WisTAF Petition Study Committee

Final Report

to the Board of Governors

November 2004

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FOREWORD

"The dictionary defines "justice" as fairness. The system for administration of our laws is called the justice system because the single most important principle upon which that system is premised is fairness. Our laws, however, are complicated. They are created by local, state, tribal and federal legislative and administrative bodies. They are interpreted and enforced by local, state, tribal and federal courts, administrative and other agencies. The volume and complexity of the laws and the procedures for their administration have made it increasingly difficult to effectively utilize the justice system without the help of a lawyer. That means for those who cannot afford a lawyer, access to the system does not necessarily mean access to justice.

"Publicly funded legal services, or "legal aid," evolved in an effort to insure that poverty was not an insurmountable barrier to justice. Financial and political support for this effort has been inconsistent over the years."

— Washington State Access to Justice Board, Introductory Paragraph, Hallmarks of an Effective Statewide Civil Legal Services System, Revised February 20, 2004

"The question has been raised, should we regard the provision of civil legal services for the poor as part of the central mission of state courts? My answer is, how can we not? We have progressive statutes providing legal remedies for many of the problems experienced by people who responded to our survey — for example, landlord-tenant disputes, domestic violence, and consumer fraud. We have fine courts with honest judges who try hard to reach just results in the cases that come before them. The people identified in our survey pay their share of taxes to support the salaries of court personnel and for facilities in which the courts operate. How do they benefit in return if their poverty prevents them from enforcing their rights under the statutes, and from bringing their cases before the court?

"In earlier eras, poverty, lack of educational opportunity, gender, or ethnic background would have blocked many of us from achieving our present positions as judges and lawyers. We are here now because of the collective efforts of others in the past to make equal justice under the law a reality. To assure reliable access to the courts for the poor is one way we can carry on that tradition in our own time."

— Judge Mary Kay Becker, Co-Chair of the Washington Task Force on Civil Equal Justice Funding, remarks to the Washington Board for Judicial Administration, October 17, 2003

"There is a need for legal aid to the poor… However, that need should be satisfied by the state of Wisconsin through the tax system. Every taxpayer and citizen of this state has a right and duty to support legal aid to the poor or be recipients of such services, if qualified. It is a function of government to see that the need is met. There is no reason that clients of bar members should be the only persons in society supplying the funds as an investment base for the money to support a legal aid program."

— Justice Donald W. Steinmetz , dissenting opinion, in In The Matter of the Creation of SCR Chapter 13 and Amendment of SCR 11.05 and SCR 20.50: Interest on Trust Accounts Program, 128 Wis.2d xiii, xx (1986)

PREFACE

As part of its analysis, the WisTAF Petition Study Committee formed three subcommittees to assist it in its work. One subcommittee worked to develop and articulate a fair and balanced analysis of the legal issues and other issues raised by the petition, including any particular issues the State Bar wishes to raise with the Court. A second subcommittee worked to examine what Wisconsin lawyers and the State Bar of Wisconsin are doing to address unmet civil legal needs and to analyze alternative approaches to addressing access to justice issues. The third reviewed member feedback.

The issues subcommittee identified 13 specific questions which are addressed in this report. While Board of Governors members may certainly formulate other questions, the subcommittee attempted to address those which it felt would best assist the Board in formulating a response to the petition. The alternatives subcommittee attempted to describe what the State Bar and Wisconsin lawyers are already doing to address the issue of the provision of civil legal services to low- and lower middle-income persons and to lay out a range of options or approaches that the Board of Governors could consider if the Bar wishes to take a leadership role in increasing the provision of civil legal services in Wisconsin.

Working with limited time and resources, the committee decided to combine the work of these two subcommittees into one report, which follows. Board members will note a variety of writing styles owing to the fact that portions of the report were drafted by individual attorneys, each with his or her individual perspective and voice on these issues. To keep this document to a manageable size all appendices referred to in the report are available on the Board of Governors Web page (which can be found at http://www.wisbar.org/bar/bog.html). Click the link labeled: WisTAF Petition Study Committee Report Appendices.

The committee members sincerely hope you will find this document to be a useful reference as you formulate the State Bar of Wisconsin's response to the WisTAF petition and the issues it raises.

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INTRODUCTION

Defining the "Problem" To Be Addressed

The delivery of civil legal services to low-income (and to an extent even to lower middle-income) persons is arguably among the greatest challenges facing our profession.

Diagnosing the problem and prescribing a remedy is not as simple or straightforward a task as it might seem. "Unmet legal need" is an amorphous concept. There is a fair amount of "gray area" as to what is a legal need, what is an acceptable level of justice to be reached in our society, and toward what needs we might expect our society as a whole to devote resources in order to reach that acceptable level of justice.

Even the concept of who is to be served via WisTAF grants is somewhat murky. The Supreme Court in creating SCR 13.02 (2) (a) 1 provided that the WisTAF board shall accept grant applications and make grants or expenditures of IOLTA funds for the purpose of "providing legal aid to the poor" but did not define the term "poor" in relation to any standard.

Justice Steinmetz, in his dissent to the order establishing the IOLTA program and WisTAF, acknowledged this lack of a standard and of definitional clarity:

> "There can be no argument against the purpose of the "Interest on Trust Accounts" (IOLTA) program as stated in SCR 13.01. There is a need for legal aid to the poor, even though that group is not defined by these rules. (SCR 13.03(2)(a).)" .[1]

Jim Baillie, immediate past President of the Minnesota State Bar Association and a long-time champion of *pro bono publico* efforts identifies the "big picture" issues as follows:

> [The delivery of civil legal services to low- and middle-income persons] seems to be an intractable problem and we have no clear sense of whether we are making progress. It is our profession's Achilles heel. If we do not meet the challenge, we will continue to be seen as serving high-end legal needs and leaving others without the help they need. We need to make the problem of delivery of legal services to low-and middle-income individuals our profession's problem and we all need to be personally involved in finding the solutions that will be part of an ideal system.
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> For some this is a problem to be addressed by contributing more money to our staffed legal services and judicare providers. I believe in those programs as an important part of an ideal system and in the need for additional funding for them, but continued efforts to increase funding are not nearly enough. We have worked very hard at increasing the resources for legal services with only moderate

[1] *In The Matter of the Creation of SCR Chapter 13 and Amendment of SCR 11.05 and SCR 20.50: Interest on Trust Accounts Program,* 128 Wis.2d xiii, xx (Justice Steinmetz *dissenting*).

success. Moreover, raising funds for the services to be provided by others makes civil legal services our charity and charity will not be enough.

Pro bono legal service, which I have advocated throughout this year, is another very important part of an ideal system. We need to bring to bear the resources of the 20,000-plus attorneys who live and practice in Minnesota who could step forward — helping people in court with, for example, family law problems and landlord-tenant disputes, but also helping the thousands of small businesses that start without legal assistance whose success would strengthen our community and helping the small nonprofits that are important in our community. Funding *pro bono* programs that match clients that need these services with lawyers who are able to provide those services is also a critical part of an ideal system.

But those together would not be enough. There is an "elephant in the room." That elephant is that to a large degree we are also not delivering the needed services to the middle class. That presents other difficult issues. That leads into the difficult area of partial fees for services provided through organized programs. Partial fees could partially support the programs and partially support the lawyers. But we would prefer not to have organized programs replacing the market delivery of services to a significant extent.

Thus, an ideal system of delivery of legal services has a large component of "privatization," — ways in which market services can be provided for fees the clients can afford and from which the attorneys make a decent living. We need innovative ways to make services available from private attorneys — from "unbundled legal services" to remote services provided via the Internet and other innovative methods of delivery. If we can help develop a system that brings more services to the middle class through private attorneys, that would help create the political constituencies (the middle class and lawyers generally) we need to support an ideal system that includes a mix of publicly funded and privately funded services. [2]

A Word on the Use of Statistics in This Report

In developing this report, the committee looked for guidance from a variety of sources of information. Members tried to draw from what other states were doing, and looked at a variety of assumptions and models for determining the scope of the unmet civil legal needs of the poor in Wisconsin. The lack of a universal definition of "poor" was an impediment to this effort and complicates the determination of what numbers should be used to quantify the problem that the provision of civil legal services seeks to address.

The committee decided after careful consideration to include numbers at various places in this document for the purpose of reporting to the Board of Governors on the general nature of the problem of unmet civil legal needs with a full recognition of their

[2] Baillie, James L,. President's Page, "*Toward an Ideal System for Delivery of Legal Services*" *Bench & Bar of Minnesota, May/June 2004.*

limitations. The numbers cited come from a number of sources, may or may not be not up to date, and may or may not be specific to Wisconsin (e.g., they may be based on extrapolation from studies or date from other states). Because no scientific study of the civil legal needs of Wisconsin residents has been undertaken, any numbers used in this report are necessarily somewhat speculative. They are used for illustration purposes, not for their accuracy.

The Board of Governors may wish to determine whether a more comprehensive attempt to address the problem of unmet civil legal needs should include an effort to update these numbers and make them specific to Wisconsin.

PART ONE: ANALYSIS OF ISSUES SYNTHESIZED FROM VARIOUS DISCUSSIONS, CONTRIBUTIONS FROM STATE BAR MEMBERS, FROM THE BOARD OF GOVERNORS AND FROM THE COMMITTEE

INTRODUCTION

As part of its analysis, the WisTAF Petition Study Committee formed a subcommittee to develop and articulate a fair and balanced analysis of the legal issues and other issues raised by the petition, including any particular issues the State Bar wishes to raise with the Court. The subcommittee identified 13 questions which are addressed below as follows:

1. Are there Important and Unmet Needs for Legal Representation of the Poor in the State of Wisconsin?

A. What are the needs?

There can be little dispute that many low-income persons in Wisconsin have legal needs that are not being met. While there is no universal definition of who is considered to be low-income, economic disparity within the state is undeniable. The greater difficulty comes in quantifying the volume of unmet civil legal needs of low-income persons. Neither SCR 13, the Commission on Delivery of Legal Services report (CDLS), nor the current WisTAF petition expressly assess the volume of Wisconsin's unmet legal service need. The Petition cites to several articles and studies, but does not offer current, detailed data for the state.

Here is some of what we know. In 1999, no more than 20,000 low-income Wisconsinites received direct representation in civil legal assistance from WisTAF grantees. Using ABA standards, approximately 183,000 additional low-income persons, or nine times the number served by WisTAF-funded agencies, needed legal services.[3] The Petition cites

[3] *See* Hannah Dugan, *Who's Providing Legal Counsel to Wisconsin's Poor?*, Wisconsin Lawyer, May 2001, p.3 on-line version available at: http://www.wisbar.org/wislawmag/2001/05/dugan.html.

this article[4] to assert that civil legal funding available for legal services is $13.47 per low-income citizen in Wisconsin.[5] The source for that estimate, the State Planning Assistance Network, noted that other nonprofit law firm resources and spending averages are not included in these calculations, hence the true amount is somewhat higher.[6]

Here is some of what we don't know. Unknown is how many practitioners, on their own, handle cases at significantly reduced fees for low-income clients. The CDLS report recommended use of lay advocates in domestic abuse and other limited proceedings. The extent to which those services are available is not quantified.[7] Similarly, the CDLS report recommended that the State Bar develop guidelines for expanding the range of activities which paralegals perform under lawyer supervision.[8] The portion of need that is filled by voluntary *pro bono* efforts of Bar members, or even by law students in clinics, is unknown.[9] Thus far efforts to document voluntary *pro bono* efforts have not succeeded.[10]

Overall, faced with the tens of thousands of persons falling under the ABA standards, there remains a tremendously high annual volume of unmet civil legal needs.[11]

Beyond quantifying the volume of unserved legal needs, evaluation of any funding program would be more thorough if the request included data on the substantive areas of unmet legal service needs. In 1996 the CDLS reviewed, among other things, a State Plan for Wisconsin drafted by the four legal service corporation (LSC) funded providers, describing the current state of legal services delivery to the poor. The CDLS also reviewed the 1993 ABA's comprehensive legal needs study, and reached consensus on six areas of legal needs as priorities for study: Financial/Consumer; Housing & Real Property; Community/Regional; Family & Domestic; Wills, Estates and Financial Planning; and Employment & Labor.[12] Feedback on the consequences of a lack of available and affordable representation in family and domestic violence matters was particularly compelling.[13]

B. How important are these unmet needs?

Certainly the low-income client with a legal need would say "Very." According to the CDLS report, identified unmet legal needs relate to basic human requirements for shelter,

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[4] Id.
[5] *See* WisTAF Petition, at ¶ 26
[6] *See* Dugan, *supra*, n.13.
[7] *See* State Bar of Wisconsin *Commission on Delivery of Legal Services Report*, at p 24. . The CDLS report cites to an ABA report including self-help or *pro se* as a form of legal assistance. Members of the CDLS commission had reservations about relying on *pro se* or self-help as a meaningful form of assistance. *See* p. 9; on-line version available at http://www.wisbar.org/bar/reports/cle/cmleged.htm.
[8] The State Bar filed a petition with the Wisconsin Supreme Court regarding licensure of paralegals. A hearing on that Petition was held on October 27, 2004.
[9] Dugan, *supra*, Note 1, p.4.
[10] *See* Petition, *supra*, Note 3, ¶¶ 21-22
[11] Dugan, *supra*, Note 1, p.3.
[12] Report, *supra*, Note 5, p.10.
[13] *Id*., p.23.

safety, family structure and gaining or maintaining employment. Other needs for legal assistance involve consumer transactions and estate issues. While the Petition does not involve the right to appointed counsel, opinions in appointed-counsel cases illustrate the disparity between parties who have representation, and those who can not afford it: "In many (custody) cases a poor, sometimes undereducated and unsophisticated, parent is faced with the full might of the State, an entity that itself seeks to deprive the parent of his or her children. If a poor person is faced with the prospect of going to jail for a minor theft offense, she is provided counsel. Yet if the same person is forced into court where she is faced with the prospect of losing a child, or losing partial or full parental rights to the State or to a third party, she is not provided counsel."[14]

As a policy maker, the Board of Governors can, and already has, agreed that these unmet needs for legal services are important.[15] Because of this recognized importance, as well as the recognition that legal services funding leaves many needs unmet, the CDLS recommended that: "All lawyers should make a personal commitment to perform or provide financial support for voluntary *pro bono* representation of individuals with limited means."[16] But for any policy maker to prioritize meeting those needs with limited pooled resources, even a variety of resources, there should be a comprehensive and current assessment of the quantity and type of needs for legal assistance that remain unmet.[17]

Other states have performed studies of unmet legal needs. In Washington State, for instance, the state court system established a Task Force on Civil Equal Justice Funding. The resulting study involved 2,100 face-to-face and telephone interviews, as well as observations from lawyers, judges and others within the justice system. Among its findings were that the civil legal problems of low-income households most often involve safety or subsistence. Family-related problems such as divorce or child support have the highest rate of lawyer assistance, but even then the rate is only 30%. Nearly half of the legal issues affecting low-income people involve housing, family and employment matters, followed by consumer and municipal and public services. Women and children have more legal problems than the general low–income population. Minorities, the disabled and members of other demographic groups also experience certain legal issues at higher-than-average rates. Low-income legal problems do not differ significantly by region, though rural residents know less about available legal resources and have less access to such services.[18]

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[14] *Frase v. Barnhart*, 840 A.2d 114, 134 (Md. Ct. App. 2003) (Cathell, J., *concurring*) *See also Joni B. v. State*, 202 Wis. 2d 1, 16, 549 N.W.2d 411 (1996) (discussing disparity in opportunity for justice between unrepresented, poorly educated parent and well-represented State entity, in holding that circuit court has discretion to appoint counsel for any party other than child in CHIPS proceeding).

[15] *See* 1989 BOG Resolution ("The State Bar of Wisconsin is committed to expanding civil legal services for low-income residents of Wisconsin…") cited in Petition, *supra*, Note 3, p.12.

[16] Report, *supra*, Note 5, p.27.

[17] (*See also* comments voiced at Milwaukee Open Forum on the WisTAF Petition, **Appendix A**)

[18] *The Washington State Civil Legal Needs Study*, Executive Summary, pp. 1-2. **(Appendix B**) The Washington State Supreme Court's Task Force on Civil Equal Justice Funding published "*The Washington State Civil Legal Needs Study*" to highlight the level of unmet legal needs among the state's low and moderate income population. Data for the study were gathered through a three-pronged approach which

The Task Force undertook the study as a predicate to a long-term approach to recommending solutions to the legal services funding problem. The Task Force desired solid documentation of the extent of the need, so that it could establish an appropriate level of funding for state-supported civil equal justice services.[19]

In the past year, the Arizona Bar undertook a similar study. Its findings included that the most prevalent need for legal services included the areas of personal finance, consumer, housing, real property, employment, estate planning, family and domestic matters.[20] In assessing the current legal services delivery system, the Task Force found that the state's three LSC-funded programs worked primarily on domestic violence cases.[21] Other legal services programs provided assistance in specialty areas, including class actions, immigration, and assistance to the elderly.[22] The report observed that when low-income persons are unrepresented, their cases can cost society far more than the expense of providing legal services to address them.[23]

The absence of a comprehensive study for Wisconsin makes it much harder to assure that a particular partial solution, even one that yields over $800,000 annually,[24] will make a significant difference. For instance, as the BOG considers its position on the Petition, it likely will want to know whether the assessed funds will be disbursed evenly among the six substantive areas identified by the CDLS, for example, or whether those funds would have the most impact if directed to, and monitored within, only two-three areas. Another consideration is the impact the federal limitations on the substantive areas LSC funded providers can engage (*i.e.*, no immigration work, no class actions) have on Wisconsin's ability to provide legal representation throughout its own prioritization of needs. This aspect is further addressed in the analysis of Question 10.[25]

Given the national and state studies already performed, along with the policy statement by the BOG in 1989 and the 1996 findings of the Commission on the Delivery of Legal Services, it must be agreed that the needs are important, but subject to prioritization. One state's ranking of needs may not match those of another, for a variety of reasons. If the

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included a field survey which targeted low-income people without a permanent residence or telephone, a telephone survey which targeted low- and moderate-income people, and a stakeholder survey which compiled data by surveying the legal and social services community in Washington. The task force based this legal needs study in part on both the ABA's 1994 national study and "The State of Access to Justice in Oregon" study. Select findings of the study include:

- Roughly 87% of low-income households experience a civil legal problem each year.
- Low-income people face 88% of their legal problems without help.
- Women and children face more legal problems than the low-income community in general.

[19] Justice Charles W. Johnson, *Moving Beyond Anecdotes: The Washington State Civil Legal Needs Study*, Washington State Bar Association Bar News, Jan. 2004, p.2 online version. (**Appendix C**)

[20] *Access to Justice Task Force, Report to State Bar of Arizona Board of Governors*, Oct. 17, 2003, p.3. (**Appendix D**)

[21] *Id.*, p.5

[22] *Id.*, p.6.

[23] *Id.*, p.4.

[24] *See* Petition, *supra*, Note 3, ¶ 24,

[25] *See* p. 31, *infra.*

BOG is to support a new SCR 14, or even a modification of SCR 13, it may want to play more of a role in determining the priority of how the funds are distributed. The BOG is also better positioned to work toward legislative solutions, an approach not available to the WisTAF Board.[26] But for any long-range solution to be effective, a comprehensive needs study should come first.

2. Has the Legal Profession in Wisconsin Failed to do its Share in Correcting the Problem of an Unmet Need for Legal Representation of the Poor Sufficiently So as to Justify a Mandatory Assessment?

A. Who shares the responsibility for solutions?

Question Two includes several sub-questions. First, what is the legal profession's share of responsibility to correct the problem, distinct from the share or responsibility of tax-paying citizens at large? There are multiple views on this. The Petition cites to the attorney's oath, to the broad call to *pro bono* service in SCR 20:6.1, and to the more explicit 1989 resolution of the BOG asking lawyers to perform legal service for low income clients for at least 25 hours per year, or to contribute a dollar amount equal to 25 hours per year to an organization that provides civil legal services for low income persons.[27] These three sources support the proposition that lawyers have a special tradition and moral or ethical obligation to assist in providing legal services to low income persons.

Some bar members view that because their livelihood is derived from the legal system, they are morally obligated to improve the system, including improving access to justice for low income persons. Their intimate knowledge of the system also makes them more able to effectively target their resources. Other lawyers support the assessment because they are afraid of the potential fall-out of not supporting it.

No one is saying the problem is a lawyers-only problem. Justice Steinmetz noted in his dissent to the order creating WisTAF that the IOLTA program takes funds strictly from lawyer's clients (or banks), and imposes only a paperwork requirement on lawyers.[28] The Petition recognizes that the problem is community-wide, and that the Court, the Bar, the Legislature and citizens need to develop a long-term strategy.[29] But because such a long-term strategy is not in place, and because the IOLTA funds are dramatically dwindling, WisTAF has put forth its Petition now. A fuller discussion of which constituencies should help solve this problem is contained in the analysis of Question 7 below.[30]

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[26] *See* WisTAF Articles of Incorporation, Sec. X.
[27] Petition, *supra*, Note 3, ¶ 23.
[28] *In The Matter of the Creation of SCR Chapter 13 and Amendment of SCR 11.05 and SCR 20.50: Interest on Trust Accounts Program*, 128 Wis.2d xiii, xx (Justice Steinmetz *dissenting*).
[29] Petition, *supra*, Note 3, ¶ 26.
[30] *See* p. 27, *infra*.

B. Has the legal profession failed to fulfill an obligation?

The second sub-question is: has there actually been a failure of the legal profession to fulfill an obligation to perform or help fund these services? The drop in interest rates is not due to any oversight or conduct of Wisconsin lawyers. The Petition does cite a change in the practice of procuring retainer fees, but does not attribute this change to lawyers seeking to keep revenue for themselves at the expense of IOLTA-funded programs.[31] Some attribute the sinking trust account balances to unauthorized practice of law by realtors and title companies.[32] The Petition also recounts the history of the Equal Justice Fund, Inc. (formerly Equal Justice Coalition), and notes that the effort to create an endowment to support legal services was not successful, as only 5% of Wisconsin licensed lawyers contributed.[33] The Petition does not describe reasons for the lack of EJF/EJC success, which may have little or nothing to do with any "failure" of the legal profession.[34]

The Petition asserts that lawyers have not met the call to offer their services on a *pro bono* basis, citing instances where *pro bono* reporting has been resisted.[35] Many in the profession disagree. They would argue that it is inappropriate to conclude that because certain legal needs are unmet solely by *pro bono* services, it necessarily follows that the *pro bono* efforts of Wisconsin lawyers are insufficient. Yet the IOLTA program established by SCR 13 and administered by the WisTAF board was not tied to, or designed to monitor statewide *pro bono* efforts. The Petition offers this syllogism: market forces have substantially decreased IOLTA revenues, resulting in further reduction of legal services for the poor. Lawyers, who have not taken up the slack in reduced funding by substantially increasing their *pro bono* service, ought to be made to contribute to a new fund so that the services level can be somewhat restored.

The 1996 CDLS report anticipated the same link eight years ago: "The scope of the commission's work was necessarily broadened to include the consequences (of reduced LSC funding and shrinking IOLTA revenues) . . . and it became apparent that the legal profession would be called upon to step up its *pro bono* efforts . . . the private bar . . has been potentially cast in the role of replacing or funding the provision of legal services to low-income people."[36] The CDLS, however, offered some additional explanations for the unmet needs. Specifically, its Report noted that the legal profession is becoming more specialized, and there are not enough lawyers with experience in poverty law issues to meet the current needs. Second, the high costs of a legal education and rising debt, plus the increasing pressure for billable hours, makes it difficult to promote volunteer

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[31] *Id*, ¶ 3.
[32] See Gwen Connolly portion of article, *Should supreme court assess lawyers to fund civil legal services for the indigent*? (*"In Opposition to the WisTAF Petition.")*, to be printed in Wisconsin Lawyer, November 2004; currently on-line at: http://www.wisbar.org/newscenter/feature/2004/1012.html.
[33] Petition, *supra*, Note 3, ¶ 15.
[34] **Appendix E** details funding provided by the State Bar of Wisconsin for the Equal Justice Fund/Coalition and related projects.
[35] Petition, ¶¶ 17-23,
[36] Report, *supra*, Note 5, p.4.

legal services.[37] In addition, a Government Lawyers study revealed that public practitioners recognize their professional obligation to participate in *pro bono* activities, but often feel constrained by Rules of Professional Conduct governing conflicts of interest.[38]

As noted above, there currently is no reliable data on how many Wisconsin lawyers annually supply *pro bono* or low-cost legal services.[39] Given the projected 180,000-200,000 low-income citizens[40] with legal needs, it is doubtful that the IOLTA program under SCR 13 was ever intended, when combined with robust *pro bono* efforts, to meet that entire need. A multi-pronged approach has always been needed.

In addition, the Petition does not address other means by which Wisconsin lawyers provide alternative services to low income citizens. Some of that information has now been assembled and is included in the section of Part Two this report addressing alternatives (starting at page 41) and in the various appendices to this report.

Overall, the financial circumstances in which WisTAF finds itself are not due to any "failure" of the legal profession. If a mandatory assessment is imposed, it will not be as a sanction for poor performance, but will be a policy statement by the Court attempting to address a need via a contribution by persons close to the problem.

3. Would The WisTAF Proposal, If Adopted, Constitute A Tax—And, If So, Does The Court, As Opposed To The Legislature, Have The Power To Levy It?

WisTAF's proposed Chapter SCR 14 includes the following provision:

> **SCR 14.03 Assessment of attorneys; enforcement. (1)** Annual assessments. Commencing with the state bar's July 1, 2005 fiscal year, every attorney shall pay to the fund an annual assessment, to be determined by the Court, to augment Interest on Lawyers Trust Account (IOLTA) revenues as granted and administered by the Wisconsin Trust Account Foundation, Inc. pursuant to SCR Chapter 13. The initial assessment shall be $50.00. An attorney whose annual state bar membership dues are waived for hardship shall be excused from the payment of the annual assessment for that year. An attorney shall be excused from the payment of the annual assessment for the fiscal year during which he or she is admitted to practice in Wisconsin.

[37] Report, *supra*, Note 5, pp. 12-13.
[38] Report, *supra*, Note 5, p. 29.
[39] Petition, *supra*, Note 3, *See* ¶¶ 21-22.
[40] *See* Dugan, *supra.*

> **(2)** Collection: Failure to pay. The annual assessments shall be collected at the same time and in the same manner as the annual membership dues for the state bar are collected. An attorney who fails to timely pay the annual assessment shall have his or her right to practice law suspended pursuant to SCR 10.03(6).

Article VIII, Section 1 of the *Wisconsin Constitution* provides:

> The rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods. Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe. Taxation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other nor with the taxation of other real property. Taxation of merchants' stock-in-trade, manufacturers' materials and finished products, and livestock need not be uniform with the taxation of real property and other personal property, but the taxation of all such merchants' stock-in-trade, manufacturers' materials and finished products and livestock shall be uniform, except that the legislature may provide that the value thereof shall be determined on an average basis. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided.

A. Is the proposed assessment a tax?

Fitch v. Wisconsin Tax Commission, 201 Wis. 383, 230 N.W. 37 (1930), adopts the definition of "tax" provided in the opening sentence of Cooley on Taxation (3d Ed.):

> [t]axes are the enforced proportional contributions from persons and property, levied by the State by virtue of its sovereignty for the support of government and for all public needs. The State demands and receives them from the subjects of taxation within its jurisdiction that it may be enabled to carry into effect its mandates and perform its manifold functions, and the citizen pays from his property the portion demanded, in order that, by means thereof, he may be secured in the enjoyment of the benefits of organized society. The justification of the demand is therefore found in the reciprocal duties of protection and support between the state and those who are subject to its authority, and the exclusive sovereignty and jurisdiction of the state over all persons and property within its limits for governmental purposes[41]

[41] Id. 230 N.W. at 38-39.

The term "State," as used in Cooley is a generic term for a unit of government and is not used to refer to a specific level of government (as in state versus federal or local). [42]

The proposed assessment would seem to fit the Cooley definition of a tax. It would be an enforced contribution by a unit of government—the Supreme Court. It would target attorneys—a "privilege or occupation" as those terms are used in Art. VIII, Sec. 1. It would be imposed to fund a governmental service or public need—provision of legal counsel to the indigent in civil cases.

On the other hand, it can be argued that the assessment is a licensing fee. Under the terms of the proposed rule, an attorney's license to practice law in the State of Wisconsin would be contingent upon payment of the annual assessment. Taxes are distinguishable from licensing fees. In *State v. Jackman*, 60 Wis. 2d 700, 211 N.W.2d 480 (1973), the court defined a tax as an assessment "whose primary purpose is to obtain revenue, while a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision or regulation."[43] Under *Jackman*, even if the revenue raised by an assessment exceeds the direct costs of a narrow regulatory program, that does not convert a fee into a tax.[44] Precision is not required. Still, the licensing fee must bear some reasonable relationship to the costs of related programs.[45]

The proposed assessment goes beyond merely covering for the expenses of supervision and regulation of the legal profession. It does not appear to have a reasonable relationship to existing expenses of supervision and regulation of the legal profession.

Driver's licensing fees cover expenses generated by drivers. Fishing license fees cover expenses generated by fishermen. In contrast, the legal expenses of indigent civil litigants are not expenses that are "generated" by the legal profession. The proposed assessment seeks to generate revenue to pay for a public expense. In that respect, the proposed assessment more closely resembles a tax than a licensing fee to cover supervisory and regulatory expenses.

B. If the proposed assessment is a tax, does the Court have the power to impose it?

Under the Constitution, the legislature has the authority to levy taxes.

> The legislature has plenary power over the whole subject of taxation. It may select the objects therefore, determine the amount of taxes to be raised, the purposes to which they will be devoted, and the manner in which property shall be valued for taxation. It may exempt property from taxation and limit the exercise of the taxing power of municipal

[42] See *City of De Pere v. Public Service Commission*, 266 Wis. 319, 325, 63 N.W.2d 768, 768 (1954), where the same Cooley definition of "tax" was used when analyzing a city assessment.
[43] *State v. Jackman*, 60 Wis.2d 700, 707,211 N.W.2d 480, 485 (1973).
[44] *See id*. at 710, 211 N.W.2d at 486-87.
[45] *See id.*

> corporations. These rules are subject only to constitutional restrictions and limitations.[46]

Even if the legislature were so inclined, it could not delegate the power to tax to the judiciary without running afoul of constitutional separation of powers principles. Legislative power may be delegated to subordinate administrative agencies, but cannot be delegated to or exercised by the judiciary.[47]

The judiciary may, under certain statutory schemes, enjoy the power to make determinations of the proper amount of taxes due—but it can never exercise the policy-making role of levying the taxes.[48] The WisTAF proposal would give the Supreme Court the authority both to levy the tax by adopting the proposed rule and to determine the proper amount due. If the proposed assessment is indeed a tax, then it is outside of the Supreme Court's power to levy it.

4. Does WisTAF Have Standing to Bring This Petition in Light Of The Fact It Was Organized To Distribute IOLTA Funds?

Whether the WisTAF Board has standing to bring this Petition for a new SCR is a close call. The argument for standing is that because the Board has an interest in maintaining its ability to meet SCR 13 and fulfill the purposes of the IOLTA program, it has standing to bring this Petition. The argument against standing is that the WisTAF Board was established only to administer a single, specific program: distribution of IOLTA revenues. Under that strict mandate, the Board has no standing to ask the court to establish a brand new funding program by imposing a mandatory assessment on Wisconsin lawyers.

Standing is a right to be heard by a court. Standing is not construed narrowly or restrictively. It is required as a matter of judicial policy and not as a matter of jurisdiction. To have standing, a person must show that the proceeding will have a direct effect on his/her legal interest.[49]

The legal interests of WisTAF are derived from the description of its purposes and powers. WisTAF is a nonstock, nonprofit corporation, organized for law-related charitable and educational purposes within the meaning of s. 501(c) (3) of the Internal

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[46] *State ex rel. Thomson v. Giessel*, 265 Wis. 207, 213, 60 N.W.2d 763, 766 (1953).
[47] *See Clintonville Transfer Line, Inc. v. Public Service Commission*, 248 Wis. 59, 77-78, 21 N.W.2d 5, 15 (1945).
[48] *See Fontana v. Village of Fontana-On-Geneva Lake*, 107 Wis. 2d 226, 239-40, 319 N.W.2d 900, 906 (1982).
[49] *In re Adoption of J.C.G.*, 177 Wis. 2d 424, 427, 501 N.W.2d 908 (Ct. App.1993) (citations omitted).

Revenue Code.[50] More specifically, WisTAF is the administrator of an IOLTA program.[51]

The WisTAF board has the power to adopt articles of incorporation, bylaws, rules and procedures consistent with SCR 13 for the management and administration of the IOLTA program and its affairs.[52]

The purpose of WisTAF is to receive funds from attorneys' trust accounts in accord with SCR 20.50(3) and to make grants or expenditures of these funds to provide legal aid to the poor, to fund programs for the benefit of the public as may be specifically approved by the Wisconsin Supreme Court, and to pay the reasonable and necessary expense of the board and other costs reasonably and necessarily incurred for the administration of the program including employment of staff.[53] Beyond interest revenues from the IOLTA program, WisTAF has been the recipient of donated funds distributed by the Equal Justice Coalition, Inc., and a $400,000 grant ($100,000 per year over a four-year period) by Wisconsin Legislature of Temporary Aid for Needy Families (TANF) funds.[54] .

WisTAF may exercise all powers and privileges of a corporation organized under Ch. 181, Wis. Stat., which are necessary to effectuate its declared purposes.[55] The WisTAF corporation shall not attempt to influence legislation.[56] If IOLTA funds are to be expended for a purpose other than to provide legal aid to the poor and for administrative expense, the supreme court must specifically approve the expenditure for exclusively public programs.[57] All of WisTAF's actions, with the exception of its grant-making decisions, are subject to appeal or judicial review.[58] Appellate or judicial review may be invoked by the court's own motion or upon petition of any interested party.[59]

The primary standing concern is that SCR 13 only authorizes the WisTAF Board to administer revenues derived from IOLTA funds, whether that revenue stream is a flood or a trickle. The rule is clear that the funding of new public programs (with IOLTA money) requires specific approval by the supreme court.[60] Paragraph 11 of the Petition acknowledges WisTAF's "limited mandate." The Petition explains that it is merely seeking an assessment "to augment the insufficient funds received from IOLTA for support of civil legal services for persons who cannot afford a lawyer." [61] The Petition seeks funds to support the purpose of SCR 13.03(2)(a)1 – "to provide legal aid to the

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[50] SCR 13.02.
[51] SCR 13.01(1)(c).
[52] SCR 13.03(1).
[53] Articles of Incorporation, Wisconsin Trust Account Foundation, Inc., Article III.
[54] *See* Petition, ¶ 2
[55] Articles of Incorporation, Wisconsin Trust Account Foundation, Inc., Article III (3).
[56] *Id.*, Art. X.
[57] Shirley S. Abrahamson, J. (*dissenting*) *In the Matter of the Creation of SCR Chapter 13 and Amendment of SCR 11.05 and SCR 20.50: Interest on Trust Accounts Program*.
[58] SCR 13.03(1).
[59] *Id.*
[60] SCR 13.03(2)(a)2.
[61] Petition, introductory paragraph, and proposed s.14.03(1). .

poor."[62] At a recent Milwaukee open forum on the WisTAF petition co-sponsored by the MBA, AWL and WHLA, Prof. Edward Fallone, a WisTAF Board member, stated that WisTAF is not set up to raise money, but only to administer IOLTA.[63]

On the other hand, the Petition expressly seeks creation of an entirely new fund – the public interest legal service fund, to be administered by the WisTAF Board.[64] There is no sunset provision to this new fund, nor is there a cap on the amount of the annual assessment. Another section of the Petition warns that "if IOLTA monies continue to shrink," no resources would be available to seek alternative revenue sources."[65]

At the recent Milwaukee Open Forum, sponsored by the Milwaukee Bar Association, Judge Patricia McMahon was uncertain whether, if established, the new SCR 14 would allow WisTAF to go beyond its current limitations and have authority to seek additional monies. Taken together, it is unclear whether the WisTAF Board views itself to have authority to ask for more money. But it has done just that by this Petition. The analysis of Question 5 of this Report addresses more fully the ramifications of seeking to create a new SCR instead of seeking to amend SCR 13 (under item 5 C below).[66]

According to its articles of incorporation, WisTAF has all the corporate powers at its disposal to effectuate its purposes. Its purposes can be read broadly or in more restrictive fashion. Given its reporting relationship with the supreme court, the express provision for judicial review of WisTAF actions, and the liberal application of standing principles, a reasonable conclusion is that the Board has standing to bring a petition to the supreme court to seek means of increasing the money available to it, at least to serve the law-related charitable and educational programs already in place. In that light, WisTAF's purpose, and its legal interest, is to provide funding for those legal service programs.

In contrast, if WisTAF's purpose is defined as limited to distributing however large or small the IOLTA revenue stream is, then it has no standing to bring the Petition. WisTAF was created by SCR 13 after the State Bar petitioned for it. Unlike the State Bar, WisTAF does not have a constituency from which its board of directors is elected. Its legal interests have already been defined, and restricted, by SCR 13. Under this view of standing, a petition seeking an assessment on state bar members should come directly from the State Bar Board of Governors and its over 21,500 member constituency.

5. Is WisTAF the appropriate entity to administer and distribute any assessment imposed, giving due consideration to its past experience and to its past financial decisions?

[62] *Id.*, *See* proposed SCR 14.02(2).
[63] *See* summary of comments voiced at Milwaukee Open Forum on the WisTAF Petition, **Appendix A.** (The Forum was sponsored by the Milwaukee Bar Association, the Association for Women Lawyers and the Wisconsin Hispanic Lawyers Association.)
[64] *Id.*, *See* proposed SCR 14.01.
[65] Petition, *supra*, ¶ 4.
[66] *See* i*nfra*, p 24.

Consideration of the above issue may be explored by examining the following four aspects: (a) the financial management of WisTAF; (b) the dissemination of information by WisTAF; (c) the creation of Supreme Court Rule Chapter 14, rather than an amendment to SCR Chapter 13; and (d) adherence to SCR 13.03(1) by WisTAF.

A. Financial Management of WisTAF.

A review of the financial management of WisTAF focuses on the following three areas: (1) investment of funds; (2) grant administration; and (3) establishment of a reserve.

1. Investment of Funds.

Among the documentation provided by WisTAF to this Committee, there are no guidelines or policies related to the investment of its funds. Prior to 1998, the allocation of the investments held by WisTAF was not disclosed on its financial reports. However, the financial reports from the years 1998 through 2003 disclose the following allocation of its investments and with the respective unrealized gain or loss:

Year	Investment Basis	% Money Market	% Fixed Income/Bond	% Equities	Unrealized Gain (Loss)
1998	965,980	1	61	38	94,943
1999	1,105,885	3	50	50	8,433
2000	1,058,506	2	35	63	47,636
2001	997,109	2	25	73	161,015
2002	1,105,335	13	14	73	(140,733)
2003	1,093,610	0	40	60	69,430

This information about WisTAF's investment experience should be examined and should be compared with members' experiences concerning the investment of funds for other non-profit organizations. It should also be compared against the industry standards relative to the investment of funds by foundations or other non-profit institutions. In addition, the investment strategy should be viewed in light of Wisconsin Statute §112.10, the Uniform Management of Institutional Funds Act[67] with particular attention to subsection (6).

[67] Wis. Stats, §112.10. reads as follows:

Uniform management of institutional funds act

(1) Definitions. In this section:

(a) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument.

(b) "Gift instrument" means a will, deed, grant, conveyance, agreement, memorandum, writing, or other governing document, including the terms of any institutional solicitations from which an institutional fund resulted, under which property is transferred to or held by an institution as an institutional fund.

(c) "Governing board" means the body responsible for the management of an institution or of an institutional fund.

(d)1. "Historic dollar value" means the aggregate fair value in dollars of the following:

a. An endowment fund at the time it became an endowment fund.

b. Each subsequent donation to the fund at the time it is made.

c. Each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund.

2. The determination of historic dollar value made in good faith by the institution is conclusive.

(e) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes.

(f) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include any of the following:

1. A fund held for an institution by a trustee that is not an institution.

2. A fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund.

(2) Appropriation of appreciation. The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by sub. (6). This subsection does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution.

(3) Rule of construction. Subsection (2) does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended. A restriction upon the expenditure of net appreciation may not be implied from a designation of a gift as an endowment, or from a direction or authorization in the applicable gift instrument to use only "income", "interest", "dividends", or "rents, issues or profits", or "to preserve the principal intact", or a direction which contains other words of similar import. This rule of construction applies to gift instruments executed or in effect before or after May 15, 1976.

(4) Investment authority. In addition to an investment otherwise authorized by law or by the applicable gift instrument, and without restriction to investments a fiduciary may make, the governing board, subject to any specific limitations set forth in the applicable gift instrument or in the applicable law other than law relating to investments by a fiduciary, may:

(a) Invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, stocks, bonds, debentures, and other securities of profit or nonprofit corporations, shares in or obligations of associations, limited liability companies, partnerships, or individuals, and obligations of any government or subdivision or instrumentality thereof;

(b) Retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable;

(c) Include all or any part of an institutional fund in any pooled or common fund maintained by the institution; and

(d) Invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, limited liability companies, investment partnerships, real estate investment trusts, or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board.

(5) Delegation of investment management. Except as otherwise provided by the applicable gift instrument or by applicable law relating to governmental institutions or funds, the governing board may do any of the following:

(a) Delegate to its committees, officers or employees of the institution or the fund, or agents, including investment counsel, the authority to act in place of the board in investment and reinvestment of institutional funds.

(b) Contract with independent investment advisers, investment counsel or managers, banks, or trust companies, to act in place of the board in investment and reinvestment of institutional funds.

(c) Authorize the payment of compensation for investment advisory or management services.

(6) Standard of conduct. In the administration of the powers to appropriate appreciation, to make and retain investments, and to delegate investment management of institutional funds, members of a governing board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or

Another view of the financial management of the WisTAF funds is summarized in the table below[68] and shows the IOLTA revenue, grants awarded, and change in net assets:

	TRUST ACCOUNT INTEREST INCOME	AWARD	CHANGE IN NET ASSETS
1987	413,415		373,501
1988	1,514,363	509,550	960,924
1989	1,575,678	1,718,250	377,185
1990	1,717,882	1,398,100	371,419
1991	1,674,076	1,532,400	199,443
1992	1,517,035	1,681,500	(133,152)
1993	1,064,696	1,594,750	(538,178)
1994	922,832	1,428,500	(563,464)
1995	828,067	1,232,209	(477,770)
1996	1,211,209	988,000	239,113
1997	1,584,451	1,012,000	537,674
1998	1,784,282	1,475,000	320,186
1999	1,862,680	1,785,339	55,760
2000	1,987,073	2,313,774	(123,611)
2001	2,104,251	1,956,571	235,590
2002	2,443,642*	2,839,874	(419,974)
2003	1,099,788	1,146,700	(79,764)

* 18-month period

A summary of the WisTAF Financial Statements[69] notes the following:

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decision. In so doing they shall consider long and short term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions.

(7) Release of restrictions on use or investment. (a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of death, disability, unavailability or impossibility of identification, the governing board may apply in the name of the institution to the circuit court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The attorney general shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate or impracticable, it may by order release the restriction in whole or in part. A release under this paragraph may not change an endowment fund to a fund that is not an endowment fund.

(c) A release under this subsection may not allow a fund to be used for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution affected.

(d) This subsection does not limit the application of the doctrine of cy pres.

(8) Uniformity of application and construction. This section shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this section among those states which enact it.

(9) Short title. This section may be cited as the "Uniform Management of Institutional Funds Act".

[68] Summary taken from *WisTAF Financial Reports* from 1987 through 2003.

[69] *Financial Analysis*, September 3, 2004, Lynda Tanner, CPA, , State Bar of Wisconsin Finance Director, Notes 2 - 5. (See **Appendix F**)

> Between 1987 and 1991, grants awarded (and paid) were less than trust account interest income and the investments continued to grow. In 1992, the Foundation began paying out more in grants than it was receiving in trust account interest which meant it had to dip into the investment account to make payments. That trend continued through 1996, depleting the investment account from $1.9 million to only $300,000. At that point, grants paid dropped below the level of trust account interest income again and the investment account began to grow. Beginning in 2000, grant expense again exceeds trust account interest income.
>
> Excluding 1987, the average trust account interest income has been $1,555,750; the average grants paid has been $1,504,532; and the non-grant expenses have averaged $154,372 and have averaged an 8% increase each year since 1993.

As shown, in the mid-1990s, a decline in the interest rates occurred resulting in lower IOLTA revenue; however, fortunately, interest rates increased so that the impact of the declining revenue was not an ongoing issue as it appears to be now.

2. Grant Administration Process.

The grant administration process is one in which significant documentation exists concerning the process, policies, site visits, and guidelines as to the criteria used to make the grant decisions.[70] In this aspect, the following two issues are involved: (1) the dissemination regarding the availability of the funds, and (2) the diversity of legal assistance programs which receive funding.

From the information disclosed, it is unclear how potential grantees are made aware of the availability of funds other than the mailing by WisTAF of the application, annually, to past recipients. The committee did not see any information exists to that the availability of grants is published or otherwise disseminated through the State Bar or local bar associations.

In a spreadsheet prepared by WisTAF outlining the organizations it has provided funding to since 1988[71], the majority of the funds have been disbursed to LSC organizations. In fact on that spreadsheet, separate lines exist to identify the "WI Coalition of Legal Services", "total grants to date for LSC", "% of annual total to LSC", and "% if grants to date to LSC". The average per year of the WI Coalition of Legal Services from 1988 through 2004 is: $1,038,513.80, and as indicated in the year 2004, the average percentage of grants to date from 1988

[70] *See* "Grants and Evaluation Program" handout from WisTAF (**Appendix G)** and "2005 Grant Application" from WisTAF. (**Appendix H.**)
[71] *See* "Grants by Calendar Year 1988 to 2003" handout (**Appendix I.**) (Note: a column in this handout provides information for 2004 as well.)

through 2004 to LSC is 73%. While not stated in its grant-making policies or guidelines, it appears that a formula exists to provide a particular level of funding to LSC organizations.

"LSC organizations" receive federal funding but with restrictions placed on the use of that funding. As a result, any other funds LSC organizations receive are restricted in the same manner. Two organizations in Wisconsin comprise the LSC organizations now, Wisconsin Judicare and Legal Action of Wisconsin.

3. Reserve.

Supreme Court Rule 13.05(2) provides that "[t]he program is authorized to maintain a reasonable reserve fund". As mentioned earlier, a reserve account existed at one point in time. The reasons for the erosion of that fund are summarized as follows:

> As revenues have fallen so have grants but at a slower rate so as to minimize the shock on grantee operations. We have been making up the difference by drawing on our reserve. Over the last 18 months we have had to expend just shy of half of the reserve of a million dollars.[72]
>
> When interest rates were on the rise, the board deliberated on whether to build reserves or whether to grant anticipated revenues. . . the general con[s]ensus has been to grant as much as practically feasible, while ensuring that enough of a reserve is available to facilitate a structured closure of the organization, should its revenues decline. In light of the declining rates, the finance committee now uses a more historical basis in recommending grant amounts, which has been enhanced by the change to a calendar fiscal year. The $2.8 million grants referred to by Ms. Connolly[73] were grants that were awarded in prior years and the board felt strongly that it was important to dip into reserve if necessary to pay those obligations.[74]

From these comments and others contained in the voluminous material reviewed by the committee as well as by the WisTAF financial reports, WisTAF generally adhered to the principle that it was best to distribute a substantial portion of the IOLTA revenue each year. Particularly during the mid-1990s when IOLTA revenues were declining, the reserve funds substantially supplemented that lack of revenue. As a result, those reserve funds have been used up now, at least

[72] Patrick F. Norris, Executive Director, WisTAF, July 30, 2004 letter to John P. Macy.
[73] *Referring to* the October 12, 2004 "Con" discussion by Gwendolyn G. Connolly contained at: www.wisbar.org/newscenter/feature/2004/1012.html to be published in the November 2004 Wisconsin Lawyer.
[74] Robert Mathers, CPA, in an e-mail from Deb Smith dated October 18, 2004.

partially, to distribute as much in funds as possible but reserving enough to close-up shop, if need be.

Again, a note to a financial analysis of WisTAF[75] explains the reserve account issue as follows:

> According to the notes on the financial statements, "Designated Equity" represents 'self-imposed limits by action of the Board of Directors for grant awards to be paid in the future.' It must be assumed that these are not firm 'promises to pay' or they would be listed as liabilities in the audited financial statements. Given the footnote disclosure regarding the "Board Designated Net Assets" it appears that there is no reserve policy in effect for the Foundation.

The reserve is depleted and while authorized, the Board of WisTAF has elected over the years to grant funds rather than to grant funds and maintain a reserve for times such as that organization is in, now.

Consideration should be given to the management of the IOLTA revenue by WisTAF as compared to the management of the funds of any other business or organization. Its stated purpose was and still is very narrow and has always been (as shown in the mid-1990s) subject to interest rate fluctuations.

B. Dissemination of Information by WisTAF.

Supreme Court Rule 13.03(5) provides: "[e]ach year the program shall submit to the supreme court and the state bar board of governors a report, including the audit, reviewing in detail the administration of the program and its activities during the preceding year".

> It is unknown whether WisTAF has complied with this provision. The financial (and other) information discussed in this report was received upon direct request to WisTAF.

C. Petition Seeks Creation of Chapter SCR 14 rather than an amendment to Chapter SCR 13.

The scope of Proposed Chapter SCR 14 is "to fund direct legal services to persons of limited means in non-criminal matters".[76] Supreme Court Rule 13 created "[a]n interest on trust accounts program of the state bar . . . for law-related charitable and educational purposes as provided by this chapter"[77] These are analogous yet distinct purposes as SCR 13 elaborates the distinct rules which

[75] Financial Analysis, September 3, 2004, Lynda Tanner, CPA, State Bar of Wisconsin, Note 1. (*See* **Appendix F**).
[76] Petition, at pp.1-2.
[77] SCR 13.01(1).

comprise "law-related charitable and educational purposes". In addition, the funding mechanism for the two are very different. One is an assessment on attorneys and the other is the 'pooling' of interest on attorneys' trust accounts involving money that would otherwise go to clients or financial institutions.

The creation of a separate chapter results in a broader form of WisTAF than was originally intended when SCR 13 was created. The purpose and sole reason for the creation of WisTAF was for the administration of IOLTA funds.[78]

> Furthermore, the expanded authority of WisTAF under proposed Chapter SCR 14 would require amending the Articles of Incorporation for the Wisconsin Trust Account Foundation, Inc.[79]

By creating a separate funding mechanism and granting that same Board the authority to administer the assessment funds, the purpose of WisTAF would be broadened beyond that stated in Chapter SCR 13 and beyond that provided in its own Articles of Incorporation.

D. Consultation with State Bar Board of Governors.

Supreme Court Rule §13.03(1) states, in part, the following, "[i]n consultation with the state bar board of governors, the board shall adopt articles of incorporation, bylaws and rules and procedures consistent with this chapter for the management and administration of the program and its affairs".

A question that the Board of Governors should examine is to what extent has the board of WisTAF consulted with them regarding the management and administration of the administration of the IOLTA funds or the board's affairs? By providing for the above language in Chapter SCR 13, the vision apparently existed that the Board of Governors of the State Bar would be involved in the administration of the IOLTA funds. The consultation of the Board of Governors and their continuing involvement appears to be an important component and requirement of the powers and duties of the WisTAF board which, possibly, to date, has not been adhered to. The committee found no evidence that WisTAF consulted with the Bar about, for example, the long-term effect of making grants in excess of revenues.

6. What Is the State Bar's Institutional Responsibility for Access to Justice?

A. Supreme Court Rules, State Bar bylaws, Bar Standing Policy positions, and the State Bar's strategic plan all address the State Bar's institutional responsibility for access to justice.

[78] SCR 13.02(1), SCR 13.01(2)(c).
[79] Articles of Incorporation, Wisconsin Trust Account Foundation, Inc., Article III.

1. Supreme Court Rule 10.02(2), charges the State Bar "to aid the courts in carrying on and improving the administration of justice; . . . to promote the innovation and development and improvement of means to deliver legal services to the people of Wisconsin; to the end that the public responsibility of the legal profession may be more effectively discharged."

2. The standing position of the State Bar concerning the delivery of legal services makes reference to Supreme Court Rule 10.02(2) and declares, "In accepting this responsibility, the State Bar of Wisconsin supports policies which encourage and enhance the quality and availability of legal services to the public." *See* State Bar of Wisconsin, Policy Positions (2004), at 13, for the rationale of the Bar's commitment to the delivery of legal services.

3. State Bar bylaws, Article 4, Section 5, establish a standing Committee on Legal Assistance and charge it as follows:

> "This committee shall promote the establishment and efficient maintenance of legal aid organizations equipped to provide legal services to those unable to pay for such service; shall study the administration of justice as it affects persons in the low income groups; and shall study and report on methods of making legal service more readily available to persons of moderate means, and shall encourage and assist local bar associations in accomplishing this purpose."

4. The State Bar's strategic plan declares its mission "to improve the administration of justice of the delivery of legal services and to promote the professional interest of Wisconsin lawyers." The plan sets a goal to improve public access to the legal system.[80]

5. The Board of Governors, through policy statements and budget decisions, has a history worth recalling. The State Bar declared a voluntary *pro bono* policy in 1989. Implementing that policy, the State Bar established and funded a *pro bono* coordinator position, developed model law firm *pro bono* policies that were promoted, organized free *pro bono* conferences and continuing legal education, funded and staffed a delivery of legal services commission and implemented the Commission's recommendations, staffed and supported a voluntary drive for funding legal services called Equal Justice Campaign, and has annually advocated for federal and state funding for civil as well as criminal legal services to the poor. Presently, it funds an effort to establish a statewide coordinated *pro bono* system.

The State Bar has a mission, history and ongoing interest in access to justice for people of low and moderate means on a statewide basis.

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[80] *See* Objective 2.1 (Promote solutions to eliminate barriers to effective access to the civil and criminal justice system.) and Objective 2.3 (Increase the availability of *pro bono* services to those in need.) Available online at: http://www.wisbar.org/bar/dwnlds/Strategic_Planning/20031114strpln.pdf

7. Do Lawyers Have Some Special Obligation To Pay For The Legal Needs Of Indigent Civil Litigants?

A subtext of the WisTAF petition is that those engaged in the practice of law—as distinguished from society as a whole—have a special obligation to fund legal services for the poor.

While this memo does not take the position that the proposed assessment would constitute a taking of private property for a public purpose, one of the key tenets of takings clause analysis is worth mentioning here. The purpose of the Fifth Amendment is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[81]

It seems that providing for the legal needs of the poor is a burden of the public as a whole. By way of analogy, there are a large number of Americans who cannot afford health insurance. But it would be seem unfair to ask medical doctors alone to shoulder the burden of funding health insurance for those who cannot afford it.

In its petition, WisTAF cites the attorney's oath and the *pro bono* duty discussed in the rules of professional responsibility. The oath taken by attorneys admitted to practice in Wisconsin includes the following phrase:

> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice.[82]

While SCR 20:8.4 says that it is professional misconduct for any attorney to violate his oath, no Wisconsin disciplinary proceeding (or any other case, for that matter) analyzes the practical effect of the obligation imposed by this portion of the oath.

Moreover, the proposed assessment does not seem to address the same principles embodied in that passage from the oath. The oath is couched entirely in individualized terms. The oath imposes an individualized duty on each and every attorney to accept and vigorously litigate cases on behalf of the defenseless or oppressed—irrespective of considerations of personal financial gain. There is no provision in the oath that allows the attorney to "outsource" his duty by making payment to some third-party in the hopes that the third-party will represent the defenseless and oppressed.

SCR 20:6.1 provides:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the

[81] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[82] SCR 40.15

> legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

The proposed assessment better approximates the duty imposed by the Supreme Court Rule than the duty imposed by the oath. Unlike the oath, SCR 20:6.1 provides that the public service obligation may be fulfilled by "financial support for organizations that provide legal services to persons of limited means."

However, like the oath, SCR 20:6.1 discusses the *pro bono* obligation in individualized terms—"a lawyer should." Involuntary payments do nothing to satisfy the attorney's obligation under SCR 20:6.1, but would only satisfy the obligation that would be created by the adoption of proposed SCR 14. If anything, the proposed assessment may, in the minds of some attorneys, dilute the responsibility to take cases on a *pro bono* basis or lend financial support. It may lead some attorneys to believe that their duty is automatically satisfied with the mandatory annual check to the public interest legal service fund.

8. Does a Mandatory Assessment and Distribution to WisTAF-Sanctioned Groups Comport With Bar Members' Rights of Free Association or Free Speech?

WisTAF has granted over $22 million to various organizations according to records from 1988 to 2002. Its endowed organizations include a wide array of legal service organizations from local legal aid societies to national organizations like the Americans Civil Liberties Union. While some grants are politically non-controversial, some State Bar members would find others politically objectionable even if use of the monies granted by WisTAF is restricted to the provision of legal services to the poor. The question is whether transferring a portion of mandatory WisTAF assessments to politically controversial organizations violates these bar members' First Amendment rights of free speech or free association.

This issue is unresolved, as Justice Kennedy's dissenting opinion in *Brown v. Legal Foundation of Washington*, [83] emphasizes. *Brown* held that by requiring lawyers to establish IOLTA accounts Washington state did not take property in violation of the Fifth Amendment's Compensation Clause. But Justice Kennedy warned:

> The First Amendment consequences of the State's action have not been addressed in this case, but the potential for a serious violation is there. *See Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U. S. 1 (1990). Today's holding, then, is doubly unfortunate. One constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course.

[83] 538 U.S. 216 (2003)

Any analysis of the issue also implicates *Keller v. State Bar of California.*[84] *Keller* held that a state bar association may use mandatory membership dues to fund activities germane to goals of regulating the legal profession and improving the quality of legal services, but not activities of a political or ideological nature falling outside those areas. *Keller* reserved the question of whether a First Amendment freedom of association violation occurred. State and federal courts have, of course, analyzed these and other issues related to our mandatory bar association but none addressed the issue of mandatory assessments.[85] Closely related to these decisions are cases where closed shop labor unions expend mandatory dues to advance political issues that some in their membership oppose.[86]

But none of theses cases squarely addresses the WisTAF issue presented here. While these bar association and union cases relate to the appropriate expenditure of association dues on association political activities, none involve compelling direct contributions from members to non-profit organizations selected by organizations like WisTAF.

Opponents of the WisTAF petition will say that it is one thing for bar association dues to be used for Bar political activities which affect the profession, but quite another to transfer income from lawyers to others. They will point out this association has procedures by which dissenting members can obtain *Keller* rebates and challenge the calculation of those rebates by arbitration. They will note Bar members have the right to elect representatives to the Board of Governors and thus affect Bar expenditures as in any representative democracy, but the WisTAF board does not stand for election and the Bar membership cannot remove them from office.

WisTAF supporters will say that WisTAF operates under the auspices of the State Supreme Court, our justices are elected, and members have a right to elect and voice concerns to the Court. They will say that transferring money to a non-profit organization to foster legal representation of the poor has no practical difference from State Bar expenditures to foster *pro bono* activities by Bar members and local bar associations. WisTAF supporters may suggest a comparable rebate procedure to try to satisfy possible *Keller* concerns.

There will no doubt be other arguments besides those mentioned here. The most important point is, however, the one that Justice Kennedy made in his dissent in *Brown*. The question is unsettled and will eventually be resolved at the highest appellate courts.

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[84] 496 U.S. 1 (1990).

[85] *See e.g. In Re State Bar of Wisconsin*, 169 Wis.2d 21 (1992); *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993); *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th cir. 1996); *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988); *In Re: Matter of Discontinuation of State Bar of Wisconsin*, 93 Wis.2d 385 (1980); *In Re: Petition to Review Bar Amendments*, 139 Wis. 2d 686 (1987); *Lathrop v. Donohue*, 10 Wis. 2d 230 (1960), aff'd 367 U.S. 820 (1961); *In Re: Integration of Bar*, 5 Wis. 2d 618 (1958); *In Re: Integration of Bar*, 273 Wis. 281 (1955); *In Re: Integration of Bar*, 249 Wis. 523 (1946); and *Integration of Bar Case*, 244 Wis. 8 (1943).

[86] *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Railway Employees v. Hanson*, 351 U.S. 225 (1956); *Teachers v. Hudson*, 475 U.S. 292 (1986).

There are principled arguments on each side of the issue but no firm answers. Governors should know a credible challenge to and a credible defense of a WisTAF assessment on freedom of speech and association grounds can be advanced.

9. Is The Assessment Which The WisTAF Petition Proposes Likely To Affect The Pro Bono Activities Of Wisconsin Bar Members?

Lawyers have an obligation, as has been stated elsewhere in this memorandum, to engage in *pro bono* activities. Those activities include, but are not limited to, helping the unrepresented poor in legal matters. While no accounting for *pro bono* obligations is made to the Supreme Court, OLR, or any other governing body, it is apparent that Wisconsin lawyers take this obligation seriously. Many firms have formalized *pro bono* programs which allow not only partners but associates the opportunity to satisfy their *pro bono* requirements. These firms, by sponsoring *pro bono* programs, formalize the attorney's obligation to fulfill *pro bono* requirements. Every year, *pro bono* activities of lawyers and law firms are spotlighted in the Wisconsin Lawyer magazine.

Activities such as support for mock trial activities, the hot line, and numerous others stand out as ways in which Wisconsin lawyers satisfy their *pro bono* obligation and their own needs to "give back" to their communities and to those less fortunate. It would be incomplete to consider a mandatory assessment such as that proposed by the WisTAF Petition without discussing the possibility that these activities could be affected by mandatory assessments which Bar members might view as "in lieu of" fulfilling their *pro bono* obligations.

Additionally, Wisconsin lawyers make voluntary contributions to non-profit law firms that provide civil legal services to low-income persons. SCR 20:6.1 permits a lawyer's voluntary support of legal aid to satisfy the lawyer's *pro bono* obligations. The impact of mandatory assessment on lawyers' voluntary financial support for legal aid organizations has not been assessed. Mandatory assessment may, however, reduce lawyers' voluntary financial contributions to legal aid programs.

It would be speculation to conclude that lawyers would either a) continue their present level of activity or b) decrease it, seeing payment of the assessment as a less burdensome alternative. We must keep in mind, however, the increasing pressures of the practice of law (not only from a financial standpoint but in terms of competition with other lawyers and law firms), and the requirements of simply keeping up with fast-paced changes in the law and satisfying obligations to clients, may make the WisTAF assessment an attractive alternative to *pro bono* hours.

After much consideration, it seems reasonable to conclude that those who recognize and honor their *pro bono* obligation will continue with their activities despite an assessment as proposed by the WisTAF petition. There likely will, however, be those who will see

the assessment, if enacted, as an alternative to contributing *pro bono* hours that satisfies an obligation and will cease *pro bono* activities.

While the actual effect of the assessment is difficult to determine, consideration of the above possibilities is certainly appropriate.

10. How Significant an Impact Will the Proposed WisTAF Assessment Have on the Problem of Unmet Legal Needs of the Poor?

A. The impact can be seen as significant or insignificant depending upon how one chooses to look at it.

As noted elsewhere in this report, the available research suggests that the need for legal representation among Wisconsin's low income population is substantial and unmet. Whether the assessment sought under the WisTAF Petition will address this substantial unmet need is a matter of perspective.

Using the results of the ABA's Comprehensive Legal Needs Study (CLNS)[87] 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.

Another finding from the CLNS, was that 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 serious 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 based on income, client-type and case-type, there may be other, more systemic needs that are not captured by this data:

[87] See **Appendix J** (Report available online at: http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf)

- 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%).

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, 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.[88]

1. Arguments that the monies derived from the assessment will provide a significant impact in meeting unmet civil legal needs include the following:

[88] *See* WisTAF Petition, *supra* at ¶ 4.

a. This money may make the difference between keeping doors of certain providers open and closing them.

b. As Table 1 above indicates, (LSC) funding from federal sources has been cut in actual dollar terms over the years. To compound matters the 2000 census reflected an 11% decrease in poverty, which resulted in an additional cut in actual federal funding. The census figures are just one tool to measure need and are generally disputed as incomplete. Notwithstanding debate over the correctness of the census figures, legal services to the poor have always been greatly under funded, hence there continues to be an unmet need.

c. Not providing the funds generated by the assessment will result in the loss of legal services positions, including clerical and other support staff and lawyers.

d. The *Washington State Legal Needs Study*[89] reflects that the availability of some legal services may prevent persons from falling into poverty or further into poverty. For example, if someone can keep their job they can probably keep renting their home. Bottom line basic legal services may prevent additional social ills.

e. Decreases in legal services will increase the civil problems of the poor in relation to their basic needs such as housing, family safety, medical and employment.

2. Arguments that the assessment will have an insignificant impact upon meeting the needs of the poor include the following: (For definition purposes "poor" can mean many things—"poor" could extend: from those at or below the poverty level; to 125% of poverty to persons of modest income; and to others who cannot afford an attorney.)

a. Approximately 451,538 Wisconsin residents (8.7%) live in poverty as determined by federal standards.[90]

b. Wisconsin legal services programs were only able to provide services to about 20,000 low-income residents, which is approximately 4.5% of total poverty population.[91]

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[89] *See* **Appendix B.**

[90] Source: US Census 2000 figures. (Families and persons are classified as **below poverty** if their total family income or unrelated individual income was less than the poverty threshold specified for the applicable family size, age of householder, and number of related children under 18 present.) The Census Bureau uses the federal government's official poverty definition. *See* table for poverty level thresholds online at: http://www.census.gov/hhes/poverty/threshld/thresh99.html.

[91] *See* Deborah M. Smith portion of article, *Should supreme court assess lawyers to fund civil legal services for the indigent*? (*"In Support of the WisTAF Petition."),* to be printed in Wisconsin Lawyer, November 2004; currently on-line at: http://www.wisbar.org/newscenter/feature/2004/1012.html.

c. Subtracting the 20,000 persons who receive civil legal services from the total poverty population (see item a. above) the number of poor without legal service would be 431,538 or 95.5% of the poverty population.

d. It should be noted, however, that not every poor person has a need for legal services on an annual basis. Using ABA projections approximately 183,000 low-income persons, or nine times the number served by WisTAF-funded agencies, need legal services in a given year.[92]

e. The ratio of poverty lawyers to poor people is approximately 1 to 3,272. [93]

11. What Effect Will The WisTAF Assessment Have Upon State Bar Members, Wisconsin Law Firms, Wisconsin Non-Resident Lawyers, and Revenues of the State Bar of Wisconsin?

A. Impact upon State Bar Members.

1. The impact financial or otherwise cannot be known specifically. The following are some of the reactions/positions that may be taken by members:

   a. Those who support the assessment may support it for a variety of reasons and may demonstrate that support in a variety of ways, including the following:

      1) Some would pay the assessment and give more money, but some would not perform any additional *pro bono* work as making payments would be viewed as meeting their obligation.

      2) Some would pay the assessment and continue with existing *pro bono* activities.

      3) Some would pay the assessment and more and continue with existing *pro bono* activities at the same level or below.

      4) Some would simply pay the assessment and view this as meeting their obligation for *pro bono*. Some

[92] *See* Section 1. A., *supra*, p. 8.
[93] Per information provided by Legal Action of Wisconsin.

who may support the assessment but cannot afford to pay the assessment or perform *pro bono* activities and would seek a waiver or other solution.

5) Some would support the assessment but could not afford to pay it and would seek a waiver or other solution.

6) Just getting the word out and educating members as to the need may increase *pro bono* services being performed by lawyers.

2. Adverse affects are not limited simply to the financial impact/ ability to pay. There are a number of other reasons why members do not support the assessment. It is important to note that the reasons identified below should not be construed as disagreement with the overall principle that the poor are entitled to legal services and those legal services should be provided.

a. Among the rationales identified are the following:

1. "Mandatory" *pro bono* is illogical. It makes no sense.

2. The assessment will be viewed as an illegal tax.

3. Potential litigation regarding the legality of the assessment could place the profession in a bad light.

4. Slippery slope #1: There are no sunset provisions or limitations on the potential amount of the assessment. Will it end or does it become permanent?

As a corollary some argue that the Bar should oppose for this very reason: silence will be interpreted as acquiescence. An assessment, if imposed will continue and will expand; witness Minnesota where a proposal is on the table to increase the $50 assessment to $75. The Minnesota State Bar leadership apparently now regrets not opposing the original imposition of the assessment on the grounds that this is a societal problem. It feels its moral standing on that issue has now been weakened by its failure to make an argument on that point from the beginning.

5. Alternatives have really not been tried or even identified.

6. No comprehensive scientifically-based study on need has been conducted.

7. Slippery slope #2: No plan/restriction for the use of the fees collected. Does this open the door for assessments against attorneys to be used for other purposes?

8. The assessment will have an overall negative impact upon *pro bono* services currently being performed. (Some will feel they have met their obligations by making a cash payment, others may feel the assessment sends a message that contributions to legal services providers are more highly valued than contributions of their own time.)

9. There is no exemption/recognition for attorneys that perform substantial amounts of *pro bono* work. No matter how much pro bono work a lawyer does voluntarily, he or she would be required to pay $50.

10. Some members may change their status from active to inactive or drop membership entirely. There is a process in place for granting of hardship dues waivers. Currently, the waiver process for State Bar dues is to submit a letter requesting waiver, the President for the State Bar and Executive Director review the request and make the determination. [94] This fiscal year 7 waivers were granted. It is not known if this process will be used for the proposed $50 assessment or what impact this will have on the number of requests for waivers. If there were no significant impact the cost would be negligible. The $50 assessment may increase the current number of requests for hardship waivers. Partial waivers or total waivers may be granted.

11. When members become inactive or drop membership and when waivers are granted and the overall amount collected from the State Bar members to fund the Supreme Court Assessments

[94] State Bar Bylaws, Article I, Section 4.

for the operation of the Office of Lawyer Regulation (OLR) and the Board of Bar Examiners (BBE) remains the same, each remaining member's share of the cost increases proportionately. If more members seek hardship waivers or change their membership status, the cost of Supreme Court Assessments and the Wisconsin Lawyers' Fund for Client Protection Assessment for each remaining member will be a larger amount.

12. Recent graduates/admittees currently only pay half of the normal Bar dues but would be expected to pay the entire $50 assessment under the terms of the petition.

13. Attorneys employed by government may or may not be impacted. In some cases the government employer pays their Bar dues while in others the employer does not. In the case of government employers who pay the Bar dues and assessments, there is a paradoxical effect that taxpayers are paying the assessment for civil legal services.

14. Attorneys employed by legal services providers may be seen by some to be working for reduced wages due to the "public service" they perform. One may question to wisdom of assessing them to pay their wages.

B. Impact upon Wisconsin law firms.

1. The size of the firm and the time the firm has been in business may be a factor. One could assume that the fee will have less of an impact upon the bigger firms who may simply consider it a cost of doing business (of licensing their attorneys).

2. The length of time in business most likely will be a factor. The fee may have a greater impact upon smaller new firms.

3. The fee may have a greater impact upon solo practitioners and attorneys working in associations together.

4. Some law firms may see the payment of a $50 per lawyer assessment as an inexpensive 'buy out" of the *pro bono* obligations of associates (and partners).

B. Impact upon the non-resident lawyers is not known; however some assumptions can be made:

1. Some active non-resident lawyers may choose to go inactive; some inactive non-resident lawyers not renew their membership.

   (As of October 21, 2004, there are currently 6,517 non-resident lawyers. Of those engaged in private practice, only 861 engage in the practice of law in Wisconsin. Of those who engage in private practice in places other than Wisconsin 1,954 are active and 2,354 are inactive. An additional 720 are employed as corporate counsel, publicly employed or otherwise not required to maintain a trust account. While the majority of these lawyers are not licensed in other states, it is not clear how many of them need to maintain their Wisconsin licenses.)

   Note: **Appendix K** examines non-resident membership by trust account type and provides clues as to the number of members in various categories who might be likely to convert their membership status or drop their license altogether.

2. Feedback received to date from non-resident lawyers indicates that the vast majority oppose the proposed assessment.

3. It is expected that non-resident lawyers are members of firms, solo practitioners, and working in association with other lawyers. All of the concerns discussed above in paragraph B would have an impact upon non-resident lawyers.

D. Impact upon State Bar members who are 70 years of age or older is not known; however some assumptions can be made:

1. Some active lawyers aged 70 and above may choose to apply for emeritus status and thus avoid paying Bar dues; others may choose to go inactive; while others may choose not renew their membership.

   Note: **Appendix L** examines Bar membership status of those members aged 70 and older by trust account type and provides clues as to the number of members in various categories who might be likely to convert their membership status or drop their license altogether; **Appendix M** provides age statistics on Bar membership and provides projections through the year 2015.

E. Impact upon the revenues of the State Bar is not known; however some assumptions can be made:

1. The costs of collecting the assessment and other administrative costs need to be evaluated and deducted from the amounts collected in order not to impact adversely the finances of the State Bar. If this is not done, then the cost needs to be identified and budgeted for (or otherwise addressed) within the Bar's budget or the Bar's budget will be affected.[95]

2. Bar revenues may be impacted by members not renewing memberships or going to inactive status in two ways. Current bar dues are $224. (Inactive members pay half that amount or $112 and do not have to comply with CLE requirements.) If members fail to renew their membership or opt to move from active to inactive status in response to the imposition of an assessment, the Bar will lose not only the revenue their dues would have provided but could lose substantial amounts of CLE Books and Seminars revenue. (In Fiscal Year 2004, CLE Seminars provided 20.6% of Bar revenues, while CLE Books provided 14.8%.) Depending upon the extent of the financial loss, services may be cut for Bar members and the per lawyer share of the required OLR, BBE and LFCP payments paid by remaining members will increase as costs are spread over a smaller member base.

    a) In addition, the burden of funding the Supreme Court Assessment (for OLR, BBE), and the assessment for the Lawyer's Fund for Client Protection (formerly Client Security Fund) will fall on fewer active members. As these costs increase, more members may change their membership status or claim the *Keller* dues reduction.

       Note: **Appendix N** provides an analysis of the effect on State Bar revenues and on the dues and assessments on the remaining full dues equivalent paying members if varying percentages of members opt to take certain membership actions

3. Some members may start the process to convert from a mandatory to a voluntary bar.

4. Some members (or law firm administrators) may look for savings in other areas and elect to take the *Keller* dues reduction to save money rather than because they object to the Bar's political or ideological activities.

   Note: **Appendix O** provides an analysis of recent experience with the *Keller* reduction and the effect of increases in the percentage of

[95] For example, currently, the Bar imposes no administrative fees for collecting Supreme Court Assessments but pays out the monies collected to OLR and BBE in twelve equal installments. If the proposed assessment were to be collected by the Bar as part of the dues collection process and turned over immediately to WisTAF the State Bar would incur costs that would not be covered by the interest earned on the funds over the course of the time they are held in trust by the Bar.

members claiming the deduction has on overall assessments; **Appendix N** also provides an analysis of the effect on State Bar revenues and on the dues and assessments on the remaining full dues equivalent paying members if varying percentages of additional members opt to take the *Keller* dues reduction.

5. There may be additional administrative costs associated with reviewing requests for hardship fee waivers.

12. Will the WisTAF proposal have an effect on the general civil justice system by, for example, increasing filings, reducing *pro se* litigation, and influencing alternative dispute resolution efforts?

A. The committee, although seeing this as an important question, found data and other resources are not available to predict the impact the petition may have on the number of legal filings. Additionally, the uncertainties regarding federal LSC funding and the impact of the proposed assessment on voluntary giving by attorneys to legal aid providers and fundraising organizations such as the EJF further complicates the analysis.

B. *Pro se* litigation and alternative dispute resolution may or may not increase. The Washington state study indicates that if poor people cannot obtain legal assistance they just live with the problem.

13. Is the WisTAF proposal a practical solution to this problem?

A. The arguments that the proposal is either a practical solution or an impractical approach to the problem are as follows:

1. Assessment Is A Practical Approach

   a. The proposed assessment is mandatory and a voluntary assessment likely will not produce the amount of funds needed to maintain funding stability.

   b. While lawyers have a requirement to perform *pro bono (public interest legal)* service, many do not and this is one way to ensure compliance.

   c. There is an immediate need and the proposed assessment is the quickest way to address it.

d. The proposed assessment is only practical from the standpoint of being a "stop-gap" or temporary measure while a full and complete study of the matter is conducted.

3. Assessment Is Not A Practical Approach

a. Lawyers are performing *pro bono* service and the Bar is doing its share to address this matter and society as a whole needs to address this problem.

b. The proposed assessment places a financial obligation on lawyers alone without any limitations.

c. The proposed assessment simply takes money from one area and places it in another. Member feedback indicates individual attorneys feel they should be able choose the organizations they wish to fund. Many resent WisTAF's control over the allocation of the funds to be generated by a $50 assessment, which WisTAF may then grant to organizations the individual attorney does not support.

d. The matter needs to be addressed by the state legislature.

e. Government agencies (primarily those at the state and federal levels) create problems for the poor that have to be corrected by lawyers.

f. The assessment is temporary in nature. It is not a solution. It is a "stop-gap" measure.

g. The assessment does not create a steady, reliable revenue source. (With interest rates on the rise this initiative may not be necessary.)

PART TWO: ALTERNATIVES TO THE WISTAF APPROACH—CAN THE BAR DO BETTER?

INTRODUCTION

As a second part of its analysis, the WisTAF Petition Study Committee formed a subcommittee to describe what the State Bar and Wisconsin lawyers are already doing to address the issue of the provision of civil legal services to low- and lower middle-income persons and to lay out a range of options or alternatives for increasing the provision of civil legal services in Wisconsin in the future.

In the event the Board of Governors should view WisTAF's proposed assessment of attorneys as only a "stop gap" measure, Governors may wish to consider a more comprehensive approach to the delivery of legal services, in which meeting the funding needs of the existing staffed programs through WisTAF is only a part of the solution.

Part Two of the report is based on the premise that the analysis in Part One of this report suggests the WisTAF petition may both misstate and understate Wisconsin's "access to justice" problem by focusing on the funding needs of LSC-funded programs and other staffed nonprofit programs (such as Legal Aid Society of Milwaukee and other grantees) instead of legal needs of poor people across the state.

The committee believes—based on the State Bar of Wisconsin's larger mission concerning the delivery of legal services to the people of Wisconsin—that the focus ought more properly to be on the legal needs of low-income Wisconsin residents rather than on the needs of the legal services providers.

If the State Bar wants to take a leadership role in addressing access to justice issues, it can and must offer better ideas for the delivery of legal services than the existing model provides. Meeting the funding needs of the programs through WisTAF (or other means) is only a part of the solution.

The subcommittee has gathered ideas for Board of Governors discussion and decision making, and has tried to take a fair and balanced approach to would allow the reader to draw his or her own conclusions.

1. What Are Some of the Perceived Flaws in the Approach Taken By the WisTAF Petition?

Some may argue that the WisTAF petition defines unmet legal need too narrowly in that it: a) accepts the view that we traditionally meet no more than 20 percent of the legal needs of the poor; and b) by offering no suggestions other than assessing attorneys appears to aspire to ensure only that the legal needs of those roughly 20 percent or less of the poor who find their way to the doorstep of the WisTAF grantees will continue to be met.

This criticism boils down to an assertion that the WisTAF petition sets the bar or standard far too low. It goes something like this: The WisTAF petition is, by its own admission, merely a "stop gap" measure. It does not recognize, let alone attempt to identify, the variety and the levels of legal needs in our state in any meaningful way. It merely seeks to preserve a level of funding that will maintain a system that even the proponents of the petition admit fails to serve the legal needs of the 80 percent of Wisconsin's poor who either fail to find their way to WisTAF grantees or who for various reasons have legal needs that do not qualify them to receive services from WisTAF grantees.

Such critics would further argue that the "formulaic" approach to meeting the civil legal needs of the poor espoused by the WisTAF petition—the idea that to meet the unmet need we ought to provide a certain ratio of legal services attorneys to indigent clients has

been tried and found wanting. In effect, they would argue it has persuaded nobody. They point to the history of the Equal Justice Coalition, and the lack of success of its efforts to create an endowment to support legal services as evidence that the formulaic approach is not compelling.

The view that because a relatively small group of civil legal services providers will have to turn people away, all lawyers must be taxed so that those providers can maintain their current caseload misses the point, according to the critics. In fact, they would argue that it misses the big picture entirely. In their view, the question of how best to meet unmet legal needs is much more than simply an employment issue for a few public interest law firms. What is needed, argue critics, is a fresh, innovative look at a whole range of issues. Those issues include evaluating whether the scope of unmet needs extends beyond merely those who are "poor" to the so-called "working poor" and how the needs of this latter group should be addressed. When, for example, 60 to 70 percent of parties in family law actions are unrepresented, it suggests the scope of unmet legal needs of many lower-middle-income households may be larger than it might seem.

2. What Are Wisconsin Lawyers Doing Already To Address The Issue Of The Provision Of Civil Legal Services To Low- And Lower-Middle-Income Persons?

As noted earlier in this report, there is much that we don't know. Unknown is how many practitioners, on their own, handle cases at significantly reduced fees for low-income clients. The CDLS report recommended use of lay advocates in domestic abuse and other limited proceedings. The extent to which those services are available is not quantified.[96] Similarly, the CDLS report recommended that the State Bar develop guidelines for expanding the range of activities which paralegals perform under lawyer supervision.[97] The portion of need that is filled by voluntary *pro bono* efforts of Bar members, or even by law students in clinics, is unknown.[98] Thus far efforts to document voluntary *pro bono* efforts have not succeeded.[99] The petition is subject to criticism on the ground that it assumes that only dollars contributed to legal service providers or to EJF should be counted toward Wisconsin's ranking.[100] Whether the figures cited in the petition used to characterize Wisconsin's effort as paltry take into account lawyers' direct contributions to legal aid providers (e.g., Legal Aid Society of Milwaukee, various local Bar legal clinic efforts, etc.) or other trust funds (e.g., Dane County Bar Pro Bono Trust Fund) is not known. We are, however, able to describe and document the efforts of legal services providers and the State Bar.

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[96] *See* State Bar of Wisconsin *Commission on Delivery of Legal Services Report*, at p 24.. The CDLS report cites to an ABA report including self-help or *pro se* as a form of legal assistance. Members of the CDLS commission had reservations about relying on *pro se* or self-help as a meaningful form of assistance. *See* at p. 9; on-line version available at http://www.wisbar.org/bar/reports/cle/cmleged.htm.

[97] The State Bar filed a petition with the Wisconsin Supreme Court regarding licensure of paralegals. A hearing on that Petition was held on October 27, 2004.

[98] Dugan, *supra*, Note 1, p.4.

[99] *See* Petition, *supra*, Note 3, ¶¶ 21-22

[100] Id., citing Dugan at ¶ 20.

A. 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 2,000 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.

Other Providers that serve the legal needs of low income residents include programs such as ABC for Health, Centro Legal por Derechos Humanos, Coalition of Wisconsin Aging Groups (Elder Law Center), Wisconsin Coalition for Advocacy, and the AIDS Resource Center. 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. 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, 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.

State Bar staff has prepared a "white paper" document summarizing 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, including alternative structures for managing IOLTA funds and alternative funding sources and addresses the question of what Wisconsin lawyers are doing already as well. [101]

B. The State Bar's Efforts

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

[101] *See* **Appendix P.**

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 recently recognized by the ABA and the State Bar Board of Governors 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.

C. Efforts of Other Entities

Wisconsin's Equal Justice Fund, Inc.(EJF). EJF 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[102] that are capable of supporting a sustained fund raising campaign for civil legal services.

3. What Lessons Can Be Learned From the Experience of Other States?

Several lessons can be learned. The Subcommittee examined the approaches being taken by a number of states that have grappled with addressing "access to justice" issues. The subcommittee believes Wisconsin should look to states like Washington, Maryland and others for revenue sources and solutions other than assessment.[103]

In particular, the subcommittee members found the State of Washington to be a model for addressing access to justice issues in Wisconsin. Washington makes a strong case for

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[102] *See* p. 60, *infra,* for a more detailed description of the WLF donor-advised funds.

[103] **Washington State Obtains Increased Legislative Funding for Legal Services** –
Washington will receive an additional $1,900,000 from the legislature, bringing its total state appropriation for legal services to $6,600,000. The publication of the state's first Civil Legal Needs Study and the decision to transfer fiscal agency responsibilities for state funding from non-LSC funded Columbia Legal Services to the LSC-funded Northwest Justice Project helped to generate the bi-partisan support needed to obtain this increase. The effort was strongly supported by the governor, the state supreme court, the entire judiciary, the state bar association, local bar associations, prosecuting attorneys and many others.

Maryland Legislature Approves Filing Fee Increase for Legal Services –
On May 26, 2004, the governor of Maryland signed legislation increasing the filing fee surcharge. It is estimated that the increase will generate $4,950,000 in revenue for legal services programs in the state. This will bring the total revenue from filing fee surcharges to approximately $7,250,000 annually. The legislation, which was approved by an overwhelming majority of legislators, was strongly supported by the Maryland Court of Appeals the state bar association, and individual lawyers from around the state, who worked tirelessly to educate lawmakers about the importance of this legislation.

Source: Legal Services Now Online Newsletter, ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) June 2004.

state funding of civil legal services without special assessment of lawyers. It also shows the value of looking not simply at the narrow problem of providing legal services to those in poverty but also those living in near poverty.

The Washington Study focused not only on the unmet legal needs of low-income and vulnerable populations but individuals whose household income falls below 200 percent of the federal poverty guidelines. This group includes individuals eligible for free legal services provided by funding from the Legal Services Corporation (LSC) (below 125 percent) and those individuals generally referred to as having "moderate incomes" (125-200 percent).[104] This second group of individuals generally makes too much money to qualify for free legal services but not enough to afford an attorney on their own.

Through a Supreme Court-led and Bar-supported effort, the Washington Task Force on Civil Equal Justice Funding undertook a comprehensive approach to identifying the full scope of unmet civil legal needs in that state through a scientifically sound Washington State Civil Legal Needs Study. [105]

In a January 2004 article entitled "*Moving Beyond Anecdotes: The Washington State Civil Legal Needs Study"*[106] Justice Charles W. Johnson and Judge Mary Kay Beck, who co-chaired the Task Force, make a persuasive case for the benefits of undertaking a comprehensive scientific approach to analyzing the problem. They write:

> ***Why do we need a civil legal needs study?*** *It is undisputed that the civil equal justice services in our state are inadequate to serve the need. Staffed legal-services programs and programs that utilize volunteer attorneys to provide civil legal services to low-income people can address only a small fraction of the needs of the poor, which for most programs include only those clients with incomes at or below 125 percent of the federal poverty level (FPL).*
>
> *It also is undisputed that the poverty population continues to increase. Washington state has approximately 1,039,000 low-income residents living at or below 125 percent of the FPL. Washington ranked third in poverty growth rate over the past decade, with a 46 percent increase in the number of people living in poverty since 1990. Statewide, 13.2 percent of Washington state's census-based population is low-income.*
>
> *That said, financial support for civil equal justice services continues to erode. We know how many low-income people receive services and which services they*

[104] The Legal Services Corporation published its revised Poverty Guidelines on February 23, 2004. 45 CFR 1611. For example, a four-member family with annual income of $ 23,563 in Wisconsin would be at 125 percent of the current Poverty Guidelines (as determined by the Department of Health and Human Services. That same family with an income of $37,704, would be at 200 percent of the current Poverty Guidelines.

[105] See Study at **Appendix B**. (Note: The study, in PDF format, can also be found online at www.courts.wa.gov/newsinfo/CivilLegalNeeds%20093003.pdf.)

[106] *"Moving Beyond Anecdotes: The Washington State Civil Legal Needs Study," Washington State Bar Association Bar News, January 2004.*

receive; and we also have a good idea of the number of people who are turned away. Indeed, the civil equal justice programs in our state estimate that over the past decade they have turned away four out of every five eligible low-income clients. Given this continuing crisis, proposals for conducting a civil legal needs study in this state historically have been rejected as being an unnecessary use of scarce resources — resources that could better be utilized to pay for legal services for low-income clients.

The Task Force on Civil Equal Justice Funding is charged with taking a fresh and long-term approach to recommending solutions to the problem of inadequate funding for these services. To do that effectively, we need solid documentation of the extent of the need to enable us to establish an appropriate level of funding for state-supported civil equal justice services. The Washington State Civil Legal Needs Study is the first comprehensive effort in our state's history to provide this documentation of the types of civil legal needs experienced by low-income people, and the first study to explore the consequences for low-income people and the justice system.

The task force adopted a three-part approach to collecting this data, drawing on the best practices of two previous major legal-needs studies — a national study conducted by the American Bar Association in 1994, and a study conducted in Oregon in 2000. We commissioned a field survey of in-depth interviews of members of 15 "demographic cluster groups," similar to that of Oregon, and simultaneously commissioned a telephone survey of randomly chosen households, similar to that used by the American Bar Association. To these were added a new survey, one seeking anecdotal input from a broad array of legal and social-services professionals.

What do the findings tell us? *The data from the nearly 2,100 face-to-face and telephone interviews was analyzed and compiled into 12 key findings, followed by a discussion of supporting data. These findings paint a troubling picture. Many thousands of our state's most vulnerable residents have serious legal problems and cannot get any help in resolving them. Many don't even realize their situations have a legal dimension. Others don't know where to seek help or are too overwhelmed to try. Meanwhile, they are systematically denied the ability to assert and enforce fundamental legal rights, and forced to live with the consequences. The findings are predictable in many ways but also contain some surprises. Following are some of the study's salient points:*

> ***How great is the need in Washington state?*** *Approximately 87 percent of low-income households experienced at least one civil legal need during the previous year, resulting in an aggregate of more than one million important problems annually.*
>
> ***Who gets assistance and who doesn't?*** *Only 12 percent of low-income people were able to secure advice or representation from an attorney.*

Even problems characterized as "extremely important" by the households themselves, which usually involved housing conditions, access to or conditions of employment, or other basic needs, got attention only 15 percent of the time.

Do legal needs differ among women, minorities, and other groups? *Domestic-abuse survivors, the vast majority of whom are women, have the highest per-capita rate of legal problems among all demographic cluster groups (5.6 percent vs. 3.3 percent for all households with a legal problem).*

What kinds of legal needs do low-income people have? *The greatest number of legal issues experienced by low-income people involve matters relating to housing. The overriding perception among the legal and social services professionals surveyed was that family law was the most prevalent. While the study confirms that family law is one of the areas of significant legal need, it accounts for only 13-14 percent of legal issues. And significantly, low-income people are more likely to get an attorney's help for family issues (30 percent) than for any other issue (less than 10 percent).*

How do the legal needs of different income groups compare? *There are significant differences in the number of legal problems experienced by low-income people as compared to higher-income households. For example, low-income households experience nearly three times as many issues relating to substandard housing conditions, at least twice as many issues relating to the ability to secure and maintain essential utilities, and four times as many discrimination-related issues.*

How often is discrimination part of the problem? *Discrimination is pervasive — one in four legal problems is perceived to have a discrimination component. Discrimination appears in nearly every category of legal problems, and accounts for half of employment and health issues, and nearly 15 percent of housing-relating issues. (It should be noted that only those claims that appeared to the reviewing attorney for this study to meet applicable legal standards for one or more types of actionable discrimination were entered into the database.)*

Do legal needs differ based on where people live? *The field survey allowed for comparative analysis of responses by region and by urban and rural residency. Although there was general consistency across the regions, there were some notable differences, including the fact that households in the North Central region report nearly twice the percentage of immigration-related problems as households in other regions. This finding reflects the changing demographics of this area, particularly immigration of Latinos.*

Does knowledge of, and access to, legal resources differ by where people live? *Even though legal problems do not vary significantly between urban and rural low-income households, urban residents are nearly 30 percent more likely than rural residents to know of free legal services in their areas, including various toll-free telephone "hotlines" for legal assistance. This is particularly true of households in the North Central and South Central regions, which have the highest percentages of households where English is not the primary language.*

What happens to those who don't get legal help? *Of those who were not able to get legal assistance and look elsewhere for help, 55.5 percent turn to organizations that cannot provide legal advice or assistance. Surprisingly, only 2.6 percent went to law libraries and only 1.3 percent consulted court staff.*

Can technology make a difference? *The surprising statistic is that nearly half of low-income people have access to computer technology and that 40 percent have the ability to use the Internet. However, only 19 percent of those households know of a website where they can get information or help with civil legal problems.*

What are the consequences for low-income people and the justice system? *Among those who seek but do not get an attorney's help, only 21 percent feel positively toward the justice system. By contrast, more than half of those who are able to get an attorney's help — whether from legal services or a private attorney — have positive attitudes toward the justice system.*

Where do we go from here?
This Task Force on Civil Equal Justice Funding, the Washington State Supreme Court, and others will be examining these findings in the coming months to inform discussions about policy, service delivery, and funding. The study provides stark documentation of the need to increase the capacity of Washington state's legal-services delivery system to address these overwhelming needs.

Despite the best efforts of our state's civil legal-services programs and programs that utilize thousands of volunteer attorneys to provide free legal assistance to low-income people throughout the state, less than 15 percent of low-income people are able to get help with their civil legal problems. And the problem is about to get worse. In the past 36 months, stagnant funding has caused Columbia Legal Services and the Northwest Justice Project, Washington's two statewide staffed legal-services providers, to effectively downsize by 18 full-time attorneys between them (from a starting point of 105 attorneys). Last year, the Legal Foundation

of Washington was forced to reduce funding for a number of volunteer attorney programs and other providers of civil legal assistance due to reduced IOLTA income. Finally, Columbia Legal Services and Northwest Justice Project face a $2 million combined deficit by the end of 2004 and are consequently unable to maintain their already-reduced capacity to deliver critically needed legal assistance. The programs have begun a process to initiate involuntary downsizing (i.e., layoffs) to take effect in the first quarter of 2004.

Every lawyer, judge, and court clerk, and anyone else who serves as a steward of our state's justice system, should read the Washington State Civil Legal Needs Study. It also has important messages for those in our legislative and executive branches of government, for funders, for those who run social- and human-services programs, and for those who develop technologies. It should be featured prominently in all media outlets in our state so that members of the public can better understand the challenges facing our justice system. It should be a tool for us all to use as we work toward the promise of equal justice for all."

In May 2004, the Washington Supreme Court Civil Equal Justice Task Force released a report entitled: *Quantifying the Additional Revenue Needed to Address the Unmet Civil Legal Needs of Poor and Vulnerable People in Washington State*[107]

The report finds that an additional $28.26 million is necessary to address the civil legal needs faced by 140,000 low-income households in the state each year. Basing its assessment on a recently completed civil legal needs study, the Task Force calculates the resources currently available to address civil legal needs of low-income people totaled about $19 million dollars but also finds that more than 75 percent of low-income people in the state needing civil legal help could not obtain any assistance. The Task Force report declares that the state of Washington has a "fundamental responsibility" to solve the problem and should appropriate an additional $18.25 million for this purpose.

According to one Task Force member, the increase in state financial support for civil legal aid will "close the gap and restore a sense of hope and fairness to a justice system that is out of reach and increasingly irrelevant to those who most need its protection."[108]

Also in May 2004, the Washington Supreme Court Civil Equal Justice Task Force released its final report and recommendations; including comments on each of the charges it was given.[109]

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[107] *See* **Appendix Q.**
[108] Comments of Atty. Jim Bamberger, Columbia Legal Services, Task Force on Civil Equal Justice Funding, Quantifying the Additional Revenue Need to Address the Unmet Civil Legal Needs of Poor and Vulnerable People in Washington State.
[109] *See* **Appendix R**.

4. How Much Would It Cost To Undertake A Study Here In Wisconsin Similar To The One Undertaken In Washington?

According to Joan Fairbanks, Justice Programs Manager of the Washington State Bar Association, the Washington State Civil Legal Needs Study was initiated by Supreme Court order and took about a year to complete.

It cost approximately $110,000 in direct cash outlays to conduct the study, most of which was used to pay for the random-digit dialing telephone survey completed by Washington State University and for data tabulation. The field survey was conducted by Portland State University (which had conducted a similar study in Oregon state.) The field survey work was conducted by volunteers (lawyers and students). Early discussions had considered using retirees to conduct the field surveys but the Bar was able to find sufficient numbers of students and members willing to volunteer.[110] This helped keep the costs down and is something to be considered if a study is undertaken in Wisconsin. To the extent volunteers can provide certain donated services, these services do not have to be purchased.

The Supreme Court of Washington provided $50,000 and the Washington State Bar Association (WSBA) provided $20,000. The remainder was provided by the state's Department of Aging, non-LSC-funded legal services providers and from other sources, including funds from several Sections of the Washington State Bar Association. In addition, the WSBA made a substantial in-kind contribution, subsidizing the project by loaning an employee for roughly a year to assist with the study. (The estimated value of this in-kind contribution was at least $70,000.) In addition, the WSBA supported the effort in other ways. Bar members negotiated and drafted the contract for the field study. The Bar publicized the study and helped with the logistics of getting the study published and distributed.

In addition to staff provided by the WSBA, the study was also staffed in part by personnel loaned from Columbia Legal Services, a Spokane–based, non-LSC funded provider.

Washington State was well positioned to conduct such a study. It had in place an independent board, the Access to Justice (ATJ) Board, which had been established in 1994 by Supreme Court order in response to the threat posed by cuts in federal LSC funding and other uncertainties.[111] The ATJ Board, which is administered by the WSBA,

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[110] Due to some important cultural distinctions, it was important for the success of the Washington study to find survey personnel who could communicate effectively with ethnic minorities. Even with large numbers of volunteers there were some difficulties getting as deep a penetration into certain ethnic communities such as Pacific Islanders and some Hispanic groups as statisticians would prefer.

[111] The Access to Justice Board was a product of the WSBA's strategic planning process and was first proposed as part of the Gates Commission Report (named for Bill Gates' father, who chaired it). The ATJ Board was designed to serve as a "traffic cop" sort of entity to ensure that scarce civil legal service resources were used effectively and to set up a state wide plan. The ATJ Board was set up initially on a two-year trial basis, after which time it was renewed by the Court for another five-year trial and is now permanent.

reports directly to the Court. The ATJ Board exercises broad overview and coordination responsibilities. The ATJ Board was the entity that originally requested the civil legal needs study and agreed that it would be staffed. The Supreme Court then directed and oversaw the study.

It is interesting to note that one of the first problems addressed by the ATJ Board upon its creation was a lack of coordination. At that time no plan existed for monies to be spent, no value structure was in place for the monies spent and no structure existed around which to build a statewide effort to solicit contributions. The Board began a comprehensive review of Washington's statewide legal service delivery system and development of a plan to respond. This review and planning process is an ongoing project. The ATJ Board's first significant project was the development in 1995 of its *Plan for the Delivery of Civil Legal Services to Low Income Persons in Washington State* (State Plan). The State Plan included 18 recommendations for reconfiguring and supporting Washington's delivery system so as to preserve access for low-income clients to a full range of advocacy and services. The State Plan has since undergone periodic revision a number of times.

In undertaking its planning responsibilities, the ATJ Board first sought to articulate a mission and vision of statewide equal justice. Based on this mission, it then attempted to identify those values that flow from the mission statement and which, in turn, lead to the identification of the components and capacities that seem necessary for the system to be effective.

The ATJ Board is directed to act in the public interest which means its first priority is to look at the interests of clients. To guide its efforts the Access to Justice Board prepared and regularly revises a document entitled, "*Hallmarks of an Effective Statewide Civil Legal Services System"* [112] The first such document was prepared in 1995.

5. What Other Options Are Available?

A. Limited Legal Services ("Unbundling")

In 1996 the State Bar's Commission on the delivery of legal services issued its final report including a recommendation "The State Bar should sponsor a symposium on the subject of 'unbundling' of legal services and lawyer assistance in self-representation." Bar-sponsored discussions of unbundling and *pro se* issues in the delivery of legal services have been regular topics at conventions, committee meetings and governance meetings. Action on changes to the Rules of Professional Conduct for Attorneys to address unbundling and limited scope representation has awaited the Ethics 2000 review.

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[112] A copy of the most recent revision is attached as **Appendix S**.

In 2003, the State Bar's Legal Assistance Committee established an Unbundling subcommittee to review Ethics 2000 recommendations concerning limited legal services and non-profit or courthouse annexed volunteer efforts. With minor variations in text from the Ethics 2000 recommendations, the Legal Assistance Committee recommended Bar support for the concept of limited legal assistance and non-profit or courthouse annexed volunteer efforts.

1) **Proposed changes to scope of representation in SCR 20:1.2 and a new proposed SCR 20:6.5 permit innovation in access to justice and legal services but raise malpractice and ethics concerns.**

a) Limited scope legal assistance is already part of Wisconsin's justice system. Courthouse assistance centers, where lawyers provide information, self-help resources and at times limited advice; hot lines, anonymous and caller identified; community outreach efforts; on-line information; stand alone interviews and advice; coaching in mediation; collaborative lawyering; preparing and reviewing documents and pleadings without appearing as counsel; coaching throughout *pro se* litigation; representation in initial proceedings for domestic abuse which frequently affect the later divorce or custody case in which the person appears *pro se*; lawyer of the day programs; and group representation. All proceed on a "less than full-service basis" and purport to offer competent but limited legal assistance.

b) Concerns include malpractice coverage, ethics of contact with persons served with limited legal assistance, pleading and practice problems such as "ghost writing", limited appearance and withdrawal, allocation of tasks between lawyer and client, acceptance of factual basis without independent evaluation resulting in overlooked legal considerations, and the perception that people of modest means are offered less than effective legal representation and lawyer ethics are placed on a sliding fee scale.

The Board of Governors could support these rule changes as necessary for innovation in the delivery of legal services. Centralized intake and referral, assessment of need for limited or extensive legal assistance, relaxation of imputed disqualification in brief service settings and greater recognition of "screening" together can reduce duplication, better allocate attorney resources and remove obstacles to *pro bono* involvement in an integrated delivery system. While not addressed by these two rule changes, licensed and lawyer supervised paralegals may soon be available as part of an innovative delivery system.

It should be noted that the ABA Litigation Section Modest Means Task Force has issued *The Handbook on Limited Scope Legal Assistance*. The ABA's promotional material for the handbook says it "provides direction for both policy-

makers and practitioners. It includes case studies of lawyers providing limited assistance as part of their practices, methods to maximize client services and an analysis of the applicable ethics issues. An extensive appendix includes state rules, checklists and sample client agreement forms." Going forward this is an excellent guide on the possible and questionable, should the Board of Governors wish to explore these options further. The Handbook is available in PDF at: http://www.abanet.org/legalservices/downloads/delivery/innovations.pdf.

B. Single Integrated Statewide Intake and Delivery Process

The concept of centralized intake and referral as well as assessment of need for limited or extensive legal assistance was introduced in the preceding section above.

One of the innovations Washington state employs is a statewide, integrated, telephone-based intake process that allows for *triage* principles to be applied in allocating scarce legal resources effectively. This is a system that could be adapted for use here in Wisconsin. The State Bar already operates a Lawyer Referral and Information (LRIS) System. To the extent experienced attorneys/paralegals were charged with screening the calls, it is likely that the *triage* aspect of the centralized intake process would be more effective.

The Arizona Task Force recommended that the State Bar of Arizona sponsor a clearinghouse and reduced fee panel for Arizonans with moderate incomes as follows:

> *"The State Bar could improve access to justice for Arizonans with moderate incomes (between 125 and 200 percent of poverty) by creating an access to justice clearinghouse and panel of lawyers who will work for qualified participants at a reduced fee. An individual in need of legal services could contact the State Bar by using a toll-free number or log on to the State Bar's web site. This service could also be integrated into the new statewide website, AZLawHelp.org that is sponsored by the legal aid organizations and is designed to help low-income individuals in Arizona find legal assistance.*
>
> *If the person phones in, a State Bar screener would first determine financial eligibility. An individual who has income of less than 125 percent of the poverty level would be referred to the appropriate free legal services program. An individual who has income between 125 and 200 percent of poverty would be eligible for the Bar's Reduced Fee Panel. The screener would enter the individual's relevant information into the web-based database, including the legal area of need (e.g., landlord/tenant), and location. Individuals could also perform the same function by using the web site.*
>
> *The screener or the individual in need of legal assistance would then review a list of attorneys willing to provide assistance. The assistance would not be free but rather provided at a greatly reduced fee, such as $30.00 per hour.*

To assure that every attorney has an equal opportunity to participate in the program, the computer would randomly generate the names of three to five attorneys. The attorneys, of course, would be matched with a potential client only if the attorney has indicated a willingness to provide services in the particular area of need.

The Board should first consider approving this recommendation in concept and then exploring how much it would cost to implement. The costs would include building the database and website and staff time to maintain the web site, phone number and attorney list.

If the Board approves this recommendation Participating attorneys might provide another source of funding. They could be charged a nominal annual fee to be listed, or they could be asked to pay the program for the first hour of services provided, as is done in the Maricopa County Bar Association's Lawyer Referral Program. This program, however, would be different from that program because the lawyers would have to charge a reduced fee for all of the services provided rather than just the initial hour."

The Board of Governors may wish to consider whether the State Bar of Wisconsin's existing Lawyer Referral and Information Service (LRIS) might be revamped to assume any of the roles proposed in Washington or Arizona.

C. Form a Resource Development Committee

The Washington State Bar Association has formed a Resource Development Committee that provides strategic recommendations to the Access to Justice Board regarding fundraising. A review of its May 2004 Report to the Board might be instructive.[113]

D. Create A Volunteer Lawyer Legal Services Action Plan to Involve the Court and Types of Lawyers Who Don't Traditionally Engage in *Pro Bono* Activities

The Washington State Bar Association has also instituted a Volunteer Attorney Legal Services (VALS) Action Plan, which includes the following initiatives/components:

1. **Corporate Counsel & Government Attorney *Pro Bono* Activities**
   To encourage the development of a culture of *pro bono* within corporate law departments and the government law sectors.
2. ***In Forma Pauperis***
   To develop a proposed *In Forma Pauperis* rule, which will provide uniformity

[113] *See* **Appendix T**.

throughout the state and which will revolve much of the subjectivity now surrounding decisions to grant a waiver of fees.

3. **Supreme Court Involvement**
   To promote increased involvement of the Washington State Supreme Court in taking a leadership role in encouraging WSBA members to provide *pro bono* services.
4. **Local Rules**
   To propose court rules and/or policies to facilitate the appearance of *pro bono* counsel, to facilitate the filing of documents, and to otherwise remove procedural and administrative barriers that impede volunteerism.

E. Restructure the Way IOLTA Funds Are Managed to Assure Greater Accountability; Explore Alternative Ways to Raise Voluntary Donations or Both

Currently, WisTAF is unique among state entities charged with administering IOLTA in that it is in a "no man's land." Although both the Chief Justice of the Supreme Court and the State Bar President (with the approval of the Board of Governors) make appointments to the WisTAF Board, WisTAF is not under the direct supervision or either the Supreme Court or the State Bar of Wisconsin.

In most other states, the entity responsible for administering the IOLTA program is either an agency of the Court (and therefore directly accountable to the Court) or connected to a foundation administered by or for the Bar. Because of WisTAF's unique position, it can be argued that neither the Bar nor the Court is directly supervising Wisconsin's IOLTA program.

Furthermore, WisTAF is a) prevented by SCR 13 from engaging in advocacy and b) has opted not to engage in any concerted fundraising for fear of placing itself in direct competition with its grantees. The result is a "neutered" agency that has chosen to make itself totally dependent upon the vicissitudes of the interest rate cycle. This could hardly be illustrated more clearly than through the comments that follow:

> "If you look at the more successful programs you see that they have a number of sources of income. The successful programs have integrated the management of IOLTA funds, with fundraising efforts by the Bar Foundation and the fundraising efforts of private foundations like EJF. This gives these programs the wherewithal to leverage the resources of the Bar, the Courts and the Legislature to bring them to bear on the solving the problem. That (balance of funding resources) creates a program grantees can rely on over time and makes them less vulnerable to exogenous variables like interest rates going down that puts the legal services providers at risk as well as the people they serve."

> "A good example is if you look at what Pennsylvania did last year to raise court filing fees. They were in a very similar situation as far as IOLTA revenues. There, the trust account foundation, which is a subsidiary or agency of the court partnered with the Bar to put together a project to raise filing fees, raising $7.5 million a year. It was a 3-year project to get there."

> "In Minnesota, where the trust account foundation is an agency of the court, the Supreme Court gets an amount of funding from the Legislature, part of it goes to the foundation. Minnesota also imposes an assessment on attorneys. "Michigan gets the bulk of its money from filing fees although it has a very active foundation that is involved in fundraising."
>
> "Some have suggested that WisTAF should go out and do fundraising. The last thing we want to do is to be out there competing with our grantees for funds from foundations." [114]

Funding for legal service providers in Wisconsin comes from three principle sources: 1) federal LSC funds; 2) WisTAF grants from the administration of IOLTA funds; and 3) private fundraising efforts through EJF. Currently, the work of administering IOLTA and charitable fundraising is being carried out principally by two entities (WisTAF and EJF) each of which has its own overhead costs.

The Board of Governors may wish to explore whether these functions ought to be consolidated under the auspices of a single entity and, if so, whether the Wisconsin Law Foundation (WLF) may be suited to take on either or both aspects of this dual role. Lynda Tanner, State Bar Finance Director, has prepared an estimate of what it might cost to operate an entity like WisTAF within the State Bar.[115]

Success in charitable fundraising sort requires thoughtful planning and careful execution. 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.

The 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 this past fiscal year.

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.

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[114] Comments made by Atty. Patrick Norris, the executive director of WisTAF in a phone conversation with State Bar Public Affairs Director Dan Rossmiller on September 2, 2004.

[115] *See* **Appendix U**.

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 and to minimize the amount of overlap in the appeals to actual or potential donors. In the view of WLF 's Funds Development Director there is still much more that can be done.

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.[116]

[116] 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 Coalition, Wisconsin Bar Foundation
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 for legal services
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 and *Pro Bono* Initiative support; Wisconsin Bar Foundation grants to legal services
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	WLF has created the ability to have separate funds and is pursuing major donors.
Endowment funds	MA, GA	

United Way designated giving	IL	
Fee for service contracts	NC, TX, PA, AK, HI	
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	
City and county funds	PA, VA, NY	

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.

F. Look To The Legislature For Funding Of Civil Legal Services

It should be assumed that it will be a difficult lobbying task to try to convince lawmakers to allocate state general purpose revenues (GPR)—monies raised from taxes such as income and sales taxes that are channeled into the state's general fund— to fund any new initiatives, at least in the short run.

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 and the Bar has been unsuccessful in raising private bar reimbursement rates to address constitutionally-mandated obligations, it seems 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, if revenues grow by 5% annually all the money coming in to the state treasury will go to fund programs already promised, leaving virtually no money to fund new programs. It is only if revenues begin to exceed 5% by a substantial percentage that money will be available 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.

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.[117]

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 *pro bono* work currently being performed by Wisconsin lawyers. By helping the Bar to present the contributions of Wisconsin lawyers in definitive terms, 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.

Reminder: All Appendices to this report can be accessed on the Board of Governors' Web page on WisBar.org. Go to: http://www.wisbar.org/bar/bog.html and click on the link: WisTAF Petition Study Committee Report Appendices.

[117] 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.