income tax check-off and the Legislature will not meet again until January 2005, it will not be possible to implement a tax check-off for 2004 Wisconsin income taxes. The earliest such a check-off could be implemented would be for the 2005 tax year and tax forms would have to be changed to reflect this. Donations wouldn't be received until January 2006 at the earliest.

The example that would most closely resemble this concept might be Wisconsin's Endangered Species tax check off. In tax year 2002, the most recent year for which data is available, approximately 41,400 (or 1.5% of all) Wisconsin individual income tax filers made a donation through the check off. Those filers contributed roughly $658,800, an average donation of $16 per filer. This represented a decrease from the previous year. In tax year 2001, approximately 46,400 (or 1.7% of all) individual income tax filers made a donation through the check off. Those filers contributed roughly $690,600, an average donation of $15 per filer.

Because tax forms and instruction books are revised each year to reflect law changes and various applications of indexing for inflation, there would likely be no additional cost to implement the check-off, provided the Department of Revenue learned of the change far enough in advance of the deadline for printing tax forms and instructional materials or the deadline for posting them online. Typically, the Department of Revenue (DOR) receives a percentage of the proceeds from the check off as a "processing fee." The Legislative Fiscal Bureau indicates that for the endangered species check off, typically about $30,000-$35,000 is paid to the DOR for this purpose.

In 2001, a total of 43 states and the District of Columbia imposed an income tax. Most states include check-off or voluntary contribution provisions for a variety of programs. The most common programs offered by the states in 2001 are listed below.

Endangered/nongame wildlife funds.....36 states
Child/domestic abuse trust fund.....22 states
Election/campaign fund.....21 states
Health related funds .....17 states
Veterans' programs/memorials..... 12 states

The following seven states do not impose an individual income tax: Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming.

3. Increase civil filing fees

Challenges:

a) Would have to be passed by the Legislature.
b) BOG position in opposition.

> "The State Bar of Wisconsin opposes filing fee increases. Thirty years ago the commencement of a civil suit required an $8.00 clerk's fee. In 2004, that $8 fee now exceeds $250 (variations for case type). Fee increases, though they may appear to be incremental, cannot continue to be viewed outside of the overall context of the court system and the citizens they impact. They inhibit an individual's ability to access the justice system and are particularly burdensome on those individuals who can least afford to pay. In the end, filing fee increases quietly but systematically push the legal system further away from the very individuals it was created to protect."

c) The Supreme Court/court system has generally opposed the diversion of court-related fee revenues to uses that do not support the funding of the court system.
d) No guarantee that the Legislature will not decide at some future date simply to take the revenue stream generated by the fee increase and re-allocate it to some other purpose.

Wisconsin's civil action filing fees are already substantial.

- Under current law, a person filing a large claim action pays $253 to commence the action as follows: (a) a $75 filing fee; (b) a $169 court support services fee; and (c) a $9 justice information fee.
- A person filing a small claim action pays $82: (a) a $22 filing fee; (b) a $51 court support services fee; and (c) a $9 justice information fee.
- A person filing a family court action with a request for support or maintenance pays $182: (a) a $75 filing fee; (b) a $68 court support services fee; (c) a $9 justice information fee; (d) a $20 family court counseling fee; and (e) a $10 support or maintenance petition fee

A look at the largest of the current filing fees, the court support services fee, may be instructive. This fee was established in 1993 as a $20 fee on all forfeiture judgments and most civil court filings. It has grown almost exponentially in recent years. In 1995, the fee was increased to $30 for filing small claims actions, $100 for filing large claim actions and $40 for other civil court filings and forfeiture judgments. In 2002, the fee was increased 30% to $39 for filing small claims actions, $130 for filing large claim actions, and $52 for other civil court filings and forfeiture judgments. In 2003, the fee was increased again by roughly by 30% to $51 for certain small claims actions, civil actions and special proceedings, third-party complaints or certain garnishment or wage earner actions, $169 for certain large claim civil actions and special proceedings, third-party complaints or certain garnishment or wage earner actions; and $68 for certain civil actions and special proceedings, third-party complaints, appeals from municipal court reviews of administrative decisions or forfeiture actions. The court support services fee is in addition to other court fees that may apply to these actions.

Back in 1993, concurrent with the creation of the court support services fee, three programs were established to provide state funding to counties for certain court costs paid by counties: (a) circuit court support grants, which partially reimburse counties for county court costs excluding security, rent, utilities, maintenance, remodeling or construction; (b) guardian ad litem services reimbursements; and (c) public defender transcript fee payments (the State Public Defender pays counties for the costs of transcripts requested by public defenders and state-appointed private bar attorneys).

As noted above, the court support services fee was originally created to offset the costs of the three programs listed. Indeed, from 1993 through 1996, when the state's economy was robust, state reimbursements to counties under the three programs were higher than the general fund revenue generated from the court support services fee. Since 1996-97, however, the fee has generated revenues above the amounts reimbursed to counties. For example, in 2001-02, the three programs were appropriated a total of approximately $24.7 million GPR annually, while the court support services fee generated $28.2 million. The excess revenue was used to help balance the state's general fund budget (i.e., it was spent for non-court-related purposes).

Access to the courts is a basic right and the recent increases in the court support services fee may be limiting citizen access to the courts. While the two most recent increases in the court support services fee and the recent increase in the appeals filing fees were made (ostensibly) to cover increased court costs and to generate additional revenue for deposit to the general fund, revenues generated from the increased fees were not dedicated to directly support any specific court program. This allowed the Legislature some

flexibility to "dial up" or "dial down" the percentage increase in fees to generate additional revenue to the general fund, with the amount in excess of that needed to fund the courts to be used for any state purpose.

In March 2003, when the most recent 30% increase in the court support services fee was proposed, Chief Justice Shirley S. Abrahamson expressed concern that the fee increases may limit access to the courts. However, the Chief Justice also stated that "these fee increases are intended to allow for the flexibility provided the Court and therefore may be necessary to maintain the Court's constitutionally mandated services in this biennium."

4. Add-on surcharge on civil forfeitures and criminal fines.

Advantages:

a) Imposed only on those who violate the law.
b) Would not be subject to TABOR limits (if TABOR is adopted).

Challenges:

a) Would have to be passed by the Legislature.
b) Possible constitutional problems unless properly structured.

Under current law, circuit courts may impose a fine or forfeiture and municipal courts may impose forfeiture for a violation of law. Generally, forfeitures collected by municipal courts are paid to the municipality and forfeitures or fines collected by circuit courts are paid to the state.

Over the years, the legislature has required circuit and municipal courts, when imposing, fines and/or forfeitures to add on a variety of assessments, surcharges, and restitution payments, in addition to court costs and fees. The money collected from these assessments, surcharges, restitution payments, costs, and fees funds various local and state programs.

One of the reasons that surcharges have become popular is that they are away to avoid a constitutional requirement that applies to the collections of fines and forfeitures. Wisconsin Constitution, Article X, Section 2, provides, in part, that:

> School fund created; income applied. Section 2. [As amended Nov. 1982]
> The proceeds of all lands that have been or hereafter may be granted by the United States to this state for educational purposes (except the lands heretofore granted for the purposes of a university) and all moneys and the ***clear proceeds*** of all property that may accrue to the state by forfeiture or escheat; and the ***clear proceeds*** of all fines collected in the several counties for any breach of the penal laws, and all moneys arising from any grant to the state where the purposes of such grant are not specified, and the 500,000 acres of land to which the state is entitled by the provisions of an act of congress, entitled "An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights," approved September 4, 1841; and also the 5 percent of the net proceeds of the public lands to which the state shall become entitled on admission into the union (if congress shall consent to such appropriation of the 2 grants last mentioned) ***shall be set apart as a separate fund to be called "the school fund,"*** the interest of which and all other revenues derived from the school lands shall be exclusively applied to the following objects, to wit (emphasis added):
>
> (1) To the support and maintenance of common schools, in each school district, and the purchase of suitable libraries and apparatus therefor.

(2) The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefor. [1979 J.R. 36, 1981 J.R. 29, vote Nov. 1982]

A January 30, 2001 Legislative Council memorandum examined the subject of the meaning of the term "clear proceeds" as used in Wisconsin Constitution, Article X, Section 2. Based on *State ex rel. Commissioners of Public Lands v. Anderson*, 56 Wis. 2d 666 (1972) and other Wisconsin cases construing the term "clear proceeds," the memorandum sets out a few general conclusions concerning the meaning of "clear proceeds". These may be of assistance to the State Bar should it consider possible legislation affecting clear proceeds from fines and forfeitures:

1. The Legislature has the implied power to determine what portion of a fine constitutes "clear proceeds" as used in the state constitution, but this power is limited by judicial standards of reasonableness.

2. In determining what amount constitutes "clear proceeds," the Legislature may estimate the reasonable costs of collecting the fines concerned.

3. "Clear proceeds" means ***net proceeds*** and any deduction from the amount of fines should represent the actual or a reasonably accurate estimate of the costs of prosecution.

4. As a corollary to (3), the Legislature may not allow the county to withhold more money from fines than are necessary to reimburse the county for the expense of prosecuting the offense which generates the fines.

5. The Legislature may not grant so large a percentage of fines that the sum left for the school fund is merely nominal.

6. The percentage of fine left to the county can be substantial (e.g., 50% in traffic cases) where the amount bears a reasonable relationship to the county's cost of enforcing the laws from which the fine is derived.

7. The Legislature may not provide for sums to be deducted from fines for future enforcement of the law.

In order to avoid these limitations, the Legislature has tended to prefer the assessment of surcharges earmarked for specific purposes. This approach would be preferable for funding civil legal services.

The Legislature recently consolidated all of the court assessments, surcharges, and restitution payments into Chapter 814, Wis. Stats., (the chapter of the statutes that requires the courts to impose costs and fees) and clarifies which assessments, surcharges, and restitution payments apply to which type of violation. Also, the act changes the name of all of these assessments, surcharges, and restitution payments to surcharges and requires the Director of State Courts to prepare a fiscal estimate on any bill that creates or modifies a surcharge.[7] The accompanying **Appendices I, II and III** outline the various court

[7] 2003 Wisconsin Act 139 took effect on March 25, 2004, except as follows: effective July 1, 2004, the Department of Administration, rather than the State Treasurer, is required to report annually to the Legislature the amount of money that the courts collect as costs, fees, fines, forfeitures, and surcharges.

assessments, fees, surcharges and restitution charges imposed in Wisconsin (with designations reflecting pre Act 139 nomenclature).

An illustrative example of the way surcharges work is the crime victim and witness surcharge assessed against any person who is convicted of a misdemeanor or felony violation of state law. Prior to 1993-94, the surcharge was $30 for each misdemeanor violation and $50 for each felony violation and the resulting surcharge revenues were authorized solely to fund county reimbursements for victim and witness assistance services. By 1993, the victim and witness assistance surcharge underwent two modifications. First, surcharge revenue was authorized to partially fund the crime victim compensation program. Second, the surcharge for a misdemeanor offense was increased from $30 to $50 and for a felony offense was increased from $50 to $70. The $20 increase for each classification of crime was to be used to fund a sexual assault victim services program. Thus, the initial $30 for a misdemeanor and the initial $50 for a felony was termed "Part A" of the surcharge. These surcharge amounts are authorized to fund crime victim compensation and victim and witness services. The additional $20 for both a misdemeanor and a felony violation is termed "Part B" of the surcharge. These Part B amounts are authorized to fund the sexual assault victim services program. **Table 5** below details the amounts of crime victim and witness surcharge revenues collected during each of the last 10 fiscal years for which figures were available.

Table 5: Crime Victim and Witness Surcharge Revenues Collected

Fiscal Year	Part A Amount	Part B Amount
1992-93	$1,946,800	---
1993-94	1,874,600	$66,500
1994-95	2,167,500	412,500
1995-96	2,217,900	755,800
1996-97	2,271,800	970,300
1997-98	2,279,400	1,117,800
1998-99	2,432,700	1,307,000
1999-00	2,597,400	1,415,500
2000-01	2,261,500	1,307,100
2001-02	2,918,800	1,626,400

5. *Pro Hac Vice* Fees To Provide Funding For Civil Legal Services

Challenges:

a) The Office of State Courts does not currently track pro hoc vice admissions nor is any fee imposed on *pro hac vice* practice in Wisconsin.
b) Would require Supreme Court action (adoption of a Supreme Court rule).
c) The Rules and Bylaws revisions adopted by the Board of Governors in May 2004 would have to be revised.
d) Not likely to generate vast sums of money.
e) Might lead other (i.e., surrounding) states to impose similar fees.
f) Wisconsin might adopt a *pro hac vice* rule and then choose to use the revenue for some other purpose (e.g., funding OLR regulation of attorneys admitted under *pro hac vice);*
g) If admissions rules permit admission reciprocity this might reduce the number of lawyers subject to the *pro hac vice* fee.
h) It might require amendment of proposed rules and bylaws.

Twenty-two states and the District of Columbia currently impose some fee for *pro hac vice* practice; of those, four - Oregon, Mississippi, Missouri and Texas - use the revenue to fund free legal services to the poor. Similar proposals are reportedly now under consideration in Arizona, Kentucky and New York. Proponents of this funding mechanism recognize that designating *pro hac vice* fees to benefit Legal Aid is not a panacea. But they argue it is a step in the right direction and that civil justice should not be available only to those who can afford to pay a lawyer.

An instructive example might be Oregon, which in 2001, instituted the first *pro hac vice* fee specifically for legal services. There, the state legislature authorized the state supreme court to implement the fee, which is $250 per attorney per case per year. The fees are collected by the Oregon State Bar and are distributed by poverty population to the legal services providers that also receive funds from a filling fee surcharge. The fee is generating approximately $65,000 annually. (It should be noted that Oregon has a reciprocity admission arrangement with Washington and Idaho, which reduces the potential revenue. It is not clear how much it costs the Oregon Bar to administer this program. This should be researched.)

The Kentucky Supreme Court is currently considering an amendment to Kentucky SCR 3.030(2) that would require lawyers licensed in other states to pay a fee equal to the annual dues charged by the Kentucky Bar Association to members admitted for five years or more. The fee would be paid each time an out-of-state lawyer applies to appear in a case in Kentucky. The proposed amendment calls for the *pro hac vice* fees to be paid to the Kentucky Bar, but it does not specify how the money is to be spent.

Taking this step would require researching the state statutes and court rules related to *pro hac vice* to determine a process for obtaining the fee (e.g. is legislation required?). A mechanism for collecting and distributing the fee would have to be established.

6. Using Punitive Damages Awards to Fund Civil Legal Services

Challenges:

a) Would probably have to be passed by the Legislature.
b) Plaintiffs' lawyers would certainly oppose the proposal, splitting the Bar. In addition, defense lawyers might also oppose the proposal.
c) The Legislature might simply "pocket the money" by placing the revenues derived from such an approach into the state's general fund without making any allocation to civil legal services funding.
d) Would have to figure out how to address awards that are reduced on appeal.

Eight states -- Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon, and Utah – have introduced "split recovery" schemes. Most of these states require a fixed percentage (ranging from 50% to 75%) of the punitive damage awards to be allocated to the state. In Illinois, however, the trial court has total discretion over the extent of apportionment. States also differ as to which cases such schemes affect. Most split-recovery states apply the scheme to all cases in which punitive damages are available and awarded, but Georgia applies it only to products liability cases, and Iowa applies it only where the jury determines that the defendant's misconduct was not directed specifically at the individual plaintiff.

States also take contrasting approaches to calculating the plaintiffs' attorneys' full contingency fee. Most states base it upon the entirety of the punitive award; however, Indiana and Oregon base it upon only the plaintiff's portion of the award.

Finally, states differ with respect to the recipient of the monies. In Alaska, Georgia, and Utah, the state's portion is deposited into a general revenue fund, while other states have established specialized funds. For example, Missouri deposits its portion into a fund designed to compensate tort plaintiffs unable to collect judgments from insolvent defendants. Oregon distributes its portion to a Criminal Injuries Compensation Account.

California Gov. Arnold Schwarzenegger has proposed requiring the plaintiffs to split punitive damage awards with the state--with 75% going to the public coffer. Eight other states, including several of our neighboring states, apparently already have similar arrangements. Our research indicates Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon and Utah collect between 50 and 75 percent of punitive awards in their states. (There was an article in the May 24, 2004 National Law Journal on this.)

Already—and unsurprisingly—the Schwarzenegger proposal has faced scathing criticism from the plaintiffs' bar. (They argue the money belongs to victims who win monetary damages by suing negligent companies.) In addition—and much more unusually—the general concept has also faced vigorous resistance by corporate defense attorneys. For instance, Victor Schwartz, general counsel to the American Tort Reform Association, in an op-ed in USA Today, admonished: "Some things--such as Venus' flytraps and beautifully colored snakes--may look good, but they are poisonous. The same is true of the idea of having punitive damage awards go to the state rather than to an individual plaintiff."

Governor Schwarzenegger's spokespersons have argued that victims are compensated by separate awards for actual injury or loss. They have also argued that punitive damages were never meant to be "windfalls" for those who file lawsuits, but are meant to punish the defendants for egregious, wanton or reckless behavior. Society as a whole is impacted by those actions. They ask, "How does it benefit everybody when one plaintiff gets $100 million?" It should be noted that Gov. Schwarzenegger's proposal has drawn additional fire because it also includes a ban against assessing punitive damages more than once for the same incident. If a corporation's actions injure or kill dozens, for example, that would limit punitive awards to a single victim.

In theory, compensatory and punitive damages serve different purposes in our judicial system. Compensatory damages (sometimes called actual damages) are those damages awarded to compensate an injured party for the injuries sustained and to make good or replace the loss caused by the wrong of another. Compensatory damages which include, for example, amounts of lost wages, pain and suffering, and the like, redress concrete losses suffered by the plaintiff. They are intended to "make the plaintiff whole" by restoring him or her to the position he or she enjoyed before the events that led to the lawsuit occurred.

Punitive or exemplary damages, by contrast, are aimed at retribution and deterrence, and focus not on the plaintiffs' losses, but on the defendant's misconduct. In other words, they are intended to punish the defendant and to deter others from engaging in similar misconduct. Besides punishment and deterrence, punitive damages serve the incidental purpose of giving the jury a way to vent its desire to punish the wrongdoer, which would otherwise be done under the guise of increasing compensatory damages.

Punitive damages can also serve other purposes, including compensating individuals for intangible injuries not included within compensatory damages, or else to compensate for the big chunk an attorney will take out of the total compensatory damages award. Thus, punitive damages can serve as an inexact assurance that the plaintiff, indeed, will be fully compensated.

Punitive damages also create an incentive for private law enforcement (i.e., the private attorney's general function). Absent punitive damages, plaintiffs might have difficulty finding a lawyer willing to handle a case involving only modest stakes, for the usual 33-40% contingency fee.

Nevertheless, in many cases, a punitive damages award may be an undeserved "windfall" to the plaintiff. Suppose a plaintiff suffers $10,000 worth of injury (and therefore gets $10,000 in compensatory damages), but also reaps a $10 million punitive damages award. If the main purpose of the punitive damages award is to punish the company, and deter it from repeating its heinous conduct, critics have asked, then why are they awarded, in lottery fashion, as a windfall to the plaintiff? Put another way, if punitive damages serve societal objectives of punishment and deterrence, why shouldn't the public interest be served by the punitive damages award?

Some critics concede that perhaps the plaintiff (and his or her attorney) should get part of the award as a reward for bringing the public-interested suit. But, they ask why should the plaintiff get the entire multimillion dollar award, when he or she has been compensated for his or her own injury, and the rest of the damage is more widespread? In 2002, this very reasoning convinced the Ohio State Supreme Court to apportion $20 million (minus attorneys' fees) of a $30 million punitive damages judgment -- awarded against an insurance company for bad faith denial of reimbursements for cancer treatments -- to a cancer research fund it established. In so doing, the court emphasized that "[a]t the punitive-damages level, it is the societal element that is most important. The plaintiff remains a party, but the de facto party is our society . . . ." The decision was controversial because no statute authorized the court's apportionment of punitive damages. But the reasoning behind it is the same reasoning that has led other courts to uphold - and Governor Schwarzenegger to propose - "split-recovery schemes."

Indiana and Oregon's highest state courts have similarly emphasized that punitive damages vindicate societal, as opposed to individual, interests.

The Bar should investigate whether this change to the allocation of punitive damages could be done by Supreme Court Rule rather than legislation. (This would, in theory, allow control over the proceeds derived and help assure that they would be used for civil legal services.) Though Ohio has no award splitting law (as noted above), in a 2002 decision, the Ohio Supreme Court allocated one-third of the remitted $30 million to the plaintiff and the balance (less attorneys fees) to a cancer research fund established by the Court.

7. Earmark a Portion of Large Settlements

Advantages:

a) Would enable the state to use the proceeds of any future large settlement (e.g., another tobacco settlement) to establish an endowment to fund civil legal services.

Challenges:

a) Would most likely take the form of a moral entreaty/obligation rather than a legal obligation. Compliance would, therefore, be voluntary.
b) If it is done legislatively, will the Legislature redirect the money? (Note how the state's tobacco settlement monies were supposed to establish a continuing revenue stream over a 30-year-period. That revenue stream has now vanished.)

This proposal might take the form of requesting the Attorney General's office and other private litigants who enter into large settlements to consider having a portion of the settlement proceeds go to fund legal aid. (An alternative would be to request the Attorney General's office to donate restitution funds from consumer cases to legal services providers.)

8. Cy Pres

Advantages:

a) May not require legislation.
b) Once the program is established, it is a relatively low cost mechanism for obtaining what can be substantial additional resources for legal services.
c) It provides a means to achieve the goals of the lawsuit when the original purposes cannot be fully met.

Challenges:

a) Would not be an immediate or predictable source of funding.
b) Wisconsin is not a hotbed of class-action litigation.
c) Judges may be unwilling to award funds to legal services programs whose attorneys appear before them in litigation because of the appearance of favoritism. This concern can be eliminated by directing the funds to an entity such as IOLTA or a bar foundation that can then give the funds to legal services.

The *cy pres* doctrine (comes from the Norman French term "*cy pres comme possible*," meaning "as near as possible"). It has long been used as a method of fairly distributing a trust fund when the original purpose could not be achieved. Under *cy pres*, the funds are distributed to the "next best" use.

Courts utilize this doctrine to award residual funds from class action lawsuits to legal services and other non-profit organizations. The *cy pres* concept also has been employed to dispose of other funds produced by court actions. For example, the attorneys' general offices in at least two states have donated restitution funds from consumer cases to legal services providers, and at least one program has received restitution funds paid in federal court criminal cases. There have been a number of other contributions to legal services from court cases, two of which are explained in the example section below, that may not be precisely *cy pres*, but are similar enough in terms of the process for obtaining them that they are included here.

In terms of class action lawsuits, if there is to be a payment of damages to class members, a fund is created. A time period is established during which people may identify themselves as class members and make claims. Often, only a small percentage of those eligible will do so. As a result, there are often residual monies in the fund after the claim period has expired. The defendants usually have no right to these excess funds. Under the doctrine of *cy pres*, judges may order that the unclaimed funds be put to their next best use, which may be for the aggregate, indirect, prospective benefit of the class. In the typical case, the award is made pursuant to the stipulation (or at least recommendation) of counsel for both plaintiffs and defendants.

A good argument can be made that legal services providers are appropriate beneficiaries of funds under the *cy pres* doctrine in at least two types of cases: (1) where the unnamed members in many class action lawsuits are people similar to legal services clients - those who cannot afford legal counsel, and might very well not know what their rights are or have their rights protected; and (2) where the case may be on an issue, like consumer fraud, that is directly related to the work of legal services.

The State Bar could help by:

- Adopting a Board of Governors resolution supporting this initiative.

- Educating judges about their authority to direct funds under the *cy pres* doctrine to legal services providers.
- Communicating with litigation attorneys to educate them about needs of legal services and the use of this mechanism.
- Keeping WisTAF or legal services providers informed about major cases in which the *cy pres* doctrine might be applicable.

9. Temporary Assistance to Needy Families

Challenges:

a) Would have to be passed by the Legislature.
b) There is a roughly $50 million structural deficit in the state's TANF allocation, which will make it virtually impossible to get this proposal considered let alone adopted.

In the past, the Bar used its government relations resources to lead an intensive (and successful) lobbying campaign for a state appropriation for legal services as part of the Temporary Assistance to Needy Families (TANF) program. In the 1999-2001 and 2001-2003 state budgets, WisTAF, our IOLTA program, received appropriations of $200,000 over each biennium to distribute to grantees for the provision of civil legal services for low-income families. Unfortunately, that funding was discontinued as part of resolving a structural deficit in the TANF program.

Under the former arrangement, federal TANF funding was provided to the Wisconsin Trust Account Foundation (WisTAF), Wisconsin Family Law Project (WFLP), for the provision of legal services to families whose income is at or below 200 percent of poverty. WisTAF awards grants to agencies that provide civil legal services to low income clients or programs for the administration of justice.

Funding was distributed to WisTAF in proportion to the amount of private donations received to fund services for eligible families, and only after the submission of a report on the amount of private donations received to fund legal services for eligible families.

The legal services provided to these families included the areas of family/domestic violence, public benefits, consumer rights, housing and public utility. Specialized programs targeted under-served populations such as minority families with HIV+ heads-of-family, families with children with developmental and physical disabilities, and elderly heads-of-family with young children.