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Encouraging Race-Based Advocacy in Legal Services Practice

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By Charles Elsesser and JoNel Newman

Every legal services program has a waiting room, some newly furnished, others with old sofas and tattered chairs. The families, children, and elderly sitting in these waiting rooms consistently are disproportionately racial and ethnic minorities.[1] Despite this constant reminder that those seeking legal assistance for their perceived wrongs are disproportionately racial and ethnic minorities, legal services programs are bringing fewer and fewer affirmative challenges that incorporate race-based antidiscrimination claims.[2]

In this article we explore possible reasons for this lack of affirmative race- and national-origin-based discrimination claims and suggest some ideas for preserving or restarting this type of advocacy, ideas that advocates in legal services programs throughout the country are using. First we describe some examples of race-based claims that frequently arise in any busy legal services practice; we do so to demonstrate that situations that give rise to race-based claims—both simple and complex—present themselves every day and to show that advocates easily can overlook those claims. We then discuss four elements that are necessary for encouraging increased race-based advocacy and litigation in a legal services practice; these elements are based on our interviews with advocates from fifteen legal services programs throughout the country and our own experience with legal services programs.

I. Recognizing Race and National-Origin Discrimination Claims

Claims of race or national-origin discrimination exist in many of the most common legal services practice areas, such as housing, consumer, and government benefits and services. However, as the following brief examples illustrate, such dis-

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[1] *See* LSC (Legal Services Corporation), LSC Statistics: Age, Gender, Ethnicity of 1998 Legal Services Client (last visited Apr. 10, 2002), *at* www.lsc.gov/pressr/pr_age.htm.

[2] As part of our research for this article, we spoke with advocates in more than fifteen legal services programs dispersed throughout the country. We found virtually unanimous agreement among these advocates that their anecdotal knowledge indicated a significant decrease in the number of race-based affirmative cases that legal services programs currently are pursuing. This conclusion is consistent with our experience and with the little existing scholarly research. *See, e.g.*, Allen Redlich, *Who Will Litigate Constitutional Issues for the Poor?*, 19 HASTINGS CONST. L.Q. 745, 765–67 (1992). An accurate assessment of the decrease is difficult because, despite legal services programs being awash in statistics, few if any measurements of affirmative claims brought, the type of claim, or the result are available. In conducting our interviews, we assured our interviewees anonymity to encourage them to speak freely about barriers in their programs; thus in this article we generally do not identify specific programs or individuals.

crimination claims may not be the first issue advocates are inclined to address or may not even be an issue clients identify. These examples show how, through additional inquiry, legal services advocates may be able to recognize and pursue strong antidiscrimination claims on behalf of their clients.

A. Housing

Almost 25 percent of the clients of legal services providers have housing problems.[3] Housing problems typically consist of evictions or foreclosures, and advocates often handle them in a fairly routine manner. Seldom does an individual get through intake affirmatively expressing a desire to sue a landlord or home seller for race discrimination. Nevertheless, the following are two examples of race-based claims that may arise in the context of routine legal services housing intake.

Your first client of the day, a Section 8 applicant, complains that the local housing authority denied him Section 8 because of an incorrect report of a past criminal record. He tells you that the record is not his but that the housing authority refuses to believe him or to help him clear it up. He indicates that they would not even give him a copy of the alleged criminal record. Like many of your clients, this one is an African American, and, as usual, you are able to resolve his problem with a telephone call and a few faxes to the housing authority offices. The client remains upset at his shabby treatment but is happy that he has his voucher, and you move on to the next case.

Similar facts were involved in *Allen v. Muriello*.[4] There the client also described several other white applicants who were denied Section 8 because of incorrect criminal record reports, but housing authority staff assisted those applicants in correcting the erroneous reports.[5] Allen sued the housing authority for violation of the Fair Housing Act, and the Seventh Circuit held that allegations of the housing authority staff's differential treatment of the white and African American applicants were sufficient to establish a prima facie case of race discrimination.[6]

Your next client, an African American woman, is being evicted from a Section 8 apartment complex because she had unauthorized guests. She tells you that the manager is out to get her. You file an answer to the eviction. At the mediation, you threaten to show that the manager allowed white tenants to violate the guest policy with impunity. Your client settles for a dismissal of the eviction provided that she abides by the guest policy in the future.

Evictions, even for facially valid reasons, often conceal racial motivations that remain virtually invisible in the context of individual cases. A new manager or owner can express racial attitudes through discriminatory differential treatment that tenants and their advocates cannot perceive, much less attack, unless they see the pattern of discriminatory treatment expressed through the complaints of a multitude of tenants.

Advocates, while aggressively pursuing their clients' other remedies, easily can overlook the accompanying claims of race discrimination.

For example, in *Browning v. BCC Apartments*, advocates were defending several tenants in a routine private landlord-tenant eviction.[7] The tenants found a number of other tenants, all African American and all being evicted for the same lease violations, while the white and Latino tenants who engaged in the

[3] LSC, LSC Statistics: 1998 Case Services—Reasons for Closure and Legal Problem Type (last visited Apr. 15, 2002), *at* www.lsc.gov/pressr/pr_cases.htm.

[4] Allen v. Muriello, 217 F.3d 517 (7th Cir. 2000) (Clearinghouse No. 53,276).

[5] *Id.* at 519–20.

[6] *Id.* at 521–22; Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (2000).

[7] Browning v. BCC Apts., 994 F. Supp. 1440 (S.D. Fla. 1997).

same conduct were not evicted. The tenants filed a counterclaim alleging that the landlord, through its eviction action, was using the state court processes to discriminate on the basis of race in violation of the Fair Housing Act.[8] The parties later settled the case on terms favorable to plaintiffs. Similarly in *King v. Blakely Housing Authority* the plaintiffs alleged that the Blakely Housing Authority had racially discriminatory policies, including racially disparate enforcement of its visitation policies.[9]

Housing advocates also are increasingly encountering tenants who are threatened with the wholesale loss of their homes—whether through HOPE VI (Housing Opportunities for People Everywhere) programs, public housing demolitions, Section 8 opt-outs, or otherwise. In addition to claims based on statutory and regulatory violations, such housing losses may be subject to fair housing claims if the losses are due to race discrimination. Thus advocates are attacking this loss of housing as either intentionally discriminatory or disparately impacting the African American community.

For example, in Baltimore, St. Louis, Chicago, and Miami lawyers for public housing tenants have used race discrimination claims in seeking to block plans, approved by the U.S. Department of Housing and Urban Development (HUD), to demolish public housing projects, which the local housing authority routinely replaced with significantly fewer units.[10] Advocates have used similar strategies in challenging the termination of Section 8 housing assistance payment contracts and in challenging HUD's decision to demolish rather than repair and maintain a HUD-owned (foreclosed Section 236) complex that African American families occupied.[11]

B. Consumer

Almost 12 percent of clients of legal services providers have consumer problems.[12] Their complaints can range from unscrupulous car dealers to illegal mortgage lending practices. As with housing problems, advocates not only should look at the individual complaints of each client but also should see the broader patterns set by the marketing and sales techniques of the defendants.

Your first client of the afternoon is an elderly African American woman. She lives alone and tells you that she and her deceased husband paid off their house years ago. She recently borrowed some money to have some repairs done. Her interest rate is very high, and she is behind in her payments. You are an expert in the Truth In Lending Act and the Home Ownership and Equity Protection Act as well as bankruptcy and hope that you can find a statutory violation

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[8] *Id.* at 1441; Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (2000).

[9] King v. Blakely Hous. Auth., No. 00-CV-109 (M.D. Ga. filed June 26, 2000) (Clearinghouse No. 53,700).

[10] *See* Thompson v. HUD, 220 F.3d 241 (4th Cir. 2000) (Clearinghouse No. 51,012); Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth., No. 4:99CV354 (E.D. Mo. filed Mar. 3, 1999) (Clearinghouse No. 54,338) (memorandum opinion issued Dec. 14, 2001); Concerned Residents of ABLA v. Chi. Hous. Auth., No. 99C 4959 (N.D. Ill. filed July 29, 1999) (Clearinghouse No. 52,441); Reese v. Miami-Dade County, No. 01- 3766 (S.D. Fla. filed Sept. 6, 2001) (Clearinghouse No. 54,529) (see abstract in Case Reports section in this issue); *see also Survey of the Proportion of Family Public Housing Rental Units Included in HOPE VI Revitalization Sites: FY 1998, 1999, 2000 Awards*, 31 HOUSING L. BULL. 45, 45–47 (2001) (giving a statistical analysis of selected HOPE VI sites during fiscal years 1998–2000 and showing significant percentage reduction of family public housing units replaced on site).

[11] *See, e.g.*, Williams v. HUD, No. 94-C-801 (E.D. Wis. Sept. 7, 1995) (Clearinghouse No. 50,453) (challenging the termination of Section 8 housing assistance payments contracts); Robinson v. HUD, No. 3-99CV2457-G (N.D. Tex. filed Oct. 28, 1999) (Clearinghouse No. 52,721) (challenging the decision of the U.S. Department of Housing and Urban Development (HUD) to demolish rather than repair and maintain a HUD-owned (foreclosed Section 236) complex that African American families occupied).

[12] LSC, *supra* note 3.

that will provide sufficient leverage for the client to retain her home.[13]

In addition to attacking predatory lending patterns through traditional consumer claims, advocates are beginning to investigate the significant racial overlays. Not only are racial minority neighborhoods often targeted for many of the worst abuses, but also racial minority borrowers are often solicited for, or steered to, predatory loans even though they are creditworthy for much more generous terms.[14] Using fair housing, fair lending, and other civil rights statutes, advocates are challenging these practices.[15]

For example, in *United States v. Long Beach Mortgage Co.*, the U.S. Department of Justice challenged the defendant's practice of targeting racial and ethnic minorities for mortgage rates in excess of the base price dictated by the borrower's risk as violative of the Fair Housing Act.[16] The lawsuit resulted in a $3 million settlement for the victims.[17]

C. Government Benefits and Services

More than 15 percent of the clients in the crowded legal services waiting room have problems with receiving government benefits.[18] Because the poorest, most vulnerable clients are dependent on some governmental agency for many aspects of their lives, advocates sometimes must act almost as social workers, assisting such clients through the bureaucracy. However, as with housing and consumer problems, advocates with a broader perspective may use race discrimination claims to achieve systemic relief.

Your second client of the afternoon has a welfare problem. She did not appear for a job interview, and the state's Tempor-

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[13] Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* (West, WESTLAW through Dec. 18, 2001); Home Ownership and Equity Protection Act, *id.* §§ 1639 *et seq.*

[14] A review of more than one million mortgages nationwide in 1998 found that, "[i]n predominantly black neighborhoods, the high-cost subprime lending accounted for 51 percent of home loans in 1998—compared with only 9 percent in predominantly white areas." HUD, UNEQUAL BURDEN: INCOME & RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA 3 (2000) (this and other HUD predatory lending reports are available at www.hud.gov/offices/hsg/pred/predlnd1.cfm). For a subprime lending study citing numerous banking industry sources estimating that from 30 to 50 percent of subprime mortgage borrowers could have qualified for a conventional loan, see ACORN—ASS'N OF CMTY. ORGS. FOR REFORM NOW, SEPARATE AND UNEQUAL 2000: PREDATORY LENDING IN AMERICA 28 (2000), www.acorn.org/PDF/SeparateandUnequal.PDF. Both the HUD report and ACORN study assume that the statistical disparities and the consequent overcharging of the borrowers demonstrate the intent of the lenders to "steer" the borrower to a higher-cost loan.

[15] Fair Housing Act, 42 U.S.C. 3601 §§ *et seq.* (2000); Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2000); Civil Rights Act of 1870, 42 U.S.C. § 1981 (2000); Civil Rights Act of 1866, *id.* § 1982; *see, e.g.*, Hargraves v. Capital City Mortgage, 140 F. Supp. 2d 7, 29 (D.D.C. 2000) (Clearinghouse No. 53,014) (denying defendant mortgage lender's motion for summary judgment where plaintiffs alleged that defendants engaged in reverse redlining targeting African American communities with predatory lending practices in violation of, among others, the Fair Housing Act, the Equal Credit Opportunity Act, and certain Reconstruction Era Civil Rights Acts guaranteeing equal treatment in contracts and real estate transactions); Isaac v. Norwest Mortgage, 153 F. Supp. 2d 900, 907 (N.D. Tex. 2001) (Clearinghouse No. 54,530) (refusing to dismiss allegations that defendants violated the Fair Housing Act by discouraging potential purchasers from inspecting or purchasing dwellings in the predominantly minority areas of Dallas, by racially steering potential real estate purchasers, and by discriminating on the basis of race in making residential real estate loans in violation of 42 U.S.C. § 3605).

[16] United States v. Long Beach Mortgage Co., No. CV 96-6159 (C.D. Cal. filed Sept. 5, 1996) (Clearinghouse No. 51,944).

[17] Press Release, Civil Rights Div., U.S. Dep't of Justice, Long Beach Lender to Pay $3 Million for Allegedly Charging Higher Rates to African Americans, Hispanics, Women and the Elderly (Sept. 5, 1996), www.usdoj.gov/opa/pr/1996/Sept96/429cr.htm; *see also* Frank Lopez, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. ON POVERTY L. & POL'Y 73, 77 (1999) (discussing several similar cases).

[18] *See* LSC, *supra* note 3.

ary Assistance for Needy Families (TANF) administrator is reducing her small grant as a sanction. She tells you that the problem is that she does not have a car and that the buses are constantly late, when they run at all. You advise her that she has a right to a fair hearing and that she can show the hearing officer that she had "good cause" to miss the interviews because of the bus delays.

Women who have left welfare since 1996 consistently rate lack of transportation as their chief concern in getting a job.[19] Transportation for poor minority women is usually a choice between a used car purchased with exorbitant financing or unreliable public transportation.[20]

Advocates have challenged automobile financing schemes that, like subprime mortgage lenders, result in higher prices for minority purchasers. For example, in *Coleman v. General Motors Acceptance Corporation*, plaintiffs alleged that the corporation's policies encouraged the imposition of a "finance charge markup" for minority consumers and that the corporation routinely charged African American borrowers more than white consumers.[21] The district court certified a class and allowed the plaintiff class to proceed using a disparate impact theory under the Equal Credit Opportunity Act.[22]

Other advocates have used race-based claims to challenge the lack of public transportation. In *Labor/Community Strategy Center v. Metropolitan Transit Authority* advocates sued the local Los Angeles transit authority on behalf of poor and minority bus riders after the transit authority decided to spend millions of dollars on a new suburban rail line that catered to white suburban users rather than upgrade its bus operations.[23] The suit charged that the spending priorities discriminated on the basis of race and ethnicity.[24] Advocates were able to negotiate a consent decree under which the transit authority agreed to make service improvements in the bus fleet to alleviate overcrowding and agreed to a set fare structure and fare increase procedure.[25]

Each day legal services offices hear individual complaints similar to those that began each of these cases. Yet advocates, while aggressively pursuing their clients' other remedies, easily can overlook the accompanying claims of race discrimination.

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[19] *See, e.g.*, Fla. Inter-Univ. Welfare Reform Collaborative, Qualitative Study of WAGES [Work and Gain Self-Sufficiency] Draft Final Report 138 (1999), *at* www.flawelfarereform.org/reports/documents/finrep99.pdf (reporting that 19 percent of respondents (79 percent of whom were women) listed transportation in response to the question, "What problems have you had in trying to find a job since WAGES?" This was the highest single response).

[20] *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (demonstrating that black women are systematically quoted the highest prices on automobile purchases); David Dante Troutt, *Ghettoes Revisited: Antimarkets, Consumption, and Empowerment*, 66 BROOK. L. REV. 1, 61 (2000) (describing disparities in public transportation between minority neighborhoods and affluent white areas in New York City).

[21] Coleman v. Gen. Motors Acceptance Corp., 196 F.R.D. 315 (M.D. Tenn. 2000) (Clearinghouse No. 53,036).

[22] *Id.* at 323–24; Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2000).

[23] Labor/Cmty. Strategy Ctr. v. Metro. Transit Auth., 263 F.3d 1041 (9th Cir. 2001) (Clearinghouse No. 54,531) (describing the case's procedural history in district court and the terms of the consent decree). The transit authority also sought to raise the cost of the monthly bus passes that low-wage earners used to get to and from their jobs. *Id.* at 1043; *see also* Erica J. Teasley, *The Long, Long Winding Road to Better Bus Service in Los Angeles*, in this issue.

[24] *Labor/Cmty. Strategy Ctr.*, 263 F.3d at 1043.

[25] The Ninth Circuit Court of Appeals affirmed the district court's order approving the consent decree requiring the Los Angeles County Metropolitan Transit Authority to purchase 248 additional buses in order to reduce the number of bus riders who could not access the agency's buses because the fleet was so inadequate. *Id.* at 1046–47.

II. Encouraging Increased Race-Based Advocacy

The clients are there. The claims are there. How should legal services programs encourage increased use of race-based advocacy on behalf of their clients? In our interviews with numerous thoughtful advocates who are experienced in race-based advocacy in legal services practice, the advocates consistently identified certain common elements that characterize an environment in which such advocacy flourishes. These elements, which we would argue are essential to any real attempt to encourage race-based advocacy, fall generally into four categories: (1) management commitment to furthering race-based advocacy; (2) knowledge and training of legal staff; (3) contact with the minority client community; and (4) overcoming Legal Services Corporation (LSC) restrictions.

A. Management Commitment to Furthering Race-Based Advocacy

In every legal services program the executive director and management staff have enormous control not only over the program's structure and resources but also, perhaps more important, over the intangibles, that is, the reward and support systems that often determine the program's culture. In virtually all of our interviews with advocates throughout the country, advocates identified management staff's continuing support of and commitment to race-based advocacy in all aspects of program management as an absolute necessity if the program is to undertake such advocacy successfully. Those same advocates identified several ways in which that management support, or lack of it, helped or hindered their work.

1. The Effect of the New Funding Paradigm

Perhaps the most consistent observation we heard from the advocates we interviewed is that the shortage of state and federal funding has forced management staff to spend inordinate amounts of time on fund-raising. While fund-raising always has been necessary, its importance has increased tremendously as reduced interest rates and relatively flat LSC funding have required program managers to raise more and more of their funds outside of LSC or state Interest on Trust Account grants.

This increase in fund-raising can impact litigation significantly. The most obvious impact is that less management time and attention are available for the program's affirmative substantive output. This problem is magnified because many programs have eliminated their internal backup management staff (e.g., directors of litigation and regional counsel) to save funds. Thus many programs are left with significantly fewer resources to devote to the management of substantive work, while the increase in funding sources has complicated the management tasks.

Race and national-origin discrimination cases arise outside of the intake system through long-term relationships with minority client organizations or other nontraditional intake systems.

Another impact of the increase in fund-raising is that each additional grant, no matter how small, imposes statistical and caseload demands on the recipient program. Thus a relatively small grant targeted for a specific type of case may require additional untargeted resources to be devoted to the same cases solely to fulfill the statistics that the grants demand. While race discrimination claims may achieve significant results, they are difficult, time-consuming, and resource-intensive. In an environment in which few grants are targeted for race-based advocacy and in which there is an overwhelming demand for numbers of cases but little or no desire to measure the quality of the advocacy or its result, there is no institutional incentive to invest significant resources in such cases, regardless of the result. Despite the myriad of case statistics that programs currently generate for various grants, the lack of any measurement in most programs regarding the components of the advocacy indicates how pro-

grammatic priorities are driven by the fund-raising.[26]

Numerous advocates noted another impact of the increase in fund-raising, one that is seldom discussed. As legal services programs' funding bases become widespread, the programs increasingly accept funds from state and local governments and other potential defendants.[27] While many of those entities have come to understand that such funding does not preclude lawsuits against them, the potential for a chilling effect on advocacy decisions remains.

This potential chilling effect is tremendously heightened for claims of race and national-origin discrimination. Advocates acknowledge that defendants, program management, and other advocates in the office perceive race-based claims differently from other types of legal services cases, even cases of similar size and complexity. For example, most of the advocates we interviewed noted that local governments, as well as officials themselves, often became inflamed when accused of race discrimination. Even though these governmental officials have learned to accept other types of legal services challenges to their policies, they often perceive race-based claims as personal attacks. This reaction can threaten not only the funding relationships but also the informal relationships that skilled advocates manipulate for the benefit of their individual clients. Ensuring that these threats do not influence decision making at any level in a program so as to undercut subtly, or overtly, advocates' ability to pursue race-discrimination claims requires management and advocates to be particularly vigilant.[28]

2. A "Numbers Game"

On the nonmanagement side, the advocates we interviewed stated that many attorneys with whom they worked in legal services programs simply did not have the time for the type of focused, resource-intensive litigation that race-based advocacy entailed. The advocates perceived many legal services advocates as laboring under increasing pressure to produce closed cases and related caseload statistics for the various governmental and private organizations funding their programs (i.e., a "numbers game").[29]

Certainly there has always been tension between increasing the number of people served, that is, the "access" to legal services, and the quality of the representation. However, the initial federally funded legal services programs distanced themselves from the prior legal aid organizations by specifically requiring a pursuit of significant litigation to address historic inadequacies.[30] The modern LSC has sought to return the balance closer to the

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[26] As one noted commentator observed, "[a]cross the United States, in program after program, the data kept and reported by legal services offices, if it is reliable, does not provide even minimal insights into the quality of the work being done. At the statistical level, the program is totally insulated from scrutiny. . The books are not 'cooked;' they simply do not exist." Gary Bellow, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633, 1637 (1995) (for citation of Feldman article, see *infra* note 29).

[27] This conclusion is based on the interviews we conducted as well as our knowledge of the funding of legal services programs in Florida. *See also* Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2188–92 (1999).

[28] In the early stages of developing race discrimination claims in a legal services office, midlevel managing attorneys or even other advocates in the office often have the most influence over whether case development will continue; yet these managers and advocates often most directly bear the burden of any disruption in informal relationships with the potential defendants.

[29] *See also* Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1539 n.19 (1995) (discussing the percentage of legal services cases handled through referral, limited service advice, and information).

[30] Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369, 374 (1998).

legal aid model.[31] According to the advocates we interviewed, some legal services programs seem to be following that lead.

The perception that providing legal services is a "numbers game" inhibits the generation of significant impact litigation. The effect on race-based advocacy is even more pronounced because, as the advocates we interviewed indicated, advocates often perceive such advocacy as being "outside of" their normal practice areas (e.g., welfare and housing) and thus as an "add-on" to their "regular" work.

3. Intake and Screening

In our interviews, advocates consistently stated that they were not seeing race and national-origin discrimination cases come through general intake. Experienced advocates repeatedly stated that such cases arose outside of the intake system through long-term relationships with minority client organizations or other nontraditional intake systems. While those relationships are vital in pursuing race-based advocacy, some of the dramatic transformations implemented in many programs' intake and screening systems contain potential dangers in their use of technological and systems advances to increase dramatically the numbers of people served.

For example, so-called hot lines have become virtually the standard against which innovative services are measured.[32] And the routine standard for success of a hot line is the increase in the number of "closed cases" that a program can claim.[33] However, in the pigeonholing of legal problems and routinization of advice often required by hot lines, overlooking the types of systemic issues that give rise to a race discrimination claim is easy (and almost required).[34]

However, hot lines are not inherently antagonistic to the type of intensive advocacy required in race-based claims. In an early report on the use of its hot-line intake system, Neighborhood Legal Services in Buffalo, New York, noted that the hot line not only increased the number of closed cases by 250 percent but also increased the number of cases settled after litigation by 400 percent and freed up significant time for attorneys to handle more significant litigation.[35] Advocates we interviewed at other programs have developed fair housing or limited-English-proficiency questionnaires to ensure that their programs do not overlook these issues in the intake system.

4. Resources

In our interviews, advocates universally expressed the need for a full programmatic commitment of the resources necessary to pursue race-based claims. While this need may seem obvious, such a commitment can be burdensome. Race and national-origin discrimination claims are expensive to pursue. A case may turn on facts for which expert proof is required. If so, legal services advocates must locate and retain experts, and the experts must be compensated for conducting the inquiries and for preparing an expert

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[31] *See* LSC, Strategic Directions 2000–2005 Progress Report for 2001—Programs 4 (2002) (stating that the top strategic goal is to "dramatically increase" the legal services afforded to eligible recipients).

[32] *Report of the Working Group on Limited Legal Assistance*, 67 FORDHAM L. REV. 1819, 1821 (1999).

[33] Susan Sebok, *Intake Becomes Outstanding with Efficient, Cost-Effective Legal Hot Lines*, 30 CLEARINGHOUSE REV. 429 (July–Aug. 1996); State Bar of Mich., Access to Justice for All Task Force, Serv. Delivery Subcomm. Work Group B, Hotlines Report app. B (Apr. 2000), *at* www.michbar.org/access/sds/hotline.pdf (stating that the primary measurement in attainment of hot-line goals is "more people served").

[34] The hot-line case statistics phenomenon even has affected the legal services rhetoric such that the previous case-type distinction of "service versus impact" has deflated into "brief service versus extended service." Wayne Moore, *The Future of Legal Services*, 20 LEGAL HOTLINE Q. 1–2 (2001).

[35] Sebok, *supra* note 33, at 429.

report for submission to the opposing party, all at the plaintiff's expense.[36] In housing discrimination cases, the costs of experts may not be recoverable from the other side as a litigation expense even if the plaintiff prevails.[37]

Other litigation expenses also may be quite high. The costs of depositions and transcripts can add up quickly in cases in which the subjective state of mind of the decision makers alleged to have discriminated is at issue.[38] Unless program management gives serious advance consideration to the budgeting of such litigation expenses, pursuing race-based claims when they present themselves is difficult, if not impossible.

In sum, forgoing fund-raising or stopping the collection of the caseload statistics that funding entities require is impossible for program directors. However, if civil rights enforcement is to be a strategic programmatic objective, then legal services programs need to do much more than add it to their list of program priorities. Truly incorporating civil rights enforcement in a program's priorities requires the building of a comprehensive strategic plan, including fund-raising, that supports civil rights objectives; production of statistical reports that demonstrate the level and quality of the program's commitment to those objectives; and a sufficient allocation of resources, both in staff time and in litigation support.[39] Only by affirmatively countering the barriers in the current legal services culture can management foster the type of institutional environment within which advocates can pursue race-based discrimination cases.

B. Knowledge and Training of Legal Staff

The advocates we interviewed reported that the lack of an established knowledge base was one of the most significant obstacles to undertaking new substantive areas of representation.[40] Our research revealed that only a handful of programs in the country had an experienced in-house cadre of civil rights litigators. Thus advocates attempting to develop civil rights litigation have had to begin by developing a civil rights knowledge base. Advocates told us that, in doing so, they encountered several barriers inherent in the structure of most legal services programs.

1. Specialization

Legal services lawyers and advocates have followed the rest of the legal profession in becoming increasingly specialized, and many lawyers are becoming highly specialized in very narrow prac-

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[36] FED. R. CIV. P. 26(a)(2)(B) (requiring that the expert witness prepare and sign a written report containing the expert's opinions, the basis and reasons therefor, the underlying data, and any exhibits to be used by the expert, and that the report be served on the opposing party).

[37] W. Va. Univ. Hosp. v. Casey, 499 U.S. 83, 97–102 (1991). Following the *Casey* decision, Congress amended the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(c), to make expert fees available in employment discrimination cases brought pursuant to 42 U.S.C. § 1981. However, expert fees still are unrecoverable in other contexts, such as civil rights claims brought pursuant to Section 1983 and housing discrimination challenged under Titles VI and VIII. 42 U.S.C. §§ 1983, 1988 (b)–(c), 3612(p), 3613(c)(2) (2000).

[38] *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534–39 (1999) (Clearinghouse No. 52,333) (discussing plaintiff's burden of proof in an intentional discrimination case as focusing on the defendant's subjective state of mind).

[39] Several legal services programs have used HUD Fair Housing Initiatives Program grants as a means of integrating fair housing enforcement into program intake and priorities. Fair Housing Initiatives Program, 42 U.S.C. § 3616a (West, WESTLAW through Dec. 18, 2001). E.g., Legal Services of Northern California incorporates fair housing screening of incoming clients into its regular intake system, referring anyone with fair housing problems to a specialized fair housing intake. Telephone interview with Mona Tawatao, regional counsel, Legal Services of Northern California (Apr. 10, 2002). Many other Fair Housing Initiatives Program grantees have similar systems. Telephone interview with Migdalia Figueroa, attorney, Jacksonville Area Legal Aid Inc. (Apr. 10, 2002).

[40] This statement also is based on our many years of experience in working with legal services programs.

tice areas.[41] For example, the traditional areas of legal services specialization, that is, public benefits, housing, and domestic relations, have been further subdivided. A "welfare specialist" may now specialize solely in TANF and a "housing specialist" solely in public housing. Experienced attorneys specializing in TANF representation could well be conversant in every state TANF regulation and every court decision interpreting them. This specialization unquestionably results in higher-quality representation in the areas of specialized practice.

However, this high degree of specialization also has negative repercussions. Having a high level of expertise can make it difficult for specialists to see new types of problems that do not fit neatly into their area of expertise.[42] For example, a "housing specialist" attorney who knows every HUD public housing regulation by heart may have only a passing knowledge of fair housing law or other civil rights claims. Thus the attorney can overlook or discount a race discrimination claim in favor of an arguable violation of a familiar HUD regulation.

This high degree of substantive specialization can be particularly pernicious when combined with the specialization of intake. Specialized intake staff can pigeonhole and narrowly define cases before an attorney ever interviews the client. When a narrow characterization of the client's problem during the initial intake stages is combined with the routinization of advice giving, which often is reduced to supplying pamphlets or handouts, and the client in many routine situations sometimes having only brief contact with a lawyer, advocates easily can overlook clients with nontraditional claims.[43] Clients who do see an attorney already may have told their story two or even three times, with the story being clarified and refined each time by a "housing" or "welfare" paralegal intake specialist or law student, such that by the time the client reaches an attorney the problem has been transformed significantly.

Thus, for example, intake workers and advocates could have told the plaintiff in *Allen v. Muriello*, a plaintiff whose initial complaint concerned the housing authority's discriminatory treatment of him, that his real problem was a denial of Section 8 due to criminal conviction.[44] This is a complaint with which both intake workers and advocates are well acquainted and to which they are well prepared to respond. Given such a characterization of the problem, based on our experience, advocates in many programs would give the client a brochure explaining the client's rights under the Section 8 program and would advise the client to file for a grievance hearing. As a result, an important race discrimination claim would have been lost.

Because of the trend toward specialization in the legal profession, broadening legal services advocates' areas of expertise through substantive training is essential.

2. Substantive Training

Because of this trend toward specialization, broadening legal services advocates' areas of expertise through substantive training is essential. However, advocates often are unwilling to disturb the high level of comfort that comes with such narrow specialization. This is particularly true when the new area is far

[41] *See* Geoffrey C. Hazard, *Changing Structures in the Practice of Law*, 61 LA. L. REV. 167–68 (2000).

[42] According to advocates we interviewed as well as our experience with legal services programs, some specialists may not "see" the problem at all because their programs do no intake in areas outside of the staff's expertise.

[43] *See* Ingrid V. Eagly, *Community Education: Creating A New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433, 441 (1998); Feldman, *supra* note 29, at 1553 n.55.

[44] *Allen*, 217 F.3d 517.

removed from their original area of specialization.[45] For example, asking a TANF specialist to learn food stamps is one thing, asking the specialist to learn substantive federal civil rights law and federal procedure is quite another. Despite a race discrimination claim potentially achieving substantial results in a specialist's substantive area, the specialist often views a demand for expertise in race discrimination claims as a requirement for a "second" area of expertise.[46]

Our research revealed that legal services programs had attempted to increase advocates' knowledge and expertise in civil rights advocacy in a number of ways. Some programs have used traditional continuing legal education models involving instruction in civil rights law and procedure. However, substantive training, without more, often is insufficient to encourage advocates to begin looking for and litigating race-based claims. Some programs have recruited attorneys with a significant civil rights litigation background; such attorneys have greatly enhanced the program's ability to supply in-house continuing education. At least one program has developed a discrimination task force, which supplies both expertise and strategic planning across areas of substantive expertise.

One model that several programs use is to link advocates closely with experienced civil rights litigation offices such as the Mexican American Legal Defense and Education Fund, the NAACP Legal Defense Fund, or the American Civil Liberties Union. Working with experienced civil rights organizations can be highly beneficial in several ways. First, it gives the type of substantive training and backup essential to developing the necessary expertise for race-based claims. Second, it allows the civil rights entity in any joint case to claim attorney fees, thus discouraging the defendant from prolonging the case without penalty. Third, it supplies a linkage with advocates who have a long history in, institutional commitment to, and understanding of the use of civil rights laws in achieving substantive benefit goals. Fourth, and perhaps most important, beyond the substantive expertise that the less-experienced advocates gain, they are, often for the first time, introduced to the civil rights advocacy community, a community that has grown increasingly distant from the legal services community.[47]

3. Discrimination Awareness Training

Some programs have used another type of training—discrimination-awareness training—effectively to alert their legal services staff to discrimination issues. For example, one program brought in members of day-laborer advocacy groups, community-based civil rights advocacy groups, and others to discuss their experiences; the program found that its staff was sensitized as never before to the pervasiveness of discrimination in the minority community.[48] Moreover, the discussions sensitized the staff to the necessity of seeing an interrelationship between claims of pervasive discrimination and the staff's substantive areas of expertise. While programs can conduct such training in various ways, the goal is to expose legal services advocates to the everyday problems of discrimination that members of the minority community experience.

C. Contact with the Minority Client Community

According to the advocates we interviewed, the third essential element in the

[45] These two statements are based on information we gained in our interviews as well as our years of experience with legal services programs.

[46] This statement is based on information we gained in our interviews as well as our years of experience with legal services programs.

[47] Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 GEO. L.J. 1669, 1696–1700 (1995) (describing the extent to which "[m]any legal services programs and staff members are distressingly isolated from the communities they are supposed to assist").

[48] One participant in the discussions described the pervasiveness of discrimination as the "normalization of discrimination." Telephone interview with Sylvia Argueta, senior attorney, Legal Aid Foundation of Los Angeles (Apr. 10, 2002).

development of a race-based advocacy program is close contact with the minority client community itself. Virtually all advocates whom we interviewed and who are involved in race-based advocacy consistently identified their relationship with minority community organizations as essential to that advocacy. Not only are community-based organizations, particularly those that focus on advocating equality, an important source of information about issues in the minority community, but also most advocates stated that systemic problems of race or national-origin discrimination came to their attention only through these community groups. Programs that do not maintain relationships with such groups foreclose countless possibilities for recognizing and bringing race-based claims.

However, maintaining relationships with minority community groups is not easy because advocates often must balance the demands of establishing and maintaining relationships with such groups against the requirements of giving direct legal services in individual cases.[49] Many of these groups typically comprise individuals who have regular jobs and volunteer at the community organization. Therefore they must meet in the evenings and on weekends, and the meeting locations may be remote from legal services offices.[50] Even if the groups meet at convenient times and locations, an advocate's program management or colleagues may question whether the advocate's time is best spent "networking" with such groups or individuals or working on the legal services program's existing caseload. Part of the problem is that time invested in building relationships with community groups does not immediately yield a wealth of meritorious antidiscrimination cases.

Yet the potential benefits of forging close associations with minority community groups are enormous for legal services programs and advocates. These benefits are analogous to those gained by private-sector attorneys who spend time creating and maintaining relationships with potential client groups; private-sector attorneys and their law firms do not doubt that this is time well spent.[51]

D. Overcoming LSC Restrictions

Many of the advocates we interviewed mentioned concern about violating the relevant LSC restrictions as a barrier to expanding civil rights litigation in LSC-funded programs. However, while they echoed the belief of many commentators that these restrictions did impose real obstacles to aggressive advocacy against race discrimination, they also believed that certain strategies could minimize the impact of many of the restrictions.[52] Although another article in this issue of CLEARINGHOUSE REVIEW deals with this topic in detail, we present here a brief overview of possible real or perceived

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[49] *See* Houseman, *supra* note 47, at 1697; Jeff Streiffer, *If You Can't Get There from Here, Then That's Not Where You Need to Go*, 19 HAMLINE J. PUB. L. & POL'Y 397, 399 n.8, 447–48 (1997); *see generally* Feldman, *supra* note 29 (discussing challenges facing legal services advocates and need for greater community involvement); Paul R. Tremblay, *The Crisis of Poverty Law and the Demands of Benevolence*, 1997 ANN. SURV. AM. L. 767 (1997) (discussing necessary trade-offs between satisfying clients' immediate needs and impact advocacy).

[50] One commentator attributes the following remark to Oscar Wilde: "The trouble with socialism is that it takes too many evenings." He then uses the comment to remind us that "greater involvement requires greater resources." Tremblay, *supra* note 49, at 775 n.26; *see also* Houseman, *supra* note 47, at 1697 (discussing failings of legal services advocates in maintaining community involvement).

[51] *See* Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 721 (1997) ("Lawyer-client relationships tend to be formed through social and professional contacts . . "); Fiona M. Kay, *Cultivating Clients in the Competition for Partnership: Gender and the Organizational Restructuring of Law Firms in the 1990s*, 33 LAW & SOC'Y REV. 517, 527 (1999) (discussing importance of "linking the associate into social networks that facilitate the development of desirable clients").

[52] Andre L. Dennis, *The Ever-Shrinking Access to the Courts for the Needy and Unpopular*, 70 TEMP. L. REV. 1157, 1157–62 (1997); Houseman, *supra* note 27.

LSC barriers with suggested strategies for addressing each.[53]

1. Civil Rights Cases, Statutory Attorney Fees, and the Availability of Damages

Most antidiscrimination laws provide for potential damage awards as well as an award of attorney fees to a prevailing plaintiff.[54] LSC regulations prohibiting LSC-funded advocates from receiving attorney fees or from filing a fee-generating case should not deter advocates from pursuing discrimination cases.[55]

Advocates can overcome the ban on collecting attorney fees simply by omitting any affirmative request for an award of attorney fees from the pleadings.[56] Moreover, if the legal services advocate determines that associating additional counsel whom LSC regulations do not prohibit from receiving attorney fees is in the client's best interest, having cocounsel who is permitted to assert a fee claim is perfectly appropriate.[57]

Similarly the LSC regulations restricting the filing of a "fee-generating case" do not apply if advocates from the private bar are unlikely to be willing to undertake the case.[58] For example, in housing discrimination cases, cases concerning discrimination in the provision of services, and employment discrimination cases with low-income victims, the economic losses are extremely low and the potential for a large damages award is virtually nonexistent, making it extremely unlikely that the private bar will take such cases.[59]

2. Class Action Restrictions

The filing of class actions is prohibited by the LSC regulations implementing the 1996 Appropriations Act.[60] However, that does not prohibit advocates from using strategies such as filing declaratory relief actions on behalf of a single individual, joining every individual in a potential plaintiff class, suing on behalf of an organization, or filing an administrative class action.[61]

3. Restrictions on Representing Immigrants

Good training for legal services staff and for minority communities is vital to ensure that LSC regulations prohibiting representation of "ineligible aliens" and requiring verification of clients' citizenship or eligible alien status do not result in failure to represent eligible aliens in antidiscrimination cases.[62] Community education also is vital to ensure that immigrants learn about and receive referrals to appropriate legal services programs in their area with advocates who can represent them.

4. Restrictions on "Solicitation"

Programs should not allow the LSC regulations regulating "solicitation" to

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[53] *See* Camille D. Holmes et al., *Race-Based Advocacy: The Role and Responsibility of LSC-Funded Programs*, in this issue.

[54] *See, e.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000) (prohibiting discrimination in employment and providing for an award of attorney fees to the prevailing plaintiff at 42 U.S.C. § 2000e-5).

[55] 45 C.F.R. § 1642.1 (2001) (prohibiting LSC-funded advocates from receiving attorney fees); *id.* § 1609 (prohibiting LSC-funded advocates from filing a fee-generating case).

[56] Alan [W.] Houseman, *Symposium Address, Interpretation of LSC Restrictions*, 25 FORDHAM URB. L.J. 285, 291 (1998).

[57] *Id.*

[58] 45 C.F.R. § 1609 (2001).

[59] *See, e.g.*, Riverside v. Rivera, 477 U.S. 561, 576–80 (1986) (discussing damages awards in civil rights cases as being often very small).

[60] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504 Stat. 1321–55; 45 C.F.R. pt. 1617 (2001) (implementing regulations).

[61] Houseman, *supra* note 56, at 289; *see also* Holmes et al., *supra* note 53 (discussing these strategies).

[62] 45 C.F.R. pt. 1626 (2001) (prohibiting representation of "ineligible aliens"); *id.* §§ 1626.6–.7 (requiring verification of clients' citizenship or eligible alien status).

deter them from working closely with community organizations.[63] The "solicitation" restriction applies only to unsolicited advice to a potential client to take a particular legal action or to become a client.[64] The regulation does not prohibit advocates from educating potential clients about their legal rights or from taking the client's case after a training or workshop should the client so request.[65]

III. Conclusion

Our goal in this article is to encourage legal services programs to recognize that the daily client intake of every legal services office involves numerous race-based discrimination claims, many of which go unidentified. For programs striving to improve their recognition of these race discrimination claims and their advocacy on behalf of clients who have experienced race-based discrimination, we recommend the following actions.

- *Management Commitment:* Formally adopt, from the board of directors' level down, a policy to incorporate challenges to race and national-origin discrimination in the program's ongoing work, including seeking funding that allows advocates to pursue such cases; budgeting for litigation support and committing to supplying the resources and support necessary to pursue race discrimination claims; reviewing intake system and current case-handling criteria to ensure that staff handle race and national-origin discrimination claims appropriately; and ensuring that the handling of such cases is part of the advocates' evaluations as well as any overall programmatic evaluations and that advocates have the necessary time to handle the cases.

- *Knowledge and Training of Legal Staff:* Develop a training program that involves all elements of race-based advocacy, including recognizing claims, working with civil rights organizations, and conducting effective civil rights litigation and advocacy; and ensure that advocates in all specializations are integrated into the training program and develop sensitivity to potential race discrimination claims in their client community.

- *Contact with the Minority Community:* Encourage and institutionalize connections to minority community organizations and their traditional advocates through in-house training and workshops that such organizations conduct, by fostering cocounseling and other cooperative projects and cases with such organizations, by encouraging advocates' attendance at and participation in the meetings and activities of such organizations, and by ensuring a racially and ethnically diverse legal staff.

- *Overcoming LSC Restrictions:* Ensure that each advocate is well versed in exactly what types of affirmative race-based advocacy are and are not prohibited by LSC restrictions.

Authors' Acknowledgments

We are indebted to the many experienced legal services advocates whose comments and observations regarding their experiences in race-based advocacy throughout the country form much of the basis for this article.

[63] *See id.* pt. 1638 (regulating solicitation).

[64] *Id.* §§ 1638.1–.3.

[65] *Id.* § 1638.4(a)–(b).