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Private Bar Delivery of Civil Legal Services to the Poor: A Design For a Combined Private Attorney and Staffed Office Delivery System

By Andrea J. Saltzman*

In 1876, a group of citizens in New York City opened an office with one part-time staff attorney "to render legal aid and assistance gratuitously to those of German birth who may appear worthy thereof, but who from poverty are unable to procure it."¹ Twelve years later, this staffed legal aid office, the first such in the country,² no longer restricted its services to German immigrants, and another staffed legal aid office serving all those in need of legal assistance but unable to afford it opened in Chicago.³

Other cities began following the lead of New York and Chicago. In 1900, a staffed legal aid office was opened in Boston and one year

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This Article was adapted from a report prepared for the five Illinois Legal Services Corporation (LSC) grantees on the design and implementation of a private attorney component of a staff attorney program. Because it was adapted from a consultant report for LSC grantees, the author had the advantage of attending LSC conferences on the use of private attorneys in the delivery of legal services to the poor and using unpublished materials compiled by the LSC Chicago Regional Office on this topic. There are, consequently, citations to comments at conferences and to unpublished materials. All unpublished materials may be obtained from the LSC. Much is also on file with the Hastings Law Journal.

Special thanks are due to the five Illinois LSC grantees and, in particular, to Joseph Bartylak, Executive Director of Land of Lincoln Legal Aid and head of the Illinois LSC State Support Unit. Also, special thanks to the staff of the LSC Chicago Regional Office. The views expressed herein are those of the author.

1. E. Brownell, Legal Aid in the United States 7 (1951).
2. Starting in 1865, the Freedman's Bureau attempted to provide free legal assistance to newly freed Blacks in the District of Columbia and some southern states, but the scope of its activities is unclear and one cannot say that the Freedman's Bureau truly operated an organized legal aid office. See Westwood, Getting Justice for the Freedman, 16 How. L.J. 492, 504-06 (1971).
3. E. Brownell, supra note 1, at 7.
later staffed legal aid offices were opened in Philadelphia, Pittsburgh, and Newark. By 1917, forty-one cities had some type of legal aid office. By 1964, there were 250 staffed civil legal aid offices around the country. The idea of meeting the civil legal needs of the poor by opening an office employing salaried lawyers and providing services free of charge to eligible clients had taken root in this country.

Thus, in 1965, when the federal government, as part of President Johnson's "War on Poverty," began to provide funds for civil legal services for the poor through the Office of Economic Opportunity (OEO), it was not surprising that the funds would go almost exclusively to programs with staffed offices. And, in 1974, when the Legal Services Corporation (LSC) replaced OEO as the agency chiefly responsible for dispensing federal funds for civil legal services for the poor, it again was not surprising that those funds would continue to

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4. Id. at 8.
7. No one could argue, however, that all, or even a large portion, of the civil legal needs of the poor were being met by the 250 staffed legal aid offices existing in 1964. Indeed, it has been estimated that these 250 offices met approximately five percent of the poor's legal needs. JOINT INFORMATIONAL REPORT, supra note 6, at 9. Moreover, in 1964, 9 cities with a population of 1,000,000 or more, 15 slightly smaller communities, and 105 rural centers with over 100,000 in population had no legal aid offices. H. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES: THE OTHER SIDE OF THE LAW 124 (1975).
9. See H. STUMPF, supra note 7, at 141.
10. The LSC was created by the Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. §§ 2996-29961 (1976 & Supp. V 1981)). The LSC is an independent corporation which provides no direct services to clients but rather grants funds to private legal services programs throughout the country that provide the direct services to the poor.

There are other federal sources of funds for civil legal services for the poor but the LSC, as OEO before it, has been the chief source of such funds. As of 1980, the LSC provided approximately two-thirds of the funding to the 322 private legal services programs in the country while other federal sources provided about 22% of the funds and private contributions and state and local governments provided the remaining 11%. LEGAL SERVICES CORP., CHARACTERISTICS OF FIELD PROGRAMS SUPPORTED BY THE LEGAL SERVICES CORPORATION 18-19 (1981).

The status of the LSC and the amount of funds it will have available for civil legal
be channeled principally to staffed offices.\textsuperscript{11}

What was unsurprising, however, was not without considerable controversy. There were those who argued that a delivery system other than the staffed office system should be instituted.\textsuperscript{12} They proposed instead "judicare," a delivery system in which private attorneys would be compensated by the government on a fee-for-service basis for the representation of poor people.\textsuperscript{13}

As the federal government provided more funds for civil legal services for the poor,\textsuperscript{14} the debate between proponents of the compen-
sated private attorney and the staff attorney models increased.\textsuperscript{15} Congress did not ignore this debate. In 1967, a proposal to require OEO to encourage judicare was introduced in Congress, but was defeated.\textsuperscript{16} The Legal Services Corporation Act,\textsuperscript{17} passed in 1974, acknowledged that the LSC would continue to fund predominantly staff attorney programs, but required the LSC to study "alternate methods for the economical and effective delivery of legal services including judicare, vouchers, prepaid legal insurance and contracts with law firms."\textsuperscript{18}

The election of President Reagan, known for his longstanding opposition to the existing legal services delivery system,\textsuperscript{19} intensified the debate.\textsuperscript{20} Strengthened by the opposition to the LSC in the Reagan administration\textsuperscript{21} and in Congress,\textsuperscript{22} the proponents of judicare pressed


\textsuperscript{16} H.R. 12103, 90th Cong., 1st Sess. (1967).

\textsuperscript{17} See supra note 10.

\textsuperscript{18} 42 U.S.C. 2996f(g) (1976). The study, hereinafter referred to as the Delivery Systems Study, resulted in the DSS Policy Report, supra note 11.


\textsuperscript{21} See Crumpton, Crisis, supra note 20, at 522.

\textsuperscript{22} An LSC appropriations bill, passed by the House of Representatives in 1981 but
for the institution of that system.

This Article describes but does not join the debate between judicare and staff attorney proponents. Instead it proposes a hybrid delivery system, combining elements of each delivery system. It is hoped that this proposal could satisfy both sides of the debate and, most importantly, could better serve the low-income client community.23 The Article begins with an overview of the arguments for the judicare and the staff attorney delivery systems. It then discusses the potential of a delivery system that combines elements of each system. Finally, the Article sets forth a recommended design for such a combined delivery system.24

Private Versus Staff Attorneys: The Debate Over a Delivery System

The Arguments for a Staff Attorney Delivery System

When OEO began funding civil legal services for the poor, its decision to adopt the staff attorney delivery system instead of the compen-
sated private attorney system was not simply a decision to continue the existing legal aid system with increased funds derived from a different source. Although they adopted the staff office approach, the early leaders of OEO actually perceived their programs as a rejection of the traditional legal aid system, with its conservative service orientation and its downtown offices. They opted for a neighborhood office system in which staff lawyers, working in community offices, would help wage the war on poverty. They rejected, as antithetical to their law reform/social change perspective, both the conservative legal aid model and the "English System," with its open panel of compensated private attorneys. E. Clinton Bamberger, Jr., the first director of the OEO legal services program, stated:

I do not believe that an "English system" which parcels out the legal problems of the poor to lawyers engaged not because they have a singular dedication to assist poor people but because they are members of a bar association or a lawyer referral panel and somehow "chosen freely" by the poor will ever provide the necessary concerted and thoughtful legal analysis and challenge which must occur if the OEO program will be more than a chain of legal first-aid clinics.

Thus, the first argument given for the staffed office system, and the main argument of the early leaders of federally funded legal services, is that full-time staff attorneys are more dedicated to serving the poor and are more likely to engage in law reform activities and to develop broad legal attacks on poverty problems than are compensated private attorneys, who are identified with the interests they serve in their private practices. A related argument is that full-time staff attorneys are more likely to see patterns in the day-to-day problems that arise and are more likely to devise efficient and effective ways of dealing with or eliminating those problems. Faced with more demand for their services than their limited resources can meet, full-time staff attorneys develop priorities and allocate their resources in a way that will

25. See, e.g., H. Stumpf, supra note 7, at 141-44.
27. E. Johnson, Jr., supra note 5, at 32-34; Shriver, Legal Services and The War on Poverty, 14 Cath. Law. 92, 96 (1968).
28. See H. Stumpf, supra note 7, at 143.
29. E. Johnson, Jr., supra note 5, at 117-21.
30. Id. at 120.
31. See H. Stumpf, supra note 7, at 250; Cramton, Why, supra note 20, at 553; Dooley, Legal Services for the Poor: The Debate Between Staffed Programs and Judicare, 17 Clearinghouse Rev. 193, 198-99 (1983); Masotti & Corsi, supra note 15, at 496; Vorhees, supra note 15, at 27; Note, supra note 15, at 849.
32. See Cramton, Crisis, supra note 20, at 534-35; Dooley, supra note 31, at 198-99.
contribute to social change. They address issues that transcend individual interest while private attorneys do not. Moreover, because staff attorneys generally work in community offices and see the community's poor on a daily basis, they are more likely to develop a sense of the community and its needs, and, of greatest importance, to develop expertise in areas of the law of vital concern to poor people, such as welfare law or public housing law. This expertise contributes to developments and changes in these areas of the law. In short, the staffed office model is argued to have more law reform potential than the private bar model.

Second, it is argued that the quality of staff attorneys' work is better than that of compensated private attorneys because of staff attorneys' expertise in poverty law. Private attorneys, even those engaged in judicare work, would not have or develop an expertise in this area of the law. Further, the quality of staff attorneys' work is argued to be superior to that of compensated private attorneys because staff attorneys tend to be hard-working, committed attorneys who have chosen to represent the poor despite their own low salaries, while private attorneys who agree to participate in judicare programs tend to be inexperienced or marginally successful attorneys who take judicare cases, despite low compensation, because they need the experience or the money. Moreover, it is argued that even the best private attorneys would not give the time and attention to their judicare work that they

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34. See generally Gordley, Variations on a Modern Theme, in TOWARDS EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 77, 105 (M. Cappelletti, J. Gordley & E. Johnson, Jr., eds. 1975).
35. Green & Green, supra note 15, at 598; Schlossberg & Weinberg, supra note 15, at 1004.
36. See generally Johnson, Further Variations and the Prospect of Some Future Themes, in TOWARDS EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 133 (M. Cappelleti, J. Gordley & E. Johnson, Jr., eds. 1975).
37. Because this Article is not concerned with the validity of the arguments for the two opposing delivery systems but rather is concerned with resolving the debate between proponents of the two systems by proposing a compromise delivery system, no attempt is made herein to present the arguments of judicare proponents in response to this or subsequent arguments. Similarly, no rebuttal arguments will be presented when the affirmative judicare arguments are set forth.
40. E. JOHNSON, JR., supra note 5, at 119. See Eisenberg, The Role of the Private Bar in the Delivery of Legal Services to Indigent Persons Charged with Criminal Offenses, 17 CLEARINGHOUSE REV. 221, 224 (1983) (making this point in the criminal law context).
would give to their more lucrative private work. Finally, the quality of staff attorneys' work is argued to be superior to that of compensated private attorneys because of the quality control mechanisms that one can employ in staffed offices.

Third, it is argued that combining staff attorneys' expertise in poverty law with their ability to develop efficient and effective means of dealing with repetitive problems results in a staff attorney delivery system that is less costly than a compensated private attorney system. Indeed, it is asserted that full-time staff attorneys, with their low salaries and their simple storefront offices in low-rent districts, can handle more cases for less money than compensated private attorneys, whatever the relative expertise. Even if the level of compensation for private attorneys is kept low, the administrative costs of a judicare system may be high, eliminating any real savings.

Finally, it is argued that staff attorneys may provide a wider range and a greater amount of services to the poor than compensated private attorneys. Staffed offices often have social workers, community workers, or legal assistants who come from the community where the office is located. They have staff attorneys who are dedicated to serving the poor. Thus they are more likely to deal with the "whole person" than are private attorneys who would be inclined to work on discrete legal problems. Staffed offices may engage readily in community education and preventive law. They are better able to represent both organized and unorganized client groups. Because of the accessibility and visibility of a staffed neighborhood office, its ability to foster poor

42. Swanson, Judicare: An LSC Regional Director Takes a Look, 37 N.L.A.D.A. BRIEFCASE 97, 98 (1980) [hereinafter cited as Swanson, Takes a Look]; Swanson, Judicare: How One Staff Program Director Sees It, 37 N.L.A.D.A. BRIEFCASE 102, 103 (1980) [hereinafter cited as Swanson, Director Sees It].
43. Johnson, supra note 36, at 140-55.
44. Robb, supra note 15, at 135.
45. This may be at some cost to quality. See Eisenberg, supra note 40, at 225-26.
46. Gordley, supra note 34, at 103-04. The social cost of judicare may also be high. If a large percentage of lawyers participate in judicare, these lawyers would become dependent on and subject to regulation by the government. Robb, supra note 15, at 136. There would be a "socialization of the legal profession" in America. E. Johnson, Jr., supra note 5, at 238-39, and a concomitant need for a powerful national bar to control and regulate the legal profession, Schlossberg & Weinberg, supra note 15, at 1004.
47. See Masotti & Corsi, supra note 15, at 496; Robb, supra note 15, at 134; Note, supra note 15, at 811. Indeed, judicare proponents have criticized legal aid offices precisely because they address more than discrete legal problems. Dooley, supra note 31, at 198-99.
48. See generally Note, supra note 15, at 820-22 (preventive law consists of efforts, such as "legal check-ups," that prevent legal problems from occurring).
49. See generally Johnson, supra note 36, at 208-17.
people's trust, and its community education efforts, the poor are more likely to seek legal assistance from a staffed office than from compensated private attorneys. A neighborhood law office, it is thus argued, "reaches far more persons in equal time" than a judicare program.

The Arguments for a Private Attorney Delivery System

As noted, when the federal government began funding civil legal services for the poor, the legal aid staffed office approach was the dominant model in the United States. However, there were other models from which advocates of the judicare approach could draw. In England, a national judicare program had been operational since 1950. In this country there long had been panels of volunteer lawyers who would take civil cases free of charge for indigents referred to them by a local bar association or a social services agency. Moreover, court-appointed, compensated private attorneys had been representing indigent criminal defendants in this country for a number of years. The newly enacted health care programs, Medicare and Medicaid, which substituted private doctors for public hospitals and clinics in the treatment of the poor, provided a model by analogy.

The advocates of judicare in the United States drew on these models and added new features to formulate their arguments. These arguments are repeated today to justify a compensated private attorney system.

50. Cf. Green & Green, supra note 15, at 598; Pelletier, supra note 15, at 41.
52. The program was established by the Legal Aid and Advice Act of 1949, 12 & 13 Geo. 6, ch. 1.
53. E. Brownell, supra note 1, at 104.
54. Eisenberg, supra note 40, at 222.
56. See Some Thoughts Concerning Private Attorney Involvement in the 1980s, 17 Clearinghouse Rev. 175, 178-82 (1983) (interesting analysis of the validity of drawing this analogy, by members of the editorial board).
57. E. Johnson, Jr., supra note 5, at 118.
58. It has been suggested that a preference for the judicare system over the staff attorney system, and vice versa, may stem from one's basic philosophical approach to government funding of civil legal services for the poor. According to this theory, if one believes that the government should fund legal services for the poor as part of its welfare program and as part of its attack on poverty (legal aid as a "welfare right," the "social utilitarian" approach), one would probably prefer the staffed office model. If one believes that the government should fund legal services for the poor to ensure equal access to justice and to implement the right to legal aid (legal aid as a "juridical right," the "equal access" approach), one would probably prefer judicare. See, e.g., Gordley, supra note 34, at 86-88,
First, the advocates of judicare argue that judicare provides the poor with freedom of choice. Instead of assigning an applicant for legal services to one of a small number of staff attorneys in a small office, the applicant may choose any lawyer willing to participate in the program. Legal services clients should prefer such a freedom of choice over a staffed office system.

Second, the proponents of judicare argue that this freedom of choice, along with the other essential feature of judicare, service by private attorneys, minimizes the stigmatization of the poor. Poor persons seeking legal services are placed in the same position as others. They are not sent to "separate but equal" law offices or subjected to a different brand of justice than the rich. With judicare, the poor are not treated like a "neatly demarked class needing special legal treatment administered through a separate legal aid establishment."

Third, it is argued that the abandonment of the "separate but equal" neighborhood office concept in favor of the involvement of large numbers of private attorneys in the delivery of legal services to the poor is highly advantageous. The more lawyers involved with the legal services program, the more politically powerful the program will be, and the more organized bar will contribute to making it a success. Moreover, the poor potentially will have the benefit of the experience of the entire bar and the entire bar will be sensitized to the problems of the poor.

Fourth, it is argued that private lawyers are less vulnerable to financial motives, that is, private attorneys favor judicare because judicare will enrich them. It has also been suggested that a prime motivation for judicare proposals is financial: that is, private attorneys favor judicare because judicare will enrich them. Cf. Dooley, supra note 31, at 199; Robb, supra note 15, at 139-40. While it is undoubtedly true that economic considerations motivate some judicare proponents, a far larger number appear to be motivated by the ideological and political considerations discussed infra. See H. Stumpf, supra note 7, at 246.

59. E. Johnson, Jr., supra note 5, at 238; H. Stumpf, supra note 7, at 239.
60. Brakel, Free Services, supra note 15, at 548.
61. Pelletier, supra note 15, at 42.
63. Brakel, supra note 20, at 821.
64. See Robb, supra note 15, at 137; Schlossberg & Weinberg, supra note 15, at 1003.
65. Robb, supra note 15, at 137.
political interference than staff lawyers.\textsuperscript{67} Since they are not employees of programs with non-lawyer directors,\textsuperscript{68} they are better able to preserve the traditional attorney-client relationship.\textsuperscript{69} Judicare proponents note that private attorneys will accept or reject cases based on the clients' desires and the merits of each case. Staff attorneys, faced with invariably limited resources, will decide which cases to accept or reject based on their own perception of the needs of the community and their own agendas.\textsuperscript{70}

Fifth, it is argued that judicare makes more sense than a staff attorney system in rural areas where the poor are widely dispersed.\textsuperscript{71} Placing staffed offices in areas where there are few poor people is not economically practical, particularly when there are able private attorneys practicing in these areas.\textsuperscript{72}

Finally, some judicare proponents make a political argument. They assert that if the judicare system has a limited potential for law reform,\textsuperscript{73} this is as it should be. The government should not be financing social activism; staff lawyers, supported by the government, should not be "stirring up" litigation.\textsuperscript{74} They assert that individual clients come to legal services offices with basic legal problems; they need and want help with these problems, not law reforming class actions that may be opposed by other eligible clients.\textsuperscript{75}

\textsuperscript{67} Johnson, \textit{supra} note 36, at 172; Schlossberg & Weinberg, \textit{supra} note 15, at 1003; Note, \textit{supra} note 15, at 849.

\textsuperscript{68} See Legal Services Corporation Act of 1974 \textsection 1007(c), 42 U.S.C. \textsection 2996f(c) (1976) (requiring a board of directors composed of at least 60\% attorneys from state where located and one eligible client).

\textsuperscript{69} Pelletier, \textit{supra} note 15, at 14; Preloznik, \textit{Wisconsin, supra} note 15, at 1182.

\textsuperscript{70} Breger, \textit{supra} note 58, at 320-28; Dooley, \textit{supra} note 31, at 198-99; Gordley, \textit{supra} note 34, at 125-27.

\textsuperscript{71} Preloznik, \textit{Wisconsin, supra} note 15, at 1180.

\textsuperscript{72} H. STUMPF, \textit{supra} note 7, at 243.

\textsuperscript{73} But see Pelletier, \textit{supra} note 15, at 39-41.

\textsuperscript{74} As noted in E. JOHNSON, JR., \textit{supra} note 5, a 1969 conference of private practitioners advocating judicare issued a statement providing: "Any program of free legal services should be restricted to customary legal services to the individual and should not include advocacy for social reform or influencing legislation." \textit{Id.} at 374 n.26. See also Cramton, \textit{Why, supra} note 20, at 556; Dooley, \textit{supra} note 31, at 198-99.

\textsuperscript{75} In Brakel, \textit{supra} note 20, the author objected to the pre-Reagan Administration legal services' tendency "to emphasize group representation and so-called impact litigation at the expense of individual service requests." \textit{Id.} at 821. This emphasis, according to Brakel:

hardly satisfied the otherwise eligible client who went unrepresented because his problem was deemed of lesser social significance than someone else's case or cause. Not only that, but the preferred matter—more often than not "generated" by the attorney and some poverty group or other fictional client—might actually conflict with the rejected client's interest. Every gratuitous foray by a legal services lawyer
Private and Staff Attorneys: The Potential of a Combined Delivery System

Because the arguments for a private attorney delivery system and the arguments for a staff attorney delivery system revolve around different issues, they are essentially complementary rather than contradictory. Thus, it is possible to reconcile the two approaches by merging the two systems. The resultant combined delivery system, if designed with the arguments for each of the two systems in mind, may satisfy proponents of both systems.\(^7\) An overview of the potential of such a combined delivery system indicates that this may very well be the case.

By employing full-time staff attorneys, a hybrid program can have all the law reform potential of a pure staff attorney program while offering clients freedom of choice through its private attorney component. By using private attorneys on many cases, a hybrid program can offer clients the same type of service that the more affluent receive while developing efficient and effective ways of dealing with repetitive legal problems through its staff attorney component.

The staff attorneys in a hybrid program can develop an expertise in poverty law and a sensitivity to the needs of the poor and, to the profession's great advantage, can help private practitioners acquire this expertise and this sensitivity without a full-time commitment on their part.\(^7\) The private attorneys in a hybrid program, on the other hand, can give the staff attorneys, who tend to be young\(^7\) and who are often not from the community they serve,\(^7\) the advantage of their experience and their knowledge of the local community and the local courts. Combining private and staff attorneys assures that a legal services program will have expertise in all basic areas of the law, not just those into pro-abortion litigation represents a disservice to the many low-income people who oppose unrestricted choice. In opposition to the middle-class legal services lawyer's environmental concerns are often the job opportunities of the less privileged. There are poor landlords as well as poor tenants. And school bussing may be opposed by low-income blacks and whites alike.

\(^{76}\) Those judicare proponents who oppose government funded law reform, however, will probably not be satisfied with any combined system that preserves the staffed office system's law reform potential. This Article takes the position that law reform is a necessary part of any civil legal services delivery system for the poor. Thus, the suggested combined system has been designed to preserve the law reform potential inherent in the staffed office model.

\(^{77}\) See H. Stumpf, supra note 7, at 228 (judicare attorneys have developed sensitivity to the poor, with a resultant change in attitudes, from handling judicare cases).

\(^{78}\) Cramton, Crisis, supra note 20, at 530.

\(^{79}\) See H. Stumpf, supra note 7, at 250.
areas with which only private attorneys or only staff attorneys tend to
be familiar. Combining private and staff attorneys "assures that there
is the cross-fertilization and freshness necessary in the delivery of legal
services to poor people."

If it is true that private attorney delivery systems cost more than
staff attorney delivery systems on a per case basis because they cannot
develop efficient methods of dealing with repetitive problems and be-
cause administration is divorced from service, a combined system
should not cost more than a pure staff attorney system. The efficient
delivery mechanisms of a pure staff program can be readily employed
in the combined program while the staff component fulfills an adminis-
trative function. Furthermore, it is conceivable that the increased in-
volvement of a large number of private attorneys in the delivery system
could increase its political power and, consequently, its funding.

A combined system can offer all of the services that a pure staff
system offers (such as community education, law reform, and group
representation) through its staff component while offering "traditional"
handling of "traditional" cases (such as divorces and bankruptcies)
through its private attorney component. A combined system in a ru-
ral area can serve widely dispersed poor people efficiently and econom-
ically through its private bar component without losing the expertise
and law reform potential found in a staff attorney office. Moreover, the
money that could be used to hire a few staff attorneys in a few offices of

80. For example, West Virginia Legal Services Plan, Inc., a combined staff/judicare
program, did not have enough clients with problems relating to mineral rights to justify staff
developing an expertise in this law but there were enough to make private attorneys' knowl-
edge of this law a great assistance to the program. Martin, Private Attorney Involvement in
81. Eisenberg, supra note 40, at 226.
82. See supra notes 43-46 & accompanying text.
83. Earl Johnson, Jr. has stated:
Whatever the additional cost involved in incorporating private counsel into the
delivery system, it may make sense politically. It is very probable that the added
appropriations that the proponents of Judicare could generate through their polit-
ical strength would exceed the increased expense of delivering some part of the
legal assistance by this method.
E. JOHNSON, JR., supra note 5, at 241.
84. It is interesting to note that Wisconsin Judicare, the major judicare project in this
country, is in reality a combined program. As noted by its first director:
Not only does Wisconsin Judicare provide wide-ranging bread-and-butter legal
services, but the staff also devotes its time to community education, seminars for the
private attorneys and law reform through class actions, direct appeals and legislation.
Wisconsin Judicare thus is an imaginative attempt to provide both comprehensive
legal services and law reform.
Preloznik, Wisconsin, supra note 15, at 1180 (emphasis added).
a multi-office rural program could be more efficiently distributed throughout the program's service area if it were partially used to fund a private attorney component.\textsuperscript{85}

Finally, at this time when federal funding for legal services is being questioned and cut back along with many other social and benefit programs for the poor,\textsuperscript{86} wider involvement of the private bar in legal services may mean wider attorney involvement in efforts to preserve not only legal services, but also other social services and benefit programs. The private lawyers involved in such efforts, moreover, generally would have more political power than staff attorneys and their clients; the assistance they could provide to staff attorneys would thus be invaluable to the poor.\textsuperscript{87} Additionally, by compromising with the advocates of judicare, staff attorney advocates may be able to preserve the essential features of the staff attorney system in the face of continuing attacks on that system.\textsuperscript{88} By adding a private bar component, staffed legal services programs can foster better relations with the private bar.\textsuperscript{89} Legal services staffed programs can work effectively with the private bar; they may very well not be able to work at all against it.

Because of the potential of a well-designed combined delivery system, Earl Johnson, Jr., a strong proponent of the neighborhood office concept while serving as the first deputy director and the second director of the OEO legal services program, has stated:

One tempting compromise [between the staff attorney and judicare


\textsuperscript{86} See Dooley & Houseman, Legal Services in the '80's and Challenges Facing the Poor, 15 Clearinghouse Rev. 704 (1982).

\textsuperscript{87} See Eisenberg, supra note 40, where he states:

I believe it is essential that the private bar have a stake in the representation of poor people. To put it bluntly, poor people and their lawyers generally lack the clout, both in Congress and at the local level, to make a substantial difference. It is essential that there be private lawyers who are knowledgeable about the problems of the poor, about the legal remedies that are open to poor people, and about the need for reforming the system . . .

Exposure of the private bar to the legal problems of the poor . . . brings a powerful force into the battle to assist the client community.


\textsuperscript{88} See Cramton, Crisis, supra note 20, at 543-51. Even the American Bar Association, which has traditionally supported the staffed office concept, \textit{id.} at 546, is now urging private bar involvement in the delivery of legal services. In September of 1980, the House of Delegates of the ABA approved a resolution recommending that Congress amend the Legal Services Corporation Act "to mandate the opportunity for substantial involvement of private lawyers in providing legal services to the poor." Lawscope, 66 A.B.A. J. 1058 (1980).

\textsuperscript{89} Martin, supra note 85, at 503. Without these improved relations, they may find themselves defunded.
approach] is to divide responsibility between private counsel and sal-
ried staff. Private lawyers could handle divorces, adoptions, and
similar cases in which they probably possess as much expertise as
full-time staff lawyers. Staff counsel could then concentrate on law
reform, group representation, and most cases involving welfare, con-
sumer, landlord-tenant or other problems where the dispute is be-
tween a poor person and some part of the affluent society. At first
this appears to offer the best of both worlds.90

And Samuel Brakel, a staunch advocate of judicare,91 has asserted:

The entire staff lawyer-private bar dichotomy tends to be overdrawn.
In many respects their interests and capacities are similar and should
be utilized in complementary fashion. This is the strength of a hy-
brid model with both staff and private lawyers. The commonalities
of the two components should be exploited for positive effect, rather
than become the focus of division and competition.92

As Johnson and Brakel have noted, the potential of a combined private
bar and staffed office delivery system is great, but such a system must
be carefully designed to maximize this potential. The following sec-
tions of this Article will discuss how to design and implement such a
combined system to preserve the strengths of both systems and elimi-
nate the weaknesses of each.

Private and Staff Attorneys: The Design of a Combined
Delivery System

General Comments on Designing a Combined Delivery System

In designing a combined private and staff attorney delivery system
it is irrelevant whether one views the ultimate product as a staff attor-
ney program with a private attorney component or a private attorney
program with a staff attorney component. The distinction between the
two types of programs would generally arise from the amount of re-
sources allocated to either the private or staff attorney components of a
given program, but it is possible that a program viewed as a private
attorney program may actually devote a significant portion of its re-
sources to its staff component and vice versa.93 One can design an ideal

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90. E. Johnson, Jr., supra note 5, at 240. Johnson also has advocated a combined
system modelled on the Swedish one. In Sweden staffed offices exist side by side with a
separate judicare program. Johnson, Towards Equal Justice Revisited: Two Responses to a
Review, 1977 Am. B. Research J. 941, 943-45. See also Cramton, Crisis, supra note 20, at
546 (Professor Cramton, the first Chairman of the LSC, states: "My view is that a complete
legal services program would have staff attorney and judicare components, since each has
some advantages.").


93. In 1980, Wisconsin Judicare, the major judicare program in the country, devoted
combined system, as in this Article, without making any assumptions about the resources devoted to the two components. All that is essential is that each component receive enough funds to perform its contemplated functions.\textsuperscript{94}

It is similarly irrelevant whether one labels the private bar component of a combined system as a "contract" or a "judicare" component. In mandating that the LSC conduct a study of alternate delivery systems, Congress differentiated between the judicare and contract models.\textsuperscript{95} The report, prepared in accordance with this mandate,\textsuperscript{96} viewed judicare as an "open panel" system (i.e., all attorneys in a particular geographical area who wish to participate may do so) and the contract model as a "closed panel" system (i.e., only attorneys selected by a program's staff may participate).\textsuperscript{97} This distinction is not inherent in the models.\textsuperscript{98} The opportunity to contract with a staff program may be made available to all attorneys in a particular area, thus rendering the

over 40\% of its resources to its staff component that consisted of 19 people, 10 of whom were attorneys. Materials prepared for the LSC Conference on Private Bar Involvement, Minneapolis, Minn., Feb., 1981 [hereinafter cited as Minneapolis Meeting Materials].

\textsuperscript{94} One of the functions of the staff component contemplated by this Article is the representation of clients. A staffed office which only performs administrative functions or which only engages in non-case activity, such as advice, referrals, outreach, community education, or training and supervision of participating attorneys, is not considered a "staffed office" for purposes of this Article.

\textsuperscript{95} The statute mandates the study of "alternative and supplemental methods of delivery of legal services to eligible clients," specifying four different methods that must be studied, "including judicare . . . and contracts with law firms." The Legal Services Corporation Act of 1974 § 1007(g), 42 U.S.C. § 2996f(g) (1976).

\textsuperscript{96} DSS POLICY REPORT, supra note 11.

\textsuperscript{97} See, e.g., id. at apps. A-2 ("the judicare model is an open panel delivery system"), A-20 ("the contract model, by definition, involves a closed panel").

\textsuperscript{98} In the "contract" model, a staffed office contracts with one or more private attorneys to handle particular kinds of cases (e.g., domestic relations, bankruptcies), particular kinds of clients (e.g., Spanish-speaking clients, Native Americans) or all cases arising in a particular geographic area. Compensation may be on a fee for service or a retainer basis. Eligibility determinations and case intake may be done by the staffed office, by outside agencies, or by the contracting attorney(s). There may or may not be a written contract.

In the "judicare" model, a staffed office uses private attorneys to handle particular kinds of cases or, more commonly, to deliver legal services in a particular geographical area. Compensation is generally on a fee for service basis. Eligibility determinations and case intake may be done by the staffed office, by outside agencies, or by the participating attorneys. There may or may not be a written participation agreement.

The LSC, as part of the Delivery Systems Study, funded nine staff projects with "contract" components. For a fuller description of this type of component and the nine contract projects, see DSS POLICY REPORT, supra note 11, at apps. A-20 to -23.

The LSC, as part of the Delivery Systems Study, also funded four judicare components of staff programs. In addition, four funded judicare projects had staff components and functioned similarly to staffed programs with judicare components. For a fuller description of the judicare model and these eight projects, see id. at apps. A-2 to -19.
contract component "open panel." Certain attorneys may be denied the right to participate in a judicare component, thus rendering it "closed panel." Moreover, a staffed office can make case assignments in such a way that an open panel judicare program is rendered closed panel in fact, if not in theory.

Accordingly, in designing its private bar component, a legal services program need not decide if it should have a judicare or contract system. The difference is only in the name. Naming a component "judicare" rather than "contract" may have political significance because of past associations with the name "judicare," but it has no other significance.100

It is important to consider whether one is designing a combined legal services delivery system for a rural or an urban area. Certain design features should remain constant whatever the program's setting, but other features should differ depending on the location. This Article proposes a design that is adaptable to either an urban or a rural setting, though some of the discussion and recommendations deal specifically with an urban or a rural setting.101

Whether a program is rural or urban, designers of a combined legal services delivery system must keep in mind the context in which the system is to operate.102 An actual legal services delivery system cannot be designed in the abstract as was the hybrid in this Article. If there are any inflexible rules for designing a combined legal services delivery system, they are:

1) be flexible; all the components of a combined delivery system must suit local conditions and address local concerns;

2) consult with the private bar; even if the bar's wishes are not
accommodated, the bar will appreciate being asked for suggestions; and

3) consult with the community; this includes client groups, community leaders, and representatives of community service agencies.  

A final note: because most existing legal services programs use the staffing office approach, this Article presumes that it is the private bar component that is being added to an existing staffing office, and not vice versa.

Type of Panel

The first consideration in designing a private bar component of a combined delivery system is the nature of the panel: Should the panel be open or closed?

It is recommended that all private bar components be open panel.  This recommendation is based primarily on political considerations. Proponents of judicare in an area may not be satisfied with a closed panel system that could exclude many local attorneys. Even those who have not been proponents of judicare may not approve of a system that is ostensibly designed to involve the private bar but, in fact, only involves selected private lawyers. Exclusivity does not make for popularity.

Private bar involvement should improve an existing staff program's relationship with the private bar, but the limited involvement necessitated by a closed panel means limited improvement.

which provides: "The recipient shall provide the opportunity for consultations with . . . private attorneys and bar associations in the recipient's service area in the development of its plan to provide the opportunity for the involvement of private attorneys in the provision of legal assistance to eligible clients." Id. at 61,019.

104. This rule is also reflected in the Private Attorney Involvement Instruction, supra note 23. Section IV(b) mandates client involvement in planning, in addition to private attorney involvement, while the entire instruction stresses the need to know the community. Id. See also Lawson, The Private Bar and the Poor: A Client Perspective 37 N.L.A.D.A. BRIEF-CASE 92 (1980).

105. An open panel may be required. The LSC appropriations bill that passed in the House of Representatives in 1981 provides that in each state at least one program have a private bar component "with open participation rights by members of the bar." H.R. 3480, 97th Cong., 1st Sess. (1981).

106. They may not approve because they feel the responsibility of handling legal services cases should be widely shared, Read, An Overview of Private Bar Delivery Systems, 17 CLEARINGHOUSE REV. 229, 230 (1983), or because the economic rewards should be shared without favoritism, Dooley, supra note 31, at 199, or because a closed panel restricts freedom of choice, S. BRAKEL, JUDICARE, supra note 15, at 49.

107. The managing attorney of Legal Services of Northeast Wisconsin's open panel private bar component believes that the program's relationship with the private bar noticeably improved after the private bar component began operation while the Executive Director of
importantly, limited private bar involvement in the delivery of legal services to the poor could also limit the political advantages gained from private bar involvement, such as increased lobbying power for federally funded legal services.

There are also non-political reasons for choosing an open panel system. First, while several programs have had remarkable success in finding private attorneys to participate in their judicare components, the recruitment of private attorneys is generally not an easy process. Other programs, particularly those in rural areas, have had problems attracting private attorneys. Making it clear that participation will be open to everyone, without favoritism or lengthy and intrusive questioning, should make this recruitment easier.

Second, the staff attorneys of several combined programs have been surprised by the attorneys who have chosen to participate in their private bar components. These attorneys would not have been selected, or even identified, if there had been a closed panel system. Every private attorney should be given a chance to demonstrate his or her interest in such programs.

Third, with an open panel system more attorneys would be participating and clients would have a wider choice in selecting an attorney. Although many advocates of the staffed office system consider the freedom of choice aspect of a judicare system illusory, and the Western Nebraska Legal Services believes that no improvement in the program's relationship with the bar occurred after its closed panel private bar component began operation. Statement of John Cashman, Managing Attorney, "Legal Services Program Design for the 80's" Conference, Chicago, Ill., Nov. 2-4, 1981 [hereinafter cited as Design for the 80's Conference]. See J. Romero, Contracts with the Private Attorney: Pro's and Con's 12-13 (Office of Field Services, LSC, 1981). The difference between the two may stem from the difference in the type of panels of the two programs.

108. Within six months of the initiation of the Legal Services of Northeast Wisconsin's private bar program, 40 out of 200 private attorneys in the area agreed to participate. Statement of John Cashman at Design for the 80's Conference, supra note 107. Wisconsin Judicare has between 550 and 800 participating attorneys in 33 counties, Minneapolis Meeting Materials, supra note 93; 205 out of 314 private attorneys participate in the Northwest Minnesota program, id.; and, in 1980, Legal Services of Arkansas had 54 out of a total of 175 to 200 attorneys participating in a relatively new program in 24 counties, id.

109. See, e.g., J. Romero, supra note 107, at 6-7.


111. As discussed infra notes 168-72 & accompanying text, it is recommended that cases be referred to private attorneys by staff in light of participating attorneys' expertise and demonstrated commitment, but it is also recommended that clients be given the opportunity to choose an attorney prior to staff referrals.

112. See, e.g., E. Johnson, Jr., supra note 5, at 238; H. Stumpf, supra note 7, at 239-41; Dooley, supra note 31, at 199.
Delivery System Study found that freedom of choice was not abundantly utilized by legal services clients in the demonstration projects that offered it,\textsuperscript{113} "[t]he issue of free choice has enormous political importance."\textsuperscript{114} Any restriction on open participation may be seen as a restriction on free choice and may consequently be unacceptable to powerful judicare proponents whose sentiments mirror those of proponents in Wisconsin, who were "most eager to point to freedom of choice as a salient and salutory aspect of judicare."\textsuperscript{115}

Fourth, with more attorneys participating in a private bar delivery system, there should be fewer difficulties with attorney conflicts of interest. This is a particularly severe problem in rural areas where every attorney has probably, at one time or another, represented the landlords, the banks, and the other people and institutions likely to be involved in litigation with poor people.\textsuperscript{116}

Finally, an open panel system may increase the involvement of minority attorneys. As noted by Robert Harris, former President of the National Bar Association: "For many black lawyers, who barely survive economically in their practices, judicare offers a sensible approach to involving the private black practitioner in the delivery of legal services."\textsuperscript{117}

Of course there are difficulties with an open panel system. With a larger panel, more paperwork and a more complex design will be required to administer each aspect of the private attorney component.\textsuperscript{118} Demands from panel members for training, resource materials, and assistance may become excessive. Most importantly, it may be difficult to maintain quality with open participation. If all attorneys in an area are free to participate without the application of established standards, participating attorneys may not have the minimum level of competence or commitment needed to truly aid the poor.

Nevertheless, the advantages of an open panel system outweigh the disadvantages and what disadvantages exist can be overcome. For example, a program in a large urban area that fears an unwieldy

\begin{itemize}
  \item \textsuperscript{113} DSS POLICY REPORT, supra note 11, at v.
  \item \textsuperscript{114} S. BRAKEL, WISCONSIN JUDICARE, supra note 15, at 52.
  \item \textsuperscript{115} Id. at 61.
  \item \textsuperscript{116} Martin, supra note 80, at 262.
  \item \textsuperscript{117} Harris, The Private Bar's Involvement in the Delivery of Legal Services: The Role of the Black Lawyer, 37 N.L.A.D.A. BRIEFCASE 86, 86 (1980).
  \item \textsuperscript{118} See, e.g., infra note 173 & accompanying text (discussing the need for rational case referral). With a large panel, an enormous amount of paperwork would be required to make such referrals properly.
\end{itemize}
panel\textsuperscript{119} may consider an open panel in a restricted geographic area (\textit{e.g.}, an Hispanic area) or for certain kinds of cases only (\textit{e.g.}, divorces, bankruptcies). Even with an open panel, a legal services program can reserve the right to remove attorneys from the panel if they fail to provide adequate representation, if they neglect their legal services work, or if they engage in unethical or unacceptable practices.\textsuperscript{120} Moreover, a legal services program can impose clear and objective requirements for panel membership (\textit{e.g.}, good standing with the state bar, at least two years experience) without defeating the open panel system. Finally, an open panel approach can be combined with carefully designed and managed case referral and quality control systems that help to ensure quality.\textsuperscript{121}

The Scope of the Private Bar Component

In designing their private bar components, all legal services programs must make two basic and interrelated decisions: 1) whether private attorneys should serve clients in all geographic areas within the program's service area or in selected areas only; and 2) whether private attorneys should handle all types of cases or only those in specific areas of the law.

\textit{Geographic Scope}

For a rural program, it is recommended that the private attorney component serve all geographical areas served by the program.

First, a program that uses private attorneys only in selected areas may be perceived either as having "dumped" those areas on the private bar or as having abandoned the clients in those areas. The latter perception is particularly harmful in expansion areas\textsuperscript{122} or in areas where

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\item \textsuperscript{119} This fear may be unrealistic. A large number of attorneys in urban areas may not wish to participate in a private bar component. For example, Legal Aid of Southwest Missouri, headquartered in Springfield, found that only 33\% of the private attorneys in its main urban area participate in its program, compared to 80\% in its rural area. Minneapolis Meeting Materials, \textit{supra} note 93.

\item \textsuperscript{120} As noted \textit{infra} notes 169-73 & accompanying text, staff will be making referrals to private attorneys. Thus, a program can tacitly remove an attorney from a panel by failing to refer any cases to him or her. It is recommended, however, that where there is a serious problem with an attorney's work, he or she be formally removed from the panel. Otherwise the program may appear to be accepting the attorney's failing or misconduct and other participating attorneys are not put on notice that serious failings or misconduct will be treated seriously. Moreover, the case referral system may be called into question.

\item \textsuperscript{121} The design of such case referral and quality control systems are discussed \textit{infra} note 168-73, 185-93 & accompanying text.

\item \textsuperscript{122} During its early years, the LSC attempted to expand services to areas which had never been served by a legal aid program. The so-called "minimum access plan," which
\end{enumerate}
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the local bar has been actively opposed to legal services. It may appear that the active opposition caused a retreat by the traditional proponents of increased legal services for the poor or that expansion was a mistake, encouraging more opposition or discouraging future expansion if the legal services budget picture improves.

Second, many legal services programs with private bar components, even those that operate in areas that had previously been openly hostile to the legal services concept or the staffed office approach, have found that their relations with the private bar improved when they began operating their private bar components. A general spirit of cooperation developed. If the private bar delivers legal services in only selected areas, however, while staffed offices deliver services in others, there may be intensified competition between proponents of the two types of delivery systems instead of this desirable spirit of cooperation.

Third, one of the strengths of the staffed office approach is the visibility of neighborhood offices. The poor think of the local legal services office as “their office” and turn to it for assistance. Without this visibility, the poor may never seek assistance. If the bar operates alone in selected geographic areas, the legal services program will lose desired visibility in those areas.

Fourth, if a program does more impact work in areas served only by staffed offices and more service work in areas served primarily by the private bar, client resentment may develop. Clients in a “staff area” may demand more handling of divorces while those in a “private bar” area may question the overall program’s failure to deal with pervasive local problems.

Finally, since a program must develop an administrative apparatus to process and supervise the added private attorney work, it may be

established a goal of 2 attorneys per 10,000 poor people, led to the creation of many new programs, primarily in rural areas. See Legal Services Corp., Annual Report 1978 at 33 (1978). The new programs in designated expansion areas were funded through a bidding process which often pitted local judicare proponents against neighboring staffed office programs or local staffed office proponents. See, e.g., Legal Services Corp., Annual Report 1979 at 21 (1979).

123. See supra note 107.
124. Dooley & Houseman, supra note 86, at 704.
125. Gordley, supra note 34, at 106-07.
126. “Impact” work, as distinguished from “service” work, is defined as law reform or other work that goes beyond servicing the routine and traditional legal problems of individual clients in an attempt to achieve “long-lasting improvement, or avoidance of deterioration, in the living conditions of significant segments of the eligible population.” DSS Policy Report, supra note 11, at 31.
no more difficult or expensive to develop a program-wide apparatus than a local one.

There are, however, advantages to setting up a private bar component only in selected areas of a rural program's service area. Some areas may be more suited for private bar delivery systems than others. Large rural areas with small numbers of poor people or widely scattered pockets of poverty may be served more economically by the private bar. Small cities with large poor populations may be served more economically by a staffed office. There may be no private attorneys willing and able to participate in certain geographical areas. In addition, it is often difficult to recruit and retain participating attorneys in rural areas. The smaller the geographic area with a private bar component, the more time will be concentrated on effective recruitment and the less time will be devoted to attorney retention. Furthermore, an existing staffed legal services program can start a private bar component in selected areas with the intention of expanding and modifying it after seeing how the design works. Because changing a program's design after it is operational can be difficult, it is best to have the changes affect as few attorneys as possible. Finally, despite the benefits of economies of scale, an administrative apparatus can become too large and cumbersome to be effective. It may be very difficult to administer a private bar component that serves a large area.

For an urban program, the choice between a program-wide and a localized private bar component is less crucial and the advantages and disadvantages of either approach are not as clear. A program-wide private bar component is probably the simplest and most effective to establish, but there may be situations in which a localized component makes sense.

127. Martin, supra note 80, at 261.
128. There have been, however, some successful large private attorney programs. For example, Legal Aid of Manitoba serves an area of 342,000 square miles, providing both civil and criminal work through staff and private attorneys; Wisconsin Judicare serves an area of 32,000 square miles; and Northwest Minnesota Legal Services, a pure judicare program, serves an area of 23,433 square miles. Minneapolis Meeting Materials, supra note 93.
129. Administration in a city, no matter how large, is not as difficult as in a large rural area. Designing and implementing a private bar component and recruiting private attorneys is easier in a city where many attorneys belong to a common bar association and read a common legal publication. There are more attorneys in urban areas and the hostility to legal services staffed programs generally has been far less. The legal services program, which may have grown out of the old legal aid society, see E. Johnson, Jr., supra note 5, at 101, will have had a long time presence in the community. It can remain visible in the poor community even if it does not maintain offices throughout the city.
130. If an urban area has distinct and isolated ethnic communities and if there are private lawyers who practice in or are members of these communities, a private bar component,
Scope of Service

If private and staff attorneys are operating side by side in any or all geographic areas that a particular program serves, there may be a tendency to have private attorneys handle those cases that they have traditionally handled (i.e., non-poverty law cases) and to have staff attorneys continue to handle those cases rarely handled by private attorneys (i.e., poverty law cases). At first blush, this tendency seems logical. There are many reasons for using private attorneys on non-poverty law cases only. Many traditional poverty law cases (e.g., public benefit claims) do not require an attorney; they may be handled most economically by staff paralegals. Few private attorneys are familiar with poverty law and some probably have no desire to become familiar with it: they do not view expertise in poverty law as a way to expand their practices. Even if private attorneys wish to become familiar with poverty law, it is uneconomical for a legal services program to pay them to learn poverty law when staff attorneys are already trained in this area. Private attorneys often do not have the library materials necessary to handle poverty law cases. In an urban area, private attorneys’ offices may be far from the agencies that deal with poverty law cases and the attorneys may be unwilling to go to or be uncomfortable in the agencies’ offices, which are generally located in “bad” neighborhoods. While most private attorneys are unfamiliar with poverty law cases, they are very familiar with non-poverty law cases and issues, and generally can become familiar with non-poverty law cases in a poverty law context. Thus it seems most efficient and conducive to quality if such as the Delivery Systems Study demonstration project, Bet Tzedek, which serves Eastern European Jews in one area of Los Angeles, may serve these communities better than a downtown or even a local staff office. The component may be more acceptable to the client community. The component may serve the ethnic communities more economically than legal services staffed offices since the need for interpreters and bilingual staff is eliminated. Moreover, local private attorneys may be more expert in areas of unique concern to the community (e.g., immigration of relatives from Russia) than staff attorneys. Finally, an urban program can have all the advantages of an “open panel” without any danger of having an unwieldy panel if it only has a “local panel” serving a distinct ethnic community.

A legal aid office that serves only a distinct ethnic community is part of the legal aid tradition in this country. The first legal aid office in this country was established in New York in 1876 to serve German immigrants. See supra note 1 & accompanying text.

131. As used in this Article, “poverty law” encompasses cases arising in those areas of the law that only affect poor people (e.g., cases involving compensatory and bilingual education programs; public benefit programs, including medicaid; public and subsidized housing; employment training programs; and access to and quality of health care) and cases that rarely arise except for poor people, although the basic legal issues would be the same whether the clients were rich or poor (e.g., cases involving debt collection practices; uninsured motorist liability; termination of utilities).
private attorneys only handle non-poverty law cases. Further, if a goal of a private attorney delivery system is the elimination of “separate but equal” treatment for poor people, cases that are the same or substantially similar whether one is rich or poor (i.e., non-poverty law cases) should be handled in the same or in a substantially similar manner for rich or poor people, that is, by private lawyers.\(^\text{132}\)

There are also many reasons, however, why it is desirable to have private attorneys work on poverty law cases in addition to non-poverty law cases. Private attorneys can bring a fresh approach and enthusiasm to such cases. They may feel outrage when faced with a welfare “Catch 22,” for example,\(^\text{133}\) and may be ready to do battle when staff attorneys faced with the same problem may only feel resignation at a typical bureaucratic problem.\(^\text{134}\) Workers in poverty agencies may be more likely

\(^{132}\) There is one category of non-poverty law cases that may seem inappropriate to refer to private attorneys. In urban areas, many legal services programs have developed efficient techniques for processing routine non-poverty law cases such as uncontested divorces. See Johnson, supra note 36, at 153. For example, the Legal Assistance Foundation of Chicago (LAFC) has a centralized divorce division that has handled as many as 1,500 cases a year with a limited staff. RECENT DEVELOPMENTS IN LEGAL SERVICES DELIVERY SYSTEMS: AN OVERVIEW 7 (Delivery Research Unit, LSC, Sept. 1982) [hereinafter cited as RECENT DEVELOPMENTS]. It may seem best for legal services staff attorneys to continue to handle those non-poverty law cases since they can be handled so economically. Nevertheless, this “assembly-line” handling of cases is precisely the “separate but equal” or inferior treatment about which judicare proponents complain. To eliminate this complaint, it may be best to have private attorneys handle even these routine cases. This approach has been adopted by LAFC, which will continue to have staff attorneys screen applicants for financial eligibility and grounds for divorce. Staff attorneys will also prepare case files with form pleadings. The files will then be given in groups of 20 to private attorneys who will handle the cases for considerably less than their usual fee. Id. See also DSS POLICY REPORT, supra note 11, at app. A-23 (describing a demonstration project, West Texas Legal Services, that similarly contracted with private attorneys to handle divorces for which staff had done all the paperwork).

Alternatively, a program that desires to preserve the efficiencies of assembly-line processing of routine non-poverty law cases, while involving the private bar in the handling of such cases, can contract with private legal aid clinics that also have developed or may develop efficient assembly-line techniques. This has been the approach of two rural programs, Colorado Rural Legal Services and Southern New Mexico Legal Services, which have contracted with private non-profit legal clinics. RECENT DEVELOPMENTS, supra, at 11. While a rich client may never be subjected to the assembly-line techniques of private legal clinics, middle class clients are exposed to this process. See DSS POLICY REPORT, supra note 11, at app. A-52. The poor would thus receive the same treatment as that received by the middle class.

\(^{133}\) See, e.g., Adkins v. Leach, 17 Cal. App. 3d 771, 95 Cal. Rptr. 61 (1971) (discussing the requirement of the Monterey County, California, welfare department that one must have an address to obtain welfare even though the penniless plaintiffs living in their automobile could not rent an apartment, and thus get an address, without the money to make a deposit).

\(^{134}\) See Swanson, Judicare: A Close Look at Two Programs, 37 N.L.A.D.A. BRIEFCASE 104, 113 (1980).
to respond positively to private attorneys who are not perceived as fellow bureaucrats or "young radicals" than to staff attorneys who are perceived as such. This is particularly true in rural areas where the workers may know and respect the participating private attorneys. Private attorneys become sensitized to the problems of the poor and the failings of many poverty agencies and programs when they are confronted with some poverty law cases. Sensitizing private attorneys, who often are powerful politically, could, in the long run, be of great advantage to the poor.\textsuperscript{135}

There is no reason to assume that private attorneys' poverty law work will be a lower quality than staff's. The Delivery Systems Study quality ratings for each type of case shows no significant difference in quality between the staff attorney projects' and pure judicare projects' handling of, inter alia, income maintenance, consumer finance, divorce, or housing cases.\textsuperscript{136}

In summary, there is no reason to restrict private attorneys to non-poverty law cases and it is recommended that they should not be so restricted. Similarly, it is recommended that private attorneys should not be restricted to traditional modes of advocacy. To the extent that legal services programs may engage in legislative and administrative lobbying, participating private attorneys should also engage in such advocacy. After all, some private attorneys have been acting as lobbyists for their clients for years. Private attorneys can also engage in all of the other activities that staff attorneys engage in, including assisting in community education efforts and representing client groups.\textsuperscript{137}

\textsuperscript{135} DSS POLICY REPORT, \textit{supra} note 11, at app. A-9; Martin, \textit{supra} note 85, at 503.

\textsuperscript{136} DSS POLICY REPORT, \textit{supra} note 11, at 128 & table 25. As noted, "[p]reliminary results of the analysis of the relationship between . . . quality and type of attorney [salaried staff or private] handling a case indicates that . . . the type of attorney handling the case [is] not [a] major factor affecting the scores on quality of services." \textit{id.} at 124. Moreover, certain poverty law cases may be better handled by private attorneys. For example, private attorneys who practice in worker's compensation or in personal injury may be highly skilled in cases involving disability claims. They can probably be taught the relevant law in a social security disability case considerably faster than a staff attorney can be taught the techniques they have developed to establish injury or to cross-examine doctors. To cite another example, a real estate or tax lawyer may see issues in a subsidized housing case that a poverty lawyer would never consider. Finally, there are increasing numbers of private attorneys who are familiar with poverty law. Some have been staff attorneys in legal services programs during the more than 20 years that such programs have existed or have worked in a poverty law setting as law students through participation in law school clinical programs, work-study jobs with legal services programs, or volunteer activities. Some have taken poverty law courses in law school. \textit{See} Dooley & Houseman, \textit{supra} note 86, at 716; Martin, \textit{supra} note 85, at 504.

\textsuperscript{137} Indeed, certain client groups, such as those wishing to incorporate or to develop
ienced private attorneys can help train younger attorneys, both private and staff, and can help with quality control efforts.\textsuperscript{138}

In deciding the range of participating private attorneys' work, a legal services program need not think only in terms of types of cases and service, but also may think in terms of types of clients. For example, private attorneys could work exclusively for elderly or handicapped clients. Working for such clients may be far more attractive to private attorneys than working for other poor clients who may not be perceived as "worthy" of free assistance.\textsuperscript{139} While special clients, such as the elderly or the handicapped, often have special problems in areas of law beyond the expertise of most private attorneys, these attorneys may be willing to develop an expertise in these areas of the law because not all the elderly or the handicapped are poor.

Whatever decision a legal services program makes regarding the scope of service of its private bar component, the staff component should continue to handle at least a sampling of all types of cases, to serve all types of clients, and to provide all types of services. Only by doing this will staff attorneys keep abreast of the law, be aware of problems arising in certain kinds of cases, be able to develop efficient and effective case-handling techniques, and be able to adequately supervise private attorney work.

The Intake Process

In order to preserve the strengths of the staffed office system, all eligibility determinations and case intake\textsuperscript{140} must be done by the

\textsuperscript{138} Programs that have used private attorneys in some or all of these capacities have been successful. See, e.g., \textit{Private Bar Involvement, Evaluation Report}, LSC Quality Improvement Project (1981) (favorably evaluates two quality improvement demonstration projects that used private attorneys for training, co-counseling with staff, and case review of staff work).

\textsuperscript{139} Retired or semi-retired attorneys may be willing to work with the elderly when they would not otherwise work with legal services programs, although it should be noted that the LSC quality improvement projects that were staffed by retired private attorneys were not considered successful by the LSC. \textit{Id.} Using private attorneys for delivery of services to the elderly may aid a legal services program in getting additional funds through the Older Americans Act, which provides funds for legal services projects that serve the elderly. The Act provides that each area agency should "attempt to involve the private bar in legal services activities authorized . . . including groups within the private bar furnishing services to older individuals on a pro bono and reduced fee basis." Older Americans Act \textsection 307(a)(15)(A)(iii), 42 U.S.C. \textsection 3027(a)(15)(A)(iii) (Supp. V 1981).

\textsuperscript{140} As used herein, the term "eligibility determination" refers to a consideration of financial, residential, and other such criteria which determine an applicant's eligibility for free legal services. The term "case intake" refers to the process of reviewing the eligible
staffed legal services office. There are several reasons for this conclusion.

**Eligibility Determinations**

Wisconsin Judicare uses independent outside agencies for case intake.\(^{141}\) This is not a good idea. Clients with complaints against the agency may be hesitant to apply for legal assistance or may be discouraged by the agency from applying for legal services. Even when the client's problem is unrelated to the agency he or she may be hesitant to go to certain outside agencies seeking legal services or may be discouraged by certain agencies from seeking legal services.\(^{142}\)

If eligibility determinations are done by outside agencies, there is a danger that clients will not be instructed adequately as to the nature of the program and the opportunity to file a grievance. There is also a danger that agency personnel, untrained in the law, will be giving legal advice. Agency personnel may be overworked already and may resent applicant's legal problem(s) to determine if assistance will be provided and the nature of the assistance. The term "intake" refers to both eligibility determinations and case intake.

141. Under the Wisconsin Judicare system, an applicant seeks a certification of eligibility for legal services from any of several independent agencies, such as welfare departments. If the agency staff determines that the applicant is eligible for free legal services, he or she is issued a judicare card which entitles the recipient to the free services of any participating attorney he or she chooses. The chosen attorney will do case intake, as there is no case intake at the time a card is issued. The program only reviews the eligibility determinations after the private attorney completes case intake. G. POTACK, INTAKE AND CASE ASSIGNMENT SYSTEM UTILIZED BY WISCONSIN JUDICARE 2 (Office of Field Services, LSC, Apr. 1981).

A variant of the Wisconsin System is used by Northwest Minnesota Legal Services. A client applies for a card from any of several outside agencies, but the card is issued only by staff, which reviews all applications. Swanson, supra note 134, at 107.

142. While Brakel stated that there was no evidence from his study of Wisconsin Judicare that this was the case, there are disturbing indications in his study that using outside agencies for eligibility determinations may discourage applications for legal services. S. BRAKEL, WISCONSIN JUDICARE, supra note 15, at 42-43. For example, 16 out of 47 Wisconsin Judicare cardholders stated they "did not feel comfortable about going to places like welfare..." Id. at 42. In one county, the poor "expressed many reservations about the local welfare department." Id. at 41. Welfare officials in this county "made it a practice to discourage applicants from going to a lawyer when they knew the problem at hand fell outside the scope of the program." Id. at 44. The head of the welfare department in this county "emphatically" stated, as reported by Brakel, that "awareness [of judicarel was more than sufficient, implying, in fact, that there was too much of it, that it exceeded the ethic of modesty according to which poor people should be decently grateful for the bounties bestowed on them..." Id. at 27. Brakel minimized these problems by saying that if clients felt hesitant about or had problems with one agency, such as this county welfare department, there was generally another agency to which they could go. Id. at 42. This may no longer be the case. Many social agencies are being eliminated or sharply cut back by the Reagan Administration. See generally Dooley & Houseman, supra note 86, at 704.
adding legal services responsibilities to their jobs. This resentment may adversely affect legal services clients. Furthermore, legal services programs may have difficulties controlling and supervising the work of outside agencies, particularly when the agencies may be adversaries in some legal services cases. Finally, if one agency or office determines eligibility while another handles case intake and still another provides the service to the applicant, the poor are forced into a bureaucratic shuffle between agencies.\footnote{143}

Accordingly, eligibility determinations should not be done by outside agencies. They should similarly not be done by the participating private attorneys. First, while this would not be the case for all private attorneys, some private attorneys, having a financial stake in eligibility, may find some ineligible clients to be eligible. Second, it may be unpleasant for private attorneys, particularly those who are sympathetic enough with poor people to work with a legal services private bar component, to have to turn down a client.\footnote{144} Private attorneys should not be made into the "bad guys." Third, relieving participating private attorneys of eligibility determination responsibility serves to reduce the paper work required of them. Finally, it is important that the legal services program's staff attorneys have the initial contact with the

\footnote{143. On the other hand, the director of Wisconsin Judicare, Gene Potack, feels that the use of outside agencies expands knowledge of the program in the client community and is salutary for that reason. G. POTACK, supra note 141, at 7. However, outside agencies could publicize the program without handling eligibility determinations, as is done by many outside agencies. Potack also feels that when outside agencies do eligibility determinations they gain a better understanding of legal services. \textit{Id.} at 6. However, this understanding can be gained in other ways, without the disadvantages of outside agency eligibility determinations. Further, Potack feels that using many local outside agencies increases access to legal services and that the local outside agencies become local resources for the program. \textit{Id.} Finally, Potack feels that using outside agencies saves money because a major administrative task is done for nothing. \textit{Id.}

Another argument in favor of using outside agencies is that judicare programs which use outside agencies may issue eligibility cards good for a certain period of time even when an individual does not have a legal problem (somewhat like a pre-paid insurance system) and that possession of a card is a psychological comfort to the individuals who receive them. S. BRAKEL, JUDICARE, supra note 15, at 32. Of course, knowing one is eligible for free legal services may be just as much comfort as possessing a card.

Finally, it has been suggested that even if using outside agencies discourages some applicants for legal services, those who do not apply for legal services when eligibility determinations are done by outside agencies because they do not like the agencies may also dislike legal services programs and may not apply for services from them. Indeed, they may not like applying for "handouts" of any sort. \textit{Id.} at 42. There are those, however, who would seek legal services from a legal services program but who would not seek them from the outside agencies issuing judicare cards.

\footnote{144. Indeed, Wisconsin Judicare attorneys rarely refused cases. S. BRAKEL, JUDICARE, supra note 15, at 45.}
client to ensure that clients are aware of how the program operates and of how to register complaints. This initial contact by staff attorneys also ensures that clients are aware of the important role of staff.

Case intake

A compelling reason for having staff attorneys do all case intake is the finding of the Delivery Systems Study that poverty law issues are more likely to be addressed when staff attorneys do case intake. If staff attorneys are identifying the issues and shaping the cases, a process that invariably occurs at the time of case intake, poverty law and impact issues should not be ignored. Indeed, program priorities in general are more likely to be addressed.

Even if private attorneys are made aware of clearly established program priorities, with private attorney intake cases more likely would be considered in light of the individual biases of the private attorney doing intake. Institutionalized case intake done by staff attorneys does not ensure the elimination of biases and the pure application of program priorities, but staff attorneys may have personalized program priorities, which they presumably helped develop. At a minimum, they should be more aware of and in agreement with these priorities than private attorneys.

A staff intake system also allows staff attorneys to develop and revise priorities in a manner consistent with changing community needs. Through intake, staff attorneys acquire an up-to-date sense of the legal needs and priority areas in the community. Moreover, staff

145. In addition to issuing the DSS POLICY REPORT, supra note 11, the LSC issued several "research notes" which analyzed the available data from the Delivery Systems Study in greater depth than in the policy report. These research notes, which are available from the LSC, will hereinafter be referred to herein as DSS Research Notes. The finding referred to herein was in such a research note.

146. The Legal Services Corporation Act mandates that legal services programs establish priorities. The LSC is required to "insure that recipients, consistent with goals established by the Corporation, adopt procedures for determining and implementing priorities for the provision of such assistance, taking into account the relative needs of eligible clients for such assistance . . . .." Legal Services Corporation Act of 1974 § 1007(a)(2)(C)(i). 42 U.S.C. § 2996f(a)(2)(C)(i) (1976). See Breger, supra note 58, at 315-17, for a discussion of LSC priority setting. Even if there were no statutory requirement that a legal services program establish priorities, a program with limited resources and many requests for its services would necessarily have to establish some priorities. See generally id. at 294-95.


148. The Private Attorney Involvement Instruction, supra note 23, may be interpreted to mandate staff intake for these reasons. It provides that systems "designed to provide direct services to clients by private attorneys . . . shall include at a minimum . . . : (1) Intake . . . procedures which are consistent with the recipient's established priorities in meeting the legal needs of eligible clients." 46 Fed. Reg. 61,018 (1981).
intake enables staff attorneys to identify the widespread problems requiring broad solutions and to identify and develop the means to deal with repetitive legal problems.

Even those judicare proponents who question the wisdom of law reform and who feel that the clients should set priorities in the traditional attorney-client relationship, still accept the need for equitable distribution of legal resources. Staff intake should lead to this equitable distribution, whereas private attorney intake may foster unequal distribution. As stated by two social scientists who studied a judicare program with private attorney case intake:

"Judicare is essentially an uncontrollable system—or nonsystem. It is uncontrollable because the supply of services is dependent on the separate, autonomous and unpredictable decisions of hundreds of scattered private lawyers as to whether they will handle given numbers and types of clients and cases . . . . Without an enforceable quota system, the potential for unequal distribution of services would persist . . . ."

The Delivery Systems Study also found that staff intake leads to better cost and quality control. Indeed, it may well be that there can be no effective monitoring of legal work and no quality control without staff intake.

With staff intake, staff attorneys can establish and shape, from the outset, the attorney-client relationship between the program and the client. With staff intake, the case acceptance standards can be applied rationally and uniformly. Moreover, staff will have more information at hand when it applies these standards. Without staff intake, little can be known about a case at the time of approval or disapproval; the most complete form or longest memo can only tell so much about a case.

See supra notes 141-44 & accompanying text.

149. Brakel has strongly asserted that legal services programs should not be doing law reform work and rather should be responding to individual requests for legal services. Brakel, supra note 20, at 821. Nevertheless, he has devoted a chapter of his book on judicare to the "serious" problem of unequal distribution of services. S. Brakel, Judicare, supra note 15, ch. 5.


151. DSS Research Notes, supra note 145.

152. See infra notes 183-93 & accompanying text for a discussion of quality control.

153. As discussed, only staff should make the decision to accept or reject a case. See supra notes 141-44 & accompanying text.

154. The problems inherent in approving a case based on a form or memo from a private attorney are amply demonstrated by a West Virginia Legal Services Plan case. In 1977, staff attorneys approved a case which the private attorney described as a landlord-tenant case involving the defense of a habitability claim. However, the client was the landlord and the tenant was represented by another legal services program. Since that case, West Virginia has switched to a staff intake system. Martin, supra note 85, at 501 n.4.
can be made. As noted by two attorneys familiar with combined private and staff attorney programs: "Experience indicates that extensive information intake personnel are able to compile about cases as a result of centralized intake procedures results directly in more effective matches between attorneys and clients."\textsuperscript{155} Such matching is particularly important if a program has an open panel, as has been advocated in this Article.\textsuperscript{156}

Staff intake is also viewed favorably by private attorneys who understand its value. Private attorneys do not want to feel that cases or clients are merely being "dumped" on them without thought; they appreciate receiving cases in which the facts are developed, that are accurately presented, and that are clearly meritorious.\textsuperscript{157} They appreciate pre-screening which permits them to begin legal work on appropriate cases immediately.\textsuperscript{158} Even if some private attorneys do not always like staff intake, they recognize the need for it.\textsuperscript{159} Finally, staff intake permits a program to integrate its staff and private bar components. The advantages of a combined system can easily be lost if a program, in effect, operates two separate delivery systems.\textsuperscript{160}

As has been shown, there are numerous advantages to staff intake.\textsuperscript{161} There are disadvantages, however. In a rural program, staff

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\textsuperscript{155} E. LARDENT & I. COWEN, QUALITY CONTROL IN PRIVATE BAR PROGRAMS FOR THE ELDERLY 4 (Draft II, ABA Comm'n on Legal Problems of the Elderly) (available from the LSC).

\textsuperscript{156} See supra notes 131-39 & accompanying text. Such "matching" may be required by the Private Bar Involvement Instruction, supra note 23, which provides that systems "designed to provide direct services to clients by private attorneys . . . shall include at a minimum . . . case assignment procedures which ensure the referral of cases according to the nature of the legal problem or problems involved and the skills, experience and substantive expertise of the participating attorneys." 46 Fed. Reg. 61,018 (1981).


\textsuperscript{158} Martin, supra note 80, at 261.

\textsuperscript{159} Comments of David Brink, then President of the American Bar Association, at the 59th Annual National Legal Aid and Defenders Association Conference, San Francisco, Cal., Dec. 16-19, 1981, reproduced in NLADA 1982, supra note 157.

\textsuperscript{160} Martin, supra note 80, at 261.

\textsuperscript{161} In addition, when staff attorneys do the intake, many clients' problems can be resolved through referrals to social agencies or through simple advice. A referral to a private attorney becomes unnecessary, creating a substantial savings even if private attorneys are only allowed to bill a small amount for "brief service" or "advice only" cases. Moreover, private attorneys may not be familiar with the various social agencies to which legal services clients may be referred and may not wish to refer a client to these agencies, either because they wish to pursue the client's case or because they do not approve of certain agencies or of certain types of "charity." Similarly, they may not be equipped to give the simple advice
intake may require substantial telephone intake or costly and time consuming “circuit riding.” Rural staff may not be equipped to respond to an emergency occurring at a distant location. Staff of rural and urban programs alike will probably spend more time on intake and less on handling cases if a private bar component with staff intake is established. This increased burden may seriously affect staff attorney morale. Staff attorney morale may similarly be affected by the burden of increased paper work. All program clients will be treated differently than the paying clients of private attorneys, who are not subjected to institutionalized intake procedures.

These disadvantages, however, cannot outweigh the advantages of staff intake. Staff intake is a crucial part of any combined private and staff attorney legal services delivery system. Only with staff intake can the potential of such a delivery system be maximized.\(^\text{162}\)

The Case Approval Process

It is also essential to the functioning of a combined staff and private attorney delivery system that only staff attorneys have case approval powers, \(i.e.,\) that private attorneys do not proceed with any case unless their representation is authorized by staff attorneys. Even traditional judicare programs with private attorney intake (\(e.g.,\) Wisconsin Judicare) agree on this point.\(^\text{163}\) Controlling costs and developing an effective system to encumber, reserve, or set aside funds necessary to pay private attorneys on referred cases (an “encumbrance system”) has been difficult for many programs using compensated private attor-

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\(^\text{162}\) A staff intake system cannot succeed without thoroughness in the actual intake process. Information obtained from intake is all a program has to decide whether to accept a case, whether a staff or a private attorney should handle a case, and which private attorney should handle it if it is decided to refer it out. Information obtained from intake may be all a program has to assess a private attorney’s performance. Complete intake memos, hereinafter referred to as “opening memos,” should thus be prepared in all cases. Such memos not only aid in making uniform and reasonable case approval and case referral decisions, but also serve as a record of the nature of the case, the legal issues, and the objectives (as perceived by staff) for quality control and quality assessment purposes. Moreover, where cases are referred to private attorneys, giving them opening memos can save private attorneys’ time and can make them aware of poverty law issues which might otherwise be ignored. Such memos will give them useful guidance, particularly in cases involving poverty law and general law with poverty law aspects.

\(^\text{163}\) G. POTACK, supra note 141, at 10.
Without central case approval, it may be impossible. Applying uniform case acceptance standards and implementing program goals and priorities have similarly been difficult. Without central case approval, they may also be impossible.

Cases may be approved for representation before or after they are first referred to a private attorney. That is, a program can approve a case unconditionally after intake and then refer it to a private attorney or a program can withhold approval of a case that is going to be referred to a private attorney until the attorney has seen the client, reviewed the case, and made an assessment of the case. Private attorneys may be obligated to accept or, conversely, free to refuse any referred case. Final case approval may depend on reaching a fee agreement with a referred private attorney. Whatever the resolution of these case approval issues, however, there can be no doubt about the disposition of final case acceptance authority. Only staff attorneys may approve cases for program representation.

The Case Referral Process

After a case has been approved for program representation, it must be decided who will handle the case: a staff or a private attorney. If handled by a private attorney, a decision must be made as to which private attorney will handle it. The first decision must primarily be made based on the factors discussed previously. However, the decision may also be based on the complexities of an individual case, the time the case will consume, and the relative economies of staff or pri-

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165. Martin, supra note 85, at 502.
166. See supra notes 146-48 & accompanying text.
167. The case approval system developed by Legal Services of Arkansas (a combined private and staff attorney program), as described in L. Powers, Intake and Case Assignment Systems Used by Legal Services of Arkansas (Office of Field Services, LSC, 1981), may be the best system. Each case is “approved” for representation by the program (the “program” encompasses both staff and participating private attorneys) before any assignment is made to staff or a private attorney. If a case is referred to a private attorney, the private attorney must submit a fee estimate immediately after the initial client interview. This estimate must be approved by the program before the attorney’s representation is authorized.

Winona Read, an attorney familiar with staff and private bar programs, recommends that private attorneys submit written fee estimates in all cases. Presumably a case would not be approved until the estimate was approved. Read, Private Bar Contracts for Civil Legal Services—The Advantages & Pitfalls, 38 N.L.A.D.A. Briefcase 93, 97 (1981).

168. “Advice only” or “brief service” cases are not considered herein to be approved for program representation even if some of these cases are referred to private attorneys.
169. See supra notes 125-50 & accompanying text.
vate attorney representation on the particular case. Client choice should also play a large part in making this decision. The freedom of choice aspects of judicare will be lost if the staff attorneys alone make this decision.

The client should also have a role in the second decision. If it has been decided that a private attorney should handle the case, in an effort to preserve the freedom of choice aspect of judicare, the client should be offered the opportunity to select his or her own attorney from the list of suitable private attorneys. If the client expresses no preference, staff attorneys should select a private attorney for the client by applying rational criteria. That is, staff should match attorneys and cases and should not select attorneys by rotation except when there are several equally acceptable attorneys. There are several reasons for this recommendation.

First, with an open panel it is difficult to ensure quality unless case referrals are carefully controlled. Second, a rational case referral system ensures that each private attorney's caseload is maintained at an appropriate level. Third, private attorneys with demonstrated expertise or expressed interest in certain areas of the law can be referred cases in these areas, and, conversely, private attorneys with no ability or interest in certain areas or who are likely to have conflicts of interest in certain areas will not be burdened with referrals of cases in those areas.

With a rational case referral system, private attorneys may fear bias or favoritism in referrals, but a legal services program should be able to demonstrate to the participating private attorneys that a rational case referral system, with opportunity for client choice and with some rotation, is in their best interest. Under such a system, they can have control over the size of their legal services caseload without having to solicit or turn down clients. The distribution of work may ultimately be more fair with a rational referral system than with a pure

170. West Virginia Legal Services Plan also makes this decision based on whether a staff or a private attorney is more readily available and on the number of referrals in each geographical area served by the program. In other words, it has a yearly quota of referrals for each area, based on the size of the area's poor population. Martin, supra note 85, at 501.

171. Clients may very well prefer staff representation. In an experiment in Connecticut where clients were given a choice of using a staff attorney office or a judicare system, 72% chose to go to the staffed office. For landlord/tenant or welfare cases they chose the staffed office in 89% and in 91% of the cases, respectively. See generally Cole & Greenberger, supra note 15, at 707.

172. The client should also be given the opportunity to reject any of the participating attorneys. If an attorney is rejected by a client, the program should determine why and retain this information for use in making subsequent referrals.

173. As mentioned, such matching may be required by the LSC. See supra note 156.
choice or rotation system in which, for example, one attorney could end up with several time-consuming cases while another attorney ended up with no meritorious cases. Furthermore, private attorneys are far more likely to get cases in which they have an interest or expertise when there is a rational case referral system.

Payment of Private Attorneys

Most of the compensated private bar delivery systems that are mentioned in this Article or that were part of the Delivery Systems Study pay or paid participating private attorneys less than the customary rate for their services, generally one-third to one-half the private attorneys' usual rate. As noted in the DSS Policy Report, private attorneys participated in legal services programs, despite the low payments to them, because: 1) they felt assured of payment without collection difficulties; 2) even a low payment generally covered overhead; and 3) they could represent the poor without monetary loss.

Whatever fees are set for private attorney representation of legal services clients, it is recommended that these fees be paid on an hourly basis with limits on payments set according to the type of case involved. A program also must have a clear and simple method for waiving whatever fee limits it has established in order to minimize the possibility that the fee limits discourage quality or impact work.

One design question of great importance to a combined program is what should be done with court-awarded attorneys' fees when such fees are awarded in cases handled by private attorneys. These fees may be quite substantial, particularly in major civil rights cases.

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174. DSS Policy Report, supra note 11, at 90; Read, supra note 106, at 231.
176. This recommendation is made based on the DSS Research Note which concluded that such a fee schedule leads to the best cost control. The Delivery Systems Study found that when only a maximum is set and/or there is no requirement that attorneys itemize their bills, attorneys tended to charge the maximum. DSS Research Notes, supra note 145. And, when only hourly rates with no maxima were used, costs tended to be higher. Id.
177. Impact work may be encouraged by paying a premium rate for such work. Paying such premium rates may make impact assignments far more attractive and acceptable. The premium need not be large; five or ten dollars per hour would do, but even such a small premium would have a psychological impact on private attorneys. Similarly, a premium rate may be paid for appeals.
178. While LSC funded programs may not accept fee-generating cases, Legal Services Corporation Act of 1974 § 1007(b)(1), 42 U.S.C. § 2996f(b)(1) (1976), they may represent clients who seek statutory benefits in fee-generating cases where "appropriate private representation is not available," Id. Further, many cases in which attorneys' fees may be awarded (e.g., divorces) are not considered fee-generating.
are several ways to deal with such court-awarded fees. Some programs require the private attorneys to turn over all of those fees to the program, but this serves as a disincentive to collect such fees. Private attorneys could be given a choice of opting for possible court-awarded fees or for legal services payments initially. Alternatively, in certain kinds of cases where attorney's fees may be awarded, such as Social Security cases, a program may act as a guarantor. Prairie State Legal Services paid attorneys for their work as agreed but asked the attorneys to assign their rights to court-awarded attorney's fees to the program. While this eliminates the disincentive problem, it may force the program to engage in burdensome, and sometimes costly, collection efforts. As a compromise, private attorneys could be paid for their work on referred cases and allowed to collect court-awarded fees, but required to give one-third to one-half of the awarded fees back to the program, perhaps for a special fund. This appears to be the best arrangement since it gives attorneys an incentive to seek fees, but neither deprives the program of fees nor places a burden on staff to collect them.

Ensuring Quality of Service

It is important that the legal work of any legal services delivery system be of the highest possible quality. All quality control efforts are directed to this end. While many proponents of a staffed office system would argue that one can only have effective quality control with a staffed system, this is not the case. Quality control is often more difficult with private attorneys than with staff, but this does not mean that no quality control efforts over private attorneys should be attempted. It simply means that quality control efforts for the private bar component may be different than those for the staff component and

(a legal services program and a private public interest law firm were awarded $800,000 in attorneys fees).

180. Under Wisconsin Judicare's guarantor system, if an attorney is awarded fees, he or she accepts the fees and receives no payment from Judicare. If he or she is not awarded fees, he or she will receive a payment from Judicare. Minneapolis Meeting Materials, supra note 93.

181. Id.

182. Several programs have adopted this approach. Id.

183. See Legal Services Corporation Act of 1974 § 1007(a)(1), 42 U.S.C. § 2996f(a)(1) (1976) (requires that the LSC shall "insure the maintenance of the highest quality of service").

184. See, e.g., W. Read & L. Vogt, Quality Control in Pro Bono and Judicare Programs 6 (LSC 1981) [hereinafter cited as DSS Project Directors' Report]; Martin, supra note 85, at 502; Swanson, Director Sees It, supra note 42, at 103.
that existing staff programs cannot merely utilize their present quality control methods with their new private bar components.

Quality Assurance Techniques

If a legal services program adopts the case intake, case approval, case referral, and payment systems suggested in this Article,\(^\text{185}\) it will be taking important steps in assuring quality of private attorney work.

If staff does intake and if an opening memo which includes suggestions on how to proceed with the case and possible deadlines is prepared on every case and given to the private attorney assigned the case, a program will have taken the first step in assuring the quality of work. The program will be ensuring that issues are addressed and that deadlines are met—or at least that neither is missed because of lack of information.\(^\text{186}\)

Requiring staff attorneys to approve the program’s representation of any client is a second step. Such staff approval ensures uniform and thoughtful decisionmaking.

The suggested rational case referral system is a third step in assuring quality. Cases can be referred to attorneys known for their reliability or for their expertise in a relevant area of the law. Moreover, a case may be referred to a private attorney with a staff attorney co-counsel or a known experienced private attorney co-counsel.

The payment system can be used as a further step towards effective quality control. The Delivery Systems Study concluded that there was better quality control in demonstration projects that required attorneys

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185. See supra notes 145-77 & accompanying text.
186. Staff intake may also contribute to the quality assurance system in other ways. First, sample pleadings and checklists for each case may be sent to the attorney along with the opening memo. Second, if the program is aware that a case requires research or investigation, offers of paralegal or law student assistance may be made. Also, “significant cases” may be tagged at intake and extensive review of these cases planned. This system is used by Legal Aid of Southwest Missouri. Minneapolis Meeting Materials, supra note 93. A “ticker” or “tracking” system may be designed which is geared to target individual or specific types of cases. Staff can “ticker” cases for known deadlines or for dates when a reasonable attorney working a reasonable amount on a particular case would have completed the work. The tracking system may be elaborate for certain types of cases where it is felt more supervision is required and simple for types of cases where it is felt little supervision is required. Indeed, staff may decide not to track certain types of cases at all. Finally, at the time of staff intake, staff may make it clear to the client that he or she should come to staff with problems and questions. Thus, the client can help the program ensure quality on each case. Moreover, if a program believes it is necessary to obtain a release or retainer agreement from the client to permit it to review the private attorney’s work on the client’s case and to obtain confidential information from the attorney, such a release or retainer may be signed at intake.
to bill on a per-hour basis. With such billing, attorneys must account for their time and provide detailed information to staff. Such billing, however, will only serve as a quality assurance device if billing is done before the conclusion of a case. Programs should establish a monthly billing system as well. The monthly bill provides a monthly case activity report to staff.

There are other ways to use the payment system as a quality assurance device. For example, a program may closely review all cases in which a fee estimate or approved fee is being approached or in which requests to waive fee maxima have been made. Also, the final bill can serve as a "closing memo," detailing case results and activities and enclosing final judgments and decisions. Closing approval may be withheld until receipt of this bill.

There should be case review and reporting requirements apart from those incorporated into the payment and other systems. Private attorneys' files on individual cases may be regularly reviewed; regular strategy sessions may be held on all or only on "significant" cases; pleadings and significant documents in all or only in "significant" cases may be reviewed before they can be filed; a report other than a final bill may be required before closing is authorized.

187. DSS Research Notes, supra note 145.
188. Private attorneys should not consider the submission of such an activity report overly onerous since it is connected to their billing. After all, monthly billing means monthly payment and a better cash flow for the attorney. Wisconsin Judicare, on the other hand, believes that monthly billing not only is onerous but also is costly for programs since they lose out on the interest which would be earned on encumbered funds. See G. Potack, supra note 141, at 10. And, Legal Services of Northeastern Wisconsin, which gives attorneys the option of submitting monthly or final bills, has found that few attorneys submit monthly bills. Statement of John Cashman, Design for the 80's Conference, supra note 107.
189. These review and reporting requirements may seem onerous, but each contributes to quality and can have other positive effects. The Delivery Systems Study demonstration project directors concluded that such reviews and reporting requirements had a negative effect on staff morale because of the paper work involved, but that such reviews also improved staff work, built up better relationships with the private bar, and encouraged staff to go to private attorneys for help when staff had cases within a private attorney's expertise. DSS Project Directors' Report, supra note 184, at 5. Regular contact with staff on individual cases, moreover, impresses private attorneys with staff's concern for the client and for the quality of the work and may increase their concern for both. E. Lardent & I. Cowen, supra note 155, at 4. In addition, staff review efforts may actually improve staff morale, according to Esther Lardent, head of the Boston Volunteer Lawyer's Project. Referring out cases without having any role in them and without finding out what happens to them can be deadly to morale. Having a continuing role in the cases can aid morale. Comments of Esther Lardent at the 59th Annual National Legal Aid and Defenders Association Conference, San Francisco, Cal., Dec, 16-19, 1981, reproduced in NLADA 1982, supra note 157.

While it has been suggested that private attorneys, particularly those who feel they are
Two quality control devices do not involve formal or informal reviews or reports. The first involves providing a private attorney with technical assistance or support on a given case. Private attorneys should feel free, and indeed should be encouraged, to seek such assistance and support. Quality assurance efforts should not be resented if they are seen as an integral part of requested assistance or support efforts.190

The second device involves the use of informal client complaints, or even a formal client grievance procedure. While a grievance procedure generally only reveals problems after they occur, it may also identify them before they occur. Clients should be encouraged to come to staff as soon as and whenever they have a problem.

The quality control mechanisms suggested herein can be effective and accepted by private attorneys as long as: 1) they are implemented initially and not imposed after the system is operational; 2) participating attorneys understand, when they agree to participate in the private

only doing legal services work with its low pay because of their ethical responsibility to serve the poor, will not tolerate such reviews, Swanson, Director Sees It, supra note 42, at 103. Others have stated that the private bar will accept such reviews as long as they do not feel as if they are being singled out and as long as the reviews are conducted as part of a serious commitment to quality rather than as mere rote behavior. Comments of David Brink, Sara Ann Determan, and Esther Lardent at the 59th Annual National Legal Aid and Defenders Conference, San Francisco, Cal., Dec. 16-19, 1981, reproduced in NLADA 1982, supra note 157. Such case reviews should not cause ethical problems. While it is generally considered unethical for a third party to intervene between an attorney and his or her client and to interfere with case handling, Model Code of Professional Responsibility DR 5-107, EC 2-33 (1979), it is not unethical for one attorney in a “firm” to review another’s work. ABA Comm. on Professional Ethics and Grievances, Formal Op. 334 (1974). Indeed, such reviews, rather than being considered impermissible interference, are considered to be “not only permissible but salutory.” Id. With the suggested design (including staff intake, staff case approval, and staff case referral), participating private attorneys should be considered members of the same “firm” as staff attorney reviewers for case monitoring purposes.

Similarly, while it would generally be considered unethical for an attorney to reveal confidential communications from his or her client to another, Model Code of Professional Responsibility DR 4-101(B) (1979), it would not be considered unethical for an attorney to reveal confidential information to a supervising attorney or another member of his or her “firm,” particularly where, as under the suggested intake system, the supervising attorney or other firm members were themselves in receipt of confidential information from the client.

190. If technical assistance is provided by paralegals or law students, it not only may be effective quality assurance but also may be economical. Law students’ and paralegals’ services may be obtained at far less cost than attorneys, even with the low legal services compensation rate. Accordingly, Northern Minnesota Legal Services, a judicare program, has developed a system whereby selected law students at the University of North Dakota do research at the request of private attorneys (transmitted through the staff) for a small hourly rate. Every research memo is provided to the requesting attorney and made available to staff attorneys for the program’s central research file. See Swanson, supra note 134, at 109.
bar component, that they will be utilized; and 3) the staff appears helpful and anxious to be of assistance instead of displaying an attitude of mistrust towards private attorneys.

**Quality Development Techniques**

The most common and effective quality development technique is training. Training events are particularly vital with regard to a private bar component because private attorneys who otherwise might not meet each other can have an opportunity to meet at training events. They can exchange ideas and resolve mutual problems. Moreover, offers of training are an effective recruitment device. Training can be conducted informally through regional meetings or through development of task forces. Training can also occur through co-counseling or through quality control activities.

Another common and effective quality development technique is the provision of resource materials. Private attorneys may be given or lent books or periodicals for their libraries. They may be given access to research files, pleading banks, and specially prepared materials, such as desk manuals, checklists, and form pleadings. Also, they may receive newsletters that report on significant cases and how they were handled or on common problems and how they were solved.191

Client follow-up systems can also be made part of a quality development system.192 The DSS demonstration project directors stressed the importance of client feedback to quality control. While they believed that clients could not judge the quality of legal work in all circumstances, clients could provide information on 1) case outcome, 2) the way they were treated, 3) whether objectives or expectations were fulfilled, 4) fee irregularities, and 5) unnecessary delays.193

**Conclusion**

Since the federal government began funding civil legal services for

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191. Such newsletters can also give recognition to participating private attorneys. Such recognition is important to the retention of attorneys.

192. While Legal Aid of Manitoba stopped asking clients for feedback after getting a three percent return rate on the forms given to clients, Comments of Alan Finebilt, Deputy Director of Legal Aid of Manitoba, Design for the 80's Conference, supra note 107, and while the Delivery Systems Study had difficulty getting client response on quality of service, DSS POLICY REPORT, supra note 11, at 105, other programs have had return rates on client satisfaction forms or surveys that may not be large enough to permit valid statistical analysis but are certainly large enough to aid in quality development, Martin, supra note 85, at 502 n.6 (West Virginia Legal Services Plan, Inc. had a 40% return rate on a random survey).

193. DSS PROJECT DIRECTORS' REPORT, supra note 184, at 6.
the poor, advocates of a staffed office delivery system and advocates of a private bar delivery system have been locked in a debate over which is the best approach to providing those services. Now, when the entire concept of federally funded legal services is being questioned, is no time to continue such a divisive debate. The time has come for a compromise.

A well designed and carefully implemented legal services delivery system using both staff attorneys and the private bar can meet the objectives sought by proponents of both delivery systems. Such a system would have an open panel of participating private attorneys; would have these participating private attorneys serving the program's entire geographic area, handling all types of cases, and providing all kinds of services; and would have staff attorneys also serving the program's entire geographic area, handling all types of cases, and providing all kinds of services for all kinds of clients. Of vital importance, such a system would have staff attorneys doing all case intake, making all case acceptance decisions, and referring all cases to a particular staff or private attorney on the basis of rational criteria and not on a rotational or random basis. Such a system would also include methods to assure and to develop the quality of both staff and private attorney work, using its case intake, case approval, case referral, and payment systems to this end.

With such a system, the strengths of the staff attorney and the private attorney models can be preserved and maximized. Most important, with such a system, quality civil legal assistance to the poor can be provided effectively and efficiently.

If the advocates of private bar and staffed office delivery systems end their debate and, instead, join forces to make such a combined delivery system a reality in this country, they may achieve a delivery system that serves their ends and they may preserve the means to fund it.