



To: Paul C. Doyle, Florida Bar Foundation
From: Elizabeth McCulloch
Date: June 14, 1996
Re: Studies on sliding fee scales in the delivery
of social services to indigents

You asked me for information about sliding scale fees in social services for indigents. I have found no empirical research on the use of such fees in the delivery of social services. Although sliding scales have commonly been used in the delivery of mental health services in both the private and public sector, writing on the topic consists of debates regarding the ethics and therapeutic effects of charging such fees, rather than empirical studies. There is, however, abundant data and analysis on fees for medical services and products. I will discuss a small portion of this research, as well as a report on sliding scale fees for subsidized child care, before analyzing how this might apply to the delivery of legal services to the poor. In the absence of any specific proposals for fees, I have speculated as to the possible goals and structure of a fee system.

Fees for health care

A 1995 article from the Council of State Governments examined cost-sharing programs in low-income health care. States have used point of service cost sharing in their Medicaid programs, and premium cost sharing in low-income subsidized insurance programs. The primary purpose of point of service cost sharing is to discourage utilization, while the main purpose of premium sharing is to help fund purchase of subsidized insurance. However, as common sense would suggest, as the cost of health insurance for an individual rises, the

percentage of people purchasing insurance decreases, so the premium sharing requirements also indirectly reduce utilization of health services.

Most state subsidized insurance plans use a sliding scale to determine premium contributions. While the premiums differ dramatically from state to state, there is apparently no research available comparing enrollment in these programs between states with different requirements. However, at lower income levels, participation in insurance is very sensitive to premiums. When premium contributions in Washington's Basic Health Plan (a state-subsidized health insurance plan for the poor) were set at 7 percent of household income, only 10 percent of the eligible population chose to enroll.

As with premium cost sharing, low-income people are even more sensitive to point of service fees (commonly known as co-pays) than higher income people. The authors express concern that co-pay requirements can not only reduce inappropriate use of medical services, but discourage the use of medically necessary care. A particular risk is that patients will forego use of drugs which control chronic conditions, with health consequences that will prove more costly for the state in the long run.

The authors suggest several approaches for reducing inappropriate utilization without discouraging necessary care or unduly burdening the poor. The state can provide the most essential or cost-effective medical services or drugs without a co-payment. The state can also exempt the lowest-income people from co-pay requirements entirely, or establish an out-of-pocket maximum. The authors also point out that the utilization controls in managed care systems may already determine which services are essential, and states should avoid co-pay requirements which would discourage use of such services.

Beyond the research cited by the Council of State Governments, there is a lot of other research on the effect of fees on utilization of medical services. Since the health insurance and managed care industries, as well as the Medicare program, have considerable interest in the subject, much of the research has studied middle-income people, such as participants in employee health plans, rather than poor people. However, a 1968 study in Canada, where medical services are provided under a universal public insurance system, found an 18% reduction in utilization among poor people when they were charged a \$5 fee. The most alarming result of attempts to control health costs were found in a 1983 study of prescription drugs under Medicaid. While a \$1 copayment reduced the Medicaid budget with little effect on the number of prescriptions filled, "restrictions on the number of insured prescriptions per month were associated with increases in nursing home admission rates"!

Fees for child care

The Children's Defense Fund (CDF) issued a paper on sliding fee scales in child care programs, after examining problems in the implementation of sliding fee scales required in Transitional Child Care programs under the Family Support Act of 1988. CDF found that many states were using the sliding fees to ration child care dollars rather than to charge what a family could realistically afford, thereby raising barriers to child care. While many of the considerations in child care, such as free choice of providers or children's need for stability, do not apply in the context of legal services, some of the CDF's analysis is useful in considering sliding scale fees for any service delivery.

First, sliding fee scales should reflect ability to pay, as reflected in income and family size. Programs should charge no fees for those who by definition have too little to meet their basic needs, such as those whose income is below the

federal poverty level. (Because eligibility for subsidized childcare is structured on the basis of median state income, CDF proposes a formula relating median income and the federal poverty level.)

Second, the process of calculating fees should be simple and fair. Programs should avoid burdensome documentation or verification requirements. Income categories should be broad enough, and reporting periods long enough to avoid constant recalculation; low income workers' income changes frequently as their hours change or they leave and enter jobs. The parents should receive a clear explanation of how the scale is derived and the scale should be simple. For instance, the same fee schedule should apply regardless of funding source. Programs will need policies for fee collection, and a review and appeals process. The scale should be adjusted annually, and the income from fees monitored for evaluation purposes.

Fees for legal services

Some legal services programs in Florida, in response to severe funding cuts, are apparently considering charging clients fees determined by a sliding scale based on income. A few specialized legal programs for low-income people already do this. The Women's Law Center in Buffalo, New York is a nonprofit law center providing services for "working poor women" with incomes between 125% and 200% of poverty level. It charges fees on a sliding scale, and is supported by such fees, grants, and foundation funds. According to founders of the center, regular legal services programs in the area had closed intake to all but emergency cases. Centro Legal in Milwaukee represents Latina women in divorce. They use a sliding fee scale. Wichita Lawyers Care is a reduced fee plan, in which private lawyers and legal services lawyers provide representation to low- and moderate-income persons for a sliding-scale fee. The Community Health Law

Project in New Jersey operates the Legal Assistance for Medicare Patients program, charging fees on a sliding scale for legal representation in regard to problems with Medicare. Apparently, none of these programs receives federal legal services funding. Nor are their services directed primarily at clients below the poverty level.

A program which is considering adopting a fee scale for legal services should first be clear about its goals. Fees may be a means of reducing demand for services, producing income to replace funding cuts, or perhaps, enhancing client power and changing both clients' and attorneys' perception of their relationship.

Reducing demand

Certainly the need for legal services is much greater than the availability. In 1990, it was estimated that only 20% of the legal needs of the poor in Florida were being met. In 1994 there were approximately 370 legal advocates working in legal services programs in Florida for a poor population of about three and a half million people. While charging fees would not reduce the legal problems of the poor, and their presumed need for legal assistance to address most of them, it might very well reduce the demand for services, and ease the crush at the door. It might also ease the difficult burden on legal services staff of deciding whether a particular case, or a particular action in a case, is worth their time.

Commonly, legal services programs use four means to select the cases they can handle from the huge number of legal problems that present themselves. They set priorities for the categories of cases the program will address. They restrict intake appointments so that effectively they operate a first-come, first-served service, presumably within program priorities. A waiting list in conjunction with this restriction leads to self-selection by

prospective clients, either because they lose interest or because their problem has proceeded to its conclusion while they waited for an appointment. Finally, program staff evaluate individual cases before deciding whether to accept them.

Currently, federally-funded legal services programs must establish priorities for the types of cases they will handle. The local board of directors is responsible for establishing those priorities, and does so with considerable staff input. Federal regulations also require input from representatives of the poor community. Aside from client representation on the governing board, programs obtain client input through public meetings, surveys, and interviews.

If the priorities are sufficiently specific and clear they can be implemented even before any formal intake process. Thus a program which does not handle family matters (divorce, custody, adoption, domestic violence) can exclude a large proportion of these cases at the initial call for an appointment. If priorities are drafted in more general terms which require interpretation, for instance if a program decides to take only cases which may enhance a prospective client's income or help her obtain or retain shelter, someone will have to interview the client more fully and exercise judgment as to whether the case fits the criteria.

Even with established priorities, programs must select cases, since the demand for assistance even within the priorities is greater than the resources available. This selection requires individual case evaluation. Ideally, the evaluator is an attorney or paralegal who judges the case on its legal merits and determines how likely it is that legal assistance will produce positive results for the client. This is the evaluation any attorney should make after interviewing a prospective client, and

perhaps doing further investigation.

The next step of the evaluation, however, distinguishes the fee-paying from the legal services client. The legal advocate needs to estimate what resources will be required to proceed with the case. A private attorney can then advise the client as to probable costs, and the client can decide whether the possible results are worth it. However, in the case of a non-paying client, when the costs in both money and time are primarily borne by the legal services provider, the advocate will have to decide whether the program should accept the case. Many factors can enter into this decision: the advocate's evaluation of the case's significance to the broader client community (ie poor people generally) and of the importance of the case to the client, the advocate's own interests and expertise, competing demands from other clients, and sympathy for the particular client.

Refusing assistance to someone in need is very difficult. It may be particularly difficult for the sort of people who choose to work in legal services. Requiring the client to decide instead whether s/he can afford a fee, and whether the possible results are worth the fee, would remove a large burden from already burdened advocates. It would also add to the decision a new factor: the relative penury of the client. It might also add the factor of urgency. Urgency differs from importance or significance. Like the indigent patient who finds a way to make the co-payment for a painkilling drug, but not for blood pressure medication, a client may be able to scrape up ten or fifteen dollars to forestall imminent eviction, but not to challenge denial of a Section 8 certificate, a challenge which could eventually lead to improved housing.

Fees could also serve to limit the amount of representation offered once a case is accepted. Thus, programs could decide to charge fees only if

a case proceeds to litigation, or to appeal a case only if a client is willing to pay a, presumably small, fee. Certainly in my own experience in domestic relations cases, a small fee might have dissuaded clients determined to use an attorney to pursue their claim to the last disputed teaspoon. However, there is considerable evidence that over-zealousness is not a problem in most legal services advocacy. A more frequently-expressed concern is that, for many reasons, both structural and psychological, legal services advocates avoid hard advocacy: favoring settlement even when litigation is more appropriate, favoring simple advice to clients rather than active engagement in the case.

Generating income

If programs consider adopting fees as a source of income, they should look carefully at the cost of implementing a fee, whether a modest flat fee or a sliding scale fee. Presumably a program adopting a sliding scale would follow the guidelines suggested by the Children's Defense Fund for child care fees: avoid burdensome verification, keep the fee scale simple with few variables, keep income categories broad to allow for frequent changes in income, make the fee scale available to clients (and the poor community generally), provide a review and appeals process for contested fees.

Further issues will arise, however. If the fees are sufficient to produce meaningful income for the program, it is unlikely that most people living below 125% of the poverty level will be able to pay the fee at the beginning of their case. One can easily imagine an AFDC recipient in Florida taking several months to pay off a \$25 fee, for example. Would the program require complete payment before providing any services? This would certainly result in many cases resolving themselves before the client could complete payment. If the program allowed installment payments, it would need to establish billing procedures. It would need to

decide how to handle delays or failures in payment. Would services be suspended until payment was made? Would a collection process be created?

Merely posing these questions demonstrates that administration of a fee system could be quite time-consuming. It also shows that charging fees for legal services would create a fundamental shift in at least the attorneys' perception of their relationship to clients. Whether a fee system would affect clients' views of legal services programs as dramatically is another issue. Many clients probably view legal services as just another part of the welfare bureaucracy.

Changing the attorney-client relationship

At least in the academic literature, there is considerable concern for "client empowerment." A great deal of the discussion focuses on empowering poor people vis a vis government programs and private enterprise, but the writers also focus on the importance of active client involvement in both legal tasks and decisionmaking.

Decisions regarding the goals of legal action, and at least some of the means for reaching them, should certainly be made by the client to the extent possible. Legal services practitioners encounter many clients who appear unwilling to express their opinions or make decisions in a case. Perhaps they are discouraged from speaking by barriers of class and race and role;

perhaps, as experienced negotiators of bureaucratic mazes, they are cynical about the impact of their views on the progress of their case. It is possible that paying a fee would make hesitant clients more assertive.

Possible fee structures

Programs could make various choices in regard to charging fees. They might charge a modest fee for the initial intake interview. This would certainly reduce demand considerably, as most intake interviews do not result in an open case. Some cases lack legal merit or don't fit program priorities, some applicants are ineligible, many cases are dismissed with brief advice and counsel. As people in the poor community learned that paying the small fee was likely to get them only a long wait in the lobby and a half hour interview, they would probably be much less inclined to come to legal services. Cutting off demand before intake would shut off an important source of information as to what is happening in the poor community.

Programs could instead provide the initial interview and brief advice for free, but charge a fee to accept a case. Presumably this would also reduce demand, as many clients would be unable or unwilling to pay any fee. It would remove some of the psychological burden from advocates, who could view the decision not to proceed as the client's decision, rather than their own. However, it would preserve the program's connection with the community, and continue to provide a place for people to get at least some advice.

Programs could use their priority-setting process to create a fee structure. They could handle cases in high-priority areas without charge, and accept other cases only for a fee. If fees were sufficiently high to be a source of meaningful income for the program, however, this might have the paradoxical effect of encouraging attorneys to accept low-priority, but fee-generating cases.

Programs could charge fees only to clients with higher incomes. Under present guidelines, presumably they would charge fees only to clients between 100% and 125% of the federal poverty level, since that is supposed to be the level at which people are able to meet their subsistence needs.

People could make the choice to spend income beyond these subsistence needs on legal services. This strikes me as distinguishing between the extremely poor and the desperately poor.

Programs which want to use fees to increase their income could also expand services to accept clients above 125% of poverty level, and charge fees only to the higher income clients. Aside from the fact that this would expand the number of eligible clients when there are already far more than resources can serve, it would also likely skew services towards those clients who could pay a fee. Since these are people who cannot pay the full cost of legal services, programs would be shifting resources for services from the poorest clients to those who are somewhat better off, which would seem to contradict the purpose of legal services for the indigent.

Conclusion

For a number of reasons, charging fees for legal services to the indigent is an inappropriate response to the severe pressures legal services programs are currently experiencing. First, any fees which those living at or close to the poverty level could afford would be so small that they might not cover the costs of administering and collecting them. Opening up eligibility for legal services to people well above the poverty level, and charging fees to higher-income clients, would divert resources from the poorest of the poor, since government funding will certainly not increase in proportion to the expanded client base.

Second, fees are a clumsy method for reducing demand, with the availability of services determined by penury and perhaps urgency rather than significance. It is not clear that legal services programs should be sheltered from the magnitude of the need by fee-based gatekeeping. To properly represent the interests of poor people,

perhaps legal services programs should make their resource allocation choices with continuing awareness of the unmet needs. Like managed healthcare, legal services already has a structure - the priorities process - for determining which services are most essential. Programs should examine whether they are using that process effectively, rather than replacing it or supplementing it with fees as a means to reduce demand.

Finally, it is not clear that a small fee would increase client's self-perceived or actual power in their relationship with the program. It would give the client power to decide whether to proceed, presuming she is in a position to pay. However, this is the kind of "market choice" concept which now dominates all social welfare discussions, and ignores the significant constraints on the choices of people who are poor. Again, structures are available for increasing the client community's power within the program. Improving attorney accountability, where that is lacking, may also change power relations between the individual client and staff member.