

# THE FUTURE OF CIVIL LEGAL AID: INITIAL THOUGHTS

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## I. Introduction

The United States was founded under the fundamental principle of equal justice for all. In the Preamble to the Constitution, our forefathers stated clearly and forcefully the purpose of the government they were creating: “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . . .”<sup>1</sup> It is noteworthy that “establish Justice” precedes, and is the basis for, “domestic Tranquility,” and that both come before “provide for the common defense.” “Equal Justice for All” is also inscribed above the entrance to the Supreme Court of the United States.

Yet, equal justice is not a reality for millions of Americans. This is particularly true for low-income Americans who do not have meaningful access to legal information, advice, assistance, or actual representation in court. Specifically, because there is not a Constitutional civil right to counsel, millions of low-income Americans who cannot afford to pay a lawyer do not have access to necessary advice and representation in civil matters.

In 2005 the Legal Services Corporation (LSC) completed a study entitled, “*Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*,”<sup>2</sup> which examined the adequacy of available funding to meet the legal needs of the low-income population in the United States. The study was updated in 2009, employing the same methodology to document the continued need for civil legal aid among low-income Americans.<sup>3</sup> The studies revealed three main commonalities. First, both studies showed that for every client who received service from an LSC grantee, one eligible applicant was turned away.<sup>4</sup> In other words, 50 percent of potential clients that request assistance are turned away due to lack of resources on the part of the program. Second, the studies each looked at a number of individual state studies addressing the civil legal problems faced by states’ respective low-income residents conducted over the last four years.<sup>5</sup> Seven of the state studies validated the findings of the national study conducted by the American Bar Association (ABA) in 1994, which demonstrated that less than 20 percent of the legal needs of low-income Americans were being met.<sup>6</sup> Finally, the studies identified the number of legal aid lawyers in both LSC and non-LSC funded programs,

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<sup>1</sup> U.S. CONST. pmbl.

<sup>2</sup> See generally LEGAL SERVICES CORP., 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](http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf).

<sup>3</sup> See generally LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS. AN UPDATED REPORT (Sept. 2009), available at [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf) [hereinafter HOUSEMAN, JUSTICE GAP].

<sup>4</sup> *Id.* at 9.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> *Id.* at 13.

and compared that number to the total number of attorneys providing personal legal services to the general population.<sup>7</sup> The study determined that, at best, there is one legal aid attorney for every 6,415 low-income persons.<sup>8</sup> In contrast, the ratio of attorneys delivering personal legal services to the *general* population is approximately one for every 429 persons, or fourteen times more.<sup>9</sup>

Thus, a 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,<sup>10</sup> and extended representation necessary to meet the legal needs of low-income persons.

## II. Where We Are Today

A comprehensive system of civil legal aid would: (1) educate and inform low-income people of their legal rights and responsibilities, and of the options and services available to solve their legal problems; and (2) ensure that all low-income people, including individuals and groups who have little political or social capital, 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 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 people with legal advice, brief service, or, most particularly, extended representation. As a result, many low-income people who are eligible for civil legal assistance are unable to obtain it.

Civil legal aid in the United States is provided by a large number of independent, staff-based service providers funded by a variety of sources.<sup>11</sup> The current total funding for civil legal assistance in the United States is approximately \$1.3 billion.<sup>12</sup> The largest segment of the civil legal aid system is comprised of the 136 programs that are funded and monitored by LSC.<sup>13</sup> LSC

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<sup>7</sup> *Id.* at 20.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Brief services consist of legal advice; short-term assistance such as writing a letter to a landlord, making a phone call to a welfare office; and other short-term activities that could resolve a client's problem. Many clients' problems can be resolved effectively by brief services.

<sup>11</sup> We do not know the exact number of existing civil legal aid programs. Using a variety of sources, I have identified approximately 500 civil legal aid programs around the country. If we also include the 160 programs affiliated with the Catholic Legal Immigration Network ([www.cliniclegal.org](http://www.cliniclegal.org)) and the law school clinical programs operated by the 204 law schools, then we reach a total of approximately 864. See ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009 2 n.1 (July 2009), available at <http://www.clasp.org/admin/site/publications/files/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-2.pdf> [hereinafter HOUSEMAN, UPDATE]; see also NAT'L LEGAL AID AND DEFENDER ASS'N, DIRECTORY OF LEGAL AID AND DEFENDER OFFICES AND RESOURCES IN THE U.S. AND TERRITORIES 2009-2010 (2010) (supplying a comprehensive directory of legal services providers).

<sup>12</sup> See HOUSEMAN, UPDATE, *supra* note 11, at 2.

<sup>13</sup> LSC was created in 1975 after Congress passed, and the President signed, the Legal Services Corporation Act of 1974. LSC funds 136 grantees that operate local, regional and statewide civil legal assistance programs. Generally, one field program provides legal services in a designated geographic area. In addition, LSC earmarks 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. LEGAL SERVICES CORP., FACT BOOK 2009 8 (June 2010), available at <https://grants.lsc.gov/>

is also the largest single funder of civil legal services, although considerable funds come from states as well as Interest on Lawyer Trust Account (IOLTA) programs.<sup>14</sup> Additionally, there are a variety of other funding sources, including local governments, other federal government sources, the private bar, United Way, and private foundations.

In addition to LSC-funded providers, there are a number other legal services providers supported by 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 their jurisdictions. For example, in the District of Columbia, the largest general services provider of civil legal services is the Legal Aid Society of DC, a non-LSC funded provider.<sup>15</sup>

These staff-based providers are supplemented by approximately 900 pro bono programs, which exist in every state and virtually every locale.<sup>16</sup> These pro bono programs are either components of bar associations, component units of legal aid staff programs, or independent nonprofit entities with staff that refer cases to lawyers on pro bono panels. Pro bono programs do not generally provide services themselves, but refer clients to private attorneys who provide services from their private law offices. Law school clinical programs and self-help programs also supplement the staff delivery system. Self-help programs provide assistance to pro se litigants by helping them understand the law, the filing process, the court procedures and other aspects of how cases proceed. There remain a very few “judicare” programs – programs that create panels of private attorneys who receive reduced rates to handle civil legal aid cases – that are directly funded by either LSC or other funders. Indeed, LSC funds only one small judicare program, which now has staff attorneys and paralegals who deliver legal assistance in some cases.<sup>17</sup> It is very rare for a funder to directly fund, by contract or otherwise, individual lawyers or law firms. However, some staff attorney civil legal aid programs have created judicare components, or contracted with individual lawyers and law firms who are paid to provide legal assistance to certain groups of clients that the staff attorneys do not represent.<sup>18</sup>

The United States’ low-income civil legal services system also includes approximately thirty-eight state and support organizations that advocate before state legislative and

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Easygrants\_Web\_LSC/Implementation/Modules/Login/Controls/PDFs/factbook2009.pdf (reporting that the 136 LSC funded programs had \$912,375,140 of the total \$1.3 billion in the civil legal aid system).

<sup>14</sup> 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 in non-interest-bearing accounts.

<sup>15</sup> Interview with Jonathan Smith, Director, Legal Aid Society of the District of Columbia (Sept. 22, 2010).

<sup>16</sup> This estimate comes from Steve Scudder, who serves as Committee Counsel for the ABA Standing Committee on Pro Bono and Public Service. *See also* Standing Comm. on Pro Bono and Pub. Serv., American Bar Ass’n, Directory of Pro Bono Programs (Jan. 23, 2007) <http://www.abanet.org/legalservices/probono/directory.html#>.

<sup>17</sup> The LSC-funded judicare program is Wisconsin Judicare, Inc., in Wausau, Wisconsin. *See* WISCONSIN JUDICARE, INC., [www.judicare.org](http://www.judicare.org) (last visited Sept. 29, 2010).

<sup>18</sup> Data obtained from the LSC indicates that of the 93,168 cases closed through LSC-funded programs’ Private Attorney Involvement efforts in 2008, 31,052 came from judicare, reduced fee panels and contracts with private attorneys or law firms. *See* LEGAL SERVICES CORP., FACT BOOK 2008 26 (Aug. 2009), available at [https://grants.lsc.gov/Easygrants\\_Web\\_LSC/Implementation/Modules/Login/Controls/PDFs/factbook2008forRIN.pdf](https://grants.lsc.gov/Easygrants_Web_LSC/Implementation/Modules/Login/Controls/PDFs/factbook2008forRIN.pdf).

administrative bodies on policy issues affecting low-income people.<sup>19</sup> Some of these organizations also provide training and technical support to local legal aid advocates on key substantive issues.<sup>20</sup> Moreover, there are more than 30 entities that advocate on behalf of low-income people at the federal level, fifteen of which were formerly part of the national support network funded by LSC.<sup>21</sup>

Over the last ten years, the civil legal aid system has begun in earnest to utilize innovations in technology to improve and expand access to justice. As a result, low-income people have achieved increased access to information about their legal rights and responsibilities, and the options and services available to them to solve their legal problems, protect their legal rights, and promote their legal interests. For example, technological innovation has led to the creation of websites that offer information on community legal education and pro se legal assistance, as well as the courts and other social services. Most legal aid programs now have websites, with over 258 such sites in existence.<sup>22</sup> Additionally, each state has a statewide website, most of which contain useful information for both advocates and clients. Dozens of national sites also provide substantive legal information to advocates, as well as delivery, management, and technology support. Many state, national and program-specific websites utilize cutting-edge software that offers extensive functionality. For instance, I-CAN projects in several states use kiosks with touch-screen computers that allow clients to produce court-ready pleadings and to access other services, such as help filing for the Earned Income Tax Credit.<sup>23</sup> Montana and several other states use video conferencing to connect clients in remote locations with local courthouses and legal services attorneys. And an increasing number of legal aid programs across the country, in partnership with the courts and legal community, use document assembly

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<sup>19</sup> See HOUSEMAN, UPDATE, *supra* note 11, at 3. See generally ALAN W. HOUSEMAN, THE PROJECT FOR THE FUTURE OF EQUAL JUSTICE, THE MISSING LINK OF STATE JUSTICE COMMUNITIES: THE CAPACITY IN EACH STATE FOR STATE LEVEL ADVOCACY, COORDINATION AND SUPPORT (Nov. 2001), available at [http://www.clasp.org/publications/missing\\_link.pdf](http://www.clasp.org/publications/missing_link.pdf) [hereinafter HOUSEMAN, MISSING LINK].

<sup>20</sup> HOUSEMAN, UPDATE, *supra* note 11, at 3; See generally HOUSEMAN, MISSING LINK, *supra* note 19.

<sup>21</sup> Pine Tree Legal Assistance (PTLA) lists twenty-four national advocacy centers on its website. Pine Tree Legal Assistance, National Support Centers, [www.ptla.org/ptlasite/links/support.htm](http://www.ptla.org/ptlasite/links/support.htm) (last visited May 26, 2010). The Sargent Shriver National Center on Poverty Law lists six additional centers on the inside back cover of the *Clearinghouse Review*.

<sup>22</sup> Pine Tree Legal Assistance lists 258 legal services sites on its webpage. *Legal Services Sites*, PINE TREE LEGAL ASSISTANCE, <http://www.ptla.org/ptlasite/links/services.htm> (last visited May 26, 2010).

<sup>23</sup> Legal Aid of Orange County operates the most well known of the I-CAN projects. To access their I-CAN! E-File service see I-CAN! E-FILE, [www.icanefile.org](http://www.icanefile.org) (last visited Sept. 30, 2010). For the first time, as part of the Free File Alliance – a group of organizations that provide free tax-filing services – the service can be accessed through the Internal Revenue Service website. INTERNAL REVENUE SERVICES, *Free File Home – Your Link to Free Federal Filing Online*, [www.irs.gov/freefile](http://www.irs.gov/freefile) (last visited Sept. 30, 2010). 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. See Press Release, Legal Services Corp., E-File System Returns Millions to Low-Income Tax Filers, LSC (Mar. 3, 2009), available at [http://www.lsc.gov/press/pressrelease\\_detail\\_2009\\_T248\\_R7.php](http://www.lsc.gov/press/pressrelease_detail_2009_T248_R7.php).

applications such as HotDocs to expand and streamline the provision of legal services to clients.<sup>24</sup> These projects generally focus on document assembly of pro se resources used by the public, and automated documents used by legal aid staff in order to more efficiently represent their clients.<sup>25</sup>

A more recent technological innovation grew out of work done in 1999 and 2000 by Ronald Staudt and colleagues at the Center for Access to Justice and Technology at Chicago-Kent College of Law. In 2004, Chicago-Kent College of Law joined with the Center for Computer-Assisted Legal Instruction to build Access to Justice Author (A2J Author), which was designed as a "tool to build tools." This technology uses HotDocs Online software to guide self-represented litigants through a web-mediated process designed to assess eligibility, gather pertinent information needed to prepare a set of simple court forms, and then deliver those forms, ready to be signed and filed. A2J Author is equipped with "just in time" help tools, including the ability to speak each word of the interview to the user in English or Spanish. The program can also direct the user to outside websites in order to obtain explanations of technical terms.<sup>26</sup> Several legal aid programs, including Iowa Legal Aid and Legal Aid of Western Ohio, are pioneering the use of A2J Guided Interviews as a means of directly supplying potential clients with access to their case management system over the web. This will allow a potential client to interview him or herself, determine financial eligibility, provide preliminary information to locate the client problem within the service coverage of the agency, and deliver it all at any time of the night or day.

In recent years there has been a rapid expansion of efforts on the part of courts, legal aid providers, and bar associations to support people attempting to proceed pro se. Many provide access to information about the law, legal rights, and the legal process through a variety of different media, including written materials, the Internet, videotapes, seminars, and in-person assistance. Others actually provide individualized legal advice, including help drafting documents and guidance on how to pursue legal claims. Programs often provide both printed and Internet-accessible forms for use by laypersons, and may also provide assistance in completing the forms.

A critical part of expanding access has been a range of limited legal assistance initiatives aimed at providing less than extended representation to clients who either do not need such extended representation to solve their legal problems, or who live in areas without direct 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 or brief service. Legal hotlines may provide answers to clients' legal questions, analyses of clients' legal problems, and advice on solving those problems so that the client can resolve the problem with the information provided during the phone consultation. Brief services may be performed when the problem is likely to be resolved quickly; if further legal assistance is necessary, the client may be supplied with a referral. Finally, more and more states have a central phone number (or several regional

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<sup>24</sup> HotDocs is software for document assembly and preparation that is used by many LSC-funded programs. For a discussion see Ronald W. Staudt, *All the Wild Possibilities: Technology that Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1128-33 (2009).

<sup>25</sup> Many of these projects are nationally coordinated through National Public Automated Documents Online (NPADO), which is a project of Pro Bono Net. LawHelp Interactive, <https://lawhelpinteractive.org/> (last visited May 26, 2010).

<sup>26</sup> Staudt, *supra* note 24, at 1128-33.

phone numbers) that clients can call to be referred to the appropriate program or to obtain brief advice about their legal problems.<sup>27</sup>

Finally, there are many innovations in the delivery of civil legal aid that have created new ways of collaborating with providers of other services to low-income people. For example, Medical-Legal Partnerships (MLPs) integrate lawyers into the health care setting to help patients navigate the complex legal systems that often hold solutions to many determinants of health: income support for hungry families, utility shut-off protection during cold winter months, and mold removal from the homes of asthmatics. Doctors and lawyers are now partnered at over 180 hospitals and health centers nationwide in pediatrics, family medicine, internal medicine, oncology, and geriatrics. These new health care teams address families' unmet basic needs for food, housing, income, education and stability: needs that families report to their doctors, but which have legal remedies. MLPs rely on legal aid agencies for case-handling and expertise, and receive pro bono assistance from dozens of law firms across the U.S. Nearly half of LSC-funded legal services programs have an active or developing medical-legal partnership program.<sup>28</sup> In addition, dozens of private law firms provide pro bono assistance to MLP programs, over 15 law schools are currently engaged in MLP activities, and more than 20 post-graduate law fellows have been funded to work in medical-legal partnerships.<sup>29</sup>

### III. The Steps Ahead: A Broad Framework of Goals, Values and Vision

To ensure equal justice for all, the nation as a whole, and each state and jurisdiction individually, should develop a comprehensive and integrated system to deliver high quality civil legal assistance that actually resolves the legal problems of low-income people. Access to the justice system must be fully available to everyone, particularly those who need it most—the poor, culturally or geographically isolated populations, and those who may belong socially unpopular groups.

The American Bar Association developed a set of principles for such a system on the state level that, when generalized to the nation as a whole, provides a comprehensive framework for expanding and improving the civil legal aid system.<sup>30</sup> We need to achieve a system that encompasses ten broad directives.

First, a comprehensive system for the delivery of civil legal aid must provide services to the country's low-income and vulnerable populations, including those with distinct, unique, or disproportionately experienced legal needs. No vulnerable population or group that has experienced disparate treatment should be institutionally excluded from receiving legal assistance. These populations include those who cannot be served through federally funded programs for reasons such as income level, immigration status, incarceration, or other disqualifying eligibility

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<sup>27</sup> See, e.g., *Do you Need Legal Help?*, MONTANA LEGAL SERVICES ASS'N, <http://www.mtlsa.org/RTF1.cfm?pagename=Montana%20Legal%20Services%20Association%20Helpline> (last visited Sept. 30, 2010).

<sup>28</sup> *Legal Aid Agencies*, NAT'L CTR. FOR MEDICAL-LEGAL PARTNERSHIP, <http://www.medical-legalpartnership.org/mlp-network/legal-aid> (last visited Sept. 30, 2010).

<sup>29</sup> *See Law Schools*, NAT'L CTR. FOR MEDICAL-LEGAL PARTNERSHIP, <http://www.medical-legalpartnership.org/mlp-network/law-schools> (last visited Sept. 30, 2010).

<sup>30</sup> See generally AMERICAN BAR ASS'N, AMERICAN BAR ASS'N PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID (Aug. 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112B.pdf> [hereinafter ABA PRINCIPLES].

criteria. They also include the elderly and people with mental or physical disabilities, as well as those facing particular barriers to access to civil legal services, such as the homeless, institutionalized persons, children, migrant workers, Native Americans, and people lacking proficiency in English.

As the “justice gap” demonstrates, current resources are not sufficient to meet the full demand for services by low-income and vulnerable populations. Therefore, the system should identify the most compelling legal needs and determine how to allocate available resources in order to meet those needs most effectively. Underlying this process should be the goal that all groups of clients be represented in all appropriate forums. The priorities should be based on the identified needs of the clients and the communities served, and not on existing provider structures, funding source directives, or restrictions. In many states, this will require facilitating and supporting efforts by providers to set priorities and allocate resources accordingly.

Second, a comprehensive system for the delivery of civil legal aid must provide a full range of services in all forums. A full range of services includes information about legal rights and responsibilities; options among services; outreach and community legal education; legal advice and brief services; support and assistance for individuals capable of representing themselves; representation in negotiation and alternative dispute resolution; transactional assistance; representation in administrative and judicial proceedings; extended representation in complex litigation, class actions, and on systemic issues; and representation before legislative and administrative bodies that make laws or policies affecting low-income and vulnerable people. The civil legal aid system should strive to be free of inappropriate or undue government or political influence, and should educate officials about the need for providing the full range of services to all low-income and vulnerable populations in the state.

Third, a comprehensive system for the delivery of civil legal aid must provide services of high quality in an effective and cost efficient manner to low-income people and others who cannot afford counsel to meet their legal needs. All providers should comply with standards of practice and ethics developed by the state, and institutional providers<sup>31</sup> should comply with state and national standards of practice where appropriate, including the *American Bar Association Standards for the Provision of Civil Legal Aid*<sup>32</sup> and the LSC Performance Criteria.<sup>33</sup> Funders and other appropriate entities should evaluate programs and individuals providing services, who should themselves engage in self-evaluations. Staff compensation and workload should also be manageable enough to enable the provision of uniformly high quality, effective, and productive services. An appropriately diverse staff should be recruited, trained, supported, supervised, and provided with the necessary tools—including current technology—to provide high quality, effective, and cost-efficient legal services. Services should be provided in a cost-efficient manner to maximize access and limit unnecessary administrative and other costs.

All individuals participating in providing, supporting, or managing civil legal aid should receive ongoing training and participate in professional and leadership development activities. As

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<sup>31</sup> “Institutional Providers” is a term used to refer to non-profit organizations established to provide civil legal aid services, including staff attorney programs, pro bono programs, law school clinical programs and divisions of larger organizations that provide civil legal aid services.

<sup>32</sup> AMERICAN BAR ASS’N, AMERICAN BAR ASS’N STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID (Aug. 2006), *available at* [www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2006.pdf](http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2006.pdf) [hereinafter ABA STANDARDS].

<sup>33</sup> LEGAL SERVICES CORP., PERFORMANCE CRITERIA (2007), *available at* <http://www.lsc.gov/pdfs/LSCPerformanceCriteriaReferencingABASStandards.pdf>.

part of a support system, management information and information about new developments in the law should be disseminated to all advocates and managers. Assistance should be provided on all legal issues, and advocates should coordinate their work on behalf of the client community. Providers in a state should work and coordinate with national entities and organizations to receive support and information about changes in law and policy, and to ensure that the interests and legal rights of low-income persons are taken into account by national bodies involved in civil justice and dispute resolution.

Fourth, a comprehensive system for the delivery of civil legal aid must provide services in sufficient quantity to meet the need by making the most effective use of all available resources dedicated to those services. The system should systematically seek out additional resources and maximize existing ones by developing and utilizing all potential financial, volunteer, and in-kind sources to ensure both the success and the cost efficiency of the system.

Fifth, a comprehensive system for the delivery of civil legal aid must fully engage all entities and individuals involved in the provision of those services, and service providers must be central to the administration of justice in the state. Those engaged must include legal aid providers, private attorneys (including those who work pro bono and those who provide such services for compensation), court personnel, law school clinics, human services agencies, paralegals, lay advocates, and other public and private individuals and entities that provide legal services to low-income and other vulnerable people who cannot afford counsel in the state.

Sixth, a comprehensive system for the delivery of civil legal aid must make services fully accessible and uniformly available throughout the state. The ability of low-income and vulnerable persons to obtain civil legal assistance should not depend on where in the state they reside. Achieving this result will take time, but efforts can be made now to ensure that services are relatively accessible and available throughout the state.

Seventh, a comprehensive system for the delivery of civil legal aid must engage clients and those populations eligible for civil legal aid services in order to obtain meaningful information about their legal needs, and must treat clients, applicants, and those receiving services with dignity and respect. Providers should demonstrate diversity and cultural competence in all their operations and have a culturally competent and diverse staff so that all groups of clients are welcomed and represented in a culturally appropriate manner. Providers should provide legal information and other forms of non-representational services in the language of those persons seeking and using their services. Services should be accessible at intake to all people regardless of their primary language. To guide coordination and planning, the system should obtain meaningful information from, and interact effectively with, low-income and vulnerable people and groups representing them. Guidance should also be sought from those communities that face disparate treatment within and unique barriers to the justice system, including new and emerging populations and categories of potential clients.

Eighth, a comprehensive system for the delivery of civil legal aid must engage and involve the judiciary and court personnel in reforming court rules, procedures, and services in order to expand and facilitate access to justice. The judiciary should ensure that the courts are inclusive, respectful of difference, and culturally competent. It should also ensure that they are accessible and responsive to the needs of all residents, including low-income and vulnerable populations, as well as those facing financial, physical, and other barriers to access. The judiciary should examine its rules and procedures to ensure that such rules do not hinder access to the courts, and, where necessary, change them to expand and facilitate accessibility. Courts should also provide a range of services, including assistance to pro se litigants where appropriate.

Ninth, a comprehensive system for the delivery of civil legal aid must be supported by an organized bar and judiciary that provides leadership and participates with legal aid providers, law schools, the executive and legislative branches of government, the private sector, and other appropriate stakeholders in ongoing and coordinated efforts to support and facilitate access to justice for all, particularly with respect to civil justice. Their involvement should take the form of collaboration with legal aid providers, the executive and legislative branches of government, IOLTA and other state funders, the private sector, and other appropriate stakeholders in formal structures and/or specific initiatives dedicated to this goal. The organized bar has a special obligation to provide leadership in efforts to maximize pro bono services.

Tenth, a comprehensive system for the delivery of civil legal aid must engage in both statewide and national planning and oversight in order to achieve the nine principles set forth above. The system should develop and maintain the capacity to administer and manage its civil legal assistance delivery system. Planning and oversight should be open and inclusive and should include individuals who are diverse, experienced with and sensitive to the ethnic, racial, and cultural makeup of low-income and vulnerable populations. Appropriate staffing and other resources should be provided for such planning. Effective communication initiatives should be developed to increase public awareness of the availability of and need for legal aid throughout the state and nation. Participants should work together in a coordinated and collaborative manner to provide a full range of high-quality services in a manner that maximizes available resources and eliminates barriers to access. Participants should also work with their counterparts in other states to learn from one another's experiences in improving the provision of civil legal assistance. Participants should also collaborate with the American Bar Association and other national legal aid entities and institutions, such as the National Legal Aid and Defender Association (NLADA) and the Management Information Exchange (MIE), to gain a national perspective on the improvement of civil legal aid, take advantage of collective resources, and join in national efforts to achieve equal justice for all. Legal needs, including new and emerging legal needs, should be identified periodically, and effective and cost-efficient methods of addressing them should be developed. Research and evaluation of civil legal aid delivery methods and providers should be undertaken to assure the quality, efficiency, and effectiveness of the services provided, and the system should respond appropriately to the results of such evaluations.

#### IV. Achieving a Comprehensive Civil Legal Aid System

##### 1. INCREASED FUNDING

While improvements and innovations in the delivery of civil legal aid are necessary, the only practical way to move forward is by increasing resources. Future funding for civil legal assistance will come from five sources:

- Federal government;
- State and local governmental funds;
- IOLTA funds;
- Private bar contributions; and
- Other private sources, such as foundations and United Way Campaigns.

### A. Federal Funding through LSC

Although non-LSC funding exceeds LSC funding in forty-one states plus the District of Columbia<sup>34</sup>, and new funding will continue to come from non-LSC sources, increased federal funding will remain 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.

Significant political barriers stand in the way of substantial expansion of federal funding for civil legal assistance. Although LSC leadership has made significant progress in developing a much stronger bipartisan consensus in favor of LSC funding,<sup>35</sup> political leadership, particularly in Congress, remains divided about the necessity of a federal program, and the appropriate scope of such a program, if one is to exist. However, the Obama Administration is strongly supportive of LSC, and has sought out increased funding and the removal of restrictions on activities as a key part of its civil rights agenda.<sup>36</sup>

Although there is much stronger support for LSC in the White House and in Congress, the current fiscal crisis at both at the federal and state levels will make it more difficult for LSC and state funding to grow. Nonetheless, increases – possibly significant ones – are expected in the LSC budget at some point in the future.

### B. State IOLTA and Governmental Sources

Since 1982, funding for the provision of civil legal services from state and local governments has increased from a few million dollars to over \$425 million.<sup>37</sup> Until recently, this increase has come primarily from IOLTA programs, which have now been implemented in every state.<sup>38</sup> But funding from court fees and general state revenue has since overtaken IOLTA funding in many states. In 2008, IOLTA funding had reached \$213,495,000. For 2009, 2010, and 2011, there will be reduced IOLTA funding, but it is unclear how extensive the actual reductions will be,

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<sup>34</sup> See ABA RESOURCE CTR. FOR ACCESS TO JUSTICE INITIATIVES, STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, NATIONWIDE CIVIL LEGAL SERVICES RESOURCE DATA (Mar. 2009) [Hereinafter RESOURCE DATA] (on file with Standing Comm. on Legal Aid and Indigent Defendants).

<sup>35</sup> John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101, 110-11 (2000).

<sup>36</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2011, 1283-84 (2010) available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/appendix.pdf>.

<sup>37</sup> 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. See RESOURCE DATA, *supra* note 35.

<sup>38</sup> See *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (upholding the constitutionality of the IOLTA program; although the IOLTA program does involve a taking of private property – interest in escrow accounts that were owned by the depositors – for a legitimate public use, the owner did not suffer a pecuniary loss and so there was no violation of the Just Compensation Clause).

or what impact they will have on funding for civil legal aid. Some states report drastic cutbacks in IOLTA funding for civil legal aid, while others report far fewer reductions.<sup>39</sup>

Within the last seven years, substantial new state funding has come from general state or local governmental appropriations, as well as filing fee surcharges, state abandoned property funds, and other governmental initiatives. State governmental increases are likely to continue as long as state fiscal conditions remain in good shape. However, as a result of the current recession, state economic circumstances are now far worse than 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.<sup>40</sup> Therefore, we are likely to see decreases in state government spending for legal services in 2010 and 2011, but we do not yet know how large such reductions will be.

## 2. ELIMINATING THE RESTRICTIONS ON CIVIL LEGAL AID

While the lack of adequate funding is the most significant component of the “justice gap,” many low-income persons do not have equal access to justice because legal aid attorneys are not permitted to provide the full range of services clients need. Although there have always been some restrictions on LSC programs under the LSC Act,<sup>41</sup> and a number of additional restrictions were imposed on LSC funds during the 1980s and early 1990s<sup>42</sup>, a major change occurred in 1996 when Congress imposed on LSC grantees a large number of new restrictions. Congress limited the tools that would otherwise be available to attorneys serving low-income clients by imposing a number of prohibitions, such as restrictions on claiming and retaining attorneys’ fees and participating in class actions.<sup>43</sup> Access to legal assistance was severely restricted for certain low-income populations, and numerous administrative burdens were imposed on LSC recipients and their clients, many of which raised serious ethical issues and even endangered clients’ safety.<sup>44</sup>

### *A. Restrictions on Non-LSC Funds*

Perhaps most significantly, restrictions on the activities of LSC grantees, originally imposed as riders to the LSC appropriations bill, apply not just to those activities supported by Congressionally appropriated funds, but to all of an LSC grantee’s activities, regardless of the

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<sup>39</sup> See Press Release, Legal Services Corp., Annual Report Highlights 35th Anniversary of LSC's Founding (July 30, 2010), available at [http://www.lsc.gov/press/pressrelease\\_detail\\_2010\\_T261\\_R26.php](http://www.lsc.gov/press/pressrelease_detail_2010_T261_R26.php).

<sup>40</sup> See Elizabeth McNichol et al., Ctr. on Budget and Policy Priorities, Recession Continues to Batter State Budgets; State Responses Could Slow Recovery (July 2010), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=711>; Ctr. on Budget and Policy Priorities, Policy Basics: The ABCs of State Budgets (Jan. 2010), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=3067>.

<sup>41</sup> 42 U.S.C. § 2996 (1974).

<sup>42</sup> See ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW AND SOCIAL POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 30 (Jan.2007).

<sup>43</sup> *Id.* at 36-37.

<sup>44</sup> 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, 2189-2190 (1999). See also REBEKAH DILLER & EMILY SAVNER, BRENNAN CENTER FOR JUSTICE, A CALL TO END FEDERAL RESTRICTIONS ON LEGAL AID FOR THE POOR (June 2009), available at [http://www.brennancenter.org/content/resource/a\\_call\\_to\\_end\\_federal\\_restrictions\\_on\\_legal\\_aid\\_for\\_the\\_poor/](http://www.brennancenter.org/content/resource/a_call_to_end_federal_restrictions_on_legal_aid_for_the_poor/).

exact source of the funds used to support them. All of a grantee's resources are restricted, whether from the LSC appropriation, other federal funds, state or local appropriations, IOLTA programs, contracts, private donations, foundation grants or other funding sources. In some states, LSC grantees have been forced to set up entirely separate corporate entities, with costly and duplicative administrative structures, to accept and use non-LSC funds available for restricted activities.

A concerted initiative to eliminate the non-LSC funds restriction is being pioneered by the American Bar Association (ABA), the National Legal Aid and Defender Association (NLADA), Brennan Center, the American Civil Liberties Union (ACLU), the United Auto Workers (UAW), Leadership Conference on Civil and Human Rights, and others. If this initiative succeeds, non-LSC funders could provide funds to LSC grantees for whatever purpose the public or private funder determines meets the needs of the given low-income client community, and under whatever conditions the non-LSC funder concludes are appropriate. For LSC grantees with significant non-LSC resources, this revision would significantly reduce the impact of the LSC restrictions on the ability of those programs to provide the full range of legal services necessary to meet the needs of low-income clients and to expand access to legal assistance. This revision would also permit LSC grantees to directly accept funds that are not presently available to them because the uses for which the non-LSC funders wish to see the funds put would violate LSC restrictions.

### *B. Restrictions on LSC Funds*

Nevertheless, even if Congress were to eliminate the restrictions on non-LSC funds, many LSC grantees would still be unable to provide the full range of legal assistance necessary to meet the needs of the low-income community due to a lack of non-LSC resources. Congress must thus eliminate many of the other restrictions that were imposed on LSC grantees in 1996.

#### *i. Legislative Representation and Rulemaking*

Under the 1996 restrictions, legal aid advocates are severely limited in the ways they can use LSC funds for participation in legislative representation and rulemaking on behalf of low-income clients and the low-income community.<sup>45</sup> Often, an effective solution to a client's legal problem cannot be achieved without changes to the statutes or regulations governing the issue. In other instances, individual representation may solve a particular person's legal problem, but without changes to legislation or regulation the issue will continue to reoccur, and advocates will be forced to repeatedly bring the same problem to litigation. Paying clients have the ability to hire private attorneys to engage in legislative and administrative advocacy on behalf of their interests, often in ways that have a negative impact on the low-income community. Advocates for low-income people should have tools at their disposal to ensure that poor people's needs and interests are considered by those crafting the laws and regulations that impact their lives.

#### *ii. Class Actions*

The 1996 restrictions also prohibit LSC recipients from filing or participating in class

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<sup>45</sup> See 45 C.F.R. § 1612 (2009).

action suits.<sup>46</sup> As with legislative or administrative advocacy, the use of class actions to address systemic problems saves limited legal services resources by eliminating the need to litigate the same issue time and again. A prohibition on class actions is unnecessary to address potential abuse by legal services lawyers because, under the rules of all state and federal courts, the court supervises and controls the class action process from beginning to end, and judges only certify the use of class actions when appropriate. Many legal problems faced by the poor are better resolved by proceeding in the form of class actions. Class actions may provide an effective remedy where no other remedy exists, are an economical means of obtaining relief, assure enforcement of judicial decisions, and deter unlawful conduct towards similarly situated individuals.

### iii. Aliens

Another significant barrier to legal representation for a substantial segment of the low-income community is the prohibition on the provision of legal assistance to certain aliens, many of whom are legally in the US under a variety of special visa programs.<sup>47</sup> Although once primarily concentrated in major urban areas and agricultural regions, large segments of the low-income immigrant population now live in small cities and suburban areas throughout the country. In many areas with large immigrant populations, particularly in the South and Southwest, LSC-funded programs are the only form of legal aid in existence, and receive very limited non-LSC funds. Thus, even if the restrictions were lifted on those programs' non-LSC funds, they would not have sufficient non-LSC resources to devote to the representation of immigrants who cannot currently be served by LSC grantees, but make up a potentially substantial percentage of the area's low-income population. Undocumented workers are often the most vulnerable and exploited members of the work force; their inability to receive free legal assistance from LSC-funded programs in matters such as wage and contract claims and often intolerable work conditions makes it virtually impossible for many to obtain legal assistance.

## 3. INCREASING PRIVATE ATTORNEY ENGAGEMENT IN CIVIL LEGAL AID

To help serve those who cannot afford counsel it is essential to expand the role private lawyers play in the delivery of civil legal assistance. It is unclear how much time and resources private lawyers, either paid or pro bono, devote to low-income clients. A new report by the American Bar Association's Standing Committee on Pro Bono and Public Services discloses the results of a 2008 survey of 1,100 lawyers throughout the country in private practice, corporate offices, government, and academic settings.<sup>48</sup> The study found that 73% of respondents provided pro bono services to people of limited means and organizations serving the poor, and 27% of the lawyers surveyed met the ABA's aspirational goal of providing at least 50 hours of pro bono services to persons of limited means. But however much pro bono work is currently underway, the need for civil legal aid cannot be met without the increased use of private attorneys, both pro bono and paid. Such increased participation will involve far more than tapping individual

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<sup>46</sup> 45 C.F.R. § 1617 (2009).

<sup>47</sup> 45 C.F.R. § 1626 (2009).

<sup>48</sup> THE ABA STANDING COMM. ON PRO BONO AND PUB. SERV., AMERICAN BAR ASS'N, SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS (2009), available at <http://www.abanet.org/legalservices/probono/report2.pdf>.

attorneys for particular cases. To move forward with a more effective private attorney system, we must increase the supply, as well as expand the role and the scope of activities private attorneys perform in the provision of civil legal services to the poor.

The first step is to increase the number of lawyers providing such services, and the overall time they devote to the assistance of low-income persons. 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<sup>49</sup> and has been incorporated into the ethical rules in most states. Considerable efforts to increase the supply of private lawyers who provide legal assistance to low-income persons have been made by the American Bar Association and numerous state bar associations, state Access to Justice Commissions, the Pro Bono Institute, LSC, a variety of state funders of civil legal aid, and law school groups. Several promising strategies are being pursued. One such approach is to require lawyers to report their contributions in time and financial assistance.<sup>50</sup> Although Rule 6.1 is aspirational and not mandatory, a few states have required that all members of the Bar report annually on their pro bono activity. Florida, the first state to institute such a requirement, experienced substantial initial growth in both forms of aid. However, that growth has since stagnated and by some accounts there has been a decline in attorneys providing direct pro bono services.<sup>51</sup> Today, seven states have adopted mandatory reporting requirements, and eleven have voluntary reporting. Seven other states permit attorneys who take on pro bono cases to earn credit toward mandatory legal education requirements. Additionally, 29 states and the District of Columbia permit retired lawyers who are no longer active members of the bar to volunteer pro bono assistance.<sup>52</sup>

To increase pro bono participation among private attorneys, the Pro Bono Institute established the Law Firm Pro Bono Project to challenge large firms around the country to contribute 3 to 5% of their total billable hours to the provision of pro bono legal services.<sup>53</sup> Today, 150 law firms are signatories to that challenge.<sup>54</sup> The Pro Bono Institute has also just introduced a new challenge for corporate in-house counsel to increase the number of significant pro bono activities among lawyers who work directly for corporations.<sup>55</sup> The Legal Services Corporation has been another leader in encouraging private attorney involvement. Since 1981, LSC-funded programs have been required to use a portion of their funding for private attorney involvement.<sup>56</sup> Currently, each LSC-funded provider must expend 12.5% of its LSC funding on

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<sup>49</sup> MODEL CODE OF PROF'L CONDUCT R. 6.1 (2005).

<sup>50</sup> See ABA STANDING COMM. ON PRO BONO & PUB. SERV. AND THE CTR. FOR PRO BONO, REPORTING OF PRO BONO SERV., <http://www.abanet.org/legalservices/probono/reporting.html> (last updated July 14, 2009).

<sup>51</sup> KELLY CARMODY & ASSOC., PRO BONO: LOOKING BACK, MOVING FORWARD (2008), available at <http://www.flabarfindn.org/downloads/pdf/pro-bono.pdf>.

<sup>52</sup> See ABA STANDING COMM. ON PRO BONO & PUB. SERV. AND THE CTR. FOR PRO BONO, EMERITUS RULES FOR PRO BONO (Sept. 14, 2010), <http://www.abanet.org/legalservices/probono/emeritus.html>.

<sup>53</sup> PRO BONO INST., LAW FIRM PRO BONO CHALLENGE, <http://www.probonoinst.org/challenge.php> (last visited July 2, 2010).

<sup>54</sup> PRO BONO INST., LIST OF SIGNATORIES (Oct. 31, 2008), <http://www.probonoinst.org/challenge.sigs.php>.

<sup>55</sup> PRO BONO INST., CORPORATE PRO BONO CHALLENGE, <http://www.probonoinst.org/cpbo.php> (last visited July 2, 2010).

<sup>56</sup> 45 C.F.R. § 1614 (2009).

private attorney participation.<sup>57</sup> Of the 889,155 cases closed by LSC programs in 2008, 93,168 were handled by private attorneys.<sup>58</sup> Of these cases, 57,719 were done by pro bono attorneys, 31,052 by contract or judicare attorneys, and 4,397 by other PAI approaches such as co-counseling arrangements.<sup>59</sup>

In addition, the LSC Board of Directors adopted a resolution to encourage LSC-funded programs to undertake greater pro bono activity, and pledged to publicize and recognize the work of LSC-funded programs that pursue private attorney involvement initiatives.<sup>60</sup> As a result, most LSC-funded programs have adopted similar resolutions.<sup>61</sup> Moreover, LSC issued a Program Letter to LSC-funded programs in December of 2007 on how to utilize resources and innovative approaches to more effectively integrate private attorneys into the provision of high quality civil legal assistance.<sup>62</sup> Finally, LSC joined with the ABA to create the National Celebration of Pro Bono, held October 25-31, 2009.<sup>63</sup>

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. 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 judicial authority under state law to create formal statewide pro bono systems. 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.<sup>64</sup>

These efforts have produced results, and must persist so that the supply of private lawyers providing civil legal assistance to low-income persons continues to expand. Strategies that have shown success, such as mandatory reporting, should be aggressively pursued.<sup>65</sup> The ABA, state bar associations, state access to justice commissions, other state funders, and student and legal publications must also continue to focus on expanding pro bono activity and private attorney involvement. The growing ranks of retired attorneys also provide a potential pool of talent that has only recently been tapped. Legal services providers must continue to expend resources and efforts both to recruit private attorneys, and to ensure that private attorneys get adequate training, supervision, and mentoring.

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<sup>57</sup> *Id.*

<sup>58</sup> *See* FACT BOOK, *supra* note 18, at 22.

<sup>59</sup> *Id.*

<sup>60</sup> LEGAL SERVICES CORP., RESOLUTION IN SUPPORT OF ENHANCED PRIVATE ATTORNEY INVOLVEMENT WITH LSC-FUNDED PROGRAMS (adopted on Apr. 28, 2007), *available at* <http://www.lsc.gov/pdfs/LSCBoardResolution2007.pdf>.

<sup>61</sup> LSC RES. INFO., PRIVATE ATTORNEY INVOLVEMENT (PAI) (2010), [http://www.lri.lsc.gov/probono/board\\_pai\\_resolutions.asp](http://www.lri.lsc.gov/probono/board_pai_resolutions.asp).

<sup>62</sup> Program Letter from Helaine M. Barnett, President, Legal Services Corp., to All LSC Executive Directors, Guidance to LSC Programs for the Development of Enhanced Private Attorney Involvement (Dec. 20, 2007), *available at* <http://www.lsc.gov/pdfs/ProgramLetter07-2.pdf>.

<sup>63</sup> *Successful Pro Bono Week Concludes with Recognition from the White House*, ABA NOW (Nov, 11, 2009), <http://www.abanow.org/2009/11/successful-pro-bono-week-concludes-with-recognition-from-the-white-house/>.

<sup>64</sup> HOUSEMAN, UPDATE, *supra* note 11, at 22.

<sup>65</sup> *See supra* note 51.

An increase in supply cannot occur in a vacuum, and the effective participation of private attorneys is not solely an issue of numbers. Too often law firms and private attorneys are available to provide assistance, but fail to be utilized by civil legal aid providers.<sup>66</sup> This is the result of a number of factors, including concern among civil legal aid providers that private attorneys lack the specialized expertise to do the work, and will divert interesting cases away from staff attorneys. It may also be a result of ineffective pro bono recruitment on the part of civil legal aid providers. To address this problem, there must be a corresponding increase in demand by providers to use private attorneys in a variety of capacities. In addition, civil legal aid providers need to improve upon the integration of private lawyers into the delivery of services, as noted by Standard 2.7 of the *ABA Standards for the Provision of Civil Legal Aid*,<sup>67</sup> and make more effective use of private attorneys' time, resources and skills. Failure to take advantage of the skills, resources and interest of private attorneys remains a significant problem on the part of civil legal aid programs and other providers serving low-income clients.

The increased use of individual private attorneys is only one area on which legal services providers and pro bono attorneys need to focus their attentions. Effective use of law firms is also a crucial step toward the improvement of the delivery of civil legal services. Law firms have the ability to take on complex cases that legal aid providers are not capable of litigating due to activities restrictions like the prohibition on class actions or because such cases require resources beyond those available to legal services programs. Law firms could take on whole categories of cases or legal problems (for example, landlord tenant or housing development), develop expertise in these areas, and then provide in-house expertise to pro bono attorneys taking on such cases. Law firms could also place associates with civil legal assistance providers for significant periods of time, such as six months to a year or more. A small silver lining of the latest economic downturn is that attorneys with inadequate paid work have had time to develop expertise in meeting urgent social needs, and these attorneys could continue to serve as a valuable resource in the provision of civil legal services. Law firms could also act as co-counsel alongside a staff program on a series of cases or specific types of cases. Law firms and legal services providers each have unique areas of expertise, and the co-counsel relationship creates opportunities for mentorship, as well as a chance to appreciate the skills and experience each set of attorneys brings to the table. For instance, private attorneys are likely to have resources unavailable to legal service providers, expertise in litigating complex matters and a fresh set of eyes to bring to a particular type of legal problem. The providers have experience working with local officials who may be able to address the matter, knowledge of their client base, and an in-depth understanding of systemic issues. Law firms may also be able to train and mentor legal assistance staff attorneys and paralegals in the development of trial advocacy skills.

Private lawyers and law firms can bring the power of the large firm to bear on problems of low-income persons by forming effective partnerships with those advocates in daily contact with client problems, as well as with key state and national advocacy groups. Law firms are able to undertake critical lobbying and policy advocacy before legislative and administrative rulemaking bodies. In conjunction with such advocacy groups, private attorneys can help legal services providers and other advocates engaged in policy advocacy to garner the business community's support on issues of mutual interest, such as welfare-to-work and job training. Finally, using transactional legal skills and expertise, private attorneys and law firms can aid legal

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<sup>66</sup> Interview by Alan W. Houseman with Esther Lardent, President, Pro Bono Inst. (Feb. 23, 2010).

<sup>67</sup> ABA STANDARDS, *supra* note 33, at 70.

services providers – or undertake such work directly – in assisting community organizations, as well as state and municipal governments, improve welfare-to-work services, revitalize low-income communities, and create jobs, including community services employment opportunities.

The initiatives laid out above may make better use of the time, resources and skills of private lawyers and law firms than are being utilized at present. Too often, law firm pro bono programs do not strategically integrate private attorneys into more sustained civil legal services activities. Pro bono programs need direction, and a process for case selection and oversight that takes into account both participant and public interests. One cost-effective approach is to target compelling unmet needs that tap firm members' particular concerns and capacities. Ongoing partnerships with groups working in a given field can help identify appropriate projects and leverage assistance.

The Volunteer Legal Services Program (VLSP) of the San Francisco Bar Association is a prime example of how an innovative pro bono program can effectively make use of private attorneys.<sup>68</sup> VLSP provides services to 20,000 people each year, primarily through the mobilization of volunteers.<sup>69</sup> For example, in 2009 VLSP conducted a family law project, an eviction defense project, a housing negotiation project, a homeless advocacy project, a consumer project, a social services project and a low-income taxpayer clinic, among other initiatives.<sup>70</sup> VLSP has adopted a “holistic” approach to providing services that goes beyond merely seeking legal remedies for client problems, and instead attempts to meet the full range of client needs. The in-house provision of social services developed by VLSP, which is supported by a team of volunteers and social services professionals, was achieved through partnerships and collaborations with existing service providers in order to streamline systems of service and cut down on duplicative services.<sup>71</sup> Legal volunteers are trained to determine when clients need resources other than legal assistance, and informed of the resources available. For instance, VLSP would assist a battered woman and her children not only with obtaining legal protection from abuse, but also in securing child support, custody and divorce or separation.<sup>72</sup> They also connect clients with counseling services, emergency shelter, affordable housing and employment opportunities.<sup>73</sup>

Increasing the number of private attorneys who deliver civil legal assistance and improving initiatives aimed at increased participation are difficult challenges for an underfunded and overtaxed delivery system. But the development of more meaningful participation among private attorneys has enormous potential to reduce the gap between the need for legal representation and the capacity to provide it. Thus, a key component of the strategy to address the legal needs of low-income persons must be to expand private attorney involvement initiatives, and to take better advantage of the resources of law firms that can be used to serve low-income populations.

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<sup>68</sup> VOLUNTEER LEGAL SERVICES PROGRAM, BAR ASS'N OF S.F., THE VLSP STORY, <http://www.sfbar.org/volunteer/story.aspx> (last visited July 2, 2010).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

#### 4. INCREASING STATE ADVOCACY

State level advocacy has played a critical role in the provision of civil legal assistance. The Office of Economic Opportunity (OEO), which until 1975 funded the federal legal services program, recognized the necessity of state level advocacy when it funded a number of new state support programs in the late 1960s. State support initiatives, including state level advocacy, developed in a majority of states in the 1970s alongside the inception of the Legal Services Corporation. The state system never fully took root in every state, however, and over the years many state level advocacy organizations were downsized or went out of existence. In 1996, Congress eliminated the \$10 million of funding set aside for state support in the LSC budget, which led to further decline in state level advocacy.

Despite these cutbacks, state level advocacy is a necessary component in the protection of low-income persons' interests. Many critical decisions that affect the legal rights of such persons are made at the state level, either by state legislative bodies, state administrative agencies, Governors' offices or state court systems. For example, family laws, consumer protection laws, landlord-tenant laws and significant employment and labor laws are all enacted at the state level.<sup>74</sup> States help finance and administer critical federal programs, such as AFDC, food stamps, Medicaid, and unemployment insurance, and often determine eligibility levels and grant amounts for these programs.<sup>75</sup> Many states also operate their own welfare "general assistance" programs, supplemental SSI programs, mental health, and public health care programs.<sup>76</sup> Many federal programs give states wide discretion on which populations to serve and services to provide, including in childcare and social services block grant programs.<sup>77</sup> States bear substantial responsibility for education, and many states have state housing finance agencies. Most civil legal aid cases are tried in the state court system, and state court rules and procedures provide the framework for most litigation.<sup>78</sup> In short, among governmental entities, state governmental entities play the most significant role in funding and enacting the programs and policies that most affect low-income persons.

Since the mid-1970s, and even more significantly since 1995, states' role in matters affecting low-income persons has *increased* as a result of devolution: the shift in responsibility for social programs from the federal to the state level. A prime example of devolution is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which eliminated the federal AFDC program that provided cash assistance to low-income families with dependent children, and replaced it with a block grant program known as Temporary Assistance for Needy Families (TANF). Other examples include Medicaid programs, the use of federal childcare funds, the Workforce Investment Act and the State Children's Health Insurance Program.

In light of devolution, state level advocacy has become even more essential to ensuring that the rights and interests of low-income persons are protected and enhanced. Moreover, devolution has led to fundamental changes in the way that civil legal aid will be able to provide legal assistance to underserved populations, necessitating different methods of delivering legal

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<sup>74</sup> See Houseman, MISSING LINK, *supra* note 19, at 12.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

services, innovative forms of training and much more effective coordination and collaboration among a range of providers.<sup>79</sup> What is needed is broad, state level advocacy in all forums, including representation in courts and before administrative agency adjudicatory forums, rulemaking and/or policy making bodies, state legislative bodies and other public and/or private entities.<sup>80</sup> Not only should each state's civil legal aid system provide state level advocacy, it must also have an ongoing system to coordinate and provide concrete advice and assistance to the lawyers and paralegals undertaking such advocacy. For example, with respect to litigation, such a system would identify cases of statewide importance or that would have significant impact on low-income persons at the trial level, and then provide the necessary advice and assistance to the advocates involved, including co-counseling when appropriate. A coordinated system would also identify appeals that may result in precedents of statewide importance or significant impact. In addition, the system would provide advocacy teams for appropriate state-level projects, assist pro bono and other private attorneys engaged in cases of statewide importance, and identify and coordinate amicus work in such cases. Similar systems are also needed for administrative agency adjudicatory forums, regulatory or legislative issues, and other matters (e.g. court rules) of statewide importance.

In addition, each state's civil legal aid system needs to develop substantive areas of advocacy in response to emerging critical legal needs, as well as those that have been overlooked by local providers. Some needs may arise because of changes in policy, such as the need for tax advocacy in light of the expansion of EITC and the child tax credit for low-income working families. Other needs may arise because of changes in client demographics or populations. Still others may arise because of changing economic conditions, such as the current foreclosure crisis. State advocacy entities should play an essential role in highlighting these changes and developing effective responses.

Each state should also have the capacity to capture stories, photographs, and examples of client injustices so that they can use them effectively in statewide litigation and policy advocacy, as well as in media campaigns that support such efforts. Finally, each state's civil legal aid system should have liaisons with all major institutions affecting or serving low-income people in legal matters, including state, local, and federal courts, administrative agencies, legislative bodies, alternative dispute resolution bodies, and other public or private entities providing legal information, advice, or representation.

## 5. INCREASING NATIONAL ADVOCACY

National advocacy has also served as a critical component of civil legal assistance since the early days of the federal legal services program. The Office of Economic Opportunity (OEO) funded twelve national advocacy and support centers in the late 1960s.<sup>81</sup> During the 1970s, five more were added with the advent of LSC.<sup>82</sup> Like state support funding, funding for national legal

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<sup>79</sup> See Alan W. Houseman, *Legal Representation and Advocacy Under the Personal Responsibility and Work Opportunity Act of 1996*, 30 CLEARINGHOUSE REV. 932, 933-934 (Jan.-Feb. 1997) (describing how there will be fewer legal rights to assert and more fact-based advocacy needed to protect client interests).

<sup>80</sup> HOUSEMAN, MISSING LINK, *supra* note 19, at 7-9.

<sup>81</sup> See John A. Dooley & Alan W. Houseman, *Legal Services History*, at 7-8 (Nov. 1985) (unpublished manuscript) (on file with National Center on Poverty Law).

<sup>82</sup> *Id.* at ch. 3, at 28.

services support centers ceased in 1996.<sup>83</sup> Since 1996, most of the then-existing centers have persisted, and several have grown in both size and stature.<sup>84</sup> Private foundations, in addition to a few state funders of civil legal aid, primarily fund the centers still in operation.<sup>85</sup> However, national advocacy is not solely the province of former LSC-funded entities. Many key national advocacy organizations that focus on issues important to low-income people have existed outside of the old LSC network.<sup>86</sup>

National advocacy remains a critical need for any civil legal aid system in order to ensure that the rights and interests of low-income persons are represented before Congress and federal agencies. Even though state governments play a major role and enjoy substantial discretion in implementing a number of federal policies, it remains that Congress and federal agencies establish the laws and policies, set the framework, and fund many of the key programs that affect low-income persons. There are many organizations engaged in advocacy at the federal level in key areas of concern to low-income persons. However, there remain critical gaps in national advocacy on important issues facing the poor (transportation policy is just one example), and deficient advocacy, systematic research and strategy development on emerging issues such as climate change legislation.

More specifically, the civil legal aid system needs the capacity to:

- (1) Represent low-income persons before federal agencies and department rulemaking and policymaking bodies;
- (2) Represent low-income persons before Congress;
- (3) Represent low-income persons before the White House, including the Domestic Policy Council and the Office of Management and Budget; and
- (4) Provide up-to-date information about federal legislative, regulatory, and policy developments affecting low-income persons and civil legal aid practice through national websites and other methods of communication.

The responsibility to engage in national advocacy does not rest solely with national entities. Local and state civil legal aid programs can also effectively participate in national advocacy consistent with restrictions on funding. For example, civil legal aid programs can participate in national networks of advocates, work directly with national entities, provide concrete examples of how existing programs are or are not effectively serving low-income people, identify low-income people who have been hurt or helped by existing programs to testify or otherwise be highlighted as examples in national advocacy efforts, and undertake state and local grassroots advocacy as part of a national advocacy campaign.

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<sup>83</sup> See HOUSEMAN & PERLE, *supra* note 43, at 37.

<sup>84</sup> *Id.* at 41. For example, the National Consumer Law Center has grown considerably, and has widened its focus beyond the poor to include all consumers.

<sup>85</sup> See, e.g., *Funders*, NAT'L CONSUMER LAW CTR., [http://www.nclc.org/index.php?option=com\\_content&view=article&id=94&Itemid=65](http://www.nclc.org/index.php?option=com_content&view=article&id=94&Itemid=65).

<sup>86</sup> Examples include the Center on Budget and Policy Priorities, the Center for Law and Social Policy, the National Women's Law Center, the Children's Defense Fund and Families USA.

## 6. REBUILDING THE CIVIL LEGAL AID INFRASTRUCTURE

The national infrastructure of civil legal aid in the United States has been decimated over the last 28 years. When LSC began operations in 1975, it had organizational divisions devoted to training, support, and research on the delivery of civil legal aid, and its budget included funding for state and national support. When Congress substantially reduced funding for LSC in 1982, LSC ended its research funding altogether and converted its in-house training and support operations into grants to non-profit organizations to maintain its training and support capacity.<sup>87</sup> In 1996, Congress eliminated funding for national and state support centers and training programs altogether. 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 significant toll on the state support structure that had helped to ensure coordination and assistance for all legal services providers and their partners.

Since 1996, there has been considerable change in the demographics of the low-income community, and many new legal problems affecting the poor have emerged as a result. In addition, there has been a fundamental change in how legal services are delivered, and how support can be provided via the information technology revolution that has affected all aspects of the civil legal aid system. The system in place in 1995 and earlier may not be the system that should remain in place in the future. Even so, we now have a good idea of what changes need to be implemented to ensure effective and efficient legal representation, as well as innovation in legal strategies and the delivery of civil legal aid.

### *A. Training*

Civil legal aid lawyers and paralegals require skill-building substantive training and opportunities for professional development. Executive Directors and managers need access to management and administrative training, as well as means for professional development. There should be appropriate training for all civil legal aid program staff members and for the board of directors. Education and training activities should be available for all individual and institutional providers within the state in order to:

- Develop expertise in all major areas of legal services practice within a state;
- Update advocates on new developments and emerging trends in law and policy affecting low income persons;
- Ensure the use of new strategies, tools, skills, and techniques of advocacy;
- Develop effective communications and media advocacy skills;
- Develop skills to ensure that civil legal assistance programs have effective managers and new leaders; and
- Maximize opportunities for professional development for staff at all experience levels.

Training should include training and mentoring activities carried out at the workplace and, when necessary, training programs conducted outside of the office. Training should utilize all available new technologies that facilitate the efficient delivery of civil legal services. Civil legal aid programs should also coordinate with continuing legal education programs offered by state or

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<sup>87</sup> See HOUSEMAN & PERLE, *supra* note 43, at 30.

local bar associations or other entities. Finally, all legal services providers should provide opportunities for staff to participate in national and regional training, and collaborations relevant to civil legal assistance activities in the state.

While there is currently considerable civil legal aid training available at the national, regional, state, and local levels, there is widespread agreement that more is needed to ensure that all staff have the skills and professional development opportunities necessary to function effectively and efficiently.<sup>88</sup> There is also agreement that a national training system is necessary to facilitate these goals. However, there is currently insufficient funding from key civil legal aid funders, and insufficient commitment from local programs to apply their own funds, to establish such a system.

### i. State Support

In addition to the coordinated statewide education and training activities described above, each state should also develop a comprehensive system of information and support. While many states have robust support structures and engage in most or all of the functions set out below, many others lack the capacity to carry out key support functions at the state level.

A comprehensive system would begin by providing effective monitoring, analysis, and timely distribution of information regarding all relevant legal developments (e.g. case law, regulatory and legislative developments, court rules, etc.) to all individual and institutional legal aid providers and others participating in the statewide system. State justice systems must create and maintain an efficient state-of-the-art information dissemination network for advocates that includes at least four elements:

- (1) Statewide civil legal assistance websites to provide up-to-date information about state legislative, regulatory and policy developments affecting low-income persons, as well as other information relevant to the delivery of civil legal assistance, including community legal education and economic development;
- (2) Statewide electronic libraries of pleadings, briefs, forms, fact sheets, and policy analyses; electronic document assembly applications, such as HotDocs; best practices and client information materials, accessible to all institutional providers and private attorneys that provide civil legal assistance to low-income clients;
- (3) A coordinated statewide research strategy integrating Internet usage, online services, and other resources; and
- (4) A coordinated data management system to facilitate information-sharing and case file transfers.

A state's civil legal aid system should also convene regular statewide task forces and coordinate periodic statewide meetings of attorneys, paralegals, and lay advocates working within the civil legal system to discuss common issues, problems, subject areas, client constituencies, advocacy techniques, and strategies to make the most effective and efficient use of resources. The use of modern conferencing technologies and electronic communication may alleviate the need for

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<sup>88</sup> A number of organizations presently offer training, including the National Legal Aid and Defender Association, the Management Information Exchange, the Center for Legal Education, regional consortiums in New England, Ohio, Michigan, West Virginia and Virginia, and state based training entities in California, New Jersey, New York, Tennessee, Kentucky, Florida, Texas, Minnesota and elsewhere.

in-person meetings. These task forces and meetings must include both LSC and non-LSC funded advocates; private attorneys; law firms; and attorneys working for governmental entities, in addition to corporations, labor unions and human services providers involved in the provision of services to the low-income community. These task forces and meetings should focus on a wide range of issues, including legislative and administrative developments that affect the rights and interests of low-income persons, and should be linked by email lists and other electronic means to ensure constant and ongoing communication among advocates.

In addition to training, information dissemination, and coordination – functions that are traditionally characterized as state support – there are other critical functions that each state’s civil legal aid system should have the capacity to perform. First, each state should engage in ongoing initiatives to instill the values of equal justice work and the commitment to the promotion of equal justice for all among all staff members. In addition, the state civil legal aid system should develop initiatives to help all staff understand what constitutes systemic advocacy and the value of such advocacy to clients. Finally, there should be a repository in which to preserve the history of each state’s civil legal aid system, as well as ongoing communications and forums about that history.

Second, each state should designate a single provider (or state support entity, where one exists) to track and coordinate community education initiatives and programs, provide assistance to advocates across the state on the development of community education programs and materials, and ensure that materials are shared between programs. Clients and non-advocates should also have easy access to statewide websites with critical information about client rights and information about how to protect and enhance legal rights. Such websites should be developed with the user in mind, and employ language and other techniques of communication that are readily understood by the low-income or elderly end-user.

Third, the civil legal aid system in each state should have the capacity to systematically undertake substantive policy and delivery research or provide access to such research when the capacity lies elsewhere. This includes efforts to identify and promote “best practices” in areas such as intake, needs assessment, priority setting, case management, advocacy techniques, and strategy development. Also, there should be research on relevant demographic trends and new and emerging legal problems that affect low-income people within the state.

Fourth, because policy and legal developments in one state often affect similar developments in other states, it is important for advocates in the state civil legal aid system to be informed about the experiences of other states. State policy bodies such as legislatures and executive departments often look to other states when developing particular social policies, and courts in one state are often influenced by the decisions of courts in another. Similarly, efforts to improve the provision of civil legal assistance in one state often have critical influence on decisions in other states. Moreover, there will be occasions when a number of states may want to coordinate responses to common legal developments.

Finally, advocates in each state’s civil legal aid system should coordinate with national entities and organizations involved in advocacy on substantive issues affecting the low-income population. This includes former LSC national support centers, as well as a host of other national anti-poverty, civil rights, child advocacy, and other entities that were not part of the LSC national support network, but consistently work on issues that have an impact on low-income people and communities. Such coordination involves a range of efforts including the dissemination of newsletters, participation in audio conferences and email lists, the creation and use of manuals and materials, attendance at conferences and training events, the provision of advice and assistance

when needed, and the sharing of information about developments at the state and local level that have national implications.

## ii. National Support

Just as there is a need for national advocacy within the state civil legal aid system, the capacity for national support is necessary to undertake activities that are truly national in nature. Such an infrastructure nonetheless parallels many of the state support functions described above.

There needs to be training on new national developments in all of the areas of poverty law that are affected by federal developments and national trends. However, such training need not be provided only at national training events. Experts with knowledge of federal developments and national trends need to be involved in the entire range of training necessary to the civil legal aid community.

In addition, there needs to be effective monitoring, analysis, and timely distribution of information regarding all relevant national legal developments (e.g. case law, regulatory and legislative developments, court rules, etc.) to all individual and institutional legal aid providers. National entities should conduct audio conferences and email lists, prepare manuals and materials on federal developments, provide advice and assistance when needed, and collect and share information about developments that have national implications at both the state and local level. National entities should also run national task forces and hold periodic national meetings of attorneys, paralegals, and lay advocates working within the civil legal assistance system to discuss emerging trends and new legal issues and strategies. Here too, use of modern conferencing technologies and electronic communication may alleviate the need for in-person meetings and facilitate timely distribution of essential information.

There is also a need to conduct research on new anti-poverty initiatives and ideas that civil legal aid programs can use to address poverty in their states and localities. The civil legal aid system would also benefit from demographic and other analyses that would assist civil legal aid programs to plan, set priorities, and build the foundation for a future client cohort that may differ considerably from the client cohort of past decades.

At present, many of these functions are being undertaken by an array of national entities – some from the old LSC system, and many that have always existed independent of the LSC system. Yet there are significant gaps in all of these functions, and the capacities outlined above do not exist in all areas of poverty advocacy or potential poverty advocacy. Nor is there a single entity within the civil legal aid system or outside of that system responsible for exploring new anti-poverty strategies and ideas and for developing demographic and other analyses directly related to civil legal aid advocacy.

## iii. Research on the Delivery of Civil Legal Assistance

Many civil legal aid systems in Europe and Canada have entities that conduct research on the civil legal aid system and pilot demonstration programs to improve the delivery of civil legal aid.<sup>89</sup> Some entities are components of the national civil legal aid system itself, such as in the

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<sup>89</sup> See, e.g., LEGAL SERVICES RESEARCH CTR., LEGAL SERVICES COMM'N (United Kingdom), [http://www.legalservices.gov.uk/civil/innovations/independent\\_research.asp](http://www.legalservices.gov.uk/civil/innovations/independent_research.asp) (last updated Nov. 17, 2007); DEPT. OF JUSTICE, RESEARCH AND STATISTICS DIV.(Canada), <http://www.justice.gc.ca/eng/pi/rs/index.html>(last modified July 31, 2009).

United Kingdom, while others exist outside the system as part of the government, as is the case in Canada. The United States' system had such a component from 1976-1981 during the first era of the Legal Services Corporation.<sup>90</sup> The Research Institute on Legal Assistance conducted research on new poverty law developments, as well as on the delivery of civil legal aid.<sup>91</sup> It carried out the study of special groups mandated by section 1007(h) of the LSC Act reauthorization amendments of 1977.<sup>92</sup> The Institute also conducted several demonstration programs to test out new ideas and develop new delivery approaches, and pioneered the use of information technology in civil legal aid. In addition to the Research Institute, the LSC also conducted a congressionally mandated study of the delivery system itself, the Delivery System Study.<sup>93</sup>

The Research Institute was closed during the funding and political crisis of 1981. Because of statutory restrictions in the LSC Act, its functions could not be granted out to independent entities.<sup>94</sup> Since 1982, there has not been a funded entity within the United States that is responsible for researching the delivery of civil legal aid or conducting demonstration projects to test new ideas and innovations. The American Bar Association along with a number of states have undertaken legal needs studies, and LSC has conducted studies of the justice gap in the United States. Apart from these efforts, delivery research related to the civil legal aid system in the United States has been episodic, and research is usually carried out with very limited funding.

A national civil legal aid system should have the ongoing and institutionalized capacity to conduct research on the delivery of civil legal aid and to conduct and evaluate demonstration projects to test new ideas and innovations for possible system-wide replication. If the core values of a civil legal aid system are innovation and experimentation, we need to actively promote such innovation and to evaluate the effectiveness of the experiments that are undertaken. While the responsibility for funding such an entity might seem like a good fit for national foundations, past efforts along these lines have not been successful. Under the current LSC statutory framework, such a national system would likely have to be developed in-house at LSC.

#### iv. Assessment

The process of rebuilding the civil legal aid infrastructure should begin with a thorough assessment of training, support, and research needs within the civil legal aid community, and of the current capacity across the country to meet those needs. Until we understand those needs and the range of capacities that are currently available, we will not be able to fully determine how best to address them. Such an assessment should begin with an analysis of the changing legal needs of the low-income community.<sup>95</sup> The assessment should 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

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<sup>90</sup> Dooley & Houseman, *supra* note 82, at 4.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 22.

<sup>93</sup> *Id.* at 31.

<sup>94</sup> Section 1006(a)(3) of the LSC Act prohibits funding by grant or contract for broad general legal and policy research unrelated to the representation of eligible clients.

<sup>95</sup> For an early analysis of the changing legal needs of clients, see ALAN W. HOUSEMAN, CTR. FOR LAW AND SOC. POLICY, WHO ARE OUR CLIENTS? WHAT ARE THEIR EMERGING LEGAL PROBLEMS? WHAT ARE THE IMPLICATIONS FOR STATE JUSTICE COMMUNITIES? (2001), available at [http://s242739747.onlinehome.us/publications/who\\_are\\_our\\_clients.pdf](http://s242739747.onlinehome.us/publications/who_are_our_clients.pdf).

professional development for grantee executive directors and other program management staff. It may also examine the types of substantive information necessary for effective legal aid advocacy and the gaps in knowledge that currently exist. It should examine the best ways to use technology to provide information and research to grantees and their staffs, and to use skilled and experienced substantive experts and litigators to provide technical assistance and co-counseling. Finally, it should consider whether the civil legal aid system itself would benefit from the research capacity to examine the delivery of civil legal assistance, and then stimulate innovation in accordance with that research. Based on these assessments, a plan could be developed to ensure the availability of training, support, and research to address documented needs in a cost effective manner. While the civil legal aid community should be centrally involved in these assessments, it may be the case that only a revitalized LSC has the capacity and credibility to actually undertake the study and promote its recommendations.

## 7. RIGHT TO COUNSEL IN CIVIL CASES AT STATE EXPENSE

Within the last several years, civil legal aid advocates, bar associations, and academic scholars have come together in the National Coalition for a Civil Right to Counsel, and have been promoting a renewed strategy to establish a right to counsel in a category of cases “where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”<sup>96</sup> Building on this resolution, a number of state access to justice commissions and other similar entities have proposed guaranteeing counsel in limited categories of cases, or creating pilot programs to evaluate such guarantees.<sup>97</sup> There has also been a substantial increase in scholarship from the academic world and several law review symposia on the issue.<sup>98</sup>

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

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<sup>96</sup> The quote is taken from an ABA Resolution on the right to counsel in civil cases. *See* ABA TASK FORCE ON ACCESS TO CIVIL JUSTICE ET AL., REPORT WITH RECOMMENDATION (2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>. In 2005, the President of the American Bar Association established a Commission on 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 ABA House of Delegates endorsed the Commission’s recommendation at their 2006 Annual Meeting in August. 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.

*Id.*

<sup>97</sup> *See* ABA RESOURCE CTR. FOR ACCESS TO JUSTICE INITIATIVES, ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, ACCESS TO CIVIL JUSTICE FOR LOW-INCOME PEOPLE: RECENT DEVS. 11-12 (2010) [hereinafter ACCESS TO CIVIL JUSTICE]. *See also* ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS ET AL., REPORT WITH RECOMMENDATION (2010), available at [http://www.abanet.org/legalservices/sclaid/downloads/BasicPrinciplesReportRec\\_06232010.pdf](http://www.abanet.org/legalservices/sclaid/downloads/BasicPrinciplesReportRec_06232010.pdf).

<sup>98</sup> *See* Recent Legislation, *California Establishes Pilot Programs To Expand Access to Counsel for Low-Income Parties*, 123 Harv. L. Rev. 1532, 1534 (2010) (outlining much of the recent scholarship).

its jurisdiction the equal protection of the laws.”<sup>99</sup> Unlike *Gideon v. Wainwright*,<sup>100</sup> in which the United States Supreme Court held that a right to counsel exists in criminal cases in which the defendant faces imprisonment or the 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*,<sup>101</sup> 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.”<sup>102</sup>

In limited categories of cases, some state legislatures have enacted statutes requiring state-funded counsel to be appointed for one or more parties,<sup>103</sup> and the highest courts in some states have ruled that state-funded counsel should be provided as of right to some parties.<sup>104</sup> These state-funded counsel provisions or court rulings are generally in the family law area with respect to civil commitment. There are a few federal statutory requirements for appointment of counsel in civil cases, but they are very limited.<sup>105</sup> However, in the vast majority of civil cases, there is no constitutional or statutory right to state-funded counsel.

Although it is not often easy to predict what the United States Supreme Court will do, most commentators do not believe that there will be any significant right-to-counsel developments at the federal level because of the current make-up of the Court. Instead, the National Coalition and its allies have focused on litigating a state-funded constitutional right to civil counsel in *state* cases where “basic human needs are at stake.”<sup>106</sup> So far, there have not been any recent state court decisions expanding the right to counsel in civil cases beyond the areas described above.<sup>107</sup>

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<sup>99</sup> U.S. CONST., XIV amend., § 1.

<sup>100</sup> 372 U.S. 335, 344 (1963).

<sup>101</sup> 452 U.S. 18 (1981).

<sup>102</sup> *Id.* at 32.

<sup>103</sup> Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (July-Aug. 2006).

<sup>104</sup> Clare Pastore, *Life after Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (July-Aug. 2006) (providing a thorough exploration of state cases since *Lassiter*). See also Patricia C. Kussmann, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 92 A.L.R. 5th 379 (2001) (providing a detailed analysis of state court cases involving the termination of parental rights and 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 thirty-nine 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). See generally 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) (noting in particular Tables I and II, at 276, 277).

<sup>105</sup> See Abel & Rettig, *supra* note 104, at 252-270.

<sup>106</sup> See generally 40 CLEARINGHOUSE REV. (July-Aug. 2006) (discussing various theories and state initiatives throughout the volume).

<sup>107</sup> See, e.g., *Frase v. Barnhart*, 840 A.2d 114, 126 (Md. 2003), in which the Maryland Court of Appeals refused to reach the issue of the right to counsel; 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. *Id.* (Cathell, J., concurring). See also *King v. King*, 174 P.3d 659 (Wash. 2007) (refusing to find a right

A second approach has been to draft model state legislation and then seek to persuade state legislative bodies to adopt all or parts of the model. A task force of the California Access to Justice Commission prepared model legislation for a civil right to counsel in certain cases.<sup>108</sup> So far, no state legislative body or local legislative body has adopted such proposed legislation.

The most promising approach in the short run may well be the development of state and local pilot programs 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. Massachusetts began such pilot projects in 2009. The two projects will explore the impact of full representation in eviction cases. The pilots grow out of the work of the Boston Bar Association's Task Force on Expanding the Civil Right to Counsel, as described in its 2008 report, *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*.<sup>109</sup> The pilot projects test the theory that an expanded civil right to counsel should target the cases in which counsel is most likely to affect the outcome. Representation will focus on scenarios of key importance, as identified through a survey of housing experts in the state: (1) where the eviction was tied to a mental disability, (2) where it involves criminal conduct, and (3) where a viable defense exists, and enumerated factors reveal a power imbalance likely to deprive a tenant of an affordable apartment.<sup>110</sup> One pilot project is situated in a specialized housing court and another is in a generalized district court because evictions occur in both types of courts.<sup>111</sup> Funding supports representation through two legal aid offices.<sup>112</sup> Evaluative tools, including a randomized experiment, will attempt to measure the efficacy of the program, and test the theory that representation preserves housing. The projects also hope to provide an estimate of the number of these types of eviction cases statewide in the event that the program becomes the basis for a statewide proposal.<sup>113</sup>

The Texas Access to Justice Foundation has recently funded two pilot civil right-to-counsel projects for a 20-month cycle from January 1, 2010 to August 31, 2011. The two projects are joint collaborations with courts in underserved counties and two legal aid programs. The Tenant Defense Project, conducted by Lone Star Legal Aid, provides for appointment of counsel to persons involved in eviction appeals in three counties.<sup>114</sup> The Border Foreclosure Defense Project, conducted by Texas Rio Grande Legal Aid, is partnering with courts in six counties to represent low income persons in foreclosure hearings involving equity loans, tax loans, and reverse mortgages.<sup>115</sup> The two projects are also required to collect data that will be used for

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to counsel in a case involving disputes over who should have primary residential care over children from a former marriage).

<sup>108</sup> See Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REV. 176 (July-Aug. 2006). See also Russell Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 40 CLEARINGHOUSE REV. 196 (July-Aug. 2006).

<sup>109</sup> TASKFORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, BOSTON BAR ASS'N (Sept. 2008) available at [http://www.bostonbar.org/prs/nr\\_0809/GideonsNewTrumpet.pdf](http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf).

<sup>110</sup> See ACCESS TO CIVIL JUSTICE, *supra* note 98, at 11.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> News Release, Texas Access to Justice Found., Texas Access to Justice Found. Awards New Grants for Pilot Projects Impacting the Tex. Legal Delivery Sys. (Dec. 15, 2009), available at <http://www.txiolta.org/news/releases/Special-Board-Impact-Grants.aspx>.

<sup>115</sup> *Id.*

further development by the Texas Access to Justice Commission, bar associations, and the state legislature.<sup>116</sup>

In 2009, California adopted legislation to establish pilot projects that guarantee counsel for low-income people in civil matters involving housing, domestic violence, and civil-harassment restraining orders, probate conservatorships, guardianship, elder abuse, and child custody proceedings.<sup>117</sup> Counsel will only be available where there is an independent determination that the client may benefit from representation.<sup>118</sup> The Judicial Council of California, the statewide court administrative agency, will fund pilot projects over a six-year period based on proposals submitted jointly by local courts and certain civil legal aid agencies.<sup>119</sup> These pilot projects will be funded by a \$10 increase in certain court fees beginning in 2011.<sup>120</sup> The projects will provide representation particularly for people who face represented opponents.<sup>121</sup> They will also develop best practices for assisting *pro se* litigants facing represented opponents.<sup>122</sup> The legislation also requires data collection and evaluation of both the civil representation and court-innovation components in order to provide a basis to potentially revise and extend the legislation.<sup>123</sup>

## V. Conclusion

This article sets out a broad framework for the development of a comprehensive and integrated system for the delivery of high quality civil legal assistance that actually resolves the legal problems of low-income people in the United States as a whole, and in each of the individual states and jurisdictions. A move toward such a system will require innovation and delivery improvements, increased funding, the removal of restrictions on what can be done and who can be served, and increased use of private attorneys. We must also bolster state and national advocacy, and rebuild the civil legal aid infrastructure. These are some of the critical steps that should be pursued to ensure equal justice for all.

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<sup>116</sup> *Id.*

<sup>117</sup> *See* Recent Legislation, *supra* note 99, at 1534.

<sup>118</sup> *Id.* at 1535.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See* Recent Legislation, *supra* note 99, at 1535. For a description of the process by which the legislation was adopted, and of the actual framework established by the legislation see Kevin G. Baker & Julia R. Wilson, *Stepping Across the Threshold: Assembly Bill 590 Boosts Legislative Strategies for Expanding Access to Civil Counsel*, 43 CLEARINGHOUSE REV. 550 (Mar.-April 2010).