

LEGAL SERVICES FOR THE NATION'S ELDERLY

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Legal services are especially vital to the elderly, who perhaps more than any other group rely upon complex public and private institutions for their daily subsistence. Yet, in many important spheres the nation's elderly lack adequate legal representation and consequently cannot gain access to the legal system.¹ The elderly only comprise approximately 6 percent of the client load of the average legal aid office, although over 20 percent of the nation's poor are elderly.²

The legal problems of the aged frequently derive from the policies and actions of governmental agencies and private corporations, both of which often present undecipherable bureaucratic mazes which even younger beneficiaries find difficult to negotiate. Many of the elderly were at one time a part of the mainstream of middle America and became poor only when forced, at age 65, to live on fixed incomes which have been constantly eroded by inflation. Thus, these individuals have not learned to "work the system" as have many younger people forced, almost from birth, to live under governmental programs and in large bureaucracies. The crucial point is that many of these people may be the least able to deal with issues of a legal nature. Although they are confronted with a complex of legal questions, bureaucracies, and forms,

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1. See generally *Joint Hearing on Improving Legal Representation for Older Americans Before the Senate Special Comm. on Aging and the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *Joint Hearing on Legal Representation*].

2. The 6 percent figure is an estimate resulting from an informal survey conducted by the Office of Legal Services, Office of Economic Opportunity [OEO]. As to the disproportionately low representation of the elderly within legal services offices, see B. TERRIS, *LEGAL SERVICES FOR THE ELDERLY* 7 (1972). Terris suggests that the reasons for this disproportionately low representation may include the inability or lack of desire of elderly people to reach or use available poverty legal services, and the concentration of poverty attorneys on younger clients.

they have no real place to turn for adequate and effective assistance.³

Efforts are presently being made to change this situation. This Article explores the nature and scope of these efforts while considering alternative courses of action which can be adopted to expand the availability of legal services for the aged. Existing resources can provide the foundation and stimulus for a system of legal services which approaches adequacy in meeting the needs of old people. What is required is that these resources be intelligently and systematically developed.

EXISTING RESOURCES DEVOTED TO THE AGED

National Programs

In 1968, the Office of Economic Opportunity [OEO] began a series of experimental programs for the provision of legal services to the nation's elderly. This project, entitled "Legal Research and Services for the Elderly" and conducted by the National Council of Senior Citizens,⁴ was influential in focusing the attention of OEO Legal Services Programs⁵ on the special problems of the elderly. Across the country, model projects were established to address the legal problems of the rural and urban elderly and the problems of various elderly ethnic minority groups.⁶ In addition, these projects experimented with various models for the delivery of legal services through private law firms, paralegals, and existing legal services programs. Interest created by this project, the White House Conference of Aging,⁷ and the Senate Special Committee on Aging⁸ led in 1972 to the creation by OEO of the National Senior Citizens Law Center [NSCLC].

NSCLC is a national backup center⁹ providing technical assistance to OEO-funded attorneys concerned with the special problems of the elderly poor. In addition, OEO continues to fund the Senior Citizens

3. See generally *Joint Hearing on Legal Representation*, *supra* note 1.

4. See generally STAFF OF SPECIAL COMM. ON AGING OF THE U.S. SENATE, 91ST CONG., 2D SESS., LEGAL PROBLEMS AFFECTING OLDER AMERICANS (Comm. Print 1970); *Hearings on Legal Problems Affecting Older Americans Before the Senate Special Comm. on Aging*, 91st Cong., 2d Sess., pt. 1 (1970), 92d Cong., 1st Sess., pt. 2 (1971) [hereinafter cited as *Hearings on Legal Problems*, pts. 1 & 2].

5. When the term Legal Services is capitalized throughout this article, it refers to OEO Legal Services.

6. See B. TERRIS, *supra* note 2, at 1; *Hearings on Legal Problems*, pt. 1, *supra* note 4, at 96-105.

7. The 1971 White House Conference on Aging recommended: "The Federal Government (through the Office of Economic Opportunity, any successor legal service agency, or other agency) should establish a special center concerning legal rights of the elderly. . . ." WHITE HOUSE CONFERENCE ON AGING, PROTECTIVE AND SOCIAL SUPPORT: REPORTS OF THE SPECIAL CONCERNS SESSIONS 29-30 (1971).

8. See generally STAFF OF SPECIAL COMM. ON AGING OF THE U.S. SENATE, 91ST CONG., 2D SESS., *supra* note 4; *Hearings on Legal Problems*, pt. 1 & 2, *supra* note 4.

9. See generally Phillips, *What Back-Up Centers Can Do*, 5 CLEARINGHOUSE REV. 740 (1972).

Project of California Rural Legal Assistance, located in San Francisco, and New York City's Legal Services for the Elderly Poor. Legal Research and Services for the Elderly continues to function as an arm of the National Council of Senior Citizens, giving technical assistance to state and area agencies on aging in the middle-Atlantic states.

NSCLC has experienced steady growth since its creation.¹⁰ The role of national resources in a program to provide legal assistance services to the elderly can be seen in the activities of NSCLC. NSCLC has worked to focus more of the attention of OEO attorneys on the needs of the elderly poor and to increase the effectiveness with which these needs are met. The primary method by which these goals are pursued is the development and dissemination of expertise in those substantive areas of the law which have a significant impact on the elderly.

The areas in which NSCLC has developed expertise include delivery of legal services to the elderly, income maintenance—including Supplemental Security Income [SSI], Social Security, and private pensions—health and nutrition, housing, mandatory retirement and age discrimination, institutionalization and involuntary commitment, veteran's rights, and the special legal concerns of older women. The substantive priority areas for NSCLC are determined by its board of directors and Legal Services attorneys in the field. The board is composed of leaders drawn from the field of gerontology, the private and public bars, and senior citizen organizations. This board helps to ensure the legitimacy of NSCLC's work because many board members represent elderly constituencies. Legal Services attorneys also influence the direction of the Center's efforts since much of NSCLC's expertise has been developed in response to specific requests for assistance from these attorneys. Finally, the Center may, because of the unique opportunity its attorneys have to study the legal problems of the elderly, occasionally take the lead in creating interest in areas that the staff or board believes ought to be of concern to lawyers for the elderly. When NSCLC attempts to generate interest in a particular area, an article or other material is prepared to call attention to issues in that area and its impact on the aged. The response of the lawyering community is then observed to determine whether the Center's assessment of the importance and viability of the issue was correct. For example, NSCLC initiated its work on pensions,¹¹ women's issues, and veteran's rights in this manner.

10. See Johnson, *National Senior Citizens Law Center*, 6 CLEARINGHOUSE REV. 189 (1972).

11. See National Senior Citizens Law Center, *Litigation as a Tool for Private Pension Reform*, 6 CLEARINGHOUSE REV. 593 (1973).

In all of its areas of substantive concentration, NSCLC provides research for particular law suits, drafts memoranda or briefs, or appears as co-counsel if desired by the local Legal Services project. It will also comment on proposed administrative regulations and assist in drafting legislation. The Center also distributes information on a broader basis. In 1974 alone, over 600 attorneys attended NSCLC-conducted training sessions held nationwide. The Center staff has produced a considerable amount of printed material, ranging from law review articles¹² and a manual on SSI¹³ to a full set of materials on the legal problems of the elderly.

In addition to providing a central source of expertise on the legal issues confronting the elderly, national projects are uniquely situated to perform a coordinating function in efforts to use the legal process to solve the problems of the elderly. NSCLC's Washington office monitors federal legislation and administrative activity of importance to the aged and seeks to present the viewpoints of the nation's elderly to lawmakers by providing testimony at legislative hearings and commenting on administrative rulemaking. With respect to major litigation, the Center attempts to coordinate the efforts of attorneys litigating issues of concern to the elderly by keeping them aware of other activities in that area. Recently, for example, NSCLC cosponsored a conference designed to disseminate information to aid in securing recipients' rights under the new SSI program. The conference served to facilitate and encourage the exchange of information and ideas among involved and concerned Legal Services attorneys from across the country.¹⁴

As a result of the efforts of NSCLC and other projects, Legal Services attorneys have begun to increase their efforts on behalf of the elderly poor—even in the absence of specific funding for this purpose. However, the continuing dearth of legal services for the elderly and the existing overload of poverty cases confronting Legal Services attorneys has shown the necessity of developing and identifying sources of funding with which to establish legal services projects specifically for the elderly.

Local Programs

A major focus of the OEO Legal Services program since its incep-

12. See, e.g., National Senior Citizens Law Center, *Constitutional Issues in Social Security*, 8 CLEARINGHOUSE REV. 79 (1974); National Senior Citizens Law Center, *supra* note 11; Randolph, *Sex Discrimination in the Family Benefit Sections of the Social Security Act*, 8 CLEARINGHOUSE REV. 535 (1974).

13. NATIONAL SENIOR CITIZENS LAW CENTER, MATERIALS ON THE SUPPLEMENTAL SECURITY INCOME PROGRAM (3d ed. 1975).

14. This conference was of particular significance since more concerted action or information sharing on behalf of recipients will be needed in the future as social welfare programs became increasingly federalized.

tion has been broadly based action by attorneys—the use of judicial, legislative, and administrative processes to deal with major recurring problems confronting the poor of the United States. As indicated above, however, very few of these projects were dealing specifically with the problems of the elderly. While being involved in these broad-based substantive activities, NSCLC has initially concerned itself, perhaps to a greater degree, with the expansion of legal services which will deal with day-to-day problems of individuals. Broadly based reform efforts on behalf of the elderly can only take place if there is a grassroots network of attorneys concerned with daily legal problems of the elderly, working in conjunction with specialized substantive support services such as those provided by NSCLC and others.

One of the most exciting developments in the field of legal services for the elderly has been the recent funding of more than 60 projects to provide legal services specifically to the elderly. Most of these projects have been funded under Title III of the Older Americans Act,¹⁵ which provides special federal monies administered through the states and, in turn, through local Area Agencies on Aging.¹⁶ In addition, some projects have secured private foundation monies¹⁷ or general revenue-sharing funds. The indications are that this recent experience is part of a trend which will see more projects initiated and funded in the near future from various sources, particularly Title III of the Older Americans Act.¹⁸

The promise of these developments is the growth of an extensive network of attorneys working on behalf of the elderly. These attorneys will be able to exchange ideas and information, thereby achieving economies of scale in providing legal services. These developments provide a basis for the hope that, within a very short period of time, the nation's elderly will be receiving greatly expanded legal assistance from various projects. Such increased focus of attention by attorneys on the special needs of the elderly will help in bringing about needed reforms on behalf of this client group.

Despite the optimistic trend, securing funds for legal projects serving the elderly still presents varied problems. These projects do, how-

15. 42 U.S.C. §§ 3021-3028 (Supp. III, 1973), *as amended*, 29 U.S.C.A. § 3029 (1975).

16. *See* 42 U.S.C. § 3024 (Supp. III, 1973).

17. *See* Marcello, *The Birth of a Public Interest Law Firm*, 1 ALTERNATIVES, Aug. 1974, at 9.

18. Although the OEO Legal Services Projects are specifically tied to poverty guidelines, many of the projects funded from other sources are not so limited. This may be a consideration for individuals seeking to set up legal services programs for the elderly. Of course, the emphasis under the Older Americans Act also is intended to be on poor elderly individuals, but not necessarily to the exclusion of others. *See* 42 U.S.C. § 3021 (Supp. III, 1973).

ever, have appealing arguments to present to governmental and institutional sponsors. The particular approach taken will, of course, be highly individualized for each funding source and each project, but a few general considerations are worth noting. First, a proposal to provide legal services for the elderly should be presented as part of a growing national movement rather than just an isolated local effort. The number of local projects which have secured funding should reassure sponsors of the soundness of such a proposal. Second, projects can include in their proposals a variety of innovative techniques for delivering legal services to elderly clients. Including such techniques as senior citizen paralegals, mobile units, special office locations and hours, in-house attorneys in institutions, special services for the rural aged, and legal "hot-lines" in a project proposal can add a research and development component to the usual activities of legal services projects. Third, projects should attempt to diversify the funding of their programs so that each resource provides a funding nucleus which draws monies from the others. In addition, it may be easier to secure small amounts from several sources than a large amount from a single source. Finally, proposals should be based upon specific data about the particular needs of the elderly in that locality and the benefits which could be expected if such assistance were provided.

NSCLC has attempted in its overall strategy for expansion of legal services to the elderly to work on various levels in order to sensitize professionals in the field of aging to the special nature of legal services on the one hand, and to sensitize Legal Services attorneys to the particular problems of the elderly poor on the other. Now that it has become evident to Legal Services attorneys that there is a potential for increasing their services by additional funding, many work with NSCLC to reach the goal of setting up a special legal services program in their community. Thus, while NSCLC works at the national level, emphasizing legislation and attempting to sensitize federal agencies to the special legal needs of the elderly, the local legal services projects can start to make contact with local Area Agencies on Aging and other funding sources. An integral part of this effort has been the utilization of the various agencies presently at work at the federal and local levels on behalf of special interest groups for the elderly. Many of these groups do carry considerable weight on the local and federal levels and act as perfect adjuncts to an effort to secure funding for legal services to the elderly. Local agencies hopefully already have been sensitized by the national training done by NSCLC and others. This type of a broad range approach has resulted and will result in the greatly expanded field program serving the elderly.

Notwithstanding the bright prospects for specially funded projects, the elderly will still have to look to other sources for legal representation. It is unreasonable to expect the public purse or charitable organizations to support counsel in sufficient numbers to meet all the legal needs of older people, for other needy groups also have worthy claims to such assistance. Moreover, most projects will, due to the purposes of their sponsors, probably focus primarily on the elderly poor, although elderly individuals whose income is above poverty guidelines also need legal assistance. Accordingly, one of the first priorities of specially funded legal services projects should be to cultivate other existing resources in the legal community.¹⁹

Nonlegal Help for Quasi-Legal Problems

The lawyer working on behalf of elderly people serves his clientele most effectively by concentrating on services which require his skills as an attorney. Often, however, in helping to satisfy the pressing needs of elderly clients, the lawyer is forced to perform simple bureaucratic tasks such as completing forms and explaining available programs and benefits. Identifying and ensuring that service agencies and administrations provide this quasi-legal service to their beneficiaries is a task within lawyers' competence; however, given limited time, lawyers can better meet their elderly clients' legal needs by ensuring that this responsibility is executed by others rather than by attempting to fill the hiatus created when it is not.

This problem is especially acute in the case of government benefit programs. Attorneys and paralegals are often asked questions concerning SSI, Social Security, and veteran's benefits. Much of the uncertainty facing elderly individuals when dealing with these programs, for which they would normally have to seek the assistance of an attorney, could be eliminated with services supplied by the agencies themselves. The Social Security Administration, for example, is in a position to provide assistance to applicants,²⁰ but radical understaffing creates a situation where adequate assistance is the exception rather than the norm. Similarly, the Department of Labor and the Internal Revenue Service may, under existing legislation, provide assistance with private pension problems.²¹

19. See text & notes 23-25 *infra*. See also text accompanying note 70 *infra*.

20. See *Joint Hearing on Legal Representation*, *supra* note 1, at 52-59.

21. The Secretary of Labor, for example, has broad investigative powers which might be used to help an individual pursue his claim. See 29 U.S.C.A. § 1134 (1975). See also *id.* § 1132. Under the new Pension Reform Act, workers and retirees will be able to participate in the procedures by which the Internal Revenue Service [IRS] determines that a plan qualifies for tax benefits and, in addition, to appeal an IRS determination to the United States Tax Court. INT. REV. CODE OF 1954, § 7476. See generally Preminger, Jennings & Alexander, *What Do You Get with the Gold Watch?*

Whether such service on behalf of needy individuals will be forthcoming remains to be seen. If past performances by these two bureaucracies are indicative, they will only realize their potential for helping the aged with considerable prodding. Even if adequate staffing is provided, an agency's attitude toward recipients may prevent full and adequate assistance in the application process. If the agency yields to the natural inclination of middle-class bureaucrats, taking a protective posture with respect to the public fisc, doubts will be resolved against individual applicants, and the counselling services provided by the agency will be less than adequate.

If deficiencies in the quasi-legal counselling provided by agencies cannot be corrected internally, other groups can fill the gap without consuming scarce legal resources. Information and referral services are a central part of the mission of Area Agencies on Aging, now being established under the Older Americans Act.²² To be effective, these services should provide clients with information regarding potential benefits available under Social Security, SSI, and other programs for the elderly—not just directions to yet another place to go for information. Senior citizen groups active in assisting members and nonmembers alike could also provide such counselling. Finally, private and public employers can be encouraged to give preretirement counselling to elderly employees. This type of assistance should include advice on pension plan options, federal government benefit programs, and estate planning for the individual employee.

Entities providing legal services for the aged have an important function to perform in establishing such counselling services. By taking an active role in preparing materials and training personnel, legal services attorneys make agency counselling more probable as well as more effective. In addition, they can develop working relationships with non-legal counselors to ensure that when a situation calling for the special competence of an attorney arises, appropriate assistance will be sought. By seeding other organizations with the information to provide services which lawyers could, but need not, provide, lawyers can free themselves to provide their clientele with additional legal services.

An Analysis of the Employee Retirement Income Security Act of 1974, 17 ARIZ. L. REV. 426, 447-49 (1975). If a violation of the Act's disclosure requirements is proven, a plan administrator can be ordered to pay a worker or retiree up to \$100 per day from the date of his failure or refusal to comply with the request of a worker or retiree for any of the information required to be furnished under the Act. 29 U.S.C.A. § 1132(c) (1975). This latter provision could be immensely helpful if the IRS and Labor Department are energetic in enforcing disclosure requirements under the new Act.

22. 42 U.S.C. § 3024(C)(3) (Supp. III, 1973).

THE PRIVATE BAR: A POTENTIAL NEW SOURCE
OF LEGAL ASSISTANCE

Legal Services attorneys acting specifically on behalf of the elderly can increase their effectiveness by complementing rather than duplicating the conventional sources of legal assistance in the community. Here again, by stimulating other legal resources in the community to recognize and adopt roles in a coherent scheme for the representation of aged persons, Legal Services attorneys can reserve their time for services which they alone can provide.

Attorneys general, city attorneys, county attorneys, and other government attorneys, for instance, should be persuaded to devote more of their legal resources to aiding the elderly. This might include assistance with problems relating to consumer fraud, property tax exemptions, special assessments, guardianships, involuntary commitment, nursing homes, and probate matters. In each instance, individuals concerned with the rights of the elderly should examine the charters and statutes creating such legal offices for ways in which these offices can begin to assist the elderly.

On a nationwide basis, the organized bar has hitherto limited its activities to forming committees of the American Bar Association to study the legal problems of the elderly.²³ Hopefully, however, some concrete volunteer programs, especially programs utilizing the vast resources of retired attorneys, can be devised and implemented to serve the elderly. The ABA is apparently becoming aware of this latent potential in its older members. The president of the Association—taking a cue from the activities of retired business executives in SCORE²⁴—recently suggested that retired attorneys be mobilized under ABA auspices to provide legal help for other retirees.²⁵

Assistance may also be obtained from other organizations. A Jewish organization in Los Angeles, for example, is using member attorneys to provide volunteer assistance in a primarily elderly neighborhood. Another recent development has far-reaching potential. In Los Angeles, a reserve contingent of the Civil Affairs Unit of the Army has decided to devote the time of reservists to legal services for the needy. One legal services office has been located in an area with a high percentage of elderly persons and serves primarily older people. If this project were

23. The ABA Family Law Section and Probate and Trust Section have special subsections dealing with the elderly.

24. SCORE is an acronym for Service Corps of Retired Executives. See generally 42 U.S.C. §§ 5031-5032 (Supp. III, 1973).

25. Nationwide Program to Provide Free Legal Service to Elderly Sought by ABA President, ABA Release No. 111574 (Nov. 18, 1974).

duplicated by other Civil Affairs or Judge Advocate General units, the level of legal assistance to the elderly could be vastly increased.

Law students constitute yet a third resource which could be tapped on behalf of the aged. Several law schools, including Duke University, George Washington University, and Syracuse University, provide clinical programs focusing on elderly clients. These programs serve the dual purpose of sensitizing future attorneys to the special needs of the elderly and providing legal services to needy individuals.

Notwithstanding these nonconventional sources of legal assistance, the problem of providing truly adequate legal representation to the elderly cannot be solved without full and effective participation by the private bar. Although members of the private bar may provide some services on a *pro bono* basis, their participation as private attorneys will largely be on a compensatory basis. The thrust of any effort to increase the availability of legal services for the aged from the private bar, therefore, must be to identify services which can be provided on a fee-generating basis and to develop methods for providing these services at a cost which the elderly can bear.

As noted, a substantial portion of the legal concerns of the aged relate to government benefit programs. The development of assistance from the private bar in the pursuit of these benefits is trapped in a vicious circle. The belief of private attorneys that practice in this area cannot be remunerative prevents them from developing expertise concerning entitlement to benefits.²⁶ The circle is completed when this lack of expertise prevents the development of office practice methods which permit assistance within feasible cost parameters, including reasonable remuneration for the attorney.²⁷ Thus, if sufficient compensation were available for representing elderly clients with benefit disputes, an incentive would exist to develop the necessary expertise.

Social Security, SSI, and veterans benefit statutes establish fee systems which may well act to deter private attorneys from pursuing claims on behalf of elderly clients²⁸ since the Social Security Act²⁹ and

26. See *Joint Hearing on Legal Representation*, *supra* note 1, at 19.

27. For an excellent overview of problems of access to legal services, including questions regarding use of paralegals, group legal services, government-funded legal services, and fee mechanism, see *Symposium*, 4 U. Tol. L. Rev. 353 (1973). For a lengthy and complete bibliography dealing with all aspects of delivery of legal services, see Brickman, *Legal Delivery Systems—A Bibliography*, 4 U. Tol. L. Rev. 465 (1973).

28. It is interesting to note that although the fees may be too low to generate interest from private attorneys, the fact that cases under the Social Security Act might be considered "fee generating" could put such cases out of the lawful reach of OEO attorneys. 2 CCH Pov. L. Rep. ¶ 8700.35 (1972). Of course, if the case is not taken after appropriate referrals to private attorneys, OEO attorneys may take such cases. *Id.* Nevertheless, this general "fee generating" classification of SSI and Social Security cases could act to inhibit most OEO attorneys from getting involved in such cases.

The general situation is well summarized by Yarowsky, *Attorneys' Fees in Social*

other programs³⁰ regulate fees. For example, the Social Security Administration sets a reasonable fee upon the application of the representative of a claimant successful in an administrative hearing.³¹ The fee is contingent in nature. If the administrative proceedings result in the award of past-due benefits,³² the representative may receive a fee not to exceed 25 percent of such benefits.³³ In successful proceedings before a court, the representative receives a reasonable fee set by the court, but not exceeding 25 percent of the past-due benefits resulting from the judgment.³⁴

This system is irrational. The fact that fees are deducted from past-due benefits not only unduly burdens needy claimants, it also encourages attorneys to delay presenting claims so that retroactive benefits will accumulate, increasing the maximum fee.³⁵ Moreover, existing fee levels are considered grossly inadequate by those few attorneys practicing in the field.³⁶ As a result of the restrictive fee system, less than 2 percent of disallowed claims ever reach the courts, even though courts have overturned the administrative decision in 63 percent of the appealed cases.³⁷ In addition, only 5 percent of all claimants are represented by attorneys at the administrative level,³⁸ even though a vast majority of such cases involve complex matters regarding proof of disability.³⁹

Security Proceedings: A Criticism of the Official Restrictive Design, 17 KAN. L. REV. 79, 88 (1968):

The issues of attorneys' fees in social security proceedings is closely tied to legal aid. If the claimant does not meet the standards for indigency established by the local legal aid program, he is generally referred to the local bar association. However, if no private attorney will take the case because of the fee problems involved, the claimant who desires an attorney has no one to champion his cause. While some legal aid societies will represent those for whom the referral system has failed, this places the burden of the claimant's litigation on society even though the claimant, through the fees allowed, has an "ability to pay." Such procedure seem [sic] contrary to the concept of legal aid. This problem would not arise if the private practitioner were permitted to earn what his time and effort were worth.

29. 42 U.S.C. § 406(a) (1970).

30. 42 U.S.C. § 1383(d)(3) (Supp. III, 1973) (SSI); 38 U.S.C. § 3404(c) (1970) (veteran's benefits).

31. 42 U.S.C. § 406(a) (1970); 20 C.F.R. § 404.975(b) (1975). Claimants may be represented before the Social Security Administration by lay persons, 42 U.S.C. § 406(a) (1970); 20 C.F.R. § 404.971 (1975); cf. *id.* § 404.972(b), but unlike attorneys, the particular qualifications of such lay representatives are taken into account in allowing fees, *id.* § 404.976(a)(6), and they are ineligible for direct payment from past-due benefits. *Id.* § 404.977(b)(2). See 42 U.S.C. § 406(a) (1970).

32. *Hopkins v. Cohen*, 390 U.S. 530, 531-35 (1968).

33. 42 U.S.C. § 406(a) (1970); 20 C.F.R. § 404.977(b) (1975).

34. 42 U.S.C. § 406(b) (1970); 20 C.F.R. § 404.977(a) (1975).

35. *Blankenship v. Gardner*, 256 F. Supp. 405, 410 (W.D. Va. 1966); *Yarowsky*, *supra* note 28, at 84.

36. For a practitioner's view of the fee scheme, see *Yarowsky*, *supra* note 28.

37. *Id.* at 80. See also *Scott v. Celebrezze*, 241 F. Supp. 733, 736 n.21 (S.D.N.Y. 1965) (citing 47 reversals and 27 affirmances in volumes 227 to 236 of the FEDERAL SUPPLEMENT); *Seldomridge v. Celebrezze*, 238 F. Supp. 610, 620 n.17 (E.D. Pa. 1965) (75 percent reversals in volumes 231 to 234 of the FEDERAL SUPPLEMENT).

38. *Yarowski*, *supra* note 28, at 79.

39. *Id.*

The simplest method of improving representation in Social Security claims would be to amend the statutory fee system. The 1968 amendments to the Social Security Act aided recipients in obtaining representation by allowing direct payment of the contingent fee to the attorney.⁴⁰ The fee system, however, should be further amended to require the attorney's fee to be paid by the government, to remove the maximum fee limitation based on back benefits, and to provide for judicial review of fees set for services at the administrative level.⁴¹

The fee system under the SSI program lacks some of the defects of the Social Security system. There is no statutory limit on fees in successful administrative proceedings and no limit on fees a court may set, although the putative need for such limitations—to protect claimants from exorbitant fees—appears to be stronger in the case of SSI than in Social Security, because SSI involves only very needy claimants. Although the Secretary of Health, Education and Welfare may prescribe maximum fees for representation in administrative hearings,⁴² regulations to this effect have not been promulgated. A provision for direct payment of fees, which for no apparent reason was not brought forward from the Social Security Act, should be adopted in order to secure attorneys their fees.

The fee situation with respect to veterans benefits may only be characterized as bizarre. The statute limits fees to \$10 for any one claim before the Veterans' Administration [VA].⁴³ In addition, the decisions of the VA on any question of law or fact regarding a claim for benefits or payments are final and not subject to any judicial review.⁴⁴ The \$10 fee limitation clearly inhibits private attorneys from ever taking a case on behalf of a veteran. Veterans' organizations argue that they, the Red Cross, and other groups provide very effective counselling for veterans. This is exactly the kind of counseling that should be encouraged, but it should not be considered a substitute for necessary legal assistance.

40. Act of Jan. 2, 1968, Pub. L. No. 90-248, § 173, 87 Stat. 877, amending 42 U.S.C. § 406(a) (1964) (codified at 42 U.S.C. § 406(a) (1970)). See also 42 U.S.C. § 406(b)(1) (1970).

41. This would overrule the holding in *Chernook v. Gardner*, 360 F.2d 257, 259 (3d Cir. 1966); see *Yarowsky*, *supra* note 28, at 88.

42. 42 U.S.C. § 1383(d)(3) (Supp. III, 1973).

43. 38 U.S.C. § 3404(c) (1970); *Hoffmaster v. Veterans Administration*, 444 F.2d 192 (3d Cir. 1971) (constitutionality upheld). However, a recent decision by the Ninth Circuit in *Gendron v. Saxbe*, 501 F.2d 1087 (9th Cir. 1974), holding that the question of the constitutionality of the \$10 fee limitation did not present an insubstantial constitutional question for purposes of convening a three-judge court, is an indication that the provision might be found to deprive the veteran of his right to counsel, equal protection, or procedural due process. The court observed that the United States Supreme Court had never passed on the validity of the provision in the context of the constitutional rights of the veteran, as opposed to the rights of an attorney seeking fees. *Id.* at 1088-89. *Accord*, *Staub v. Johnson*, 44 U.S.L.W. 2169 (D.C. Cir. Sept. 15, 1975).

44. 38 U.S.C. § 211(a) (1970); *De Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 949 (1973) (constitutionality upheld).

These organizations depend largely on the good will of the VA for their efficacy. Moreover, these groups work with the VA on many matters other than benefit entitlement, and it is plainly in their interest to maintain good working relations. Therefore, a claim challenging a statutory or regulatory scheme and VA procedures has little chance of ever being asserted by these organizations. Without private counsel, it seems unlikely that such cases will come to the fore. Of course, without judicial review, there is even less chance of airing such issues. In light of the extremely restrictive provisions regulating fees in veterans benefit cases, the only solution to this stalemate appears to be amendment of the statutory scheme.

In cases that can generate even modest fees, including Social Security and SSI claims, another method exists for breaking the vicious circle inhibiting the private bar from pursuing government benefits for the elderly. An initial investment in developing office practice procedures, including specialization and routinization of a lawyer's tasks, could allow the private practitioner to increase his representation of the elderly without altering the basic practice of a small private firm. Greater efficiency results in greater profits for the time invested. If an attorney can represent many clients with small claims, charging small but adequate fees, it may be profitable to serve such clients. Many of the special legal services sought by the elderly are susceptible of routinization and simplification. For example, manuals could be prepared for Social Security and SSI claims which would allow assistants to prepare a case for ultimate review by an attorney. Many of the tasks presently performed by attorneys are unnecessarily complicated and could be simplified to allow more efficient treatment of individualized problems.

The natural adjunct to the specialization and routinization of the lawyer's job is the effective and expanded use of paralegals.⁴⁵ Paralegals are being employed increasingly in private practice; their utility is well established within OEO Legal Services programs because of the very limited resources available to attorneys for the poor.⁴⁶ Paralegals can handle routine substantive matters, do initial client interviewing, go to aged individuals who cannot come into the office, handle administrative appeals, and do factual investigations.⁴⁷ It may be particularly advantageous to employ elderly people as paralegals. Elderly clients may respond more openly to questions and suggestions from their peers than to

45. See B. TERRIS, *supra* note 2, at 23-25; Fry, *The Senior Citizen Paralegal: An Advocate for the Elderly Poor*, AGING, Jan.-Feb. 1974, at 11.

46. See Lander, *Legal Assistants: The Experience of the Legal Aid Society of the City and County of St. Louis*, 6 CLEARINGHOUSE REV. 663 (1973).

47. According to informal information and funding proposals reviewed by NSCLC staff, the vast majority of legal projects serving the elderly use paralegals extensively.

those of a younger person.⁴⁸ A further benefit is that some older individuals will thus find meaningful employment.⁴⁹

Experience in using standardized methods and paralegals in a variety of legal specialities indicates the potential of this practice method. Preliminary findings show lawyers saving from 25 to 50 percent of the time normally required to perform some services.⁵⁰ An analysis of the tasks involved in corporate formation confirms that delegation of ministerial tasks to paralegals can reduce the cost of providing this service by one half.⁵¹ Adequate figures have not been developed for legal services of interest to the aged. The reduction in cost to the client made possible by such efficiencies may bring many needed services within the reach of elderly people of moderate means. Legal Services attorneys can encourage the private bar to involve itself in aiding the elderly by making their expertise available in the development and preparation of such methods.

A prime example of combining routinization, specialization, and the use of paralegals is the legal clinic of attorneys Jacoby and Meyers in Los Angeles.⁵² This office has pioneered the use of kits and paralegals in order to provide low cost legal assistance to low and moderate income individuals. From all indications, a successful private practice has resulted.⁵³ The experience of Jacoby and Meyers, however, brings to the fore one problem which must be dealt with by the private bar if low cost legal assistance is to be available to the moderate income individual: the prohibition of advertising by private practitioners.⁵⁴ If profit, and derivatively, significant involvement of the private bar rests on a large volume of clients paying smaller fees, it is critical to let potential clients know about available low cost services.⁵⁵

48. See, e.g., Fry, *supra* note 45, at 11; *Joint Hearing on Legal Representation*, *supra* note 1, at 30-31; National Senior Citizens Law Center, *Senior Legal Assistants*, 7 CLEARINGHOUSE REV. 273 (1973). See also Collins, Flanagan, & Donnelly, *The Senior Citizens Project of California Legal Assistance: An Action Arm of the National Senior Citizens Law Center*, 6 CLEARINGHOUSE REV. 220 (1972).

49. B. TERRIS, *supra* note 2, at 25.

50. K. STRONG & A. CLARK, *LAW OFFICE MANAGEMENT* 93 (1974).

51. AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON LEGAL ASSISTANTS, *LIBERATING THE LAWYER: THE UTILIZATION OF LEGAL ASSISTANTS BY LAW FIRMS IN THE UNITED STATES 44-45* (Prelim. Draft, 1971).

52. Disco & Meyers, *Legal Supermarkets*, HARPER'S MAGAZINE, July 1973, at 30.

53. It should be noted that the office does not specialize in legal problems of the elderly, but in problems of the moderate income individual. Many of those problems, however, are also problems of the elderly, such as wills, Social Security, disability claims, and small claims court matters.

54. ABA, *CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)* (1975); CAL. BUS. & PROF. CODE § 6076, Rules 2-101 to -102 (West Supp. 1975). The California bar has instituted proceedings against Jacoby and Meyers. Disco & Meyers, *supra* note 52, at 30. It should be noted, however, that it has not been clearly established that advertising was involved in this case.

55. Legal services attorneys are presently allowed to advertise the availability of free legal services to their potential client community. ABA, *CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)* (1975); ARIZ. ETHICS OP. 74-7 (1974).

Publicity plays a role in at least one ongoing low cost legal services project.⁵⁶ Philadelphia has created a neighborhood law office system with offices staffed by private attorneys who provide low cost legal services for people of moderate means. The program is supported by the local bar which permits some minimal advertising but does not subsidize the offices. In return, the bar requires low fees, a specified minimum number of office hours, and office locations in areas where moderate income people live, work, and shop. This project has existed for close to 30 years but has not expanded. Perhaps the introduction of new law office management techniques, including additional use of paralegals, routinization, and specialization, would make these offices more profitable and increase the likelihood of their success in other regions.

Specialized legal services groups and information and referral services provided by groups of senior citizens or agencies working on their behalf may provide an alternative to publicity as a means of generating the volume necessary to provide standardized legal services at a low cost. These groups should analyze the needs of their clients to determine what services could be provided by private counsel. Armed with this information, they could approach private attorneys with an offer to refer clients to them if the attorney would provide the services at an agreeable fee. Clientele of specially funded legal services projects would benefit from this system because the time of project attorneys would be freed for services which cannot be specialized and routinized or which are not otherwise being provided. Control over fees could be exercised through the referral system; if the private practitioner began to overcharge, the referrals, which are the lifeblood of this sort of practice, would cease since he would be removed from the panel.

In this connection, the question arises whether a lawyer may agree to limit his fees in order to obtain a steady stream of referrals. Originally, the American Bar Association's *Code of Professional Responsibility* permitted private attorneys to cooperate with private referral services "but only . . . to the extent that controlling constitutional interpretation . . . require[d] the allowance of such legal services activities . . ."⁵⁷ In short, lawyers could accept referrals only to the extent that the referrals were constitutionally protected. The decided cases,⁵⁸ however,

56. See Abrahams, *25 Years of Service: Philadelphia's Neighborhood Law Office Plan*, 50 A.B.A.J. 728 (1964). See also B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 208-13 (1970).

57. ABA, *CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(5)* (Final Draft 1969).

58. *United Transp. Union v. State Bar*, 401 U.S. 576 (1971); *UMW v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

if not limited to their facts, provide strong authority for constitutional protection of the referral system outlined above.

The case most similar on its facts to the proposed referral program is *United Transportation Union v. State Bar*.⁵⁹ There, in order to assist certain people in enforcing their pecuniary rights, an organization sought individuals with a specific type of legal claim and encouraged them to consult selected attorneys who had agreed with the organization to charge fees which were below the prevailing rate. The United States Supreme Court held that this union conduct was an associational interest protected by the first amendment. According to the Court, "groups can unite to assert their legal rights as effectively and economically as practical,"⁶⁰ since "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."⁶¹

Arguably, the facts in *United Transportation* limit the reach of its holding. The organization there was a labor union, the people seeking service were members of the union, and their claims arose from union employment. Nevertheless, since an earlier case, *NAACP v. Button*,⁶² upheld an organization's right to advise nonmembers to litigate and to provide counsel to them, neither membership in an organization nor referral by a labor union appears a prerequisite to constitutionally protected referral. *Button*, however, would at least require that the referral activity be conducted by some organization established for the purpose of advancing the legal interests of its constituency. The significance of these factors to the free expression and association interests ultimately protected by *United Transportation* and its precursors, however, is obscure. Additionally, the protection of the elderly would seem to satisfy any requirement of specificity of legal interest for free expression and association purposes. Moreover, the trend of decisions provides little basis for the fear that these cases will be limited rather than expanded. In light of these decisions, the American Bar Association has gradually tempered its view on the matter of referral services. The *Code of Professional Responsibility* now permits lawyers to cooperate with "[a]ny bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries" if such organization meets certain conditions.⁶³ Accordingly, organized referral of legal problems

59. 401 U.S. 576 (1971).

60. *Id.* at 580.

61. *Id.* at 585.

62. 371 U.S. 415 (1963).

63. ABA, CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(4) (1975). These conditions include protections for the beneficiaries or members as to their client status with the attorney and their choice of counsel. *Id.* DR 2-103(D)(4)(d)-(e). Further, any organization offering referral services may not derive profits from such activities,

capable of solution by private counsel appears to be available as a technique for meeting the legal needs of the aged.⁶⁴

A related development with important promise for the aged is the rise of group legal service plans. Without adding to the large and growing literature on such plans,⁶⁵ it is worth noting that they may be designed to conform almost perfectly to the needs of many elderly people. The elderly may participate in such plans on several bases—as union members or as members of senior citizen groups or of other organizations which have special benefit plans for older members. The first and perhaps most likely way is through union membership and participation in a plan which benefits retirees as well as active members. A recent amendment to the Taft-Hartley Act,⁶⁶ which permits employers to provide legal services as an employee benefit under collective bargaining agreements, promises to catapult group legal service plans into prominence as a means of financing services for middle-income people.⁶⁷ Plans formed under the amendment should be designed to capture the amendment's benefits for retirees. One limitation on Taft-Hartley legal service plans which may restrict their utility for retirees is that such plans are barred from rendering services in actions against the employer or the union.⁶⁸ Thus, actions relating to some aspects of pensions or other retirement benefits could probably not be financed by these plans. However, actions against the pension trust or its trustees, as distinguished from the employer or the union, appear to be covered.⁶⁹

It would also appear that senior citizen groups, by making small regular payments, could finance an insurancelike group legal service plan to benefit members. Such a group legal service plan should be designed specifically to benefit this age group. The services available under a closed panel plan, which are often restricted to employment related matters, should be expanded to include both a preretirement

and any attorney who initiates or promotes a referral organization may not do so primarily for profit. *Id.* DR 2-103(D)(4)(a)-(c).

64. See, e.g., Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U.L. REV. 595, 628-37 (1973); Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966, 983-91 (1967); 50 CORNELL L.Q. 344 (1965). But see Simpson, *Group Legal Services: The Case for Caution*, 12 U.C.L.A.L. REV. 327 (1965). See also Mann, *Not for Lucre or Malice: The Southern Negro's Right to Out-of-State Counsel*, 64 NW. U.L. REV. 143, 161-70 (1969); Rodle, *Group Legal Services: The Case for BRT*, 12 U.C.L.A.L. REV. 306 (1965).

65. See, e.g., Hallauer, *The Shreveport Experiment in Prepaid Legal Services*, 2 J. LEGAL STUDIES 223 (1973); Politz, *Prepaid Legal Services—The Shreveport Plan: The Long-Sought Answer?* 7 TRIAL, Mar.-Apr. 1971, at 29; Roberts, *The Shreveport Plan for Prepaid Legal Services—A Unique Experiment*, 2 LA. L. REV. 45 (1971).

66. 29 U.S.C. § 186(c)(8) (Supp. III, 1973).

67. Tunney, *Financing the Cost of Enforcing Legal Rights*, 122 U. PA. L. REV. 632, 633 n.2 (1974).

68. 29 U.S.C. § 186(c)(8)(A) (Supp. III, 1973).

69. See *id.* § 186(c).

legal checkup and services in substantive areas of concern to the aged, such as special benefit programs, estate planning and probate, and guardianship. While open panel plans usually offer a wider range of services, the choice between open and closed panels should be guided by whether lawyers are available with expertise in the legal areas of concern to the aged. Where available expertise is limited, a closed panel plan permits development of needed expertise in areas of particular concern to the elderly. Finally, a plan should not automatically exclude legal representation in cases which could be taken on a contingent fee basis. Because the fees available in Social Security and pension matters are, as already noted, often insufficient to secure actual representation, attorneys with appropriate expertise may simply not be available to handle such matters. Thus, the contingent fee case would be no more than an illusion, with no attorney actually available.

CONCLUSION

In July 1975, the Administration on Aging awarded 11 model projects grants totalling in excess of \$1 million. The major focus of these grants is to provide technical assistance to state and Area Agencies on Aging to establish special legal services projects to serve the elderly. This effort dovetails with proposed 1975 amendments of the Older Americans Act⁷⁰ which are still in committee, but which are expected to provide a major thrust for the provision of legal services to the elderly. It may well be that each Area Agency on Aging will have a component concerned solely with the provision of legal services to the elderly. These offices can, and hopefully will, serve as catalysts for coordinating all legal resources within a community so that the legal needs of the elderly can begin to be met. The excitement which these developments should justifiably generate must not be allowed to dissipate until ongoing projects are permanently in place and serving the nation's elderly.

70. S. 1420, 94th Cong., 1st Sess. §§ 110, 821-22 (1975); S. 1422, 94th Cong., 1st Sess. (1975); S. 1426, 94th Cong., 1st Sess. §§ 111(c), 821-22 (1975).