

## M E M O R A N D U M

TO: BEVERLY HILLS BAR ASSOCIATION  
FROM: Kenneth G. Petrusis  
DATE: June 10, 2005  
RE: Access to the Judicial System

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### ACCESS UNDER ATTACK

Although recent events have caused us to focus on an independent judiciary as a necessary element of the Rule of Law, another element, access, is also under attack on a broad range of fronts.

Access is an essential element of the Rule of Law. (The Rule of Law consists of five elements; Fair Laws, Fair Administration, Fair Courts, Access, and Equal Treatment.) Access to the justice system can be denied in a number of different ways: Jurisdiction can be removed or narrowed, the costs of access, personal or monetary can be increased, or procedural barriers may be imposed such as an increase in the burden of proof.

In Chicago an aging holocaust victim sought to recover \$40,000,000 of Masters paintings stolen from her parents in Austria by the Nazis. Her access to the courts was dependent upon finding a court that would take jurisdiction over the case, an attorney she could afford and a filing fee that did not price her out of court. This victim's case was featured this year in a program we jointly sponsored with the Los Angeles County Museum of Art on the recovery of lost holocaust art. The suit was brought here in the United States. It was necessary to file in the United States because the filing fee to bring the suit in Austria, where the theft occurred would have been 2% of the amount sought to be recovered. For the art valued at \$40,000,000, the fee would have been \$800,000, a prohibitive amount. It demonstrates that justice is dependent not only upon

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fair laws and an independent judiciary but also upon access to the system. Restrictions on access to the courts favor those with the greater resources. Without access, justice remains a mirage.

While access is better in the United States, recently there have been numerous and varied attempts recently to restrict access to our own legal system:

The Supreme Court upheld the IRS' denial of favorable tax treatment of attorneys' fees. Where the recovery, itself, is taxable income, in many cases the net recovery by the plaintiff on a judgment could be zero or, worse yet, the successful plaintiff would owe more money to the government than the net recovery.

The Supreme Court upheld the right of securities brokers to force their clients into arbitration, denying them access to the courts.

Budget cuts restricted access by limiting the judges and courtrooms available. Congress declined to give the courts any emergency money to deal with the Supreme Court's recent rulings on sentencing guidelines which will drastically increase the burden of the courts.

Congressman John Hostetler of Indiana wants to introduce a bill to remove a Federal right of plaintiff's attorneys to receive fees in civil rights suits brought to enforce the separation of church and state.

Immigrants fighting to stay in the United States are flooding the Federal Appellate Courts with cases. With not enough judges available, cases take longer and longer to hear, stretching the resources of litigants with the result that those with fewer resources often get short shrift.

While it is difficult to see the immediate effect of these restrictions on access to justice, in Third World and developing countries, the effects of restrictions on access to justice are obvious. In Mexico, for example, access is so restricted that there is little hope of vindication of personal or economic rights. Black markets and shadow economies exist where the only justice is the justice of the street. Lack of access devastates the economy. Because legitimate business interests cannot be protected, resources are wasted, lost or diverted to the shadow economy. Middle class businesses fail and there are fewer members of the middle class in between. The result is an increased gulf between the rich and the poor.

Tort reform is another means of restricting access to the courts. Attempts to impose the English Rule, allowing the successful party to recover fees and costs from the losing party, is a related form of restriction on access. The Rule which has some element of fairness when applied between peers becomes an effective deterrent and denial of access when applied between persons of disparate resources. Restrictions on recoveries or on attorneys' fees are often arbitrary with no consideration given to providing remedies for the torts. Conduct which harms citizens should still be remedied by means such as increased transparency and reasonable awards to those harmed. Tort reform should not forbid reasonable recoveries or encourage festering problems.

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Moral and economic progress and the success of our nation are dependent upon continued access to the courts to remedy harms inflicted upon citizens, both rich and poor. Access to our courts is no less than the fulfillment of the Declaration of Independence that "all men are created equal". Unfairly, restricting access to our courts is a denial of that declaration.

KGP/ct

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