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Roundtable: Funding Strategies

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Roundtable: Funding Strategies

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Abstract

Led by moderator Maria L. Imperial, the panelists discussed funding strategies for legal services for the poor. Each panelist gave an overview of funding mechanisms in their home country (Canada, Lithuania, the United States, Australia).

ROUNDTABLE: FUNDING STRATEGIES

APRIL 7, 2000

- MODERATOR: Maria L. Imperial, *Executive Director, City Bar Fund, Inc., New York*
- PARTICIPANTS: Lorna Blake, *President, National Association of Interest on Lawyer Trust Accounts Programs, New York*
- Maria Dakolias,* *Counsel, World Bank and Judicial Reform Unit, Washington, D.C.*
- Daina Petrauskaite, *Ministry of Justice, Lithuania*
- Simon Rice, *Director, Law Foundation of New South Wales, Sydney, Australia*
- Nye Thomas, *Policy Director, Legal Aid Ontario, Toronto, Canada*

MS. IMPERIAL: Before we start, I would like to tell you what our goal is of the roundtable. Initially, we were thinking that the goal was to just share information about funding mechanisms so that everyone could learn a little bit. But as Simon pointed out yesterday to me, you could have all stayed home and read a book or gone on the Internet and found out about all these different funding mechanisms. So we are going to push you so that you could really learn more about funding and see what the limits of the strategies are and maybe come away with some opportunities for you to take back to your countries.

We realize that there's no such thing as a one-size-fits-all approach. You cannot just transplant what you are learning here to your country; you have to take into consideration cultural, political, and social considerations.

Each person was chosen on the panel because they represented a different funding mechanism or perspective. The first person I would like to start with is Nye Thomas, because, historically, Ontario was known as the Cadillac of legal services. England was the Rolls Royce.

* Please note that the opinions expressed here are those of this author and not necessarily those of the institution for which she works.

But that was, unfortunately, historically, and there have been a lot of changes in Ontario. So I thought that as a legal services provider, Nye could tell us what the situation is like in Ontario in terms of funding.

MR. THOMAS: Thank you, Maria.

My remarks will largely be about government funding and the transition that legal aid in Ontario has gone through in the last few years. Back in the mid-1990s, we were known as the Cadillac of legal aid plans because of our very rich criminal, civil, and poverty law services. Financial eligibility was quite expansive. As a result we were thought to be a model for legal aid plans around the world.

Let me give you some sense of where we were in the mid-1990s: We had open-ended funding that was demand-driven. There was no cap on our budget. Essentially, if a person was eligible for legal aid, they were issued a certificate. We had a very generous legal aid plan that, in a sense, mirrored the other welfare programs we had in the Province. Services were delivered, at least for criminal and family law, almost exclusively by the private bar through a classic *judicare* program.

Almost as soon as we were described as the Cadillac of legal aid plans, unfortunately, the wheels fell off. Our costs rose to the point where, in 1995, our budget was approximately CDN\$350,000,000 a year. That is for both criminal and civil services, and that is for a population of about 11,000,000 people.

Just five years earlier, the budget was approximately half of that. In response to the increasing costs, the provincial government, which is our primary funder, imposed capped funding on us; essentially limiting our budget and forcing us to figure out how to spend the money.

The result was a series of brutal and, in retrospect, quite crude service cuts to the number of certificates that were issued by the plan. At one point during our peak years, we were issuing over 230,000 individual *judicare* certificates to clients across Ontario. As a result of the budget cuts and our funding restrictions, that number was reduced in a space of two years to about 86,000. Most of those cuts were in fact in the civil law and family law area.

Since then, there has been a crisis in legal aid in Ontario. The culmination of this crisis was the transfer of administration

for the program from the Law Society of Ontario to a new independent statutory agency modeled roughly on the British Legal Aid Board.

Today we have a budget of about CDN\$260,000,000 for criminal and civil services. That budget is fixed. We are not allowed to run deficits. We are not allowed to spend any more than that. Of that CDN\$260,000,000, approximately CDN\$160,000,000 is for civil services, primarily in the areas of family law, poverty law, and for immigration and refugee services. This works out to approximately about US\$110,000,000, for civil services or approximately US\$10 per capita.

Our administration, as I said, is now under a new statutory agency. We are governed by a board which has legal consumer representatives and management/business representatives. Our statute says that we are not allowed to have a majority of lawyers on our board, and we are very explicitly told to deliver our services on the basis of client need.

Our delivery models have been reconfigured quite significantly as a result of our new funding restrictions. Whereas formerly our family services and non-poverty civil services were delivered by way of *judicare*, we have now opened up a series of staff offices. We have significantly expanded our duty counsel or duty solicitor program, and we are also beginning to work more closely with community agencies, the effect of which will be to decentralize the provision of summary legal advice and information out into the community.

Other consequences of our funding restrictions are very strict financial eligibility rules, very strict priority rules, and very strict limits on the amounts of money that our *judicare* lawyers can bill Legal Aid. Essentially, we have gone from a completely open-ended system to one which is now very heavily managed in just about every respect.

What are the lessons we have learned from this? First of all, we learned an important lesson about *judicare*. We have learned that you can run *judicare* on a fixed budget but, it requires very sophisticated management, management which we are still only in the process of learning ourselves.

Second, when it comes to government funding—government funding, of course, is inherently a political decision—we have learned inadvertently of the tremendous importance of de-

veloping political allegiances with the private bar, the judiciary, and the government bureaucrats who are responsible for overseeing our program. A major advantage to our *judicare* program is that we have a wide constituency of lawyers ready to argue in favor of legal aid funding. The down side, of course, is that they tend to be resistant to any move away from a classic *judicare* program, so we struggled to open up even the few staff offices that we have.

Third, we have learned that there are both advantages and disadvantages to linking civil and criminal legal aid. The first advantage doesn't so much have to do with funding but rather has to do with the independence of the program. We have found that people, at least in our political tradition, find it easier to appreciate the importance of independence for a criminal legal aid program. It is understood that it is inappropriate for the government to both conduct prosecutions and be directly involved in the provision of defense. This is a concept which is intuitive for legal professionals, but it's often hard to sell to those who make funding decisions. In our experience, the joining of the criminal and civil sides has allowed us to avoid some of the problems that we have heard about in the United States regarding government interference in the provision of civil legal aid services.

Fourth, we have discovered that it is difficult to argue in favor of civil legal aid funding on the basis of promoting access to justice alone. As a result, we have talked about the instrumental benefits to providing civil legal aid in terms of improved efficiency of the courts. In family law, we talk about the importance of maintaining family integrity, or about promoting services to victims of domestic violence, and also about the importance of legal representation in promoting self-sufficiency of families and thereby avoiding their being on social assistance.

Finally, in terms of funding pressure on civil legal aid, we have learned that it is extraordinarily important to assess and identify client needs as early as possible and as well as possible in order to direct people to the most cost-effective service provision.

MS. IMPERIAL: Davia, I know you just passed a law last month in Lithuania changing your system of delivering civil legal services or establishing a system. Can you describe the system that is going to be developed?

MS. PETRAUSKAITE: Thank you.

As you mentioned, Lithuania has just started to create a system for providing civil legal aid services for poor people. Exemptions from legal expenses are set forth in the Civil Procedure Code of the Republic of Lithuania, but legal expenses do not cover compensation for professional legal assistance. So the legal reform is ongoing, and the law on state-granted legal aid, which provides free legal assistance for poor people in civil and administrative cases as well, was adopted last week and will come into force on the first of January 2001. Until this time, the government needs to prepare and adopt some bylaws to implement the new system in Lithuania.

This law proposes to set up a state public funding model. The funding depends on the type of legal aid. The following types of legal aid shall be provided: primary legal aid, state legal aid, and legal aid provided by public institutions.

Primary legal aid means legal information and legal advice appointed and financed by a municipality. Municipalities should have agreements with barristers and are responsible for reimbursement for services of barristers pursuant to those agreements.

State legal aid covers representations in proceedings appointed by a court and financed by the state. We are planning to use the same mechanism, the same model, for funding as we have now in criminal cases. The money from the state budget will be distributed to courts through the Ministry of Justice, and barristers will receive reimbursement in courts where the legal aid was provided.

The legal aid provided by public institutions are: legal information, legal advice, and representation in proceedings. In Lithuania, we have few law clinics. This law is a legal basis for the creation of new law clinics; because although clinics existed, there was no legal basis for this. Public institutions shall be supported in accordance with the procedure described by the law on charity and support.

Another new institution we have in Lithuania that just started last week is the Public Attorney's Office. The Public Attorney's Office will be mainly financed from international funds and partly from the state; we will see which model is the best for Lithuania.

MS. IMPERIAL: Thank you.

Lorna, could you describe the IOLTA model?

MS. BLAKE: I would be happy to.

IOLTA stands for Interest on Lawyer Trust Accounts. It is a program that began in 1981 in the state of Florida. It is actually an idea that was imported from our neighbors to the north, from Canada.

The model allows lawyers to take client funds which are nominal or short-term—either nominal in amount or held for such a short period of time that practically they could generate no interest for the individual client—and to pool those funds in an IOLTA account. The interest on those funds goes to a second charitable institution or a charitable organization in each state that then distributes the money in grants to legal services for the poor. Any client funds that are larger than nominal or held for a long period of time should be handled by the lawyer according to how the client directs and according to their lawyers' ethical obligations. But, these nominal and short-term funds formerly generated float for the banks, and didn't serve any public purpose. So the IOLTA model has variously been described as sort of magic or alchemy or something that, in a way, almost creates something from nothing.

The programs in this country are created by courts and state legislatures. They exist in all fifty states and in the District of Columbia. Last year, they generated US\$140,000,000 for legal services for the poor in this country. Just to show you in terms of dimensions, the Legal Services Corporation, which is federally funded, is roughly US\$300,000,000, so IOLTA programs have become a significant supplemental source of funding.

The purposes of the programs vary from state to state in their details, but for the most part, eighty percent of these funds go to fund civil legal services for the poor in the United States. Other functions that the IOLTA programs support are law schools, scholarship, and law-related programs, and then various different programs that improve the administration of justice in their states. In some states, also, law-related education programs are funded by a percentage of the money.

The whole concept came about because of severe funding cuts to the federally-funded legal services program, so this is a program that was created to fill a need. It is not a principal vehi-

cle for funding legal services. It has always been viewed as a supplemental source of funding. It has, however, become increasingly influential in many states.

The programs vary in size from states where the IOLTA funds are as low as US\$300,000-500,000 to states where it is as high as US\$12,000,000-14,000,000. So the variation from state to state can be quite tremendous.

The IOLTA model has proven vulnerable to a couple of different issues. One is constitutional challenges. That has been an issue for the models in the United States. Challenges have been brought variously in Florida, Massachusetts, California, and most recently in Texas, where a victory was handed down by a Texas trial court judge who dismissed all the constitutional claims against the program, which we are very pleased by. That decision will be appealed, but we are hopeful that there will be a good outcome to that.

Because they are created state by state, IOLTA programs can be buffeted about somewhat by state and local politics. So the same issues that attend the politicization of legal services funding at the federal level can in fact affect programs at the state level.

Finally, the other major issue for IOLTA programs is that we are dependent on a banking model, or product, that is somewhat outdated. Most IOLTA programs derive their money from the NOW account product, which allows non-profits to earn interest on checking accounts. For IOLTAs, the owner of the interest is the charitable organization, the IOLTA program, and the owner of the principal is the lawyer and the client.

These accounts, at the onset of IOLTA development in this country, were paying 5-7.5%. Today the effective net yield for most states is under 1%. And at that, we generate US\$140,000,000. There is a huge amount of principal in these accounts. But increasingly low interest rates and high service charges have eroded the net yield for IOLTA programs in this country. It is something that the national IOLTA community is taking a look at, trying to determine how we can improve the net yield that the banks offer us on these accounts, because it just doesn't take a very astute mathematician to figure out that if we could even inch it up 1% or 2%, we would double or triple the amount of money we can give out.

MS. IMPERIAL: Thank you. Maria, can you tell us about some World Bank initiatives?

MS. DAKOLIAS: The objective of the World Bank is, as you know, to alleviate poverty, and we provide loans or credits to developing countries for economic and social development. We are a lender of last resort and we lend at the request of the government. We recently began efforts in legal and judicial reform in the early 1990s. We currently have thirteen free-standing legal and judicial reform projects and about twenty or so more in the pipeline that are now being prepared.

We work directly with the governments to develop these projects. We try to look at the legal and judicial framework as a whole, look at the problems and the priorities, and develop a dialogue. We look at court fees; whether lawyers are required in cases; the efficiency aspects, whether there is adequate legal aid, how judges are appointed and disciplined, and the like. The dialogue that we have with the government, with civil society, with the judiciary, and with the bar, is to develop activities that could be funded under a project. We discuss a holistic program and legal services is only one aspect. We look at the judiciary, ADR, access to justice, training of lawyers and judges, the media and the public as well as law reform.

One example that might be of interest is Ecuador, where there were only four public defenders in the city of Quito for a population of 2,000,000, and a study that said that over seventy percent of the marriages involved domestic violence. In that project, legal services for poor women was included and the results so far are positive. A demand driven fund for civil society organizations was established by the government so that these groups could apply to receive funding for activities related to access to justice.

We also established a fund that groups could apply to receive funding. This fund has resulted in programs to train mediators in rural populations where courts are six hours away, establishing legal clinics in law schools, training for families of prisoners on the legal process, and increasing public awareness of children's rights. This is an example of the new areas financed by the Bank. Principally, in the early 1990s, we concentrated on legal and judicial reform relating to private sector development, and these programs have evolved to include access to justice. We do have many challenges ahead in this area.

MS. IMPERIAL: Thank you. Simon?

MR. RICE: Thank you. Can I start with a couple of caveats that may make you wonder why I'm here? The first is that the Law Foundation, of which I am the director, doesn't provide legal services. We're not an example of anything useful to you in that regard, but we are a research, policy, and community development organization whose business it is to promote access to justice. One of the areas we are concerned with is promoting the provision of legal services, so we know about how they work and how they're funded. I am here because of that understanding we have.

The other caveat is that although I am here to speak to you about the private funding of legal services, it doesn't happen in Australia. So I have to tell you about what does happen in Australia. If you found private funding of legal services there, you wouldn't be surprised, since you find it in America. When you find something you expect, you don't ask any further, but when it's not there, you want to know why. I can tell you why I think we don't have significant levels of private funding in Australia, and that might be useful in terms of understanding where and how private funding is appropriate.

The way legal aid is funded in Australia is very similar to the description Nye gave you of the new-look model in Canada, with a qualification. We have what we call a mixed-model service delivery—British Columbia has one—which involves *judicare* and in-house lawyers in significant numbers. So all the description you got from Nye about how to manage a capped budget reflects the Australian system. It means that across Australia, in a number of jurisdictions, we principally have a public-funded legal service. How do we provide legal services? The government pays. End of story.

There is growing interest in alternative methods of funding because of the difficulty in obtaining and retaining public funds, hence the interest in private sources of funding.

You have in your kits a bibliography. In that bibliography is reference to *Innovative Fundraising Ideas for Legal Services*, produced by PERLS, a project in the ABA. They have been through the exercise that I have been asked to talk to you about, so I simply draw your attention to a chart they've done, which is a

long, long list of all the innovative ways you might fund legal services.

They list what I call straight fundraising—donors, bequests, special events, slow auctions, golf days, you name it. They list the IOLTA funds, which I will come back to in a minute. They list a group of activities that I call “riding on the back” activities. This group includes what’s going on in the legal system that we can leverage up a bit, like adding a premium on filing fees in court, for example. Where can we milk a little more money? A lot of it would be characterized as indirect taxation, a bit more money out of the litigants, a bit more money out of the process. I recommend that you understand the list and all the options and make up your own mind how you would fill those criteria for yourself.

Something they don’t list here—I don’t know what this tells us about the extent to which the market dominates American thinking—is what I would call market options, such as legal expense insurance and pure privatization of legal services not falling into those other categories.

What they have done is list them according to a number of criteria—the revenue they earn, the time it would take, the cost of doing it, the staff, and the upkeep—and under revenue they list low, medium, and high. Under revenue for these in Australia I would list low or nil for most of them. And I would even have some warnings about trying to do it at all and the political damage and fallout that you might get.

When I say that, I invoke the comment we heard from Danny Greenberg in the previous session. Unsurprisingly, I am saying that we should look at the cultural, social, and political context. There are sound reasons that I won’t detail in this short time why private funding of legal services hasn’t happened in Australia, and why I think it is unlikely to happen for quite some time. It is a different place: the ethos is different; the politics are different. *Pro bono* services, for example, are not a significant contributor to the legal services in Australia. It is culturally a different place.

There are a couple of exceptions in Australia where there has been a bit of private activity, but I am not sure that it is remarkable or worth looking at in more detail simply for the fact it is happening in Australia, as it happens elsewhere.

I will claim IOLTA funding for Australia! Canada got it from us. It was developed in Australia, because the private profession genuinely wanted to do a good thing. They actually had a bit of a crisis. We were using interest on lawyers' trust accounts to fund the guarantee funds for defaulting lawyers. There was a massive default in the state of Victoria in the early 1960s that bankrupted the guarantee fund, so they turned to these monies, which they have since applied to more extensive community-based purposes. The Law Foundation is funded by IOLTA funds.

Lorna listed some of the problems with IOLTA, and we have discovered all these problems in Australia. Briefly, we don't have the USA constitutional problem, but it does exist in some countries. IOLTA is problematic in trust law, depending on how it's structured. There are real questions about the legality of some of the ways we manage the IOLTA money. There are ethical issues about handling clients' money without their authority, as IOLTA funds can do, depending on how they are set up.

There are issues of technology, since new technology has threatened to be able to return interest to clients instead of having to pool it. It is interest rate-dependent, and it is dependent on the degree of trust account activity. All those reasons make our use of IOLTA funds a bit limited, although in New South Wales up to twenty percent of our annual legal services budget does come from that money.

We do use contingency fees and speculative fees; David referred to the difference before. We don't use the word "contingency." We call it speculative because we cap it; you don't get a percentage, but you can litigate and get your costs at the end. That's a way of extending legal services. When I was on the board of our Legal Services Commission, we decided in a crude way to cut legal services altogether in civil matters where they could be done on a speculative basis. We shifted the onus to the private profession to fund litigation that we had been funding before.

There have been unsuccessful attempts to get legal-expense insurance going. The Law Foundation has researched and reported on why what happens in Scandinavia or in North America doesn't work in Australia. So the attempts are limited to IOLTA, legal-expense insurance, *pro bono*, and speculative

fees. Otherwise it's publicly funded, and I think there are good, subjective, local reasons as to why private funding hasn't taken off, and I wonder if it will.

MS. IMPERIAL: Thank you.

Does anyone in the audience have a question?

AUDIENCE: I am a great admirer of your project in Ecuador and particularly the fact that the Bank has recognized the issue of domestic violence as both a personal safety issue and an economic issue for women.

My question to you is, could you say a little bit more about the challenges of persuading governments to get funds into the hands of independent NGOs to do work that may include challenges to the very governments that are the conduit for the funds?

MS. DAKOLIAS: That is a very good question, and it is something that we have to grapple with all the time. Given that there are a limited number of resources available, very often the judiciaries are concerned about their own infrastructure, computers, and training. We try to balance all the different elements that are needed so that reform can take place. That includes issues like legal aid and others related to domestic violence, which we found in Ecuador in particular.

For that reason, it has helped to have what we call legal and judicial sector assessments done, which open up the dialogue with the government. We also have included civil society and the NGOs in that dialogue, so that the priorities can be set given the particular needs. In that way, we have been able to include activities like the one we did in Ecuador. Although this has not been widespread, it may be in the future.

MS. IMPERIAL: I actually wanted to follow up on something that Anne Owers brought up in the last panel that is related to this: how are legal needs determined and priorities set? The model sounds interesting since it is collaborative, but it seems as though, in lots of situations, private funders set the priorities or the government says what you can do with the money. So I open this up to the audience as well: how can we best communicate what the true legal needs are and try to get those priorities funded? Maybe Lorna would like to address that.

MS. BLAKE: Certainly. There have been in New York State four legal needs studies done, and there have been na-

tional attempts at assessing need as well. As funders of legal services over the past decade, when funding cutbacks at the federal level became severe, we have noticed that the chase for funding has a very strong impact on program priorities, because people are going after funding for their programs, and the funders are deciding, or the government is deciding, what they are willing to fund.

Before the cutbacks, a program could perhaps undertake a community-based, priority-setting process and really take a look at what the community wanted or needed in terms of legal services. Now, however, the chase for funding implies that priorities are increasingly being driven by what funders will fund and not necessarily what communities most need. This is a concern for civil legal services programs in this country and for IOLTA programs as well. For IOLTA programs, what you can fund depends on what either your court rules or your legislature, your enabling statute, or your enabling rules allow.

Listening to Simon talk about private funding, private funders have their own agenda, and they will fund what they want to fund. So legal services programs continue to try to make inroads into that market, if you will, with pretty limited success. They can be successful when they start taking a more holistic approach, as Maria mentioned. You are not talking necessarily about legal services but, rather, a particular demographic group or a particular issue that funders are interested in and the legal services component is a part of the package of services that is provided to that group.

I think legal services programs in this country are very sensitive and pay attention to the impact of funding diversification on priorities. There is a need to have some sort of corrective mechanism to address what client needs really are, rather than what governments and private funders are willing to fund.

MR. RICE: Maria, could I just address that question of need? I said to Maria when we were planning this yesterday that I thought it was apt that I spoke last because, as a matter of principle, I think private funding does and should only come last, for a number of reasons but including that an overall view needs to be taken of where the need is when the funds are allocated.

In relation to legal needs, there is this elusive quest, a holy grail, and I think it's a hopeless quest, with endless studies of

legal need. It is a very political process. Whoever is looking into it and deciding it has their own agenda for deciding what legal need is; I wonder whether it is worth continuing to do it. It is important that we recognize that legal need will be assessed differently by different people at different times, and that however it is being assessed at any one time and however funds are being allocated, it should be according to an explicit statement of the current perception of legal need.

At any one time, we need to know what the funders think the needs are. They may be right or wrong, but, unless we know what is driving them or what their priorities are, we cannot map out how to respond or how to pull down different strategies to meet the needs.

The problem is not trying to nail down some ironclad, permanent statement of legal need; it is knowing at any one time what the agenda is so that you can invoke the strategies to meet the gaps.

MS. IMPERIAL: The Lithuanian creation here of providing these services seems to me to be rather remarkable. Is it perhaps in part a reaction to a vacuum that might have been there when they were occupied by Russia? Who has been the moving force in Lithuania? Has it been the politicians or has the bar gotten organized there to bring this about? And what kind of funding are you talking about in terms of the population to be served?

MS. PETRAUSKAITE: The idea to have laws and to create a new system in Lithuania came from the people. But the Minister of Justice was very supportive of this idea. And this new law was created in cooperation with the Soros Foundation, with the bar association, and with the Ministry of Justice. So it is very difficult to tell whether the politicians were more interested in it or society.

I think we have such circumstances that we need to create a new system. Why did we choose the state-funding model? I think it depends on our traditions, that Lithuania is a country in transition, and that we are coming from a state-planned economy to a free-market economy. At that moment, in that situation, to have some other model is very difficult for Lithuania.

We have five levels in the law, and it depends on annual income and on the amount of property people own to deter-

mine who will receive this legal aid. Some of them will be reimbursed 100%; some of them, only 50%, and so on.

MS. IMPERIAL: Does anybody else have other questions here?

AUDIENCE: Less a question and more of a comment. I am with the Federal Government in Canada, and we provide funding both for civil legal aid and for criminal legal aid to the tune of about US\$82,000,000 a year for criminal matters and, at last count, about US\$99,000,000 for civil matters.

My concern is the issue of trying to sort out some way of establishing priorities in a system where obviously there are limits to the amount of money that is available. I don't think that in Canada we have that sorted out yet. We need to have a conversation around how one goes about looking at establishing priorities when you are operating in a system with a hard cap.

There are some models that may be instructive, and we need to explore those further. There is a very small access-to-justice program that the Federal Government funds that is called Public Legal Education and Information, which is apart from Legal Aid and is a major program. The Federal Government also funds Aboriginal Court Work, which is another access-to-justice program.

The interesting model involves this public legal education funding. The position we are taking is that the non-government organizations that are providing that service at the front line need to go through an analysis of what are the needs with respect to the clients they are serving, establish what the gaps are in terms of those needs that they have identified, and then apply our funding towards the most vulnerable groups. So the approach is not dictatorial in the sense of fund X, Y, or Z, but the approach is to identify—do some analysis around identifying what are the needs—and then use our funding to address those needs.

I think there is some merit to engaging in a conversation with other funders, so that there is flexibility for service delivery at the front line but at the same time there is some demonstrable targeting of the funding for which we are accountable through our political masters.

The other interesting development, and this is coming out of the smallest of jurisdictions—I recognize that Ontario gets a

lot of play given its size, but there are some interesting innovations that we are examining, and this innovation comes out of the north. We have three territories. The third one just was created a year ago, the Territory of Nunivak, with a very heavy component of its population that is aboriginal.

The innovation that we've used with them is that we've combined three separate access-to-justice programs under one model, under one funding arrangement called Access to Justice Services, which gives the territories the flexibility to be able to use funding for either legal aid or public legal education or aboriginal court work, depending on how they see the need in terms of their own territory. It is an innovation that I think we need to explore with some of the provinces. There have been some expressions of interest around using that kind of approach.

It seems to me, however, that all of this means that we need an ongoing and sustained conversation that starts to focus on priorities and less on some of the traditional or rigid approaches that federal governments tend to have typically taken in the past. This means opening up the process more to voices both at the level of the provinces and also at the level of community groups, enabling them to influence the nature of the arrangements that we have with the provinces and territories.

MS. IMPERIAL: Would anyone on the panel like to comment?

MR. THOMAS: Yes. Actually, you touched upon something that we are struggling with right now, which is to determine who should be involved in the priority-setting discussion. In Ontario most often it has been lawyers who have decided what the priorities for the program are. The result of that has been that our priorities have tended to be heavily weighted in favor of legal representation at trial and, as a result most of our money has gone towards those kinds of services.

As we have reconfigured the governance of our program, we have begun to think about who else should be at the table, who else should be influencing our priority-setting discussion. In fact, now that we have begun to broaden that discussion, begun to go out into the community, begun to talk to those who are more representative of clients *per se* than of legal professionals, in fact their priorities are almost the exact opposite to those

of classic litigators. There is a lot more emphasis on summary legal information and advice; there is a lot more emphasis on interconnectedness between legal problems and other kinds of issues that clients may have.

As a result, we have to re-conceive our service less as a law firm and more as a social agency, which for us has been, not to overuse the phrase, quite a paradigm shift. In fact, it is quite challenging to many people who have provided our service for a long time.

AUDIENCE: Hi. I am from Australia. We heard people speaking last night and this morning about their criminal budget; for legal aid funding, it was about eighty percent on average for most legal aid societies or commissions.

My own question is around access to justice, whether it is more about keeping people away from the criminal justice system, and whether that is actually being looked at. In New South Wales, the incarceration rate is at the highest in about five years. We have mandatory sentencing, which is like a three-strikes-and-you're-out program. It mainly focuses on indigenous people because of the high incarceration rate.

I am just wondering why—we just had a cut actually in legal aid within New South Wales and what got cut first is civil law—criminal law doesn't get questioned. I am just wondering why that is and whether we should be focusing more on law reform in the criminal justice system.

MR. RICE: I was having a discussion with Nye outside before about some of the deep assumptions that are in our approach to legal aid and legal services. We are driven by this idea of civil and political rights, to put it in human rights terms. Our sense of the operation of the legal system and where the interface between the citizen and the legal system is, is around the criminal justice system; it is the sort of paradigmatic example of where people's civil rights are affected.

We still have a long way to go for our understanding, our deeply historical understanding, of that interface between the individual and the state to catch up with a new world where, to put it in human rights terms, economic, social, and cultural rights would be as important. Then we get into the next question of priorities.

With the civil program and the family law program, you

would not characterize them as classical civil and political rights, but a different kind of rights. We have modeled our systems for generations, centuries, on that historical notion of those more narrowly based rights. That is why, I think, we find criminal programs being preserved. There is no question asked, certainly in my experience in New South Wales, about the criminal program. Everything else is modeled around it.

MS. IMPERIAL: Did you want to add to this question?

AUDIENCE: Yes. I just have the same point. At the center where I work, we are very involved in thinking about how to reach out to unexpected allies, if you will, who would be supportive of civil legal right enforcement and supportive of civil legal services, and we have been putting out some public education materials.

I wonder if the panelists have thoughts about how to bring in a greater involvement of religious organizations—the churches, for example—or the teachers or the social workers or the doctors or, even, to pull in corporations who might recognize that the stability of the society depends on the effective enforcement of laws.

I know folks do that to some extent, but I wonder if you have reactions about how and whether there is a need to do more of that, and whether there are ways to better use the media or speak to journalists about how they can be supportive of this effort.

MS. IMPERIAL: That could also go to people in the audience. I don't know if there is a panelist who would like to respond.

AUDIENCE: I am addressing the lady from Australia's comment. We in the United States are finding that there are problems even getting funding for constitutionally mandated services such as criminal defense work or family court matters where there is a mandate for counsel.

We've gone to editorial boards. We even got some of our most conservative newspapers to say, "Yes, there has to be an increase in funding for criminal defense work." We also have alliances with the church.

And yet the sheer cost of the increased rates create an imperative to keep our courts from collapsing, because we have lost something like eighty percent of the lawyers who do this kind of

work. They no longer do this work, because there is no money in it. I just read with dismay in a law journal yesterday where the political response in the New York state capital has been, "We'd love to do it but we're not going to do it; it costs too much money."

That does not mean we're going to stop. The editorial response has been great, the community response has been very positive. We have alliances with the Domestic Violence Coalition and all sorts of coalitions on this issue, and yet it all seems to come down to dollars and cents. Where do we get the money from?

So I am quite interested in all these proposals that you have, but it seems to me that it comes down to a political will. The important question is, how do we get the population at large to feel that this matters to them? And that is a question that I don't hear us trying to answer, and I think that is a critical question for where we are moving today. Thank you.

MS. IMPERIAL: Lorna?

MS. BLAKE: I just wanted to comment on a project that is being undertaken now. It is being funded by the Open Society Institute and it is a part of the Project for the Future of Equal Justice of the National Legal Aid and Defender Association. In it, they are undertaking a national message campaign to do exactly what our audience member just mentioned, which is to assess the attitudes of everyday citizens about the need for legal services and social justice issues generally.

That project has been undertaking some research but also doing some work with focus groups to really go deeper into Americans' attitudes about this issue. Amazingly, we find that in the focus groups people don't really make a distinction between civil and criminal. Many Americans think that there is a right to civil representation, just as there is to criminal, which is kind of an alarming statement about something.

But then when asked or probed a little further, they think that it would be a very good idea to provide civil legal services. They seem to think that it is an issue of basic fairness to have a society that claims it is based on the rule of law and you are entitled to a lawyer if you are at risk of losing your liberty, but if you are at risk of losing your child, your home, or your livelihood, you are out of luck.

But when asked who should pay for that, the immediate response is, "Not me, not the government, not the taxpayers." So there is a disconnect there that somehow needs to be addressed, and that is what, at least initially, one group that is trying to probe this more deeply is finding. I should emphasize that this research is in the preliminary stages.

AUDIENCE: I am Bob Rhudy from Maryland. I am going to throw a fairly radical and unpopular idea on the table. I think the leadership for funding access to justice has to come from the bar. I think justice is our product. We know the need for it, I think more than the general population, anyone in the population. We know the importance of the services that we provide.

I would like to see a past president, not one running for president, but a past president, of the ABA suggest something that only our opponents have so far, which is a surcharge, a service tax on legal services.

Yesterday Judge Earl Johnson mentioned that the legal services of the United States cost US\$130,000,000,000. We get US\$600,000,000 total from all resources apparently for civil legal services in the United States right now. A one percent surcharge would be US\$1,300,000,000. At three percent, you're starting to talk real dollars.

I think lawyers must take the lead in saying that this is important, that we must break this stalemate, that this impasse over inadequate resources must end—not someone running for president, but a past president—and throw it before the politicians. It is not a matter of economics in most countries—it is in some countries, but not in this country, not in many of the developed countries—it is a matter of political will. We've got to break the stalemate and say, "We've got a suggestion on how we can fund this realistically. Don't take away the dollars that are currently going there. Let's have the diversity of funding for different purposes, but to fund basic, general, civil legal services to the poor, we've got an idea that can do the job."

I have looked at funding approaches from a whole range of areas and a whole range of countries. I don't know if this exists anywhere in the world. I think it's time someone starts talking, someone who is a proponent and a supporter of legal services, about ways to make legal services and access to justice a reality in our country.

AUDIENCE: I am involved with Legal Aid in Australia and have confronted the question of needs and priorities often. We have proposed to the government—and the Law Society of New South Wales is supportive of this proposal—that the core responsibilities for government funding of legal aid fall into the following areas: human rights, income security, family law, and housing.

Under the areas of human rights, obviously, the right to a fair trial and general criminal law is clearly the most important of those headings. But also it includes discrimination law, it includes the rights of refugees, it includes the rights of prisoners, it includes the rights of the mentally ill, and it includes civil liberties matters.

With family law, the highest priority is the rights of the child and issues around domestic violence. Under the heading of income security, it is consumer protection, which is most specifically in relation to consumer finance and insurance issues; also social security and employment law, although we have some trouble with cost-benefit on employment law. And under the heading of housing, it's the rights of public and private tenancies, the rights of residents of institutional homes, and issues in relation to bank foreclosures.

The method of service delivery changes, of course, depending on the needs of the clientele. Empowering people charged with serious criminal offenses by handing out our pamphlets is not the best method of service delivery, but it might in fact be a good method of service delivery in some areas of law, so that advice, representation, community legal education, and group advocacy are an appropriate way of spending the legal aid dollar.

I am supposed to turn my statement into a question for Nye. Nye mentioned that there was a sweeping statement of saying we fund criminal, family, and poverty law, and I wanted to know what Nye was talking about when he said poverty law. Thanks.

MR. THOMAS: Essentially for us it means, what we call, income maintenance, which otherwise might be called welfare, social assistance, and housing. Those are the two main areas. In the past, when there was more money available, it branched off into areas of consumer law, employment law, and some of the other areas that you mentioned.

We have a network of seventy community clinics, fifty-six of

which are attached to a specific geographic area that provide largely income maintenance and housing support to low-income communities. On top of that, there is a series of fourteen—soon to be sixteen—specialty clinics, which are essentially law clinics devoted to a specific issue. They cover the whole range of legal issues for low-income Ontarians. There is one on the environment; there is one for disabled law; there will be one for housing; and there are a lot of ethno-specific clinics for people who speak Spanish or other languages.

Most of our community clinics, the general service clinics, provide income maintenance and housing law. The specialty clinics provide a whole range of services in a whole range of areas on top of those basic core services.

MS. IMPERIAL: We only have about five minutes left for one last question.

AUDIENCE: Thanks. I have a question to the panel, taking up from the question that was raised by a gentleman this morning in relation to why we don't get together as a profession and lobby for funding, and to take Anne Owers' point that it is not about raising funds for lawyers but it is actually raising funds to facilitate the services that lawyers provide in this instance.

What I seem to be seeing in Australia at the moment is an insidious move to force those of us who are receiving funding to compete within ourselves for those funds. It is a kind of divide-and-rule approach, and it is turning us against one another in relation to the services that we provide.

What I want to know, from some comments from the panel or from the audience, is what we need to be doing is to articulate the diversity that we offer within the range of services that we provide and to demonstrate to the government that in fact we are providing a service to government; we're doing their work, in a sense. We need to start articulating our priorities in the language that the government understands, to try to stop what I think is becoming a very dangerous undermining of these services within ourselves because we are starting for those funds. And so what we are doing is rationalizing our services to that end rather than actually facilitating the purpose of our work.

MS. IMPERIAL: Do any of the panelists want to comment?

MS. BLAKE: Well, I think that that is a very sad reality that none of us, I think, have as much money as we would like to have

to give out or we need to meet the need. Funders as well, I think, are in the business of allocating scarce resources among very compelling and competing needs.

I think that maybe goes to the earlier question about the importance of trying to set priorities, trying to articulate priorities for those funds in a way that is inclusive and that gets everybody to the table—clients, providers, the government, the bar, and other stakeholders.

I don't really have a comment that that's a solution. I know that IOLTA programs in this country have been spending a substantial part of their time trying to maximize resources. Basically, we are in the business of turning over flat rocks to find pennies to add to the resource pool. I think that we need to take a fresh look or a really different, radical look at how we fund these services, because otherwise what we will be doing is continuing to allocate scarce resources between competing demands.

MS. IMPERIAL: Anybody else?

MS. DAKOLIAS: I think I will just add that, from the developing-country perspective, it is very hard to set those priorities, because there is a lack of information, there is a lack of statistics as to who is actually using the judiciary. Often one may see that it is only the privileged who can access formal dispute resolution. So having that kind of information allows different programs to be developed based on what is actually going on, which is crucial.

MS. IMPERIAL: We actually have to end the funding panel, but I want to just pick up on one point Maria said, and hopefully we can talk more about this in the breakout sessions. One thing that we noticed when planning for this panel was that it is very difficult to find information. There doesn't seem to be one source noting how much each government spends on legal services around the world.

And so we were thinking that we need to think about ways that we could share information with each other in a better way, whether there should be a centralized Web site. There are some list-servers that are out there. I think that one outcome of this conference might be just how we might share information after we leave the conference, and maybe we can talk about that in more detail at the breakout sessions.

I would like to thank all the panelists and thank you all.