

**Written Testimony of David Udell
on behalf of
the National Center for Access to Justice**

Maine State Legislature
Committee on Judiciary
LD 1259
1 PM, April 6, 2023

Chairpersons Carney and Moonen, and Members of the Committee,

Thank you for the opportunity to testify. I would like also to thank Representative Charles Skold for inviting our testimony today.

Introduction

My name is David Udell, and I am testifying in support of LD 1259. I am the Founder and Executive Director of the National Center for Access to Justice based at Fordham Law School. The NCAJ is an independent nonprofit nonpartisan national organization that is working to bring rigorous, principled research and analysis to the task of advancing progress toward a fairer justice system, and in so doing, to achieve a better society.¹

At the NCAJ, we understand that access to justice is a necessary part of making the rule of law fair for everyone. Access to justice means that when people encounter life challenges they are able to understand their rights under the law, protect those rights, obtain a fair outcome, and know that the result will be enforced under the law. It is high stakes. It routinely determines whether people's basic human needs for food, clothing and shelter will be met, and it can mean everything for a person in crisis. More broadly, it is a cornerstone of stability in our civil society and essential to our democracy.

Importance of Counsel

The civil legal system was built by lawyers, and designed largely for lawyers. Yet nationally the vast majority of people in American courts do not have a lawyer, in part because lawyers are expensive. According to the Legal Services Corporation (LSC), a non-profit established by Congress to provide grants to civil legal aid organizations and promote equal access to justice, nearly one-half (46%) of low-income individuals who did not seek legal help for one or more problems cite concerns about cost as a reason why.² For people of modest means, paid counsel is

¹ *Our Mission*, National Center for Access to Justice, <https://ncaj.org/our-mission>.

² <https://justicegap.lsc.gov/resource/section-1-introduction/>.

out of reach for matters as important as evictions, mortgage foreclosures, child custody and child support proceedings, and debt collection cases. A 2020 study commissioned by the Institute for the Advancement of the American Legal System (IAALS) surveyed over 10,000 Americans nationally, finding that Americans experience over 250 million civil justice problems annually, of which fully 120 million go unresolved.³ LSC reports that in 2022 “[l]ow-income Americans did not receive any legal help or enough legal help for 92% of the problems that substantially impacted their lives in the past year.”⁴

To respond to this national crisis, NCAJ established the Justice Index – an online, data-intensive, legal access ranking system, which promotes policies that enable people who need the help of state courts to gain access and get fair treatment, even if they cannot afford a lawyer.⁵ The Justice Index covers five categories of laws, rules, and practices that are essential to assuring access to justice in state justice systems, with attorney access being a critical component of the Index. According to our research, and consistent with the national overview, Mainers currently face significant barriers in accessing our civil justice system.⁶ Maine’s low-income residents in particular have limited access to civil legal attorneys, including in comparison to its state counterparts in the Northeast Region.⁷ In our most recent Civil Legal Aid Attorney Count, completed in 2021, we found roughly 61 legal aid attorneys in the state, or only 1.61 per 10,000 low-income individuals.⁸

Importance of the Bill in Maine

Moreover, the access to counsel gap also tends to be highest in rural areas. Indeed, as you are aware, Maine is considered the most rural state in the nation and forty percent (40%) of the state’s population lives in one of Maine’s 11 rural counties.⁹ Because lawyers tend to gravitate to counties with more economic capital and density, low-income individuals in rural areas face even greater challenges with obtaining legal services. Equally important, for those attorneys that are available in rural counties, they are often stretched thin as it is and face economic realities that make it harder to take on pro bono or discounted legal work. Here is where LD 1259 fits in.

LD 1259 offers an innovative approach that can help to fill this justice gap that otherwise persists. We need more innovation given how little the needle is being moved on the access to justice. The bill would create the possibility for people to obtain greater access to justice by shifting the obligation to pay legal costs and reasonable attorney’s fees from low-income Mainers who prevail in civil proceedings to non-prevailing corporate entities with greater resources. This is particularly true in rural areas where there are fewer lawyers but still a significant demand for legal services.

³ <https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf>.

⁴ Id.

⁵ <https://ncaj.org/state-rankings/justice-index>.

⁶ <https://ncaj.org/state-rankings/justice-index/attorney-access>.

⁷ <https://ncaj.org/state-rankings/justice-index>.

⁸ <https://ncaj.org/state-rankings/justice-index/attorney-access>.

⁹ <https://www.maine.gov/dhhs/mecdc/public-health-systems/rhpc/rural-health.shtml> - :~:text=Geography and Demographics&text=40%25 of the population lives,of Maine's 11 rural counties.

The one-way fee shifting rule offers a means of equalizing justice in civil litigation and assisting people of modest means in financing litigation against wealthy institutional adversaries by taking into account resource disparities between the litigating parties. Accordingly, in litigation between unbalanced parties, LD 1259 would direct courts to award attorney fees to the winner when the poor litigants prevail against their moneyed opponents (private corporations), whereas each party would pay its own fees whenever the party with more resources prevails.

This approach not only offers the potential for a more egalitarian society as it would restore the balance of power between the parties and greater access to justice, but LD 1259 would also offer the prospect of drawing more attorneys into work that would enable more low income residents of Maine to protect their rights and interests, including in less populated areas of the state. Of course, no one has a crystal ball, and although the legislation is thoughtfully constructed and well-considered in all respects, it is not possible to know in advance that the law will achieve its aim. But, it is important to proceed in a spirit of experimentation because the justice gap that is our status quo is unacceptable. If the experiment does not fulfill its promise, the law can be left inactive or repealed. But, if the approach succeeds – and we believe it will – its impact is likely to be consequential and other states may follow.

Conclusion

The ability to shift resources without state expenditures, including those earmarked for critical legal aid funding, is what makes LD 1259 a unique and potentially critical tool for Maine to address the access to justice crisis. We commend the Committee for its consideration of a critically important increase in the state's funding for civil legal services.¹⁰ In combination with LD 1259, more low-income Mainers will access justice in the legal system and the rule of law will more likely prevail.

Thank you for inviting this testimony today. I am happy to answer any questions.

¹⁰ LD 564: <https://legiscan.com/ME/text/LD564/id/2688723/Maine-2023-LD564-Introduced.pdf>.