

INTERNATIONAL ASSOCIATION OF JUDGES

UNITED STATES RESPONSE TO THE 2007

1ST STUDY COMMISSION QUESTIONNAIRE

ACCESS TO JUSTICE

I.) The costs of bringing or defending a civil claim or defending a criminal charge:

- Question 1:** (a) Is there legal aid in your country?
(b) Is this available for individuals in all courts, both civil and criminal?

In all criminal cases prosecuted in the United States in which the accused may receive a sentence of imprisonment, the defendant is entitled to court-appointed counsel if that defendant is financially unable to pay for an attorney of his or her own choosing. The provision for court-appointed counsel generally is handled in federal and state courts through the various public “defenders” or “legal defender” systems which exist in most communities. In smaller communities where no public defender’s office is established, the court is empowered to appoint local attorneys who are paid by the court for their legal services at a substantially reduced fee. In some cases, counsel accept the defense of cases on a pro bono basis. The right to court-appointed counsel in criminal cases extends through trial and appeal.

In civil cases in the federal and state courts of the United States, there is no right to the appointment of counsel. Of course, those litigants who can afford to retain counsel may do so, and other litigants choose to represent themselves. Additionally, the attorney bar associations in most communities work to provide counsel in civil cases on a pro bono basis when possible. Most communities of any significant size also have some form of “legal aid society.” Such legal aid programs may receive a combination of federal, state or local funds, financial grants, and the support of various bar associations and law schools all designed to provide legal

assistance to litigants in civil cases who cannot afford to retain private counsel. Often such clinical legal programs are established to address specific kinds of cases such as domestic relations, employment discrimination and bankruptcy cases.

Question 2: Which costs are covered by legal aid?

- (a) The costs of using the court?
- (b) The costs of the lawyer?
- (c) The costs of experts (either appointed by the court or engaged by the parties directly)?

As all courts in the United States are public, there is no cost for using the court system beyond the payment of a filing fee. Where an individual in a civil case cannot afford to pay the filing fee to initiate a civil action, they may seek leave of the court to proceed *in forma pauperis*, and upon finding of the court that the litigant does not have funds sufficient to pay the filing fee, the case may proceed without payment. There are no analogous filing fees in connection with criminal cases in federal or state courts in the United States. Otherwise, where either a public defender, legal aid attorney, or pro bono lawyer is handling a criminal or civil case, there are no cost for the lawyer charged to the litigant/defendant nor are there cost assessed for experts.

Question 3: What are the limitations of legal aid:

- (a) Are there financial limits to legal aid in (i) civil; and (ii) criminal cases?
- (b) Are there limits on (i) the type or (ii) choice of lawyers or experts that can be used if legal aid is claimed by an individual?

The only financial limits to legal assistance in criminal cases are that the court must determine the hours expended on behalf of the defense are reasonable and thus qualify for payment. In criminal cases the defendant does not have choice of a particular lawyer, but must accept the lawyer appointed by the court.

In civil cases, the financial limits to legal aid come more in the form of the limited ability of any legal aid organization to accept every case which is presented to them. As with litigants seeking private counsel, assessments must be made of the merits of the case and the expertise of available counsel to represent the client in that particular case. Once again, the litigant in a civil case seeking assistance from

a legal aid program rarely would have the opportunity to choose the lawyer that would represent them.

Question 4: Who grants legal aid for civil and/or criminal cases? Is it granted by a body which is under the control of the judiciary or by an extra judicial organ? If the latter, describe this organ.

In civil cases there is generally no judicial entity that grants legal aid assistance. Approval for representation would come from the particular legal aid program from which assistance is sought.

In criminal cases, the appointment of counsel generally is supervised by the court. In some jurisdictions, the appointment authority may be assigned to a public defender organization which itself is under the supervision of the court.

II.) Information about the judicial system:

Only those who know about the possibility of using the courts to make or defend a claim, and the possible procedures that they are going to face there, will be able or willing to go to court. Therefore information and knowledge about how the courts and the judiciary function are essential:

Question 5: Are students in

- (a) Schools and
- (b) Universities and colleges, taught about the court-system, the jurisdictions of the various courts, the judiciary, the rights of citizens to use the court systems and how the system functions?

Throughout the United States, civic education is included in the public and private education systems. For the past half century the typical approach has been to include curriculum relating to United States Government in the sixth grade at primary school, the 9th grade of middle school, and the 12th grade of high school. Additionally, there are an innumerable number of civic education programs in most communities of the United States. The most prominent is probably that sponsored by the Center for Civic Education which operates not only in the United States but in many countries of the world through its “Project Citizen,” “Civitas” and “We the People” programs. Nonetheless, if voter turnout or participation in civic life is any

indication, the matter of civic education is something which bears continued emphasis throughout the United States. On a positive note, a recent study by the Center for State Courts in Williamsburg, Virginia has indicated that approximately one third of American citizens will serve on a jury in a civil or criminal case at some point in their lives.

Education regarding the court system is not mandated at most universities and colleges, but is available in a variety of major courses of study or electives in the areas of political science, economics, history, business, etcetera. Of course, though not specifically called for in question 5, individuals must complete a three year post graduate course of study at an accredited law school to qualify to sit for a bar examination and become a lawyer. Naturally the law school curriculum includes a heavy emphasis on the court system and jurisdiction of the various courts in the United States.

Question 6: What means are there for informing potential litigants or other users of the court system about?

- (a) The court system and how it is organized;
- (b) The judiciary;
- (c) The procedure in courts (civil and criminal);
- (d) How to get assistance to make or defend a case in court;
- (e) How much court procedures may cost? (Examples of means to disseminate this information may be; internet; advice bureau; books/pamphlets published by the court service/government)

This is an interesting question which calls for a somewhat fluid answer as circumstances are changing continually in this area. The advent of the internet has made information regarding court systems in the United States more readily available than ever before, and it grows daily. Virtually all federal and state courts now maintain internet web sites which allow anyone with access to a computer to obtain all the information relating to question 6 and much more. Indeed, through the various computer systems, it is now possible to track the actual progress of most civil and criminal cases throughout the United States, including motions filed by counsel and the orders and opinions entered by the court. Prior to the proliferation of the electronic media, it was common for the various courts to publish books or pamphlets providing much the same information. Additionally, a potential litigant can gain information about access to the various courts' "Help Desk" which most

courts maintain, or from state or local bar association offices. Frankly, in the United States the question is no longer so much whether a person seeking access to the courts can obtain information, but how to protect them from an overload of information.

III.) Access for minority groups (e.g. Ethnic or language groups):

Throughout the United States, minorities have the same rights of access to justice as do the majority group. There is a substantial population in the United States of individuals for whom English is either a second language, or individuals who do not speak English at all. The most common minority language in the United States is Spanish. Virtually every court has staff, publications, and/or internet information which is bi-lingual in English and Spanish.

Special efforts may be necessary to ensure that members of minorities have the same rights of access to justice as do the majority group in a country.

- Question 7:** (a) Are there special arrangements to ensure that ethnic/language minorities are aware of their rights of access to justice?
- (b) What special arrangements (if any) are made to ensure that those minorities are able to obtain equal access to justice?
- (c) Are there facilities to enable ethnic/language minorities to have cases conducted in their language/the proceedings translated for them to follow?

In all court proceedings, civil or criminal, interpreters are available either through the court or private organizations to ensure that those speaking languages other than English are able to understand all court proceedings and orders. In criminal cases, interpretation and translation is provided without cost to the defendant. In civil cases, the cost for translations may be borne by the litigants if they are able to pay for it.

IV.) Delays in the justice system:

“Justice delayed is justice denied.” The problem of delays in dealing with both civil and criminal cases is encountered in many countries. Delays in cases can

amount to a serious denial of the right to access to justice for individuals.

- Question 8:** (a) In your country are there serious delays in dealing with civil or criminal cases because of “structural” reasons - e.g., a lack of judges/courts/experts/lawyers who are prepared to deal with legal aid cases?
- (b) If there are please explain what they are.
- (c) Are there plans to deal with these problems?

The treatment of criminal and civil cases is somewhat different with respect to delay.

In virtually all criminal cases, the defendant has the right to a “Speedy Trial.” In the federal courts this means that a defendant is entitled to proceed to trial within 70 days of arraignment, and in most state courts the time frame is similar. The reality, however, is that with the filing of pre-trial motions and other court proceedings, trials generally do not proceed within the allotted time frame. Nonetheless, the vast majority of criminal cases in the United States do proceed to trial without unreasonable delay. Where extensive delay occurs, a defendant may seek relief in the form of dismissal of charges on the grounds his right to due process has been violated. Such relief is rarely sought and even more rarely granted. Of course there are various statutes of limitations which set deadlines on the prosecution regarding the time limit for bringing criminal charges in most cases (the exception typically being murder).

With respect to civil cases, the question of delay is mixed and in most cases undoubtedly a matter of perspective. There are, of course, statute of limitations which set deadlines by which civil actions of a particular kind must be commenced. Once filed, however, there is no established deadline for the resolution of a civil case. How quickly a civil case will progress through the federal or state court systems in the United States will depend in part upon the nature of the litigation, the workload of the particular court involved, the inclination and ability of counsel to move the case along expeditiously, and the speed with which the individual judge assigned discharges his or her judicial decision making responsibilities. At bottom, the responsibility lies with the individual judge to ensure that civil cases progress expeditiously before the court. Where a judge appears unable to do so there are a variety of avenues available, none of which are fool proof.

In the federal courts, for example, the civil justice reform act, “CJRA,” requires the public reporting of all cases pending before a judge for more than three years, and all motions which have been pending before a judge for more than six months. Understandably, judges would rather not see their names on such a list with a large number of cases and motions pending and sensibly endeavor to resolve cases in a timely manner. In some state courts, there exist provisions for withholding the pay of a judge where that judge has not resolved motions pending before them within an established time frame. This is rare, but probably effective. In most state courts in the United States a judge who has chronically demonstrated an inability to handle their case load may face intervention from the chief judge of their court to provide assistance where needed. State court judges may also ultimately face removal from office when their judicial seat comes up for reelection. As federal judges are appointed rather than elected, they would encounter an intervention from the chief judge and/or colleagues to provide assistance when they fall behind in their caseload and could potentially be released of their caseloads if they are found to suffer from a mental or physical disability which has made it impossible for them to perform.

V.) Procedure in courts:

Formality in procedures may prevent individuals having access to justice.

Question 9: (a) Are there any examples in your country. Please describe the problems (e.g. mandatory representation by a lawyer, but heavy cost/few lawyers available; necessity to appear at court but excessive distances to court buildings etc.)

There are no formalities and procedures which prevent individuals from having access to justice in the United States beyond the fact that litigation can be costly and time consuming. These facts have resulted from significant growth throughout the United States of various forms of private alternative dispute resolution including arbitration, mediation, and early neutral evaluation.

VI.) Enforcement:

Effective access to justice also includes the need to ensure that judgments are enforced effectively.

- Question 10:** (a) Who ensure that a judgment is properly registered and enforced against a party?
(b) Do problems with effective enforcement exist?
(c) If so, please describe them. What might help to improve the situation?

Once again, enforcement issues are different in criminal and civil cases.

In a criminal case, the court enforces its judgments/sentence through the United States marshal, local sheriff, and either a federal or state prison system or office of probation.

In civil cases, once a judgment has been entered, the parties are bound to comply with the judgment on pain of contempt if the relief granted by the court is injunctive (provisional). In the case of monetary judgments, the prevailing party pursues the monetary relief granted from the losing party. This may include proceedings to attach bank accounts or other assets of the losing party. Enforcement of a monetary judgment is generally not a difficult issue in the case of institutional litigants or insurance companies that have funds available. Pursing a monetary judgment against an individual, however, can be more difficult. As one might say “you cannot get blood out of a stone.”

VII.) Other Obstacles:

- Question 11:** (a) Are there other obstacles to access to justice? If so, please, describe them.

The first ten questions above have addressed most issues relating to obstacles to access to justice. Fundamentally, the justice system in the United States depends upon its transparency and education to promote public understanding and confidence in the criminal and civil court systems. The jury system in the United States plays a significant role in this regard because the nearly one third of American citizens who participate in jury trials at some point in their lives receive an important civics lesson. They also add in most cases some credibility on the part of the public to the decisions made as the decisions are made by members of the community who comprise the jury.

VIII.) Recommendations:

Question 12: (a) In your country are there any existing practices or reports/proposals for the future on the subject of improving access to justice that you would recommend to the judiciaries of other countries?

In the United States there are countless reports and proposals relating to the subject of improving access to justice. The subject attracts the attention of many scholarly works by law professors and members of academia and other disciplines and is a frequent topic of discussion in local and national political affairs.