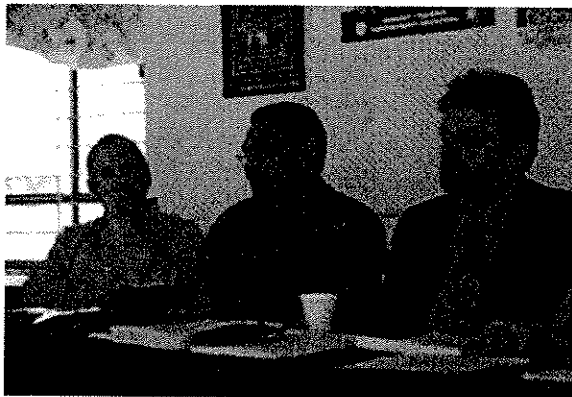




WHY SHOULD LEGAL SERVICES LAWYERS ACCEPT EMPLOYMENT CASES?

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Dale, at right, at press conference in Mexico City announcing the filing of a complaint under the North American Agreement on Labor Cooperation.

From its inception, the legal services program has been far more active in the areas of family law, housing, public benefits and sometimes consumer law, while employment law has been the nearly exclusive domain of a few migrant projects. The reasons for this are largely historical. Twenty-five or thirty years ago, when legal services was finding its identity, the typical legal services client was a single head of household welfare mom or senior citizen, who did not work. A household with a full time worker, even at minimum wage, was above the poverty level unless it was very large and had no other sources of income. Public benefit levels were so low, and wages relatively higher, so that working people, even if poor, were seen to be a little better off. Since most employment statutes contain fee-shifting provisions, there was also a sense that the private bar was available to assist in employment cases. So in the early days, there was not much perceived need for employment law expertise in legal services.

In the intervening years, circumstances have changed tremendously. Immigration has fundamentally changed the nature of poverty in the United States. The influx of new, easily exploitable workers has caused

relative wages and working conditions to fall. The Urban Institute, a non-partisan economic and social policy research organization, recently reported that, during the 1990s, one out of every two new workers was an immigrant.² Oregon's foreign-born population grew by 108 percent during the 1990s, making it the sixteenth fastest growing immigrant rate in the country.³ In 2001, while immigrants represented roughly 11 percent of the total United States population, they made up 20 percent of the low-wage labor force.⁴ Further, two million immigrant workers reportedly earned less than the minimum wage.⁵

International trade and globalization has caused the loss of hundreds of thousands of middle-class manufacturing jobs, and the new jobs being created tend to be less secure, lower wage service jobs. To save labor costs, large US employers have moved away from full-time career jobs to part time, contracted and temporary workers. Legal representation for employment matters is especially important for these workers given the General Accounting Office's recent findings both that portions of the contingent workforce are particularly vulnerable to workplace abuses and that the Department of Labor has difficulty enforcing protections afforded to these workers under the Fair Labor Standards Act and the Occupational Safety and Health Act of 1970.⁶ The percentage of workers in union jobs has fallen steadily. Welfare reform has pushed single moms off of assistance and into low-wage, dead-end work. In a real sense, employment law has become the key to "income maintenance" in the new American economy.

These combined forces have led to a very high, unmet need among low-wage workers for legal help with employment problems. In a recent statewide legal needs survey sponsored by the Oregon State Bar, the Governor and the Oregon Judicial department, one of the highest areas of legal need among Oregonians is for representation with employment problems. Twenty-seven percent of the survey respondents who had legal problems had employment-related needs. Significantly,

among the homeless (46%), farm workers (57%), Latinos not engaged in farm work (44%), immigrants (44%), and the non-English speaking (44%), the need for representation with employment problems was experienced at even higher rates.⁷ A legal needs study just published in Washington State reached similar conclusions,⁸ and a Montana study soon to be published will report similar findings.⁹

Nor is it true that the private bar is filling this need. The needs identified in the studies cited above were overwhelmingly unmet. On a contingent fee basis, private attorneys typically accept only the most attractive cases, involving large amounts of damages. A contingent, low-wage worker is unlikely to have such claims. Indeed, even though employment problems are reported to be roughly as common as family law issues, it is about four times more likely that a person with a family law problem will be able to secure representation by an attorney.¹⁰

Because of this history of not being involved with employment problems, opening case acceptance policies to include protecting low income workers on the job presents real challenges for legal services today. Many programs may not have the wealth of expertise and experience with these issues that exists in other, more traditional substantive areas. Programs may not have the internal constituencies to push acceptance of these cases, and in a funding climate where everything is seen as a zero-sum game, committing resources to this means doing less in other areas to which staff are committed. Ultimately, though, if legal services is to continue to be about meeting client needs, as opposed to staff interests, addressing this issue is long overdue.

1 D. Michael Dale was a legal services lawyer in Oregon from 1975 until 2001, during which time he directed a rural branch office, was director of Oregon's migrant farm worker program, director of litigation and acting executive director of Oregon Legal Services, and helped to organize the Oregon Law Center, a non-LSC funded provider, serving as OLC's first director of litigation. Since 2001, he has been representing low wage workers as a private lawyer and is "of counsel" to Texas Rio Grande Legal Assistance and the Southern Migrant Legal Services programs. He is currently Executive Director of the Northwest Workers' Justice Project, a non-publicly funded legal services program, which he founded in 2003, to represent immigrant and contingent low wage workers with labor and employment problems. Dale authored legal needs studies sponsored by the Oregon Supreme Court, Governor John Kitzhaber and the Oregon State Bar in 2000, and by the

Montana State Bar in 2005, served as study consultant to the Washington courts' legal needs study in 2003, and is currently working on a similar legal needs analysis in Utah.

Northwest Workers' Justice Project (NWJP) is dedicated to improving enforcement of the workplace and organizing rights of low-wage, contingent, and immigrant workers in the Pacific Northwest. NWJP provides high quality legal support and education to workers and their organizations, focusing on the priority areas of low-wage workers' organizing rights; rights of immigrant workers; rights of contingent workers (i.e., contract, part-time, day haul, temporary, etc.); and effects of international trade on low-wage workers. NWJP litigates significant cases, undertakes policy advocacy, and provides training to workers about employment and organizing rights. Through training, referral, and co-counseling, NWJP also enlists the participation of private, pro bono lawyers and publicly funded legal services lawyers in aspects of this work, thereby further expanding low-wage workers' access to legal help.

2 Urban Institute, "Immigrant Families and Workers: A Profile of the Low-Wage Immigrant Workforce" (Nov. 2003), www.urban.org (citing Andrew Sum, Neeta Fogg, and Paul Harrington, "Immigrant Workers and the Great American Job Machine: The Contributions of New Foreign Immigration to National and Regional Labor Force Growth in the 1990" (Boston: Northeastern University, Center for Labor Market Studies, Aug. 2002)).

3 The average foreign-born growth rate among states was 57 percent. See Urban Institute, K. Lotspeich, M. Fix, D. Perez-Lopez, and J. Ost, "A Profile of the Foreign-Born in the Portland, Oregon Tri-County Area" (October 2003), <http://www.urban.org/url.cfm?ID=410917>.

4 "Immigrant Families and Workers." The Urban Institute report's data comes from the March 2002 Supplement to the Current Population Survey, which recorded participants' wage and salary earnings in 2001. The report defines "low-wage labor force" as workers earning less than 200 percent of their state's prevailing minimum wage.

5 *Id.*

6 General Accounting Office, *Worker Protection: Labor's Efforts to Enforce Protections for Day Laborers Could Benefit from Better Data and Guidance*, GAO-02-925 (Sept. 2002). See also *Business Week*, "A Day's Pay for a Day's Work — Maybe" (Dec. 8, 2003).

7 *The State of Access to Justice in Oregon* at 23-25.

8 Task Force on Civil Equal Justice Funding and Washington State Supreme Court, *The Washington State Civil Legal Needs Study* (Sept. 2003), at 34-40.

9 Preliminary findings from research conducted under the auspices of the Montana State Bar, to be reported in early 2005.

10 *Id.* at 26-27.