

**CIVIL LEGAL AID IN THE UNITED STATES
AN UPDATE FOR 2009**

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The United States may be entering a new era in civil legal aid. For the first time since 1993, there is a President who is fully committed to expanding civil legal aid on a federal level and an administration sympathetic to rebuilding the civil legal aid delivery system and its long neglected infrastructure. To be sure, civil legal aid is not among the new Administration's highest priorities which are focused on the economic crisis, health care reform, energy and climate change, increasing investments in children and families, anti-terrorism, two wars and reengaging with the world in our foreign policy. We will also not know exactly how the Administration views civil legal aid until they decide on their budget recommendations for FY 2010 (sometime before April) and whom they will appoint to the LSC Board (not likely to occur until later in the year.)

While there is new hope for increased federal funding and a renewed interest in civil legal aid at the federal level, civil legal aid may face reductions in funding from state sources which, until 2009, have been expanding and overtook LSC as the largest source of civil legal aid funding. State funding actually increased for civil legal aid in 2008. Today, however, state budgets are facing far greater crises than the federal budget and have far fewer options for financing because most cannot create significant deficits. IOLTA revenues, while also increasing in 2007-2008, are also likely to be on a downward trend because of the interest rates reductions by the Federal Reserve and the substantial slowdown in housing purchases.

While funding may not be as high as in the most recent past, state activity on civil legal aid continues to increase. More states are establishing Access to Justice Commissions and moving forward in creating comprehensive, integrated state systems for the delivery of civil legal assistance consistent with the ABA Principles of a State System for the Delivery of Civil Legal Aid. So the long term trend of a state based comprehensive system is very likely to continue.

As I have discussed in previous reports, an integrated and comprehensive civil legal assistance system should have the capacity to: (1) educate and inform low-income persons of their legal rights and responsibilities and the options and services available to solve their legal problems; and (2) ensure that all low-income persons, including individuals and groups who are politically or socially disfavored, have meaningful access to high-quality legal assistance providers when they require legal advice and representation.

The United States has made considerable progress in meeting the first of these two objectives, but progress has been slow in meeting the second. In most areas of the United States, there is not enough funding or pro bono assistance available to provide low-income persons who need it with legal advice, brief service, and most particularly extended representation. As a

result, many low-income persons who are eligible for civil legal assistance are unable to obtain it.

I. CURRENT LEGAL AID SYSTEM

Overview: Civil legal aid in the United States is provided by a large number of separate and independent staff-based service providers funded by a variety of sources.¹ The current overall funding is approximately \$1.2 billion.² The largest element of the legal aid system is comprised of the 137 programs that are funded and monitored by the Legal Services Corporation (LSC). LSC is also the largest single funder, but overall, far more funds come from state and IOLTA than LSC.³ In addition, there are a variety of other sources, including local governments, other federal government sources, private bar, United Way, and private foundations.

In addition to the LSC-funded providers, there are many other legal services providers that do not receive LSC funds but that are supported by funds from these other sources. Most are small entities that provide limited services in specific locales or for particular client groups, but many are full-service providers that operate alongside the LSC providers in the jurisdictions they both serve. For example, in the District of Columbia, the largest single provider is the Legal Aid Society of DC, a non-LSC funded provider.

These staff-based providers are supplemented by approximately 900 pro bono programs, which exist in every state and virtually every locale.⁴ These pro bono programs are either components of bar associations, component units of legal aid staff programs, or independent nonprofit entities with staff who refer cases to lawyers on the pro bono panels. Law school clinical programs and self-help programs also supplement the staff delivery system. There are very few “judicare” programs directly funded by LSC or other funders; indeed, LSC funds only one small judicare program, and even it now has staff attorneys and paralegals who deliver legal assistance in some cases.⁵ It is very rare that a funder will directly fund, by contract or otherwise, individual lawyers or law firms. However, some staff attorney programs have created judicare components or contracted with individual lawyers and law firms, who are paid by the staff program to provide legal assistance to certain groups of clients.⁶

¹ We do not know the exact number of civil legal aid programs. Previously I identified 500 civil legal aid programs. If we also include the 160 programs affiliated with the Catholic Legal Immigration Network (www.cliniclegal.org) and the law school clinical programs operated by the 204 law schools, then we reach a total of 864. This figure excludes the 900 pro bono programs identified by the American Bar Association.

² The data on funding comes from the Project to Expand Resources for Legal Services, a project of the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants.

³ IOLTA stands for “Interest on Lawyer Trust Account.” IOLTA programs capture pooled interest on small amounts or short-term deposits of client trust funds used for court fees, settlement payments, or similar client needs that had previously been held only in non-interest-bearing accounts.

⁴ This estimate comes from Steve Scudder, Committee Counsel, ABA Standing Committee on Pro Bono and Public Service; Directory of Pro Bono Programs, <http://www.abanet.org/legalservices/probono/directory.html#>.

⁵ The LSC funded judicare program is Wisconsin Judicare, Inc., in Wausau, Wisconsin.

⁶ Data obtained from the Legal Services Corporation for 2007 indicated that of the 97,531 cases closed through the Private Attorney Involvement efforts of LSC funded programs; 28,457 came from judicare, reduced fee

The United States system also includes approximately thirty-eight state advocacy and support organizations that advocate before state legislative and administrative bodies on policy issues affecting low-income persons.⁷ Some of these also provide training and technical support to local legal aid advocates on key substantive issues.⁸ Moreover, more than 30 entities are engaged in advocacy on behalf of low-income persons at the federal level. Fifteen of these were formerly funded by LSC and were part of the national support network; others never were funded by LSC.⁹

Over the last ten years, the civil legal aid system has utilized innovations in technology to improve and expand access to the civil justice system. As a result, low-income persons have access to information about legal rights and responsibilities and about the options and services available to solve their legal problems, protect their legal rights, and promote their legal interests. Technological innovation in virtually all states has led to the creation of Web sites that offer community legal education information, pro se legal assistance, and other information about the courts and social services. Most legal aid programs now have Web sites with over 223 sites.¹⁰ Virtually all states have a statewide website, most of which also contain information useful both to advocates and clients. Dozens of national sites provide substantive legal information to advocates; other national sites support delivery, management, and technology functions. Many program, statewide, and national websites are using cutting-edge software and offering extensive functionality. I-CAN projects in several states offer kiosks with touch-screen computers that provide clients with pleadings and access to other services, such as help with filing for the Earned Income Tax Credit.¹¹ Video conferencing is being used in Montana and other states to connect clients in remote locations with local courthouses and legal services attorneys. Finally,

panels and contracts with private attorneys or law firms. See **Legal Services Corporation, FACT BOOK 2007 at p. 21 (June 2008)**.

⁷ Alan W. Houseman, *Civil Legal Aid in the United States: An Overview of the Program and Developments in 2005*, at 4 (July 2005), available at http://www.clasp.org/publications/us_overview_program_2005.pdf [hereinafter *Overview*]; Alan W. Houseman, *The Missing Link of State Justice Communities: The Capacity in Each State for State Level Advocacy, Coordination and Support*, Project for the Future of Equal Justice and the Center for Law and Social Policy (Nov. 2001), available at http://www.clasp.org/publications/missing_link.pdf [hereinafter *Missing Link*].

⁸ *Overview*, *supra* note 8, at 4; *Missing Link*, *supra* note 8.

⁹ The number of national support and advocacy centers is based on my own calculation. Pine Tree Legal Assistance lists twenty-four national advocacy centers (www.ptla.org/ptlasite/links/support.htm) and the Sargent Shriver National Center on Poverty Law lists six additional centers not on the Pine Tree web site listing on the inside back cover of the *Clearinghouse Review*.

¹⁰ Pine Tree Legal Assistance lists 232 legal services sites on its webpage, <http://www.ptla.org/ptlasite/links/services.htm>.

¹¹ The most well-known of the ICAN projects is operated by Legal Aid of Orange County, <https://secure.icandocs.org/>. I-CAN! E-File is available to taxpayers at www.icanefile.org and, for the first time, as part of the Free File Alliance, a group of organizations that provide free tax-filing services and are listed on the Internal Revenue Service website, www.irs.gov. For the 2008 tax-filing season, EITC provided \$47 billion in refunds and offsets to tax liabilities. Of that total, I-CAN! E-File brought back more than \$33 million in refunds and credits to low-income workers in 45 states, demonstrating how an innovative technology project can make an impact in serving low-income families.

the civil legal aid community has created a National HotDocs server and many programs are now using it to create automated court forms and pleadings to streamline and make more efficient their representation of clients.

In addition, there has been a rapid expansion of efforts by courts, legal aid providers, and bar associations to help people who are attempting to represent themselves in courts. A recently published **Directory of Court-Based Self Help Programs** lists 130 programs throughout the country.¹² Civil legal aid programs are devoting substantial time and resources to address the issue of assistance to pro se litigants. Many legal aid programs throughout the country operate self-help programs independently or in conjunction with courts. Some programs provide only access to information about the law, legal rights, and the legal process in written form, on the Internet, on videotape, through seminars, or through in-person assistance. Other programs actually provide individualized legal advice and often provide also legal assistance in drafting documents and advice about how to pursue cases. Often, programs provide both printed and Internet-accessible forms for use by persons without legal training, and they may provide also assistance in completing the forms.

A critical part of expanding access has focused on a range of limited legal assistance initiatives to provide less than extended representation to clients who either do not need such extended representation in order to solve their legal problems or live in areas without access to lawyers or entities available to provide extended representation. Many legal aid programs now operate legal hotlines, which enable low-income persons who believe they have a legal problem to speak by telephone to a skilled attorney or paralegal and receive advice and brief service. Legal hotlines may provide answers to clients' legal questions, analysis of clients' legal problems, and advice on solving those problems so that the client can resolve the problem with the information from phone consultation. Hotlines may also perform brief services when those are likely to solve the problem and make referrals if further legal assistance is necessary. Hotlines are now being used in over 165 programs in forty-nine states, Puerto Rico, and the District of Columbia.¹³ Some hotlines focus on particular client groups, such as the elderly. Others serve the low-income population in general. There are fifty-four statewide hotlines in thirty-eight states, fourteen regional hotlines, and ten local hotlines. Finally, more and more states have a central phone number (or several regional phone numbers) that clients can call to be referred to the appropriate program or to obtain brief advice about their legal problems.

Legal Services Corporation: In 1974, Congress passed and the President signed the Legal Services Corporation Act, the comprehensive legislation to make permanent the legal services program started under the Economic Opportunity Act. The LSC Act was reauthorized in 1977 but has not been reauthorized since.

LSC is not a federal agency, nor a government controlled corporation, but a nonprofit corporation established with the powers of a District of Columbia corporation and those provided by the LSC Act. The President of the United States appoints a bipartisan eleven-member board that must be confirmed by the Senate. Board members serve in a volunteer

¹² The Directory can be found at <http://www.ncsconline.org/WC/Publications/ProSe/contents.htm>

¹³ The data reported here is available in the State-By-State Legal Hotline Directory available on the website for the Technical Support for Legal Hotlines Project, sponsored by the Administration on Aging and the AARP Foundation, at www.legalhotlines.org.

capacity, are not Executive branch employees and, under the LSC Act, cannot be fired by the President. Board members serve for three-year terms but hold over at the conclusion of their terms until new board members are qualified, i.e. confirmed by the Senate. The Chair of the board is chosen by the board, not by the President. The LSC board also appoints a president for LSC as well as certain key officers of the Corporation who serve at the pleasure of the board. The LSC president appoints the LSC staff. The LSC president and staff are not federal employees.

Unlike many federal agencies or government corporations, the LSC president administers the Corporation, making all grants and contracts. The LSC board does not administer the entity and board members do not serve on a full-time basis. The LSC board does provide general oversight of LSC, makes broad policies, and promulgates the rules, regulations and guidelines governing LSC and the legal services grantees it funds. The board also submits its budget mark directly to Congress. Board members are not employees of LSC, but do receive per diem compensation for their board activities and travel reimbursement. The board meets at least four times a year for one or two days, although a new board may decide to meet more often initially.

LSC funds 137 grantees that operate local, regional or statewide civil legal assistance programs. Generally, one field program provides legal services in a designated geographic area. In addition, LSC, with Congressional approval, has earmarked funds for migrant and Native American grants for specialized programs that deliver services to these populations. All legal services programs are private, nonprofit entities, independent of LSC. All LSC grantees are governed by boards which consist of 60% attorneys and one-third eligible clients. By LSC regulation, all programs must expend 12.5% of their basic LSC grant on the involvement of private attorneys in the delivery of legal services.

Clients Served: National data on the number of clients serviced by civil legal aid, the types of cases that are handled and the services provided do not exist. The only national data is from the 137 LSC funded programs. According to 2007 data reported to LSC (the last available data), LSC programs provided services in 906,507 cases. The vast majority of services provided were counsel and advice (58.1%) and brief service (18.5%). Cases involving an administrative agency decision were 3.5% and court decisions were 9.9%. The largest category of cases was family law cases (37.6%) following by housing (25.2%), consumer (11.5%) and income maintenance (11.4%).¹⁴

II. ELIGIBILITY AND RESTRICTIONS

Eligibility

Legal aid programs funded by LSC have limitations on the clients that they can serve. The primary limitations relate to financial eligibility and status as an alien. LSC programs may use funds from sources other than LSC to serve individuals or groups who do not meet the LSC

¹⁴ These numbers are taken from the Legal Services Corporation, 2006 Fact Book, (June 2007) pages 11-16.

financial guidelines, but they may not serve aliens who do not meet the alien eligibility guidelines.

Legal aid programs that do not receive funding for LSC often restrict service to clients who meet financial eligibility guidelines. These guidelines often mirror the LSC guidelines but may be more generous or more restrictive than those guidelines, depending on the program’s priorities or on restrictions that may be imposed by other funders.

LSC-funded programs may only use LSC funds to provide legal assistance to clients who meet specific financial eligibility guidelines. The 2009 annual eligibility guidelines for LSC are set out in the following chart:

Legal Services Corporation 2009 Poverty Guidelines¹⁵

Size of household	
1.....	\$13,538
2.....	18,213
3.....	22,888
4.....	27,563
5.....	32,238
6.....	36,913
7.....	41,588
8.....	46,263
For each additional member of the Household in excess of 8, add.....	4,675

LSC programs set their own asset ceilings for individual clients. These asset ceilings may be waived under certain circumstances. LSC programs may serve individuals who meet the asset ceilings and whose income is below 125% of the current official Federal Poverty Guidelines (poverty guidelines), which are revised annually by the U.S. government. In addition, under certain circumstances LSC programs may serve individuals who meet the asset guidelines and whose income exceeds 125% of the poverty guidelines. LSC programs may serve, without regard to income, those individuals who are seeking to maintain benefits provided by governmental programs for low-income individuals or families or whose income is primarily

¹⁵ The figures in this table represent 125% of the poverty guidelines by household size as determined by the Department of Health and Human Services under guidance from the Office of Management and Budget (in the Executive Office of the President). The poverty guidelines are income thresholds that were established in the 1963 and updated by a cost of living index each year. The research underlying the original thresholds was based on food expenditures by low-income families in 1955. Calculations at the time showed the families then spent about a third of their income on food. The low-income food budget was multiplied by three to come up with the poverty line. There has been much controversy about the adequacy of the poverty guidelines, but they have not been changed and remain the basis for eligibility and income distribution of many federal programs.

devoted to medical or nursing home expenses. LSC programs may also serve individuals whose income does not exceed 200% of the poverty guidelines if they are seeking to maintain or obtain certain governmental benefits or if the program has determined that they should be financially eligible based on certain other specified factors.¹⁶

LSC-funded programs are also permitted to provide legal assistance to organizations of low-income persons, such as welfare rights or tenant organizations. To qualify for LSC funded assistance, the client organization must lack the means to retain private counsel, and the majority of its members must be financially eligible under the LSC regulations; or the organization must have as its principal activity the delivery of services to financially eligible members of the community.

LSC-funded programs are permitted to serve financially eligible individuals who are U.S. citizens or who are members of specified categories of aliens.¹⁷ These include:

1. Lawful permanent resident aliens.
2. Any alien who is either married to a U.S. citizen, the parent of a U.S. citizen or an unmarried child under the age of 21 of a U.S. citizen, assuming such alien has filed an application for adjustment of status to permanent residency and such application has not been denied.
3. Aliens granted asylum.
4. Aliens granted refugee status.
5. Aliens granted conditional entrant status.
6. Aliens granted withholding of deportation.
7. H-2A nonimmigrant temporary agricultural workers (concerning the worker's employment contract).
8. H-2B nonimmigrant forestry workers, concerning the worker's employment contract.
9. Victims of human trafficking
10. Aliens who are victims (or parents of victims) of domestic violence, victims of sexual assault or certain other sexual or violent crimes, when legal assistance is directly related to the prevention of, or obtaining relief from, the violence, assault or criminal activity.

The last three categories were added over the last three years.

LSC programs cannot assist undocumented aliens; aliens seeking asylum, refugee status, or conditional entrant status; or other categories of aliens, not listed above, who are legally in the U.S., including students and tourists.

Furthermore, LSC programs are not permitted to provide certain services to prisoners. Specifically, LSC programs cannot participate in civil litigation on behalf of a person incarcerated in a federal, state or local prison or participate in administrative proceedings

¹⁶ See 45 CFR 1611.

¹⁷ 45 CFR 1626

challenging the conditions of incarceration.¹⁸ Also, LSC programs are not permitted to represent persons convicted of or charged with drug crimes in public housing evictions when the evictions are based on threats to the health or safety of public housing residents or employees.¹⁹

Unlike civil legal aid plans in most developed countries, neither LSC nor most state funders impose a formal “merit” test on applicants for service and representation.²⁰ Nor is there a “significance test” required by LSC or state funders.²¹ Programs may impose their own criteria for service, such as only providing advice and brief service in certain kinds of cases or providing assistance only in particular categories of cases or with regard to specific issues. But the decision to limit service is a program-by-program decision and not a decision made by LSC or most other major institutional funders, such as state IOLTA programs. Some other funders limit the use of their resources to certain clients or types of cases, such as domestic violence victims.

Civil legal aid programs generally do not impose co-payments or client contributions from the clients served, and neither LSC nor state funders require co-payments or client contributions. In fact, LSC prohibits its programs from using co-payments for clients eligible for LSC funded services. In addition, since the U.S. legal system is not generally a “loser pays” system, civil legal aid clients and programs are not usually required to reimburse an opponent’s legal fees and costs if they lose.

Restrictions

Much of the funding for civil legal aid programs is provided to the programs without earmarks on who can be served and what can be done. With these funds, the programs themselves make the key decisions about who will be served, the scope of service provided, the types of substantive areas in which legal assistance will be provided, the mix of attorneys and paralegals, and the type of services provided (such as advice, brief services, extended representation, law reform, and the like). While Congress has imposed restrictions on what LSC can fund, and a few other states have similar restrictions, in the U.S. system, LSC, IOLTA, and many other funders do not decide what the program will do. It is the program that undertakes planning and priority setting and decides who will deliver the services (staff attorney or private attorney). As a corollary to this responsibility, it is the program that oversees how these services are delivered and the quality of work that is provided by its staff attorneys and the pro bono and paid private attorneys with whom the program works.

However, there are some government and private funding sources that limit their funding to specific types of clients (e.g., aliens) or specific types of cases (e.g., domestic violence). Civil legal aid programs can decide whether or not to seek this funding, and many do. It is the program itself that decides internally whether to seek funding.

¹⁸ 45 CFR 1637

¹⁹ 45 CFR 1633

²⁰ A merit test requires some degree of possible success, such as the reasonable likelihood, reasonable probability, or reasonable possibility of success.

²¹ A significance test usually is expressed as a significant or substantial interest and sometimes measured against a hypothetical “modest income litigant” and whether such a person would hire a lawyer in a particular case.

The U.S. Congress has imposed some restrictions on what types of cases civil legal aid programs funded by LSC can bring and what types of advocacy they can pursue even with non-LSC funds. LSC funded providers are precluded from advocacy and representation before legislative bodies and in administrative rulemaking proceedings, except in a few circumstances. In addition, LSC programs cannot initiate, participate, or engage in any class actions. LSC programs cannot claim, collect, or retain attorneys' fees from adverse parties, even when the fees are otherwise permitted by statute. LSC programs are prohibited from representation in redistricting cases and from participating in any litigation with regard to abortion. Although prior to 1996 there had been some restrictions on what LSC-funded legal services programs could do, particularly with LSC funds, the 1996 restrictions prohibited LSC grantees from using funds available from non-LSC sources to undertake those activities that are restricted with the use of LSC funds.

In other words, all of a LSC grantee's funds, from whatever source, are restricted.²² Nevertheless, the restrictions do not cover most of the work that LSC programs can do on behalf of the low-income community, and LSC-funded programs can continue to provide representation in over 95% of the cases they were able to undertake prior to the imposition of the latest restrictions.

III. THE JUSTICE GAP

Through the innovative technologies described above, the United States civil legal aid system has made continuing progress in expanding access in most areas of the United States. But there is not enough funding available to provide all low-income persons who need it with legal advice, brief service, and particularly extended representation by a lawyer or paralegal. As a result, many low-income persons who are eligible for civil legal assistance are unable to obtain it.

In 2005, LSC completed a study, "*Documenting the Justice Gap in America – The Current Unmet Civil Legal Needs of Low-Income Americans*,"²³ that used three different methodologies to examine the adequacy of available funding to meet the legal needs of the low-income population. First, LSC asked its grantees to document over a two-month period – from March 14, 2005 to May 13, 2005 – the number of eligible applicants who actually came to their offices whom the programs could not serve due to lack of resources. The LSC "unable to serve" study established that, for every client who received service, one eligible applicant was turned away, indicating that 50 percent of the potential clients actually requesting assistance from an LSC grantee were turned away due to lack of resources on the part of the program.

Second, the LSC *Justice Gap* study carefully analyzed nine studies, undertaken over five years in individual states, of the civil legal problems faced by states' low-income residents. The

²² For a more detailed discussion of the restrictions, see Alan W. Houseman, *Restrictions By Funders and the Ethical Practice of Law*, 67 *Fordham L. Rev.* 2187 at 2189-2190 (1999).

²³ Legal Services Corporation, *Documenting the Justice Gap in America – The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2005), available at http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf [hereinafter *Justice Gap*].

nine state studies validated the findings of the American Bar Association's (ABA) 1994 national study on the subject and demonstrated that less than 20 percent of the legal needs of low-income Americans were being met.²⁴ Eight of the nine studies found an unmet legal need greater than the 80 percent figure determined by the ABA in their 1994 national survey.²⁵

Finally, the LSC *Justice Gap* study identified the number of legal aid lawyers in both LSC and non-LSC funded programs and compared this to the total number of attorneys providing civil legal assistance to the general population in this country.²⁶ The study determined that there is, at best, one legal aid attorney for every 6,861 low-income persons.²⁷ In contrast, the ratio of attorneys delivering civil legal assistance to the *general* population is approximately one for every 525 persons, or thirteen times more.²⁸

The Justice Gap study formed the basis of the funding requests that LSC has made to Congress for the FY 2007 appropriation forward. Beginning in 2006, LSC has sought to close the Justice Gap by proposing an increase in funding of 20% each year in order to double funding in five years from the FY 2006 funding level of \$326,577,984. Thus for FY 2007, LSC sought a request of \$411,800,000. In subsequent years, LSC has sought similar increases in funding. The FY 2009 funding request from LSC was \$471,362,000 and the funding request for FY 2010 will be \$485,100,000. Nevertheless, the House and Senate Appropriations Committees both recommended \$390 million for FY 2009.

LSC has begun a new study to update the 2005 Justice Gap study which LSC hopes to complete by the summer of 2009.

Thus, the major problem in achieving meaningful access to a full range of high-quality legal assistance programs is the lack of programs with sufficient funding to provide the legal advice, brief service, and extended representation necessary to meet the legal needs of low-income persons.

While the lack of adequate funding and providers is the most significant component of the "justice gap," there are two other related major inadequacies in the civil legal aid system. First, in many states, there are few, if any, non-LSC providers to ensure that low-income persons have access to the full range of services that they need. Second, state advocacy, training, and support are insufficient in many states and totally inadequate or non-existent in many others.

A significant gap in the civil legal aid system in the United States, and particularly in the many states with limited non-LSC resources, is the lack of providers that can (1) serve prisoners, aliens, and others who cannot be represented by LSC funded providers; (2) bring class actions and effectively and strategically use attorneys' fees statutes; and (3) engage in advocacy in all relevant forums, including legislative and administrative rule-making and policy-making forums. In large parts of the country such providers do not exist, or, if they exist, they are small, under-

²⁴ *Id.* at 13.

²⁵ *Id.* at 9.

²⁶ *Id.* at 15.

²⁷ *Id.*

²⁸ *Id.*

funded, and not able to meet the need that exists. This problem is, in part, a result of the restrictions imposed on LSC-funded entities by the 1996 appropriation riders.²⁹

A final component of the “justice gap” is the lack of statewide support and coordinated advocacy. Historically, LSC and some IOLTA funders have sought to ensure coordination and support for all legal providers and their partners, along with a central focus on statewide issues of importance to low-income persons, including representation before legislative and administrative bodies. The loss of over \$10 million in state support funding as a result of the Congressional funding decision made in 1996 has taken a large toll on the state support structure that was previously in place.³⁰ Many of the state support units and the regional training centers that were part of larger programs have been eliminated. In a number of states, there has been no state-level policy advocacy, no significant training of staff, no information sharing about new developments, no litigation support, and no effective coordination among providers. Several new entities have been created to carry on state level advocacy, particularly policy advocacy. However, virtually all of these new entities are severely under-funded and under-staffed. Several of the remaining freestanding state support programs have survived; but, with a few exceptions, they have not made up the loss of LSC funds.³¹

IV. FUNDING

A. *Where We Are Today*

The United States civil legal aid system is not funded by one principal source. Although LSC is the largest single source of funding, it is not a source of funding for most of the system. According to information provided by the Project to Expand Resources for Legal Services, a project of the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants, the total amount of legal aid funding in the 50 states at the beginning of 2008 was \$1,179,499,253. This total does not take into account funding in the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Micronesia, and other territories and countries that receive LSC funding. Nor does this figure take into account the amount of pro bono time contributed, the funding for many of the state advocacy entities, or the funding for the national advocacy programs.

Broken down by funding source for the fifty states, the relative amounts are:

²⁹ Some have turned to the courts to address this fundamental challenge, initially culminating in the United States Supreme Court decision in *Velazquez v. LSC*, which struck down one part of the restriction that prohibited representation of clients in welfare cases where a challenge to a welfare law or regulation was necessary. 531 U.S. 533 (2001). The remaining 1995 restrictions were upheld. There are three ongoing cases that are challenging LSC rules on “program integrity.” The “Program Integrity” provision, Public Welfare, requires that LSC programs “have objective integrity and independence from any organization that engages in restricted activities.” 45 C.F.R. § 1610.8 (2005). The regulation sets out criteria by which LSC will measure compliance. It is these criteria and their implementation that are being challenged. So far none of the cases have been successful in changing the “program Integrity” provision..

³⁰ *Missing Link*, *supra* note 8, at 6.

³¹ A few states – including California, Florida, Massachusetts, New Jersey, Washington, Michigan – have preserved and/or strengthened the capacity for state-level advocacy, coordination, and information dissemination; increased training; and developed very comprehensive state support systems.

LSC	\$ 311,042,253
Other public (Federal and local)	\$ 237,055,000
State government	\$ 211,706,000
IOLTA	\$ 169,761,500
Foundations	\$ 78,101,000
Private lawyer contributions	\$ 59,609,500
Other	\$ 104,506,000

If we include funding from LSC for Puerto Rico, the District of Columbia, and the territories, along with the non-LSC funding for the District of Columbia, the total United States funding for civil legal assistance is approximately \$1,205 billion.³²

While LSC funds are distributed according to the 2000 census data on individuals living below the poverty line (\$8.92 per poor person in 2008), the other funding sources are not distributed equally among states. As a result:

- 10 states have total funding exceeding \$50 per low-income person.
- 14 states have funding between \$30 and \$49 dollars per low-income person.
- 17 states have funding between \$20 and \$29 dollars per low-income person.
- 9 states have funding less than \$20 per low-income person.

Dollars per low-income person ranged from a low of \$10.9 to a high of \$99.80. The lowest-funded states are in the South and Rocky Mountain states, and the highest-funded states are in the Northeast, Mid-Atlantic, Midwest, and West. Attachment # 1 is a chart illustrating the dramatic differences in civil legal aid funding.

While non-LSC funding sources have been steadily increasing overall, LSC funding has not kept pace. LSC funding today purchases less than half of what it did in 1980, the time when LSC funding provided what was called “minimum access” or an amount that could support two lawyers for each 10,000 poor people in a geographic area. Since 1980, LSC has been unable to convince Congress to appropriate sufficient funding to maintain the level of access achieved then. LSC has lost considerable ground because of two significant budget reductions (in 1982 and 1996) and the inability to keep with up inflation. The chart on the following page presents a few funding comparisons:

³² This estimate is based on the funding for Puerto Rico at \$20,675,396, American Somoa at \$94,627, Guam at \$920,746, Micronesia \$2,183,861 and the Virgin Islands at \$1,306,645 as reported by the Legal Services Corporation, *Fact Book 2007* at pages 5 and 6; it is also based on a funding estimate for the District of Columbia of \$20 million.

Grant Year	Annual LSC Appropriation in Actual Dollars	Appropriation If It Had Kept Up With Inflation	Percentage Change From 1980 (Using 1980 Dollars)
1980	300,000,000	300,000,000	0.0%
1981	321,300,000	331,004,146	-2.9%
1982	241,000,000	351,219,424	-31.4%
1990	316,525,000	475,649,712	-33.5%
1995	400,000,000	554,737,587	-27.9%
1996	278,000,000	570,998,079	-51.3%
2002	329,300,000	623,444,568	-47.2%
2005	330,804,705	704,055,010	-53.0%
2007	348,500,000	733,178,279	-52.5%
2008	350,490,000	739,072,032	-52.6%

Over the last twenty-five years, there has been a radical shift in funding from LSC and federal sources to a far more diversified funding base, including substantial increases in funding from state sources. As a consequence, the United States civil legal aid program has moved from a federally-based system to a state-based one. Many legal services providers have developed the ability to generate significant additional revenue at the state and local level. Overall, funding has grown in actual dollars and when adjusted for inflation, but LSC funding has continued to decline, as shown above. However, there is high variability among states in terms of success in attracting funding. There is a wide gap between the highest- and lowest-funded states – a difference so great that it makes talking about average funding on a national level almost meaningless. See attachment #1 for a map illustrating the differences.

As many commentators have pointed out, the United States system is funded far below the level of funding provided by most of the other Western, developed nations.³³ Even at the lower end, Germany and Finland invest more than three times as much of their gross domestic product (GDP) as the United States does in serving the civil legal needs of lower income populations. At the higher end, England spends twelve times as much of its GDP as the United States does to provide civil legal aid to its citizens. In between, New Zealand spends five times

³³ See Earl Johnson, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *FORDHAM INT'L L. J.* 583 (2001).

more than the United States, and the Netherlands over seven times as much. Canadian provinces are also in the middle, but several spend significantly more than the US on civil legal aid. Even though the US is far behind virtually all developed countries with a civil legal aid plan, it is important to recognize that, over the last decade, the U.S. system has grown from approximately \$700 million to over \$1.205 billion (including the District of Columbia, Puerto Rico, and the territories).

B. *Future Funding*

Future funding for civil legal assistance will come from five sources:

- federal government;
- state and local governmental funds;
- IOLTA funds;
- private bar contributions; and
- private sources, such as foundations and United Way Campaigns.

1. **Federal Funding through LSC**

Even though forty-one states plus the District of Columbia now have non-LSC funding that exceeds LSC funding, and even though new funding will continue to come from non-LSC sources, increased funding from the federal government will continue to be essential for two reasons. First, civil legal service is a federal responsibility, and LSC continues to be the primary single funder and standard setter. Second, there are many parts of the country – particularly the South, Southwest, and Rocky Mountain states – that have not yet developed sufficient non-LSC funds to operate their civil legal assistance program without federal support.

Supporters of increased federal funding will have to overcome significant political barriers to substantially increase federal funding for civil legal assistance. Although LSC leadership has made substantial progress in developing a much stronger bipartisan consensus in favor of funding for LSC,³⁴ the political leadership particularly in the Congress remains divided about whether there should continue to be a federal program and its scope.

In addition, the current fiscal crisis both at the federal level and in the states will make it hard for LSC and for state funding to grow even though there is much stronger support for LSC in the White House and Congress. For the future, we expect to see some increases, possibly significant increases in the LSC budget, but are likely to see reductions from state and IOLTA sources. At the time this report is prepared, we do not yet know what the final appropriation for FY 2009 will be for LSC and we do not know what the OMB mark for LSC will be for FY 2010.

2. **State IOLTA and Governmental Sources**

³⁴ John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101, 110-11 (Fall 2000).

Since 1982, funding from state and local governments has increased from a few million dollars to over \$425 or more million.³⁵ Until recently, this increase has been primarily through IOLTA programs, which have now been implemented in every state.³⁶ But funding from court fees and general state revenue has now overtaken IOLTA funding in many states. In 2008, IOLTA funding had increased to \$212,273,211. For 2009, however, we know there will be reduced IOLTA funding, but we are not yet sure how many the actual reductions will be and what the actual impact on civil legal aid funding will be. Some states are reporting drastic reductions in IOLTA funding for civil legal aid, while others are reporting far fewer reductions.

These reductions in IOLTA funding are likely to occur because of the reduced interest rates and the lack of home purchases.³⁷ Even so, IOLTA programs are developing new initiatives to expand revenue in many states. These initiatives include capturing the general rise in interest rates, changes in IOLTA rules in some states, and aggressive negotiation work with financial institutions in others.

Within the last seven years, substantial new state funding has come from general state or local governmental appropriations,³⁸ filing fee surcharges, state abandoned property funds, punitive damage awards, and other governmental initiatives.³⁹ State governmental increases were likely to continue as long as state financial conditions remain in good shape. In fact, in 2008, state funding increased to \$215,827,500 from the 2007 level of \$211,706,000. However, state financial conditions are far worse than even those at the federal level. States are facing huge budget deficits and most do not have the capacity to deficit spend because of state constitutional provisions requiring a balanced state budget. The National Conference of State Legislatures and the National Governor's Association are reporting at least a \$137 billion budget shortfall for fiscal years 2009 and 2010. Therefore, we are likely to see reductions in state government spending in 2009, but we do not yet know how much such reductions will be.

3. Right to Counsel in Civil Cases at State Expense

³⁵ The exact amount of state funding for civil legal assistance has not been fully documented, because much of this funding has gone to non-LSC funded programs, which, unlike LSC-funded programs, do not have to report to any central funding source.

³⁶ In 2003, the United States Supreme Court upheld the constitutionality of the IOLTA program in a narrow 5-4 decision, *Brown v. Legal Foundation of Washington*. 538 U.S. 216 (2003). The Court held that although the IOLTA program does involve a taking of private property – interest in escrow accounts that was owned by the depositors – for a legitimate public use, there was no violation of the Just Compensation Clause of the Constitution because the owner did not have a pecuniary loss.

³⁷ In November, the American Bar Association, National Association of Bar Counsel and NLADA successfully persuaded the Federal Deposit Insurance Corporation to modify its rules of its new Temporary Liquidity Guarantee Program to ensure IOLTA accounts are fully insured by the government. Without such a rule change there was realistic fear that many lawyers would abandon the program and revenues would be even further reduced.

³⁸ According to a 2009 report by the ABA Project to Expand Resources for Legal Services, thirty states have income for civil legal aid from court fees and fines, and thirty-six states have some form of funding from state appropriations.

³⁹ This newly emerging system of delivery must be put into context. State funding is no more secure than federal funding, and the debate over whether there should be governmental funding for civil legal assistance is not limited to Congress. Many of the same debates are occurring at the state level. For example, in 2000, 2001, and 2002, efforts were made in Virginia to impose the LSC restriction on state funds. Washington state did impose LSC restrictions on state appropriated funds in 2004.

In the United States, there is no general right to state-funded counsel in civil proceedings. The United States Constitution does not provide an explicit right to state-funded counsel in civil proceedings, although the Fourteenth Amendment does prohibit a State from depriving “any person of life, liberty, or property, without due process of law” or denying “to any person within its jurisdiction the equal protection of the laws.” Unlike *Gideon v. Wainwright*,⁴⁰ in which the United States Supreme Court held that there must be counsel in criminal cases in which the defendant faces imprisonment or loss of physical liberty, the Court refused to find a constitutional right to counsel in civil cases when first faced with the issue in 1981. In *Lassiter v. Department of Social Services*,⁴¹ the Supreme Court held in a 5-4 ruling that the due process clause of the federal constitution did not provide for the guaranteed appointment of counsel for indigent parents facing the termination of parental rights. Rather, “the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings is to be answered in the first instance by the trial court, subject, of course, to appellate review.”⁴²

No state constitution explicitly sets out a state-funded right to counsel in civil cases. Virtually all state constitutions have due process and equal protection clauses whose wording may differ from the federal constitution but whose scope have often been interpreted to be similar to or even broader than the federal constitution’s provisions. These provisions have been the primary legal framework for asserting the right to counsel in civil cases at state expense. Many state constitutions have “access to court” provisions, and some have provisions incorporating English common law rights. Recently, advocates have pursued these provisions to assert the state-paid right to civil counsel.

In limited categories of cases, some state legislatures have enacted statutes requiring state-funded counsel to be appointed for one or more parties,⁴³ and the highest courts in some states have judicially decided that state-funded counsel should be provided as of right to some parties.⁴⁴ These state-funded counsel provisions or court rulings are generally in the family law area and civil commitment. There are a few federal statutory requirements for appointment of counsel in civil cases, but these are very limited.

Thus, in the vast majority of civil cases, there is no constitutional or statutory right to state-funded counsel. Based on the usual caseloads of most general civil legal aid providers, it

⁴⁰ 372 U.S. 335 (1963).

⁴¹ 452 U.S. 18 (1981).

⁴² *Lassiter*, 452 U.S. at 32.

⁴³ Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REVIEW 245 (July-Aug. 2006).

⁴⁴ A thorough exploration of state cases since *Lassiter* is found in the article by Clare Pastore, *Life after Lassiter: An Overview of State-Court Right-to-Counsel Decisions*. 40 CLEARINGHOUSE REVIEW 186 (July-Aug. 2006). See also 92 A.L.R.5th 379 (2001 & Supp. 2006) (providing detailed analysis of state court cases involving termination of parental rights and the developments subsequent to *Lassiter*); Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363, 367 (2005) (noting that forty states now provide free counsel for parents in state-initiated termination-of-parental rights actions, up from thirty-three at the time of the *Lassiter* decision); Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States’ Response to Lassiter*, 14 TOURO L. REV. 247 (1997) (particularly note Tables I and II at pp. 276, 277).

would be fair to conclude that there is no statutory right to counsel in over 98 percent of the cases that would directly involve low-income persons as defendants or plaintiffs.⁴⁵

Most commentators do not believe that there will be any significant developments at the federal level because of the current make-up of the United States Supreme Court. Instead, most action that is occurring is focused at the state level in a few states. Major initiatives are underway in several states to litigate a constitutional right to civil counsel at state expense.⁴⁶ So far, there have not been any recent major state court decisions expanding the right to counsel in civil cases beyond the family law areas described above. There was a vigorous dissent by three justices in a recent Maryland case before Maryland's highest court. In *Frase v. Barnhart*,⁴⁷ the Maryland Court of Appeals refused to reach the issue of the right to counsel, but three of seven justices stated in a concurring opinion that the court should have addressed the question and decided in favor of a civil right to counsel in certain cases.⁴⁸ More recently, in December of 2007, the Washington State Supreme Court in a 6-2 decision refused to find a right to counsel in a case involving disputes over who should have primary residential care over the children of a former marriage.⁴⁹ There is a pending case in Alaska before its Supreme Court seeking court appointment of counsel for an indigent party to a child custody dispute where the other party is represented by private counsel.

In addition to litigation in the courts, there are significant efforts to develop more expansive state statutes that provide for the right to counsel in civil cases at state expense in situations that go far beyond the few areas that now provide for such counsel.⁵⁰ At least one local government, New York City, is considering legislation that would provide a right to counsel in eviction and foreclosure proceeds for low-income seniors.

It is likely that efforts to expand and develop the civil right to counsel at state expense will intensify. Not only is there increasing interest among civil legal aid advocates, as illustrated by the Clearinghouse Review volume on this subject, but there is now a very active national Coalition For a Civil Right to Counsel. In addition, there is likely to be increasing bar attention as well. In 2005, the President of the American Bar Association established a Commission on

⁴⁵ Data from the Legal Services Corporation tracks the number and type of cases that LSC-funded programs bring. According to 2007 data, for example, LSC-funded programs provided some kind of legal assistance in 906,507 cases. They provided legal assistance in only 2,167 termination of parental rights cases, or .0024 of the total cases, and in 787 mental health cases, or .0009 of the cases brought. Even assuming there is a statutory or constitutional right to civil counsel in all of these cases, then LSC-funded entities handled only .003 of the total cases, or less than 1 percent. If we assume in some other categories of cases there is a statutory right to counsel, it is doubtful that the total number of cases reaches 1 percent. Most state funders do not require collection of this level of case-type data. When non-LSC funded programs have collected similar data, the percentages have historically tracked the data of LSC-funded programs.

⁴⁶ See 40 CLEARINGHOUSE REVIEW (July-Aug. 2006) (discussing various theories and state initiatives throughout the volume).

⁴⁷ 840 A.2d 114 (Md. 2003).

⁴⁸ For a discussion of this case and the ongoing Maryland efforts, see John Nethercut, *Maryland's Strategy for Securing a Right to Counsel in Civil Cases: Frase v. Barnhart and Beyond*, 40 CLEARINGHOUSE REVIEW 238 (July-Aug. 2006).

⁴⁹ See *King v. King*, No. 79978-4 (December 6, 2007).

⁵⁰ Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REVIEW 176 (July-Aug. 2006); Russell Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 40 CLEARINGHOUSE REVIEW 196 (July-Aug. 2006).

Access to Justice in Civil Legal Aid. One of its two tasks was to develop a policy statement on the right to counsel at public expense in civil cases. The Commission's recommendation was endorsed by the ABA House of Delegates at their 2006 Annual Meeting in August.⁵¹ The policy statement provides:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.⁵²

Several states have now also adopted similar resolutions including New York and Pennsylvania. In addition, there are an increasing number of state bar symposiums focusing on the civil right to counsel. Last year, for example, a New York State civil right to counsel conference was held at Touro Law School which produced a civil right to counsel symposium issue of the Touro Law Review.⁵³

California proposed a pilot project and model statute. California Chief Justice Ronald M. George endorsed a resolution on the right to counsel in civil matters by the Conference of Delegates of the California Bar Association. At his request, California Governor Schwarzenegger's proposed budget includes \$5 million for a pilot project to provide representations in evictions, custody disputes, and other civil cases where important rights are at stake. However, the legislature did not approve the funding. In addition, a task force of the California Access to Justice Commission released model legislation creating a civil right to counsel in certain cases.

V. FUTURE DEVELOPMENTS AFFECTING LSC

Three developments may occur during 2009 and 2010 that will substantially affect the future of the federal civil legal aid program and LSC.

First, the President will appoint a new LSC Board. Currently, there are ten confirmed members of the LSC board and one vacancy. The terms of all of the confirmed board members have expired. However, under Section 1004(b) of the Legal Services Corporation Act as amended, each member shall continue to serve until his or her successor has been appointed and confirmed. Thus, the current board can continue to function and oversee the operation of the Legal Services Corporation until the President nominates and the Senate confirms a new board. Under section 1004(a) of the LSC Act, the President has authority to nominate a board of Directors consisting of eleven voting members, no more than six of whom shall be of the same political party. A majority must be lawyers, none can be a full-time employee of the United States, and the board must include eligible clients and must be "generally representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general

⁵¹ American Bar Association, *Report to the House of Delegates (112A)*, Aug. 7, 2006, available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>. The recommendation was unanimously approved.

⁵² *Id.* at 1 (emphasis removed).

⁵³ See http://www.tourolaw.edu/lawreview/Vol25_No1_2009.html

public." At the moment, the LSC transition team is putting tougher recommendations on possible nominees to the LSC Board for consideration by the White House.

Second, as noted earlier, the Administration will indicate its support for increased funding for LSC when it determines its budget mark for LSC for 2010. Technically, LSC submits its budget directly to Congress. The LSC Budget is not a part of the Administration's budget and LSC does not go through all of the steps and review of other federal Departments and Agencies that are part of the President's budget. However, the President's mark is often very important to the Congress, particularly in a new Administration with a Congress controlled by the same party as the President. Thus, President Obama's budget mark will signal the level of support for LSC by the Administration and in many respects frame the playing field for Congressional action.

Third, the LSC Act has not been reauthorized since 1977. Although the reauthorization section of the LSC Act expired in 1980, there is no sunset provision, and the LSC Act continues as the legislative framework for the program. LSC continues in existence because Congress has continued to appropriate funds to support it. Since 1980, Congress has made numerous legislative changes affecting LSC's operation through riders to the appropriations acts. For the first time since 1995, there is Congressional interest in considering reauthorization of LSC. Senator Tom Harkin, the lead supporter of LSC in the Senate at this time, and a key member of the appropriation Senate Committee that considers LSC, will introduce a reauthorization bill shortly. While action is not likely over the next several months, there is a likelihood that this Congress will take up LSC reauthorization before its two-year term ends.

In addition, after a new LSC Board is confirmed, they are likely to take up the question of how to address the support and infrastructure issues that have been postponed since 1996. A key component of quality is training, support and necessary research. When LSC began operations in 1975, it had organizational divisions devoted to training and research on the delivery of civil legal aid and it provided funding for state and national support. LSC ended its funding for research in 1982, and in 1996 Congress eliminated funding for national and state support centers and training programs. As a result, LSC could no longer fund the national infrastructure that had included 15 national support centers and five regional training centers. In addition, the loss of over \$10 million in LSC's state support funding took a large toll on the state support structure that had helped to ensure coordination and support for all legal providers and their partners, along with a central focus on statewide advocacy on issues of importance to low-income persons, including representation before legislative and administrative bodies.

No recent assessments have been done regarding the needs for training, support and research within the civil legal aid community, nor has there been a comprehensive assessment of the capacities that exist across the country to meet those needs. Therefore, a careful assessment of those needs and the range of capacities that are currently available is necessary in order to determine how LSC should proceed to address them. Such an assessment would likely begin with an analysis of the changing legal needs of the low-income community. The demographics of the low-income community have changed considerably over the last 15 years, and many new legal problems affecting poor people have arisen. LSC would also examine the need for skills and substantive training, access to research capacity and professional development for legal aid attorneys and paralegals as well as the need for management and administrative training and

professional development for grantee executive directors and other program management staff. It may also examine what types of substantive information is necessary for effective legal aid advocacy and what gaps exist. It will examine the best ways to use technology to provide information and research to grantees and their staffs, as well as the need for access to skilled and experienced substantive experts and litigators who could provide technical assistance and co-counseling. Finally, it will likely consider whether LSC should have a research capacity to stimulate innovation in, and examine the delivery of, civil legal assistance. Based on these assessments, LSC would then develop a plan to ensure the availability of training, support and research that addresses the documented needs in a cost effective manner.

VI. SUPPLEMENTS TO THE STAFF ATTORNEY SYSTEM

PRO BONO

Pro bono efforts are the primary supplement to the staff attorney system and, in many respects, an integral and integrated part of that system. Pro bono efforts in the United States continue to expand and engage more private attorneys, providing greater levels of service.

While there is no reliable data about how much pro bono activity is actually going on, states are starting to measure the amount of pro bono being done either through surveys or through mandatory reporting requirements. Periodically, *The American Lawyer* magazine surveys the 200 largest law firms on the amount of pro bono performed during the prior year and the number of lawyers in each firm who participate. In 2005, 183 firms reported an aggregate of 93,175 lawyers, who provided 3,335,375 hours of pro bono legal services to individuals and organizations that could not afford to hire lawyers. These figures represent only 18% of practicing lawyers nationwide, and these figures do not account for the work done by solo practitioners and those in small and medium-sized firms.⁵⁴

In addition, the American Bar Association's Standing Committee on Pro Bono and Public Services issued a report—**Supporting Justice: A Report on the Pro Bono Work of America's Lawyers**—which reports on a 2004 survey of 1,100 lawyers throughout the country in private practice, corporate counsel, government, and academic settings. The study found that two-thirds of respondents provided free pro bono services to people of limited means and organizations serving the poor, and 46% of the lawyers surveyed met the ABA's aspirational goal of providing at least 50 hours of free pro bono services.

The Legal Services Corporation has been a leader in encouraging pro bono activity and continues to do so. Since 1981, LSC-funded programs have had to provide a proportion of their funding for private attorney involvement. Currently, each LSC-funded provider must expend 12.5% of its LSC funding for private attorney involvement.⁵⁵ Of the 906,507 cases closed by LSC program in 2007, 97,531 were done by private attorneys. Of these cases, 64,494 were done

⁵⁴ See Debbie Segal and Steven Scudder, "Pro Bono: No Longer Random Acts of Kindness," 19 Management Information Exchange, p. 36 (Spring 2005). See also Tanya Neiman, "Unleashing the Power of Pro Bono," at p. 48.

⁵⁵ The requirement is imposed by LSC through its regulatory authority. See 45 CFR 1614.

by pro bono attorneys, 28,457 by contract or judicare attorneys and 4,580 by other PAI approaches. (This is the latest available data).

In 2007, LSC began three new initiatives. First, the LSC board adopted a Resolution in April of 2007 that encouraged LSC-funded programs to undertake greater pro bono activity and pledged to publicize and recognize the work of LSC-funded programs in pursuing private attorney involvement initiatives. Since then, 99 LSC-funded programs have adopted similar resolutions. Second, LSC is also with the ABA to create a National Celebration of Pro Bono for October 25-31, 2009 and will create a pro bono honor roll of outstanding pro bono involvement with LSC funded programs. Third, on December 20, 2007, LSC issues a new Program Letter that provided guidance to LSC-funded program on resources and innovative approaches that were available to more effectively integrate private attorneys into the providing of high quality civil legal assistance.

In addition to LSC initiatives, there continue to be substantial efforts by both the American Bar Association and state and local bar associations to increase pro bono activity among all segments of the practicing bar, including government attorneys and corporate counsel.

Pro bono work is an aspirational ethical goal in the U.S. It is included in Rule 6.1 of the ABA Model Rules of Professional Conduct and has been adopted by most states in their state ethical rules. Although Rule 6.1 is not mandatory but aspirational, a few states have required that all members of the Bar report annually on their pro bono activity. According to a survey put together by the ABA Standing Committee on Pro Bono and Public Service, most states have no mandatory reporting requirements.

- Five states—Florida, Illinois, Maryland, Mississippi and Nevada—now have mandatory pro bono reporting.
- Eight states—Colorado, Indiana, Massachusetts, Minnesota, New York, Pennsylvania, Tennessee and Utah—have rejected mandatory pro bono reporting.
- Eleven states—Arizona, Georgia, Hawaii, Kentucky, Louisiana, Missouri, Montana, New Mexico, Texas, Utah, and Washington—have voluntary pro bono reporting.
- Two states—Michigan and Vermont—are considering voluntary pro bono reporting.
- Eight states—Arizona, Colorado, Delaware, New York, Tennessee, Vermont, Washington, and Wyoming—permit attorneys who take pro bono cases to earn credit toward mandatory continuing legal education requirements.

In addition to mandatory reporting efforts, much is happening at the state level to expand pro bono services for low-income persons. A number of states have modified their Rules of Professional Conduct to promote pro bono service. The highest courts of several states have been very involved in promoting pro bono. The courts have used their formal judicial authority provided under state law, to create formal statewide pro bono systems. For example, state-level commissions and local committees, with judicial or joint bar-judicial leadership, have been created by Supreme Court rule in Indiana, Maryland, Nevada, and Florida. Several states have also initiated major state pro bono recruitment campaigns led by the chief justice and bar presidents or have initiated other efforts to expand pro bono service in the states. Most states now have extensive Web-based resources to support pro bono attorneys.

Finally, the Pro Bono Institute's Law Firm Pro Bono Project challenged large firms around the country to contribute 3 to 5% of their total billable hours to the provision of pro bono legal services. Today, 150 law firms are signatories to that challenge.⁵⁶ The Pro Bono Institute has also just begun a new challenge for corporate in-house counsel to increase the number of significant pro bono activities among lawyers who work on legal matters directly for corporations. The Corporate Pro Bono Challenge is a simple, voluntary statement of commitment to pro bono service by corporate legal departments, their lawyers, and staff.

LAW SCHOOLS

Law schools and law school clinical programs also supplement the staff attorney system. Virtually every ABA-accredited law school operates a clinical law teaching program. Some operate a number of clinics that actually service individual or group clients. In some areas, such as the District of Columbia, the law school clinics are an integral part of the civil legal aid system. In other areas, law school may work closely with legal aid programs and send law students to the programs for part of their clinical training. In some areas, law school clinics are small programs that operate totally independent of civil legal aid programs. Overall, law school clinical programs are a very small component of the delivery system, accounting for less than 2% of the clients served.

However, law schools have also focused more broadly on equal justice beginning in December 1999, when the American Association of Law Schools (AALS) created an equal justice project—Pursuing Equal Justice: Law Schools and the Provision of Legal Services. The centerpiece of the Project was a series of 19 Equal Justice Colloquia convened at law schools across the United States during the 2000-2001 academic years. These colloquia drew more than 2,000 attendees, and the colloquia were followed by a Plenary Session at the 2001 AALS Annual Meeting. The results of this effort are catalogued in an AALS report in March of 2002, **AALS Equal Justice Project: Pursuing Equal Justice: Law Schools and the Provision of Legal Services**.

Since the publication of this report, AALS has adopted a statement of Core Values, which requires AALS members to have “a faculty composed primarily of full-time teachers/scholars who constitute a self-governing intellectual community engaged in the creation and dissemination of knowledge about law, legal processes, and legal systems, and who are devoted to fostering justice and public service in the legal community....” AALS is also working with Equal Justice Works, the organization of public interest law student organizations, to develop a reporting scheme that would provide information on public interest activities of law schools. New courses in social justice and equal justice have also been started in a number of law schools; and several new textbooks include substantial materials about civil legal aid, equal justice, and social justice activities.

⁵⁶ Information is available from the Pro Bono Institute. See www.probonoinst.org.

VII. SELF-HELP LITIGANTS AND PRO SE DEVELOPMENTS

A significant development in civil legal aid in the United States is the rapid expansion of efforts to help people who are attempting to represent themselves in courts. These are described as “pro se,” “self-help,” or “self-represented” litigants. Historically, parties in high-volume courts such as traffic, housing, and small claims courts consisted primarily of pro se litigants. However, more recently, pro se litigants have also begun to dominate family law dockets across the country. There are also significant increases in pro se representation in probate and other civil matters as well.

The United States does not have complete and comprehensive national data on self-help litigants. We do not know how many self-represented litigants appear in state and federal courts and on what types of matters, what impact self representation has had on the courts, the impact of programs to assist pro se litigants have on the courts and on the litigants, and whether self-represented litigants who receive assistance are more likely to obtain a favorable court outcome.⁵⁷

Over the last several years, the Self-Represented Litigation Network, which brings together courts, bar and access to justice organizations in support of innovations in services for the self-represented, has undertaken a number of activities to ensure the justice system works for all including those forced to go to court on their own. For example, the Network developed a judicial curriculum and leadership package which includes PowerPoint slides, detailed faculty notes, an Activity Handbook, which describes activities that help participants to understand underlying issues and begin the planning process, and a Resource Handbook. The judicial curriculum was launched at Harvard Law School in late 2007. Teams from 30 states, the District of Columbia, and four territories consisting of 150 participants including five chief justices, attended the conference. The Network also developed Best Practices in Court-Based Programs for the Self-Represented: Concepts, Attributes and Issues for Exploration which includes 41 Best Practices.⁵⁸

More information about the Self-Help Litigation Network and self-help programs can be found at www.SelfHelpSupport.org, an online resource where pro se and self-help programs can access and share the resources they need to maximize their effectiveness.⁵⁹

Many courts have developed self-help programs. A recent **Directory of Court-Based Self Help Programs** listed over 130 programs. These vary widely, however. Some routine provide broad ranges of information resources and many provide training for judges in how best to facilitate access for the self-represented. Some courts provide electronic document-assembly services, while others provide clinics and individual informational services. These services have

⁵⁷ The National Center for State Courts has some state data available. See **Pro Se Statistics Memorandum** (NCSC, September 2006); <http://www.ncsconline.org/WC/Publications/Memos/ProSeStatsMemo.htm>

⁵⁸ See http://www.ncsconline.org/WC/Publications/KIS_ProSeBestPracticesSRLN.pdf.

⁵⁹ This site was initially funded by the State Justice Institute, hosted on Pro Bono Net, and maintained by the National Center for State Courts. It has approximately 4,000 participants and 2000 documents in its library. An interesting effort to change how courts operate is found in a book by Richard Zorza, *The Self-Help Friendly Court*, National Center for State Courts (2002).

been facilitated by guidelines, protocols, and codes of ethics governing the appropriate role of court staff in provision information assistance.

Many U.S. civil legal aid programs are devoting substantial time and resources to address the issue of assistance to pro se litigants. Many legal aid programs throughout the country operate self-help programs independently or in conjunction with courts. We do not have accurate data on how many such programs exist, but we do know that they cover a wide range of services. A 2005 directory listed over 413 separate self-help assistance programs sponsored through legal aid programs with pro se initiatives.⁶⁰ Some programs provide only access to information about the law, legal rights, and the legal process in written form, on the Internet, on videotape, through seminars, or through in-person assistance. Other programs actually provide legal advice and often provide also legal assistance in drafting documents and advice about how to pursue cases. Often, programs provide both written and Internet-accessible forms for use by persons without legal training; some also provide assistance in completing the forms.

VIII. ENSURING QUALITY

In the United States efforts are made to ensure the quality of civil legal services, through the use of case management systems, the establishment of standards and performance criteria, and the use of peer review onsite examination of the overall effectiveness of programs—based on the standards and performance criteria. Generally, outcome measures have not been used extensively, although five state IOLTA/state funding programs require their grantees to report on outcome measures.⁶¹

In 2006, the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) revised the ABA **Standards for Provision of Civil Legal Aid**.⁶² These were presented to and adopted by the ABA House of Delegates at its August 2006 meeting. The revised Standards, for the first time, provide guidance on limited representation, legal advice, brief service, support for pro se activities, and the provision of legal information. The revised Standards also include new standards for diversity, cultural competence, and language competency.

LSC has also completed a revision of the **LSC Performance Criteria**,⁶³ which were originally developed in 1992 as a tool to evaluate LSC programs through a peer review system. These criteria have been the framework for much of the program evaluation that has gone on in civil legal aid, both by LSC and by peer reviews conducted by others for the program. Some IOLTA and state funders also use staff and peers from programs to monitor and evaluate their grantees, based on the **Standards** and **Criteria**. All LSC-funded providers are required to utilize case management systems, and many non-LSC providers utilize similar systems.

⁶⁰ *Pro Se Legal Services Directory*, AARP Legal Advocacy Group (September 2005).

⁶¹ New York, Maryland, Virginia, Texas, and Arizona measure specific outcomes that could be achieved for clients in specific substantive areas, such as housing, and which focus primarily on the immediate result of a particular case or activity (such as “prevented an eviction”). These systems do not capture information on what ultimately happened to the client. All of these states use the information collected to report to their state legislatures and the public about what the grantees have accomplished with IOLTA and state funding.

⁶² www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2006.pdf

⁶³ <http://www.lsc.gov/pdfs/LSCPerformanceCriteriaReferencingABAStandards.pdf>

Finally, many civil legal aid programs have developed their own evaluation systems, which are designed to help individual programs perform better and to better market what they accomplish. Some programs have developed rigorous internal evaluation systems, including the use of outcome measurements, to evaluate whether they are accomplishing what they set out to do for their clients. The programs have used a variety of creative techniques to conduct their outcome evaluations, including focus groups, client follow-up interviews, interviews of court and social service agency personnel, courtroom observation, and court case file review. In California, the Legal Services Trust Fund, which is the state IOLTA funder, and the Administrative Office of the Courts (AOC) have teamed up to support the development of a “tool kit” of program self-evaluation tools for use by programs as a part of the statewide system of evaluation. The Management Information Exchange’s (MIE) Technology Evaluation Project (TEP) also developed a set of tools—also referred to as a “tool kit”—that is available for programs to use to evaluate their Web sites and their use of video conferencing and legal work stations, which serve clients through “virtual law offices.”

IX. STATE JUSTICE COMMUNITIES

Perhaps the most far-reaching change in the US civil legal aid system has been the evolving effort to create in every state comprehensive, integrated statewide delivery systems, which are often called state justice communities. These include LSC and non-LSC providers, pro bono programs and initiatives, other service providers including human service providers, pro se initiatives, law school clinics, and key elements of the private bar and the state judicial system. In theory, these state justice communities seek to create a single point of entry for all low-income clients, integrate all institutional and individual providers and partners, allocate resources among providers to ensure that representation can occur in all forums for all low-income persons, and provide access to a range of services for all eligible clients—no matter where they live, the language they speak, or the ethnic or cultural group of which they are a member.

One of the most effective ways to develop, expand, and institutionalize comprehensive, integrated state systems for the delivery of civil legal aid is through the establishment of state Access to Justice Commissions. These commissions are created by Supreme Court rule or order in response to a petition or request by the state bar, sometimes with formal support from other key stakeholder entities as well. Their members are representative of the courts, the organized bar, civil legal aid providers, law schools, and other key entities and are either appointed directly by these entities or appointed by the Supreme Court based on nominations by the other entities. They are conceived as having a continuing existence, in contrast to a blue-ribbon body created to issue a report and then sunset. They have a broad charge to engage in ongoing assessment of the civil legal needs of low-income people in the state and to develop, coordinate, and oversee initiatives to respond to those needs.

In a few states, Access to Justice commissions have existed for a decade or more: the Washington State Access to Justice Board, the California Access to Justice Commission, and Maine’s Justice Action Group. Now, 29 states have active Access to Justice Commissions and new commissions are on the drawing boards in several more states.

The commissions' activities are likely to increase over the next several years because of recent steps taken by the ABA. In addition to developing an ABA position on the right to counsel in civil cases, the ABA Commission on Access to Civil Legal Aid was charged with expanding Access to Justice Commissions and state access to justice initiatives. The Commission produced a document that sets out ten principles for state civil legal aid systems; it was adopted by the House of Delegates of the ABA in August 2006. The ABA Principles of a State System for the Delivery of Civil Legal Aid⁶⁴ were developed to provide guidance to state Access to Justice Commissions and similar entities in assessing their state systems, planning to expand and improve them, and ensuring ongoing oversight of their development.

CONCLUSION

The trends in US Civil Legal Aid that I have previously identified continue through 2008. We have seen increased state funding, relatively level federal funding with some increases in 2007, and increases from other funding sources. There are more Access to Justice Commissions and increased attention to civil legal aid at the state level. The notion of a right to counsel in civil matters has gained renewed attention. Yet, the basic civil legal aid system has not undergone fundamental change. Efforts to expand access through technology and self-help representation activities continue and have expanded, but the fundamental problem remains: there are not enough actual staff lawyers, paralegals and private attorneys available to meet the huge needs of low-income persons for advice, brief service and full representation. The New Administration and a new Congress offer the possibility that there will be increased efforts to expand the civil legal aid system to address significantly more of the legal needs of low-income persons in the United States through increased federal funding, supportive reauthorization legislation, and an effort to rebuild the support and legal aid infrastructure.

⁶⁴ American Bar Association, *Report to the House of Delegates, Principles of a State System for the Delivery of Civil Legal Aid (112B)*, Aug. 7, 2006, available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112B.pdf> [hereinafter *ABA Principles*].