CIVIL LEGAL AID IN THE UNITED STATES: AN OVERVIEW OF THE PROGRAM AND DEVELOPMENTS IN 2005

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INTRODUCTION AND BACKGROUND

Civil legal aid in the United States is continuing to undergo major change and transformation, but the U.S. has a very long way to go in order to enable low-income persons to access a system of civil legal assistance that will address their legal needs effectively.

This paper will review developments in civil legal aid in the U.S. using the framework that was developed by the Project for the Future of Equal Justice.

A national civil legal assistance system should have the capacity to:

- Educate and inform low-income persons of their legal rights and responsibilities;
- Inform low-income persons about the options and services available to solve their legal problems, protect their legal rights, and promote their legal interests; and,
- Ensure that all low-income persons, including individuals and groups who are politically or socially disfavored or have distinct and disproportionately experienced legal needs, have meaningful access to high-quality legal assistance providers when they have chosen options that require legal advice and representation.

In the United States, unlike most other developed countries, this capacity will be developed and implemented within each of the 50 states, the District of Columbia, Puerto Rico, and the territories.

Within many states, progress is being made to achieve these three broad capacities, but the progress varies widely among states. This is primarily because of the huge funding differences among states, but it is also because

states differ in how they are organizing their civil legal assistance systems and in the level of leadership and commitment by key stakeholders.

There are some broad generalizations that can be made about the U.S. system, but these generalizations do not apply to all states. For example, we are seeing new innovations in how providers intake clients and deliver legal assistance, increased involvement of legal aid providers in addressing the problems of self-help participants in the judicial system and a range of creative uses of the Internet and websites to provide legal information and coordinate advocacy. Funding is expanding for the overall legal aid system, with virtually all of the additional funds coming from state government and private sources. Moreover, many states are attempting to create comprehensive, integrated, statewide systems of delivery, which include a range of providers, many of which do not receive Legal Services Corporation (LSC) funds. LSC is a private, nonprofit corporation that provides government funding for legal services organizations in the United States. A number of states now have State Access to Justice Commissions often set up by state Supreme Courts and which involve a range of key stakeholders. However, many states have no concrete overall entity to oversee civil legal aid development.

Other changes affecting the civil legal aid systems are also occurring. State court systems, for example, are continuing to struggle with the large number of litigants who are not represented by a lawyer, particularly in the domestic relations area, and are beginning to develop innovative and systematic approaches to addressing this problem. Client legal problems are changing as U.S. social programs evolve, or to be more precise, devolve from the federal to state levels, and legal protections and entitlements are being eliminated or modified. And the demographics of low-income clients differ in significant ways from those who have been historically assisted by legal aid providers.[i] Courts—particularly federal courts—are continuing to impose a host of restrictions, denying access to increasing numbers of litigants and refusing to consider legal issues under a variety of gate-keeping doctrines.[ii] These and many other developments outside of, but related to, the legal aid system are helping shape the civil legal aid system of today and that of the future.

OVERVIEW OF THE CURRENT U.S. CIVIL LEGAL AID SYSTEM

The U.S. civil legal aid “system” consists of a range of different types of service providers funded by a number of sources. Overall, the system is really two or perhaps three different systems. One system is funded and somewhat driven by LSC. Legal services organizations that receive money from LSC must restrict the legal aid they provide. One system is totally independent of LSC but a critical part of the overall delivery system in each state. A final system is both totally independent of LSC and not effectively integrated into the delivery system in the states. However, how these three different systems actually provide services on the ground differs widely among states.

We do not know the exact number of civil legal aid staff attorney programs. As of January 2005, LSC-funded programs numbered 140, of which 136 serve all types of clients within a service delivery area, and four are stand-alone Native American programs serving only Native American clients. This is in contrast to the 325 LSC-funded programs in 1995.

However, there are many more legal services providers than these LSC-funded providers. The following chart explains the legal aid landscape.

TOTAL NUMBER OF PROGRAMS
(EXCLUDING PRO BONO)

LSC	140
NON-LSC	750

FULL-SERVICE PROVIDERS

LSC	133
NON-LSC	65

PRO BONO PROGRAMS FOR THE POOR

BAR OR FREE-STANDING	900
LAW FIRM	250

OTHER ADVOCACY ORGANIZATIONS

STATE ADVOCACY	38
NATIONAL ADVOCACY	30

Many of the non-LSC-funded programs and some LSC-funded programs are not full-services providers. Some may focus only on one major type of legal matter, such as employment or domestic violence. Others may only deliver a particular type of services, such as a hotline or support to self-represented litigants. However, a number of these non-LSC-funded providers are full-service providers, serving a city, region, or state. Today, in 16 states and over 25 large or medium-size cities, instead of one full-service provider funded by LSC, there are two direct, full-service providers operating in the same geographic areas—one LSC-funded and one non-LSC-funded.

In addition to staff attorney programs providing direct legal assistance, a number of pro bono programs are operated by civil legal aid providers, bar associations, or independent programs. The American Bar Association Center for Pro Bono has estimated that these pro bono programs number over 900. Today, over 150,000 private attorneys are registered to participate in pro bono efforts with

LSC-funded programs and 45,000 are actually participating.[iii] In addition, over 250 major law firms have pro bono programs that provide significant service to low-income clients.

The U.S. system also includes a number of state advocacy organizations that advocate before state legislative and administrative bodies on policy issues affecting low-income persons. Some of these also provide training and support to local legal aid advocates on key substantive issues. A 2001 study conducted by the Project for the Future of Equal Justice identified non-LSC-funded entities engaged in state advocacy in over 38 states.[iv] Moreover, more than 30 entities are engaged in advocacy on behalf of low-income persons at the federal level. Some of these were formerly funded by LSC and were part of the national support network, and some of these (like CLASP) were never funded by LSC.

The U.S. civil legal aid system is not funded by one principal source. Although LSC is the largest single source of funding, it is not a source of funding for most of the system. According to information provided by the Project to Expand Resources for Legal Services, Standing Committee on Legal Aid and Indigent Defendants, American Bar Association, the total amount of legal aid funding in the 50 states at the beginning of 2005 is $956,344,038. This total does not take into account funding in the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Micronesia, and other territories and countries that receive LSC funding. Nor does this figure take into account the amount of pro bono time contributed, the funding for many of the state advocacy entities, or the funding for the national advocacy programs. Broken down by funding source for the 50 states, the relative amounts are:

LSC	$ 295,145,168
Other public	$ 199,974,500
State government	$ 71,350,000
IOLTA[v]	$ 113,905,000
Foundations	$ 74,536,000
Private lawyer contributions	$ 37,420,600
Court filing fees/fines	$ 68,649,500
Other	$ 132,783,870

If we add in funding from LSC for Puerto Rico, the District of Columbia and the territories, this would add another $21,649,832. In addition, the District of Columbia has substantial non-LSC funds of approximately $5,092,000. Taking into account other possible funding, the total U.S. funding for civil legal assistance is over $1 billion.

While LSC funds are distributed according to the 2000 census data on individuals living below the poverty line, the other funding sources are not distributed equally among states. Attached is a chart that displays the funding differences among states based on funding per capita for poor persons from all sources.

As the chart displays:

7 states have funding exceeding $50 per poor person.
8 states have funding between $30 and $49 dollars per poor person.
14 states have funding between $20 and $29 dollars per poor person
21 states have funding less than $20 per poor person.

Dollars per poor person ranged from a low of about $9 to a high of over $60. (The average is about $28; the median is about $23.) The lowest-funded states are in the South and Rocky Mountain states, and the highest-funded states are in the Northeast, Mid-Atlantic, Midwest and West.

Another way of looking at this data is that in 37 states and DC, non-LSC funds are greater than LSC funds.

While non-LSC funding sources have been steadily increasing overall, LSC funding has not kept pace with its purchasing power. It is less than half of what it was in 1981, the time when LSC funding provided what LSC called "minimum access" or two lawyers for each 10,000 poor people in a geographic area. LSC has been unable to obtain sufficient funding to maintain the level of access achieved then. In addition, it has lost considerable ground because of two significant budget reductions (of 1982 and 1996) and the inability to keep with up inflation even when funding was increasing. The following chart presents a few funding comparisons:

Grant Year	Annual LSC Appropriation in Actual Dollars	Annual LSC Appropriation in 2001 Dollars	Percentage Change From 1980 (Using 2001 Dollars)
1980	300,000.000	646,238,000	0.0%
1981	321,300,000	627,401,000	-2.9%
1982	241,000,000	443,290,000	-31.4%
1990	316,525,000	429,864,000	-33.5%
1995	400,000,000	465,879,000	-27.9%
1996	278,000,000	314,500,000	-51.3%
2002	329,274,000	329,274,000	-47.0%
2005	330,804,000	324,121,000	-48.1%

As many commentators have pointed out, the U.S. system is funded far below the level of funding that is provided by most of the other Western, developed nations.[vi] Even so, it is important to recognize that over the last decade, the U.S. system has grown from approximately $700 million to over $1 billion (including DC, Puerto Rico and the territories).

DIFFERENCES BETWEEN U.S. AND MOST OTHER CIVIL LEGAL AID SYSTEM OF DEVELOPED COUNTRIES

There are many differences between the legal aid system in the U.S. and those in the developed countries that are included within the International Legal Aid Group. First, the United States has not established a statutory or constitutional right to counsel in most civil cases. While a national coalition is attempting to move this agenda forward, there has been little concrete progress in establishing such a right either by court decision or by legislative action.

Second, the United States has not embraced nor suggested changes to the existing system that would substantially increase the involvement of paid private lawyers in the delivery of civil legal assistance to low-income persons. Instead, the United States continues to rely on pro bono attorneys and pro bono programs both to supplement the staff attorney system and to independently deliver legal services to the poor. While some have argued that the U.S. would improve its funding if more private attorneys were paid for providing civil legal aid, so far there is virtually no legislative pressure to change the staff attorney model at either the federal or state legislative level.[vii]

Third, providers and not funders make the key decisions about who is served, the scope of service provided, the types of substantive areas in which legal assistance is provided, the mix of attorneys and paralegals, and the type of services provided (such as advice, brief services, extended representation, law reform, and the like). While Congress has imposed restrictions on what LSC can fund, and a few other states have similar or even more stringent restrictions, in the U.S. system, the funder does not decide what the provider may do. It is the provider who undertakes planning and priority setting and decides who will deliver the services (staff attorney or private attorney). As a corollary to this responsibility, it is the provider who oversees how these services are delivered and the quality of work that is provided by its staff attorneys and the pro bono and paid private attorneys with whom the provider works.

Fourth, because the U.S. system is so decentralized and differs so greatly among providers and among states, there is a wide divergence, even among LSC providers, in the types services offered. Some do considerable consumer work and others do virtually none. Some have substantial emphasis on housing, while others have a substantial emphasis on public benefits. In addition, they emphasize different functions. Some primarily or substantially utilize hotlines and advice and brief service. Others emphasize extended representation in court and before administrative agencies. Some do all of these functions.

Fifth, the legal framework differs among the states. The laws affecting key poverty law issues differ. For example, in some states, landlord tenant law provides a warranty of habitability and affirmative defenses to an eviction. In other states, neither of these is available to the advocate for a tenant. Thus,

what can be accomplished for a tenant will vary depending on what rights a tenant has. In addition, there are differences in how court and administrative adjudicatory agencies operate and in the quality of their decisions. This, too, affects what can be done by a civil legal aid provider.

HOW DID WE GET HERE?

My 2003 paper —*Securing Equal Justice for All: A Brief History of Civil Legal Aid in the United States*—sets out the history of civil legal aid in the United States. Here is a very short version.

Civil legal assistance for poor people in the United States began in New York City in 1876 with the founding of the predecessor to the Legal Aid Society of New York. In 1965 the federal government first made funds available for legal services through the Office of Economic Opportunity (OEO) and started the "legal services program." The OEO legal services program was designed to mobilize lawyers to address the causes and effects of poverty.

OEO funded full-service local providers, each serving one geographic area, which were to ensure access of all clients and client groups to the legal system. OEO assumed that each legal services program would be a self-sufficient provider—all advocacy would be done by the program, including major litigation and holistic advocacy, using social workers and others. OEO also developed a unique infrastructure that, through national and state support and training programs and a national clearinghouse, provided leadership and support on substantive poverty law issues, as well as undertook litigation and representation before state and federal legislative and administrative bodies.

In 1974, Congress passed the Legal Services Corporation Act, and in 1975, LSC took over programs started in OEO. The delivery and support structure put in place by OEO was carried over fundamentally unchanged by LSC when it began to function in 1975. While the LSC Act said that LSC was set up "to continue the vital legal services program," it also explicitly changed the goals of the program. LSC was to ensure "equal access to our system of justice for individuals who seek redress of grievances" and "to provide high quality legal assistance to those who were otherwise unable to afford legal counsel." LSC strengthened existing providers, retained and strengthened the support structure, and expanded the program to reach every county.

Even though there were experiments dealing with delivery of services (e.g., hotlines for the elderly funded by the government and private interests), the structure of the federal legal services program remained essentially unchanged until 1996. At that point, Congress reduced overall funding by one-third, entirely defunded the support system and imposed new and unprecedented restrictions. Although there had been some restrictions on what LSC-funded legal services programs could do, particularly with LSC funds, the new restrictions prohibited

LSC grantees from using funds available from non-LSC sources to undertake activities that are restricted with the use of LSC funds. In other words, all of a LSC grantee's funds, from whatever source, are restricted.

In response, a number of LSC providers gave up LSC funds and expanded the non-LSC-funded delivery system. Moreover, many state support entities were eliminated, and, in order to survive, national support entities had to rely on private funding, often from major national foundations. In addition, we saw new intake systems, such as hotlines, developing throughout the country and expanded use of the Internet to provide information and coordinate advocacy. We also saw new approaches to assist self-represented litigants, often in conjunction with the courts, but including many civil legal aid providers. And most fundamentally, we saw a technology revolution in U.S. civil legal aid that was initially fostered by the Project for the future of Equal Justice and, since 2000, stimulated by LSC through its innovative Technology Initiative Grant (TIG) program to improve and expand access to justice through the use of technology.

The Technology Revolution

In the mid-1990s, organizations providing civil legal assistance to low-income people were beginning to use new technologies on an increasingly regular basis. All but a few programs were using word processing systems for text documents, and most offices had local area networks (LANs) in place. Most programs were using accounting software to keep their books. Some programs were using computerized case management systems, largely oriented toward keeping case statistics for funders. Several programs and regions also were beginning to experiment with more sophisticated telephone systems for intake and providing brief advice and assistance by phone.

At the same time, comparatively few programs had their own websites, and only a handful of sites went beyond serving as a “virtual business card” with contact information to include significant amounts of legal or practice information for staff and/or clients. Fewer than half of all advocates were making full use of outside e-mail, computerized legal research tools, and Internet research tools, often accessing the web from home due to a lack of access at the office.

Today, in 2005, almost every legal services advocate has desktop access to the Internet and e-mail and uses those resources daily. In most places, advocates are able to use fee-based computerized legal research tools such as Lexis and Westlaw. Virtually all staffed legal aid programs use a computerized case management system, often one that can be accessed in real-time from every office in the program, and some from remote locations. Increasingly, case management systems work with document assembly software that can automatically generate routine correspondence and pleadings.

Many programs now have a website, with over 250 sites offering information useful to advocates, clients, or both. Virtually all states have a statewide website, most of which also contain information useful both to advocates and

clients, and many other states are currently building such sites. Dozens of national sites provide substantive legal information to advocates, and other national sites support delivery, management, and technology functions. Many program, statewide, and national websites are using cutting-edge software and offering extensive functionality.

In addition, more and more states have a central phone number (or several regional phone numbers) clients can call to be referred to the appropriate program or to obtain brief advice about their legal problems. A number of programs are using videoconferencing software either for advocate interaction or to deliver services to clients who cannot come into the office. Technologists in the community also are working on "interoperability standards" that will allow users to search information across different web platforms.

State Justice Communities

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

In addition, there has been a steady expansion of leadership at the state level. Initially bar leaders and then high court judges have looked at efforts in other states and set out to emulate them. The phenomenon has now reached a critical mass. Between April 2004 and April 2005, new Access to Justice commissions were created by state supreme court order in Arkansas, New Mexico, Oklahoma, the District of Columbia, Georgia, and Massachusetts. Proposals to create new commissions are pending before the supreme courts of Alabama, Mississippi, and West Virginia.[viii]

Similar commissions have been in existence in a few states for a decade or more: the Washington State Access to Justice Board, the California Access to Justice Commission, and Maine's Justice Action Group. Several others have been created in the past five years, including the Montana Equal Justice Task Force (2000), the Texas Access to Justice Commission (2001), and the Colorado Access to Justice Commission (2002). In addition, new entities created in 2004 in Vermont (Access to Justice Coalition) and New York (Equal Justice Commission) also bring together the courts, the bar, and legal aid providers in somewhat different structures.

While there is a strong national trend toward the creation of state Access to Justice Commissions, creation of such a body is not the only effective approach. A number of other states use different kinds of structures effectively, such as a committee of the state bar or bar association that is charged with a broad access to justice function. These committees are most effective when they include representatives of the judiciary and legal aid providers, in addition to bar leaders, or other relevant partners who work collaboratively with them. Several states in this category—New Jersey and Minnesota—have some of the best-established Access to Justice Initiatives in the country.[ix]

WHERE WE ARE TODAY IN CIVIL LEGAL AID

PROGRESS TO ACHIEVE ACCESS

The U.S. civil legal aid system is making substantial progress in meeting two of the three fundamental objectives of a civil legal aid system: (1) educating and informing low-income persons of their legal rights and responsibilities; and (2) Informing low-income persons about the options and services available to solve their legal problems, protect their legal rights, and promote their legal interests.

Access has been substantially increased by the use of innovative technology as well as some increase funding for civil legal assistance. Technological innovation has lead to statewide web sites in virtually all states which offer community legal education information, pro se legal assistance, and other information about the courts and social services. I-CAN projects in several states are providing clients with pleadings by using a touch screen computer in a kiosk and other services such as help on filing for the Earned Income Tax Credit. Video conferencing is being used in Montana and other states to connect clients in remote locations with local courthouses and legal services attorneys. A critical part of expanding access has focused on a range of limited legal assistance initiatives to provide less than extended representation to clients who either do not need such extended representation in order to solve their legal problems or who live in areas without access to entities available to provide extended representation.

Legal Hotlines

Many legal aid programs and a number of states 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. Legal hotlines may provide answers to clients' legal questions, analysis of clients' legal problems, and advice on solving those problems so that the case can be resolved with the phone consultation or soon thereafter. Hotlines may also perform brief services when those are likely to solve the problem and make referrals if further legal assistance is necessary.

Since 1996, there has been a huge growth in legal hotlines but, since my last report in 2003, this growth has slowed down considerably. Hotlines are now being used in over 148 programs in 49 states, Puerto Rico, and the District of Columbia.[x] Some focus on particular client groups, such as the elderly or low-income populations. In 2005:

- 72 were senior legal hotlines;
- 102 focus on all client groups but limit their representation to low-income persons; and
- 39 have been developed for special targeting efforts, such as housing, consumer protection, child support, and the like.

There are 54 state hotlines in 38 states, 14 regional hotlines, and 10 local hotlines. There is overlapping funding for these various hotlines:

- LSC provides funds for 85,
- IOLTA for 60,
- U.S. Administration on Aging for 40,
- State government for 40, and
- Private funders for 71.

The Project for the Future of Equal Justice undertook a study of the effectiveness of centralized telephone legal advice, brief service, and referral systems in the delivery of civil legal assistance. As we reported in our 2003 report, the outcome results show that hotlines work well for some clients, enabling them to handle their legal problems to their satisfaction. However, for an equally large group of clients, hotlines are not effective, at least as they currently operate.

A key finding of the study was that most clients who do not obtain a favorable resolution of their problem had either not understood the hotline's advice correctly or had not followed it out of fear, discouragement, lack of initiative, lack of time, or a similar reason. Very few clients both understood and acted on the hotline's advice and still failed to resolve their problem. In addition, the study showed that clients who reported receiving follow-up calls from the hotline (which were generally made by the hotline to obtain or provide additional information from or to the client, rather than simply to "check in") were more likely to be successful.

The study also found that certain demographic categories of clients were much less likely to obtain favorable outcomes than others. Non-English speakers and those who report no income performed significantly worse than other demographic sub-groups. Similarly, clients who reported having a less than 8th grade education or reported having problems with transportation, reading or comprehending English, scheduling (work, daycare, or other), stress or fear, or other personal factors affecting their ability to resolve their problems, were less likely to obtain a successful outcome.

The study showed that certain types of hotline cases and services are more likely to result in successful outcomes. The most striking differences depended on who the opposing party was: cases in which the hotline provided advice on dealing directly with a landlord, creditor, ex-spouse or partner, or other private party, were much more likely to have a successful outcome than cases in which clients were advised about representing themselves in court or representing themselves or otherwise dealing with a government agency.

A number of hotlines have responded to the study by changing how they operate. For example, the hotline in Washington State, conducted by the Northwest Justice project and one of those involved in the Hotline Study, modified their system by reducing the volume of calls handled in favor of more brief services and follow-up with client by hotline advocates. In addition, hotline staff also began to handle telephonic administrative hearings involving termination of public benefits under the state-funded disability program.[xi]

Brief Services Units

In my 2003 report, I described a new approach that is being tested by AARP/Legal Counsel for the Elderly (LCE) in Washington, DC—the Brief Services Unit, which is devoted solely to providing brief services to clients that require more than phone contact but do not require the services of an attorney or paralegal for more extensive or systemic representation. This unit does active intake, including periodic clinics in low-income neighborhoods. It is staffed with an attorney, paralegal, and volunteers. The unit was designed to (1) ensure that hotline attorneys focus on advice and do not perform too many brief services; (2) free up other staff attorneys to work on more in-depth legal matters; and (3) to follow up on cases to ensure that hotline callers followed up on the advice given them. There may be no other civil legal aid program that has actually separated its brief service from its advice, although some programs are experimenting with more effective ways of providing brief service.

This experiment is still a work in progress. Even so, the experiment has proved to be effective at delivering brief services to those served by at AARP/LCE. The unit works best when it is thoroughly integrated into the rest of the program and operates seamlessly with a hotline, pro bono project, and staff attorneys. Because many issues presented to the BSU present thorny issues of law, a BSU should be staffed with or supervised by seasoned practitioners who can easily identify the issues and any potential consequences of litigation or alternative courses of action. However, In-house volunteers working with brief services staff can provide valuable assistance on a wide range of brief service activities. Special systems can be set up effectively to deal with public benefits cases and consumer debt cases in which bankruptcy is not the best option. Finally, the experience of LCE/AARP is that brief services staff and volunteers can be used to follow up on hotline advice or suggested action where the hotline attorney has identified a client who may need further reminders or assistance.[xii]

Self-Help Litigants and Pro Se Developments

A significant development in civil legal aid in the United States is the rapid expansion of efforts to help people who are attempting to represent themselves in courts. Historically, high-volume courts such as traffic, housing, and small claims courts consisted primarily of pro se litigants. However, more recently, pro so representatives have now dominate domestic relations courts in many jurisdictions. There may even be an increase in pro se representation in other matters as well.

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

Two recent papers prepared for the Summit on the Future of Self-Represented Litigants (March 24-25, 2005) provide some insight into what is going on in the U.S. Kathleen Sampson reported on a survey by the American Judicature Society, which surveyed representatives from a 1999 National Conference on Pro Se Litigation. From that survey, 44 states reported on some efforts to assist the self-represented. She divided the group into four categories of assistance: (1) Eleven comprehensive program states that included statewide or widespread assistance for self-represented litigation, including a website, regular education programs, institutionalization of the program, and often helpful court rules; (2) nineteen partially integrated program states with some of the characteristics of the comprehensive states; (3) fourteen emerging states offering very limited assistance and (4) eight states that did not respond to the survey.[xiii]

In another paper for the same conference, John Greacen made the following observations:

> "A very high percentage of family law cases involve at least one self-represented litigant—ranging from 60 percent to 90 percent of all such cases. However, less than 5 percent or fewer of other cases in the general civil docket in the general jurisdiction court have a self-represented litigant…"
>
> "Many courts have developed sophisticated services addressed to the needs of self-represented litigants. These typically include simplified forms, instructions, and procedural information, often translated into languages other than English to serve minority ethnic communities. They may also include substantive legal information, often provided through a

> court or legal services website. The amount of personal assistance provided to litigants in the use of this information varies significantly from court to court, with some only providing the information and others completing forms for litigants. Some courts provide workshops to assist litigants in comprehending the information provided. Others provide videotapes of typical proceedings. Some non-court programs—particularly those for victims of domestic violence—provide a representative (usually not law trained) to accompany the litigant in the courtroom. Some courts are taking advantage of new technologies to provide easy-to-complete forms and information, including the ability to file them electronically with the court. In general, this area has been characterized by an unusual level of creativity and innovation."[xiv]

More information about self-help programs can be found on the website for SelfHelpSupport an online resource where pro se and self-help program can access and share the resources they need to maximize their effectiveness.[xv]

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

Ethical Developments to Promote Limited Assistance

,As part of its Ethics 2000 review of model ethical rules, the American Bar Association (ABA) adopted two new ethical rules and a modified an existing rule to encourage and permit the growth of hotlines, pro se assistance programs, and other limited legal assistance programs. States are now reviewing their ethical rules, which actually bind lawyers (while the ABA Model Rules of Professional Conduct do not), and proposing changes to take into account the new ABA model rules.

The most significant addition was a new rule that specifically stated that lawyers could provide short-term limited legal assistance to clients through a program sponsored by a court, bar association, or other nonprofit organization without being subject to conflict-of-interest rules, including the rule imputing a conflict from one attorney to another in a law firm. The official comment to the rule expressly discussed "legal-advice hotlines, advice-only clinics or pr se counseling

programs." This rule permits volunteer lawyers to become involved in court-sponsored programs that provide pro se litigants with individual consultations and documentation in civil matters. It also encourages legal aid offices and nonprofit entities to sponsor clinics, hotlines, and provide additional limited legal assistance. This rule is thus encouraging lawyers to participate in providing limited assistance but also preserves protection for clients when there is a risk of harm from a conflict.

At of July 2005, Arizona, Delaware, Idaho, Louisiana, Minnesota, Montana, Nebraska, New Jersey, North Carolina, South Carolina, South Dakota, Virginia, Maine, and Washington have adopted rules similar to the ABA model rule.[xvii]

The second new rule (called Model Rule 1.2[c]) laid out the duties of a lawyer to a prospective client where there is no established lawyer-client relationship. This rule is intended to protect the communications between a prospective client and the lawyer under the confidentiality rules. It also provides guidance for addressing the potential conflicts of interest that may arise when the prospective client provides information to the lawyer that could be harmful to an existing client. These circumstances often arise in hotlines conducted by civil legal aid lawyers.

In addition to the two new rules, the rule on scope of representation was modified to make clear that the scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. Thus, there must be informed consent of the client. However, the limitation must be reasonable under the circumstances. The official comment to the rule expressly states that a "lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation."[xviii]

States are now making changes in their own rules to respond to the proposals in Model Rule 1.2(c). Two key issues that affect limited legal assistance are arising as states consider how to proceed. The first is whether informed consent must be in writing. Most states, like the model rule, do not require it in writing, but a few require some form of writing except where there is advice or brief service over the phone. The second is whether Model Rule 1.2 requires lawyers to inquire into and analyze the factual and legal elements of a client's problem. If so, such a duty may preclude lawyers from providing legal information and document preparation services that are now becoming widely available through others who are not lawyers.

More generally, states are now in the process of developing their own ethical rules to encourage and provide ethical parameters on limited legal assistance, assistance in pro se representation, hotlines and "ghostwriting," the practice of assisting a pro se litigant by drafting pleadings, briefs, and other assistance without entering into representation for the pro so litigant. Maine, Washington,

Colorado, Wyoming, Nevada, Florida, New Mexico, and California have developed new ethical rules on unbundling of legal services that go further than the ABA Model Rules. For example, California enacted a new rule, effective on July 1, 2003, that permits an attorney to assist in the preparation of family law pleadings without disclosure if he or she is not the attorney of record. However, under the California rule, an attorney providing limited-scope representation must disclose his or her involvement if the litigant is requesting attorney fees to pay for those services, so that the court and opposing counsel can determine the appropriate fees. The California rule also provides procedures for counsel to be relieved of continuing representation upon completion of limited-scope representation and for objection from the client if he or she does not believe the attorney has completed the work they mutually agreed the attorney would do.[xix]

SLOW PROGRESS ON ENSURING FULL REPRESENTATION IN ALL RELEVANT FORUMS AND IN ENSURING STATEWIDE COORDINATION AND SUPPORT

While the U.S. civil legal aid system has made continuing progress in expanding access and thus meeting two of the three fundamental objectives of a civil legal aid system, progress has been slow in meeting the third objective of a civil legal aid system: ensuring that all low-income persons, including individuals and groups who are politically or socially disfavored or have distinct and disproportionately experienced legal needs, have meaningful access to a full range of high-quality legal assistance providers when they have chosen options that require legal advice and representation.

In most areas of the US, there is not enough funding available to provide low-income persons who need it with extended representation by a lawyer or paralegal. As a result, many low-income persons who would be eligible for civil legal assistance are unable to obtain it. Legal Needs studies estimate that only 15%-25% of those eligible receive the level of civil legal assistance that they may need to address their legal problems.[xx] Thus, the major problem in achieving meaningful access to a full range of high quality legal assistance providers is the lack of providers with sufficient funding to provide the full range of civil legal aid and extended represented necessary to meet the need.

However, there are two other critical problems as well.

1. The Lack of Providers to Serve All Clients in All Forums

One significant gap in the civil legal aid system in the United States, and particularly in the many states with limited non-LSC resources, is the lack of providers (a) that can serve prisoners, aliens, and others who can not be represented by LSC funded providers; (2) that are able to bring class actions and obtain attorneys' fees provided by statute; and (3) that can engage in advocacy in all relevant forums, including legislative and administrative rule-making and

policy making forums. In large parts of the country such providers do not exist, or, if they exist, they are small, under-funded, and not able to meet the need that exists.

This problem is, in part, a result of the restrictions imposed on LSC-funded entities by the 1996 appropriation riders that prevented LSC-funded entities from engaging in class actions, collection of attorney's fees, policy advocacy in legislative and rule-making forums, and the representation of prisoners and certain aliens.[xxi] It is also a result of providers that have sufficient non-LSC funds but refused to restructure their organizations in order to ensure that these three sets of activities go forward.

While the efforts to create state justice communities continues and expands, it has not focused sufficient attention and resources on these huge gaps in the U.S. system. This is clearly a fundamental challenge for the future. As the U.S. system seeks to expand access, it must also ensure that all individuals seeking legal assistance have meaningful access to providers that can effectively serve them.

Some have turned to the courts to address this fundamental challenge, which initially culminated with the U.S. Supreme Court decision in *Velazquez v. LSC,* 531 U.S. 533 (2001). Several programs are attempting to eliminate barriers that have prevented them from setting up affiliated groups with one executive director and located in the same space. They achieve an initial victory on December 20, 2004, when the U.S. District Court for the Eastern District of New York in the case of *Dobbins v. LSC* held the LSC interpretation of its program integrity rules unconstitutional as applied.[xxii]

2. The Lack of Statewide Support and Coordinated Advocacy

An integrated, comprehensive state system of civil legal assistance requires a systematic effort to ensure coordination and support for all legal providers and their partners and a central focus on statewide issues of importance to low-income persons, including representation before legislative and administrative bodies. Such a system will have to have the capacity to coordinate advocacy in all state level legal forums on matters of consequence to low-income people.

The loss of over $10 million in state support funding as a result of the Congressional funding decision made in 1995 has taken a large toll on the state support structure that was previously in place. Many of the state support units and the regional training centers that were part of larger programs have been eliminated. A number of new entities have developed to carry on state level advocacy, particularly policy advocacy. However, virtually all of these new entities are severely under-funded and under-staffed. Most of the remaining freestanding state support programs have survived, although with a few exceptions, they have not made up the loss of LSC funds.

In 2001, the Project for the Future of Equal Justice undertook a study of state advocacy.[xxiii] I recently reviewed what was happening across the country through a set of phone interviews with state advocacy organizations and confirmed the conclusions that we had reached in the 2001 survey.

Since the demise of LSC funding:

- A few states - including California, Florida, Massachusetts, New Jersey, Washington, Michigan - have preserved and/or strengthened the capacity for state level advocacy, coordination, and information dissemination; increased training; and developed very comprehensive state support systems that carry out virtually all of the activities inquired about in the questionnaire.

- In a number of states, there has been no state-level policy advocacy, no significant training of staff, no information sharing about new developments, no litigation support, and no effective coordination among providers.

- In a number of states, some state support activities have been undertaken by new entities or carried on by former LSC-funded entities. What activities are provided vary widely and there is no generalization that can be made from the information we collected. In some states an existing entity continued but at lower funding. In other states, a new entity was created to replace an existing entity or to work alongside an existing entity. In still other states, entire new ways of providing state level advocacy, coordination, and support have emerged.

There is one very positive report. The Mississippi Center for Justice, headed by Martha Bergmark, a former participant in ILAG, has grown into a first rate and effective institution in Mississippi and has won a number of critical court and legislative victories. The Center has worked closely with civil rights and legal services organizations, community groups, private lawyers, and others in the state to create a capacity for systematic advocacy on behalf of low-income residents of Mississippi.

While there has been some progress in developing effective state support systems in several states, there has not been significant forward movement except in Mississippi.

OTHER DEVELOPMENTS AFFECTING CIVIL LEGAL AID

Pro Bono

The United States continues to expand pro bono efforts to engage more private attorneys and provide increasing levels of service. In addition to the requirement

that each LSC-funded provider must expend 12.5% of its LSC funding for private attorney involvement, there are substantial efforts to increase pro bono activity among all segments of the practicing bar. The Law Firm Pro Bono Project challenged large firms around the country to contribute 3% to 5% of their total billable hours to the provision or pro bono legal services. Today, 138 law firms are signatories to that challenge.

While there is no fully accurate data about how much pro bono activity is going on, states are starting to measure the amount of pro bono being doing either through surveys or mandatory reporting requirements. Each year, the *American Lawyer* magazine surveys the top 200 law firms on the amount of pro bono performed during the prior year and the number of lawyers in each firm who participate. In 2003, 183 firms constituted an aggregate of 93,175 lawyers who provided 3,335,375 hours of pro bono legal services to individual and organizations that could not afford to hire lawyers. These figures represent only 18% of practicing lawyers nationwide and these figures do not account for the work done by solo practitioners and those in small and medium sized firms.[xxiv]

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

Pro Bono work is an ethical aspirational goal in the US and is included as Rule 6.1 in the Model Rules of Professional Conduct and adopted by most states in their state ethical rules. The Ethics 2000 Commission did not modify the pro bono rule to make it mandatory, as some on the Commission had proposed. Nor did the ABA require mandatory reporting. However, much is happening at the state level to expand pro bono services for low-income persons. Among other developments, four states now require mandatory reporting: Florida, Maryland, Nevada, and Mississippi. A number of states have modified their Rules of Professional Conduct to promote pro bono service. In addition, formal statewide pro bono systems, with a state-level commission and local committees, with judicial or joint bar-judicial leadership, have been created by Supreme Court rule in Indiana, Maryland, Nevada, and Florida. Several states have also initiated major state pro bono recruitment campaigns led by the chief justice and bar presidents or have initiated other efforts to expand pro bono service in the states. Most states now have extensive web-based resources to support pro bono attorneys.

Law Schools

Law schools have continued to be engaged in a new focus on equal justice. This began in December 1999, when the American Association of Law Schools (AALS) created the an equal justice project—Pursing Equal Justice: Law Schools and the Provision of Legal Services—to explore the roles that legal education can play in confronting the lack of legal resources for low-income persons, persons in capital cases, immigrants, and others. The centerpiece of the Project was a series of 19 Equal Justice Colloquia convened at law schools across the United States during the 2000-2001 academic years. These colloquia drew more than 2,000 attendees. This was followed by a Plenary Session at the 2001 AALS Annual Meeting. The results of this effort are catalogued in an AALS report in March of 2002, *AALS Equal Justice Project: Pursuing Equal Justice: Law Schools and the Provision of Legal Services.*

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

KEY DEVELOPMENTS FOR THE FUTURE

STATE JUSTICE COMMUNITIES

The broad-based initiative to create comprehensive, integrated state systems of civil legal aid will continue. LSC will maintain its strong support for a state-based system and will continue to encourage its grantees to be key players in the development of strong, viable state justice communities and to collaborate with a broad array of supporters and stakeholders. However, LSC has shifted its priorities away from state planning. ABA, the National Legal Aid and Defender Association (NLADA), and the Center for Law and Social Policy are giving these state planning initiatives greater priority.

The Access to Justice Support Project, a partnership of the ABA and NLADA, will continue to provide overall leadership to this initiative. They recently convened the fifth annual meeting of State Access to Justice Chairs during the Equal

Justice Conference. This group has grown considerably and now includes representatives from 38 states. During the next two years, we anticipate increased attention by the ABA and its top leadership to expanding state access to justice commissions and increasing efforts to improve state justice communities. These initiatives will continue to focus on:

- Increasing public awareness of the civil legal needs of low-income people and the importance of civil legal assistance through legal needs studies and other reports, hearings, evaluation reports, and public awareness campaigns.
- Increasing efforts to educate federal legislators about the need for increased LSC funding and increasing state-level funding through state appropriations, court fee or fine surcharges, voluntary or mandatory bar dues contribution, statewide fundraising campaigns, improvements in IOLTA, and other means.
- Increasing pro bono participation among private attorneys through pro bono initiatives such as mandatory reporting, rule changes, campaigns, websites, conferences, and statewide data collection.
- Creating and expanding loan repayment assistance programs for young attorneys.
- Assisting efforts to bring together the bar, the courts, legal aid providers, and others to make the courts more accessible and user-friendly and address the challenges posed by the self-represented through comprehensive plans, reports and evaluations, training and education, simplification of rules and forms, courthouse support, Internet- and technology-based tools, and other activities.
- Developing new programs and statewide collaborations to ensure effective coordination among providers, to implement innovative technology-based systems, and to ensure systemic advocacy and services to special populations such as immigrants and prisoners.

The incoming President of the ABA has established a new Commission on Access to Legal Services which will be charged with expanding Access to Justice Commissions and state Access to Justice initiatives.

In addition to the Access to Justice Support Project, NLADA and CLASP, working through the Project for the Future of Equal Justice and the new Program Enhancement Initiative described below, will be coordinating a new effort, stemming from an earlier 1998 initiative, to create concrete and measurable guides for what a state justice community should attempt to achieve to ensure the continued development of a comprehensive, integrated statewide system of civil justice. This effort will parallel initiatives undertaken by the ABA and its new President.

State Legal Needs Studies

As part of the state justice initiatives, a number of states have undertaken state legal needs studies. These include Illinois and Montana (2005), Oregon (2000), Vermont (2001), New Jersey (2002), Connecticut (2003), Massachusetts (2003), Washington (2003), and Tennessee (2004). All nine of these state studies were based on the methodology of the Comprehensive Legal Needs Study conducted by the American Bar Association in 1993 (released in 1994), which remains the most recent *national* study of the legal needs of low-income Americans.

The nine state studies validated the findings of the ABA study.

- All nine state studies found levels of legal need equal to or higher than the level in the ABA study. The state studies found a per-household average ranging up to more than three legal needs per year; the ABA study found one legal need for year per-household.
- Like the ABA study, all nine state studies found that the combined efforts of the private bar and publicly funded legal services providers serve only a small portion of legal needs reported by low-income households. The comparable findings in the recent state studies were even lower than those in the ABA study, which found that help was received for only 21 percent of all problems identified.

The ABA study was based on roughly 1,800 random telephone interviews with low-income Americans, conducted during the spring and summer of 1993. Respondents were asked about a set of circumstances that anyone in their household might have experienced during the preceding year. A panel of attorneys ensured that the situations described to the respondents contained a legal issue and met a threshold of seriousness. When respondents reported such circumstances, follow-up questions asked what the household did (or did not do) about the situation and what contacts, if any, it had with the civil justice system.

The nine state studies all used a survey questionnaire based upon the questionnaire used in the ABA study. Although each state modified the questionnaire somewhat to reflect local circumstances and concerns, the general approach used and the majority of the questions asked were the same as in the ABA study.

The ABA study found that the largest problem areas were housing (such as evictions, foreclosure, and unsafe housing conditions) and personal finances and consumer (such as debt collection, bankruptcy, and consumer scams), followed by regional and community problems (such as inadequate police and municipal services), and family (such as divorce, domestic violence, child custody, and support). Other major problem areas were employment-related issues, personal injury, government benefits, and health care. The recent state studies found

problems falling into the same categories, although the percentages of the different problem areas varied somewhat from state to state.

The ABA study also explored the reasons why so many households with a legal need did not seek legal help, but instead either did nothing or sought to resolve the problem on their own. The predominant reasons given by respondents were a sense that getting a lawyer would not help and that it would cost too much. A majority of respondents did not know of the availability of free legal assistance and did not understand that they were eligible. Seven of the state studies asked people who had experienced a legal problem and not sought legal help to give their reasons for not doing so. These studies confirm that a large percentage of low-income people with a legal problem are not aware that the problem has a legal dimension and potential solution. All of these states found low awareness on the part of the respondents that they were eligible for free legal assistance. The lowest percentages of people knowing about free legal aid were in New Jersey (26 percent), Tennessee (21 percent), and Illinois (23 percent).

FUNDING

While civil legal assistance in the United States has continued and evolved in the face of reduced federal funding, without additional funding, the civil legal assistance community cannot achieve increased access for low-income persons nor implement the civil legal assistance system for the future. Future funding for civil legal assistance will come from five sources:

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

Since 1982, funding from state and local governments has increased a few million dollars to over $370 million.[xxvi] Until recently, this increase has been primarily through IOLTA funding that has now been implemented in every state.[xxvii] Recently, IOLTA programs have faced decreasing funds because of lower interest rates. However, we are seeing, and are likely to see more new initiatives to expand revenue from IOLTA programs in many states, although it is not yet clear whether they will be successful in raising additional IOLTA funds.

Within the last seven years, substantial new state funding has come from general state or local governmental appropriations, filing fee surcharges, state abandoned property funds, punitive damage awards, and other governmental initiatives. In addition, there has been substantial increases in funding from private sources, including foundation and corporate gifts, United Way funding, special events, funding from religious institutions, fee for service projects, lawyer fund drives, attorney registration fee increase or dues assessment, dues check-

off or add-ons, bar association appropriations, funds from *cy pres* awards, and from awards from attorneys' fees pursuant to fee-shifting statutes.[xxviii]

Even though 37 states plus the District of Columbia now have non-LSC funding that exceeds LSC funding, and even though new funding will continue to come from non-LSC sources, increased funding from the federal government will also be essential for two reasons. First, civil legal services is a federal responsibility and LSC continues to be the primary single funder and standard setter. Second, there are many parts of the country—the South, Southwest, and Rocky Mountain states—that have not yet developed sufficient non-LSC funds to operate civil legal assistance, including pro bono programs, without federal support. Abandoning a federal commitment to civil legal assistance would mean that in many states—and thus in the nation as a whole—the principle of equal justice would be a fiction.

Supporters of increased federal funding will have to overcome significant political barriers to substantially (as opposed to incrementally) increase federal funding for civil legal assistance. Although LSC leadership has made substantial progress in developing a much stronger bipartisan consensus in favor of funding for LSC,[xxix] the political leadership of the U.S. remains divided about whether there should be a federal program, and, if there should be one, should it be a federal program or a block grant program administered by the states.

In addition, there are substantial efforts to reduce U.S. domestic discretionary spending over the next five years in order to address the huge budget deficit that has resulted primarily from the tax reductions and the increased spending on defense (Iraq and Afghanistan wars) and homeland security. The Congress recently passed its budget resolution, which would reduce domestic discretionary spending by more than $200 billion over the next five years. These cuts would grow deeper over time and are projected to affect all domestic discretionary spending, including LSC funds and other federal funds available for civil legal aid.[xxx]

The President's budget proposal for FY 2006 illustrates how the federal budget issues impacts civil legal aid. The Administration has proposed to cut funding for LSC by 5 percent. This would reduce funding available to the national legal aid program to $318.2 million, an amount less than the $321 million LSC received in 1980. This year, FY 2005, LSC lost funding from an appropriate level of $335.3 million in FY 2004 to an appropriate level of $330.8 million in FY 2005.

The Board of Directors of LSC has requested $363.8 million for FY 2006. (LSC submits its own budget directly to Congress, unlike federal departments and agencies whose budgets are determined by and presented in the official budget of the President.) The ABA and NLADA/CLASP are aggressively working to increase, not decrease, LSC funding through direct lobbying and an expansive grassroots effort involving state and local bar leaders and others. We do not yet

know how much will be appropriated. The House adopted an appropriation of $3308 million. The Senate has yet to act although the Senate Appropriations Committee only is proposing $324.5 million.

In order to strengthen the prospects of increased LSC funding, LSC, working with the ABA and NLADA, has started an effort to expose the "justice gap" between what funding is needed to provide equal access to justice and the funding levels that exist. This initially involves obtaining information on the applicants who are turned down for civil legal aid by LSC-funded providers. The initiative is also exploring whether and to what extent it is possible to capture more detailed state information about the number of individuals who are participating in various state court and administrative agency civil proceedings but are not represented by lawyers. And the initiative is reviewing state legal needs studies to see what common points can be made to highlight both the extent of unmet civil legal needs and the need for increased resources to address those needs.

These LSC initiatives may well provide a new basis for advocating for, and make a more persuasive case to the Congress on the need for, increased LSC funding. However, substantial growth in federal funding, as well as state and local governmental funding, is not likely to occur until there is much greater support for civil legal aid among the general public (as distinguished from the organized bar). The central challenge to supporters of civil legal aid is to develop effective strategies that garner broad-based public support.

NATIONAL COALITION FOR RIGHT TO COUNSEL IN CIVIL CASES

Within the last two years, a National Right to Counsel Coalition has formed and is now working in a number of states to obtain court rulings and statutory changes to advance the right to counsel in civil cases. This new group is an outgrowth of a national coordinated discussion among advocates, academics, state and local bar associations, community organizations, access to justice commissions, national networks of poverty law and civil rights advocates, and others interested in furthering recognition of the right to counsel in civil matters in states and nationally. These discussions began with the leadership of the Public Justice Center, located in Baltimore, Maryland, which launched an Appellate Advocacy Project in 2000.

The Public Justice Center and Shriver Center on National Poverty Law (Chicago, Illinois) are teaming up to create an online library of briefs, decisions, research, and other materials for their members. Private law firms are devoting pro bono resources to these efforts. For example, legal teams at Wilmer Cutler Pickering Hale & Dorr LLP are devoting substantial research time to analyzing the constitutional laws of states in order to find states that may be amenable to the civil Gideon argument. Moreover, there has been increased academic attention to the subject.[xxxi]

This group has focused primarily on creating the right to counsel in cases in Maryland[xxxii] and Washington State[xxxiii] and initially hoped to prevail but did not. However, one recent court victory held that abused children have a right to counsel and to adequate assistance of counsel at every major stage of their experience in a state's child welfare system.[xxxiv] There are ongoing activities in Wisconsin, New York, and elsewhere, in addition to continuing efforts in Maryland and Washington. In addition, there are new efforts to create a statutory right to counsel in some civil cases. For example, in California, the "Model Statute" Project is drafting a model statute that creates and defines the scope of a statutory entitlement to equal justice, including a right to counsel in appropriate circumstances. A similar effort is going forward in Massachusetts. In addition, the State Bar of Texas has introduced legislation providing a civil right to counsel for low-income tenants in certain appeals cases.

The American Bar Association is taking a new look at the civil right to counsel, as well. In April, the Standing Committee on Legal Aid and Indigent Defendants created a new subcommittee to examine the scope of the right to counsel and to determine what the ABA could do to further the development of such a right. In addition, Michael Greco, President-Elect of the ABA, is considering leading a national effort on the civil right to counsel as one of the main messages of his Presidency. He has already begun to talk about this topic.[xxxv] His new Presidential Commission on Access to Legal Services will also focus on expanding the right to counsel in civil cases.

INITIATIVES TO IMPROVE QUALITY

Since 2003, there have been a number of new initiatives to improve the quality of civil legal aid providers. These have generally been efforts to work within the existing decentralized system of civil legal aid that has evolved in the United States under which individual providers decide who to serve, the types of cases to prioritize, and the scope of activities to undertake.

American Bar Association Task Force to Revise Standards for Providers of Civil Legal Services to the Poor

The ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) has launched an effort to revise the ABA **Standards for Providers of Civil Legal Services to the Poor** (Standards). This revision was thought necessary because much has changed since the current standards were last revised nearly two decades ago in 1986. The delivery system has seen fundamental realignment, new funder restrictions on program activities have become more common, the model ethical rules for lawyers have been amended, technology has become a key delivery tool, and many other developments have occurred.

SCLAID has created a task force of representatives of interested groups within the legal services community to provide advice and guidance in revising the

Standards.[xxxvi] John Tull, a former participate at ILAG conferences, has been retained as the Reporter for this project, reprising the role he played for the 1986 Standards.[xxxvii] The goal is to complete the Standards in time to be presented and adopted by the ABA House of Delegates at its August 2006 meeting.

The current standards and information about the work of the Task Force (including how to submit comments) are available at: http://www.abanet.org/legalservices/sclaid/civilstandards.html.

The revised Standards will, for the first time, provide guidance on limited representation, legal advice, brief service, support for pro se activities, and the provision of legal information. Unlike the Model Rules of Professional Conduct, discussed above, which treat the provision of unbundled legal services primarily in the context of paying clients, the Standards will set out a framework for providers who serve non-paying clients who often have no alternatives to the services available from a civil legal aid provider. The Standards will also include new standards for diversity, multi-cultural, and language competency. The Standards will not be designed as check lists for use by funders or criteria to use in peer review of civil legal aid providers. Instead, the Standards will be designed to be used by civil legal aid providers to improve their performance and enhance their effectiveness.

Revision of the Performance Criteria by the Legal Services Corporation

LSC has begun a new quality initiative, which will be described in greater detail in the report prepared by LSC for this conference. One LSC activity is to revise the **LSC Performance Criteria** that were originally developed in 1992 and which, for awhile, served as a tool to evaluate LSC programs through a peer review system. The Performance Criteria have also been used by IOLTA funders and a few other funders, as well as by a number of civil legal aid providers. These criteria have been the framework for much of the program evaluation that has gone on in civil legal aid. LSC has appointed a task force of LSC staff and others to revise the criteria.[xxxviii] This project is on a very fast time table and should be completed by the end of 2005.

New Initiative by NLADA to Enhance The Performance of Civil Legal Aid Providers

NLADA has begun an intensive new initiative designed to improve quality, encourage innovation, and enhance the performance of civil legal aid providers. After the LSC Performance Criteria and ABA Standards are finalized, NLADA will work in collaboration with LSC and the ABA to train and provide technical assistance to help providers effectively incorporate the standards into their ongoing and routine operations. It will also prepare “model” guidelines that providers of various types could use to effectively incorporate the ABA Standards and LSC Performance Criteria into daily operations. It also plans to prepare

detailed papers or guidebooks, provide on-site technical assistance, and undertake targeted training events that provide guidance and information to civil legal aid providers in order to help them improve quality and enhance performance. This new initiative will also collect detailed information about "program-owned evaluations" and other program efforts. The initiative will make this information available to the boarder civil legal aid community, affirmatively promote "program-owned evaluations," and conduct one or more training programs and follow-up technical assistance to help programs develop and effectively implement program-owned evaluations. Finally, this initiative plans to collect national data and information about civil legal aid resources, programs, funders, activities, quality initiatives, and the like and, where feasible, create a national database and website with this information. In addition, it hopes to undertake directly and stimulate others to undertake research on the delivery of civil legal aid, such as was done on hotlines by the Project for the Future of Equal Justice.

Other Continuing Quality Improvement Efforts

In addition to these initiatives, efforts continue on three somewhat separate tracks for examining legal services quality and effectiveness: (1) peer review process evaluations conducted by IOLTA programs in a number of states; (2) outcome measurement systems developed and implemented by five IOLTA programs; and (3) program-owned evaluations that are designed to help individual programs perform better and to better market what they accomplish.

1. IOLTA Evaluations

The network of state Interest on Lawyers Trust Account programs (IOLTA) is the second largest funder of civil legal assistance providers, including both LSC- and non-LSC-funded programs among their recipients. A number of IOLTA funders across the country undertake peer review evaluations of their grantees and others do desk audits using a set of evaluation criteria.

2. IOLTA Outcome Measurement Systems

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

3. Program-Owned Evaluations

Finally, a number of programs across the country are utilizing what is now called "program-owned evaluation" to ensure high-quality and effective representation. There have been a number of developments in the expansion of program-owned evaluation in the past few years. First, on their own, some programs have developed rigorous internal evaluation systems, including the use of outcome measurements, to evaluate whether they are accomplishing what they set out to do for their clients. Many other programs have begun to use the techniques developed elsewhere as a part of their own program-owned evaluation.

Though these efforts are diverse, they are answering the same overall question for each program: whether the program's efforts have succeeded in accomplishing for clients what it intended. They are explicitly outcome-based, and the outcomes are carefully and strategically chosen by each program to guide its work. The programs have used a variety of creative techniques to conduct their outcome evaluations, including focus groups, client follow-up interviews, interviews of court and social service agency personnel, courtroom observation, and court case file review.

Two developments have encouraged the expansion of program-owned evaluation, including the rigorous use of outcome measures. In California, the Legal Services Trust Fund, which is the state IOLTA funder, and the Administrative Office of the Courts (AOC) have teamed up to support the development of a "tool kit" of program self-evaluation tools for use by programs as a part of the statewide system of evaluation. The tools are optional for programs and include end-of-service surveys, client follow-up interviews, focus groups, courtroom observations, review of documents filed in court, interviews of court and agency personnel, and outcome measures. The state-level agencies decided that the use of the tools should be optional as a way to encourage programs to make use of those that they would find useful for their own management purposes. Hence, the name "program-owned evaluation." The reports from the program-owned evaluations will be provided to the state agencies to help them fulfill their obligations to report to the state legislature, but the Trust Fund and the AOC both see the primary beneficiaries of the tool kit to be the programs that embrace its use.[xxxix]

A similar development has been the LSC-funded Management Information Exchange's (MIE) Technology Evaluation Project (TEP). The resulting product is a set of tools—also referred to as a "tool kit"—that is available for programs to use to evaluate their websites and their use of video conferencing and legal work stations that serve clients through "virtual law offices."

CONCLUSION

Civil legal assistance in the United States has, over the last 40 years, developed from a haphazard program with limited, virtually all private funding into a significant $1 billion institution. The legal aid program has a long history of

effective representation of low-income persons and has achieved a number of significant results for them from the courts, administrative agencies, and legislative bodies. However, funding remains totally inadequate to address the legal needs of the poor. Moreover, few states have implemented an effective and efficient state integrated and comprehensive system of delivery. It will take both significant increases in funding and the development of effective state justice systems in order to have a civil legal aid system that meets one of the key purposes of the LSC Act, to provide assistance to those "unable to afford adequate legal counsel."

As this report indicates, the U.S. has made considerable progress in meeting two of the three fundamental objectives of a civil legal aid system: (1) educating and informing low-income persons of their legal rights and responsibilities; and (2) informing low-income persons about the options and services available to solve their legal problems, protect their legal rights, and promote their legal interests. While much more progress is necessary in order to achieve these two goals, at least there has been continuing progress over the last several years. On the other hand, progress has been very slow in meeting the third objective of a civil legal aid system: ensuring that all low-income persons, including individuals and groups who are politically or socially disfavored or have distinct and disproportionately experienced legal needs, have meaningful access to a full range of high-quality legal assistance providers when they have chosen options that require legal advice and representation.

The U.S. has far to go to meet all three objectives of a civil legal aid system. First, to raise the funds needed, it must develop a much stronger base of public support for civil legal aid within the general public and among key leaders in local communities. Second, state efforts must continue and increase efforts to implement an integrated, comprehensive statewide system that is efficient and effectively serves all low-income person in need of civil legal assistance. To implement such a system, key state justice leaders including state supreme court justices and others must become involved. Finally, the civil legal assistance community must continue and substantially increase its efforts to create a new and more effective system of advocacy, coordination, and support at the state and national level.

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Endnotes

[i]See Houseman, Alan W., "Who are our Clients? What are the Emerging Legal Problems? What Do These Implicate for State Justice Communities?" Prepared for the LSC Client Conference in April of 2001 and reprinted in the Summer 2001 Issue of the *Management Information Exchange Journal.*

[ii] See Gill Deford, Jane Perkins, Gary Smith and Matthew Diller, "Federal Court Access Issues in the U.S. Supreme Court's 2003-2004 Term," 38 Clearinghouse Rev. 464 (November-December, 2004); Jane Perkins, "Using Section 1983 to Enforce Federal Laws," 38 Clearinghouse Review 720 (March-April, 2005).

[iii] Legal Services Corporation, *Background Information and Talking Points, Promoting Pro Bono* (1999).

[iv] See Alan W. Houseman, The Missing Link of State Justice Communities: The Capacity in Each State for State Level Advocacy, Coordination and Support, Project for the Future of Equal Justice and the Center for Law and Social Policy, (November 2001). Some of the state entities are formerly LSC-funded state support centers, although there are only 12 of those still in existence.

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

[vi] See Earl Johnson, "Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies" 24 *Fordham Int'l L*. J. 83 (2001).

[vii] For example, I have represented the civil legal aid community before Congress continuously since 1973. During that time, there has been little support for a judicare system among both supporters and critics of the Legal Services Corporation.

[viii] These new commissions follow the same basic model: Most are created by Supreme Court rule or order, in response to a petition or request by the state bar, sometimes with formal support from other key stakeholder entities as well. Their members are representative of the courts, the organized bar, civil legal aid providers, law schools, and other key entities, and are either appointed directly by these entities or appointed by the Supreme Court based on nominations by the other entities. They are conceived as having a continuing existence, as distinct from a blue-ribbon body created to issue a report and then sunset. They have a broad charge to engage in ongoing assessment of the civil legal needs of low-income people in the state and to develop, coordinate, and oversee initiatives to respond to those needs.

[ix] A detailed discussion of state access to justice initiatives is found in the publication that I will distribute at the conference, *Access to Justice Partnerships State by State: Improving and Expanding Access to Civil Justice*, by the Access to Justice Project, a partnership of the American Bar association and the National Legal Aid and Defender Association.

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

[xi] See Joan Kleinberg, "An Invitation to a Serious Conversation about Hotlines," *Management Information Exchange Journal*, Volume XVII, Summer 2003 at p. 33.

[xii] This information is found in an article by Amy Mix, Yvonne Tobias, Cecilia Isaacs-Blundid and Jan May, "Brief Services Units: A Preliminary Report," 32 AARP Legal Hotline Quarterly, Fall 2004 at p. 11.

[xiii] See Kathleen M. Sampson, *Progress to Date: Survey Results Updating Self-Represented Litigation Innovation Activities 1999-2004*, paper presented at the Summit on the Future of Self-Represented Litigation.

[xiv] See John M Greacen, "Framing the Issues for the Summit on the Future of Self-Represented Litigation," 2005.

[xv] This site was initially funded by the State Justice Institute, hosted on Pro Bono Net, and maintained by the National Center for State Courts. It has approximately 1,000 members and 800

documents in its library. An interesting effort to change how courts operate is found in a book by Richard Zorza, *The Self-Help Friendly Court*, National Center for State Courts (2002).

[xvi] *Pro Se Legal Services Directory*, AARP Legal Advocacy Group (September 1999).

[xvii] See "An Analysis of Rules That Enable Lawyers to Serve Pro Se Litigants," by the ABA Standing Committee on the Delivery of Legal Services, February 2005.

[xviii] Rule 1.2, Scope of Representation, provides in part (c): "A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." The quote in the text is taken from Comment (7).

[xix] See California Rules of Court (effective July 1, 2003), Rule 5.170 (Nondisclosure of attorney assistance in preparation of court documents) and Rule 5.171 (application to be relieved as counsel upon completion of limited scope representation).

[xx] Echols, Robert, "Recent State Legal Needs Studies Validate Findings of 1993 ABA Study Concerning Civil "Justice Gap" for Low-Income People," ***Dialogue***, Summer 2005, Vol.9,No.1 at Page 31.

[xxi] See Alan W. Houseman, "Restrictions by Funders and the Ethical Practice of Law," Vol. LXVII *Fordham Law Review*, April 1999 (p. 2187).

[xxii] The plaintiffs brought a facial challenge to the 1996 restrictions on class actions, attorneys' fees, and solicitation, as well as to the "entity" restriction that prohibited programs from using their non-LSC funds for restricted activities. In addition, the suit involved an "as applied" challenge to LSC's application of the program integrity rules to several LSC programs. These rules precluded LSC-funded programs from establishing entities that were run by the same Executive Director and housed in the same space. The plaintiff programs had submitted a configuration proposal for creating affiliate structures that LSC rejected as inconsistent with its interpretation of the program integrity rules. Although the Court rejected the plaintiffs' facial challenges to the restrictions, the Court did find that LSC's application of its program integrity rules to the configuration proposal submitted by the plaintiffs imposed an undue burden on the programs' exercise of their First Amendment rights and should be enjoined. All sides have appealed. No decision on the appeal is expected until at least 2006.

[xxiii] See Alan W. Houseman, *The Missing Link Of State Justice Communities: The Capacity In Each State For State Level Advocacy, Coordination And Support*, Project for the Future of Equal Justice and Center for Law and Social Policy, (2001).

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

[xxv] ABA Standing Committee on Pro Bono and Public Service, Supporting Justice: A Report on the Pro Bono Work of America's Lawyers, August, 2005, American Bar Association.

[xxvi] This 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 do not have to report to any central funding source, unlike LSC-funded programs.

[xxvii] In 2003, the U.S. Supreme Court upheld the constitutionality of the IOLTA program in a narrow 5-4 decision, *Brown v. Legal Foundation of Washington,* 123 S. Ct. 1406 (March 26, 2003). The Court held that although the IOLTA program does involve a taking of private property—interest in escrow accounts that was owned by the depositors—for a legitimate public use, there was no violation of the Just Compensation Clause of the Constitution because the owner did not have a pecuniary loss.

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

[xxix] See John McKay, "Federally Funded Legal Services: A New Vision of Equal Justice Under Law," 68 *Tenn. L. Rev*. 101, 110-111, (Fall 2000).

[xxx] See Sharon Parrott, "The Federal Budget Debate: Implications for Families, States and Communities," Center on Budget and Policy Priorities, (May 2, 2005).

[xxxi] Johnson, Jr., Earl *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases,* 2 Seattle J. for Soc. Just. 201 (2003); Johnson, Jr., Earl *Toward Equal Justice: Where the United States Stands Two Decades Later,* 5 Md. J. Contemp. Legal Issues 199 (1994); Nethercut, John. *"'This Issue Will Not Go Away…' Continuing to Seek the Right to Counsel in Civil Cases."* 38 Clearinghouse Review 481 (2004); Perluss, Deborah. *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest,* 2 Seattle J. for Soc. Just. 571 (2004); Scherer, Andrew. *The Important of Collaborating to Secure a Civil Right to Counsel*, presentation to New York Judicial Institute, (May 2005).

[xxxii] *Frase v. Barnhart,* 379 Md. 100 (2003).

[xxxiii] See *In Re Custody of Halls,* 109 P.3d 15 (Wash. 2005).

[xxxiv] See *Kenny A ex rel Winn v. Sonny Perdue,* 356 F. Supp. 1353 (N. D. Ga. 2005).

[xxxv] On January 28, 2005, Michael Greco, President-Elect of the American Bar Association addressed the Fellows of the Alabama Law Foundation:

> I believe that the time has come for us to recognize, finally, that a poor person, whether facing either a serious criminal OR civil matter, must have access to counsel if that person is to receive justice. Let me be clear—I am not talking about providing a lawyer in every situation where a poor person believes he or she has been aggrieved. But in matters where a poor person's family, sustenance, health or housing are threatened by a legal problem, our system of justice should provide the necessary legal assistance. Such critically important assistance should not be measured out by the teaspoonful. It should not be subject to long waiting lists, limited capacity and narrow legal aid priority lists. It should be available to all who qualify. That is the eloquent promise etched in stone on the U.S. Supreme Court building—Equal Justice Under the Law.

[xxxvi] The Task Force includes several participants in the International Legal Aid Group including Ronald Staudt, Helaine Barnett, and the author.

[xxxvii] The Task Force is receiving comments and suggestions from all interested persons and groups concerning the Standards. The Task Force has held three hearings – the first on December 1 at the NLADA Annual Convention in Washington, D.C.; the second on May 7, 2005 at the Equal Justice Conference in Austin, Texas; and the third on June 3, 2005 at the Statewide Legal Services Conference in San Francisco, California.

[xxxviii] ILAG participants include John Tull, Helaine Barnett, and the author.

[xxxix] The Judicial Council of California issues its report in March of 2005, *Equal Access Fund: A Report to the California Legislature.* The report made five key findings: (1) the Equal Access Fund improves the lives of vulnerable Californians; (2) thoughtful and innovative delivery systems have been implemented to stretch Equal Access Fund dollars and maximize services to clients; (3) the Equal Access Fund strengthens, expands, and is efficiently incorporated into the legal aid delivery system; (4) the Equal Access Fund creates strong partnerships between the courts and nonprofit legal aid providers that benefit low-income litigants, the judicial system and the public at large; and (5) despite the gains, significantly more funding is necessary to serve California's unrepresented litigants.