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Civil Legal Aid in the United States
An Update for 2007

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Since 1965, the United States has funded two national efforts to create a national civil legal assistance system: first through the federal Office of Economic Opportunity (OEO) and later through the Legal Services Corporation (LSC). Funding from state sources has gradually expanded since the 1980s; and efforts are now underway to create comprehensive, integrated state systems for the delivery of civil legal assistance.

An integrated and comprehensive civil legal assistance system should have the capacity to (1) educate and inform low-income persons of their legal rights and responsibilities; (2) inform low-income persons of the options and services available to solve their legal problems, protect their legal rights, and promote their legal interests; and (3) ensure that all low-income persons, including individuals and groups who are politically or socially disfavored, have meaningful access to high-quality legal assistance providers when they require legal advice and representation.

The United States has made considerable progress in meeting the first two of these three objectives, but progress has been slow in meeting the third. Most areas of the country lack the funding and available pro bono assistance to provide low-income persons who need it with legal advice, brief service, and extended representation. As a result, many low-income persons who are eligible for civil legal assistance are unable to obtain it.

I. OVERVIEW OF CURRENT LEGAL AID SYSTEM

Civil legal aid in the United States is provided by a large number of separate and independent staff-based service providers, which are funded by a variety of sources.[1] Currently, overall

[1] We do not know the exact number of civil legal aid programs. Recently, I attempted to determine the number of legal aid programs by counting the programs funded by LSC and Interest on Lawyer Trust Accounts (IOLTA) commissions and those listed in the *2003-04 Directory of Legal Aid and Defender Offices in the United States and Territories* (National Legal Aid and Defender Association). I identified 500 civil legal aid programs. If we also include the 160 programs affiliated with the Catholic Legal Immigration Network (http://www.cliniclegal.org) and the law school clinical programs operated by the 204 law schools, then we reach a total of 864. This figure excludes the 900 pro bono programs identified by the American Bar Association (ABA).

funding is approximately $1 billion.[2] The largest element of the legal aid system is comprised of the 138 programs that are funded and monitored by LSC.[3] While LSC is also the largest single funder, overall, far more funds come from other sources—including state and local governments, other federal government sources, private bar, United Way, private foundations, and Interest on Lawyer Trust Accounts (IOLTA) programs.[4] Many legal services providers do not receive LSC funds but are supported by funds from these other sources. While most are small entities that provide limited services in specific locales or for particular client groups, many are full-service providers that operate alongside the LSC providers in the jurisdictions that both serve.

These staff-based providers are supplemented by approximately 900 pro bono programs, which exist in every state and virtually every locale.[5] Some of these programs are components of bar associations; others are component units of legal aid staff programs; and still others are independent nonprofit entities, with staff who refer cases to lawyers on the pro bono panels. The staff delivery system is also supplemented by law school clinical programs and self-help programs. There are very few "judicare" programs directly funded by LSC or other funders—LSC funds just two small ones, and even these now have staff attorneys and paralegals who deliver legal assistance in some cases.[6] It is very rare for a funder to directly fund, by contract or otherwise, individual lawyers or law firms. However, some staff attorney programs have created judicare components or contracted with individual lawyers and law firms, which are paid by the staff program to provide legal assistance to certain groups of clients.[7]

The United States system also includes approximately 38 state advocacy and support organizations that advocate before state legislative and administrative bodies on policy issues affecting low-income persons.[8] Some of these also provide training and technical support to local

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[2] The data on funding comes from the Project to Expand Resources for Legal Services, a project of the ABA Standing Committee on Legal Aid and Indigent Defendants.

[3] LSC is a private, nonprofit corporation, established to provide low-income persons "unable to afford adequate legal counsel" with access to high-quality legal assistance in civil matters. It is not a federal agency or department. LSC is headed by a bipartisan board of directors, whose 11 members are appointed by the president and confirmed by the Senate. No more than six members of the board may be from the same political party. The board appoints a president of LSC, who functions as the chief operating officer. Today, LSC provides grants to 138 independent nonprofit legal aid programs throughout the United States and its territories, distributing more than 96 percent of its total funding from Congress to these programs.

[4] 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—funds that had previously been held only in non-interest-bearing accounts.

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

[6] The two LSC-funded judicare programs are Judicare of Anoka County, Inc., in Blaine, Minnesota, and Wisconsin Judicare, Inc., in Wausau, Wisconsin.

[7] Data for 2006 obtained from LSC indicated that of the 106,604 cases closed through the private attorney involvement efforts of LSC-funded programs, 26,208 came from judicare, reduced fee panels, and contracts with private attorneys or law firms. Legal Services Corporation, *Fact Book 2006*, June 2007, 22.

[8] Alan W. Houseman, *Civil Legal Aid in the United States: An Overview of the Program and Developments in 2005*, July 2005, http://www.clasp.org/publications/us_overview_program_2005.pdf, 4; 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, Nov. 2001, http://www.clasp.org/publications/missing_link.pdf.

legal aid advocates on key substantive issues.[9] Moreover, more than 30 entities are engaged in advocacy on behalf of low-income persons at the federal level. Fifteen of these were formerly funded by LSC and were part of the national support network; others never were funded by LSC.[10]

Over the last 10 years, the civil legal aid system has utilized innovations in technology to improve and expand access to the civil justice system. As a result, low-income persons have access to information about legal rights and responsibilities and about the options and services available to solve their legal problems, protect their legal rights, and promote their legal interests. Technological innovation in virtually all states has led to the creation of Web sites that offer community legal education information, pro se legal assistance, and other information about the courts and social services. Most legal aid programs now have Web sites; more than 200 such sites exist.[11] Virtually all states have a statewide Web site, most of which contain information useful both to advocates and clients. Dozens of national sites provide substantive legal information to advocates; other national sites support delivery, management, and technology functions. Many program, statewide, and national Web sites are using cutting-edge software and offering extensive functionality. I-CAN projects in several states offer kiosks with touch-screen computers that provide clients with pleadings and access to other services, such as help with filing for the Earned Income Tax Credit.[12] Video conferencing is being used in Montana and other states to connect clients in remote locations with local courthouses and legal services attorneys.

In addition, there has been a rapid expansion of efforts by courts, legal aid providers, and bar associations to help people who are attempting to represent themselves in courts.[13] Civil legal aid programs are devoting substantial time and resources to address the issue of assistance to pro se litigants; many programs throughout the country operate self-help programs independently or in conjunction with courts.[14]

One critical part of efforts to expand access has focused on a range of limited legal assistance initiatives to provide less than extended representation to clients who either do not need such extended representation in order to solve their legal problems or live in areas without access to lawyers or entities available to provide extended representation.

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[9] Houseman, *Civil Legal Aid*, 4; Houseman, *The Missing Link*.

[10] The number of national support and advocacy centers is based on my own calculation. Pine Tree Legal Assistance lists 24 national advocacy centers, http://www.ptla.org/ptlasite/links/support.htm. On the inside back cover of the *Clearinghouse Review*, the Sargent Shriver National Center on Poverty Law lists six additional centers not included on the Pine Tree Web site.

[11] Pine Tree Legal Assistance lists 223 legal services sites at http://www.ptla.org/ptlasite/links/services.htm.

[12] The most well-known of the ICAN projects is operated by Legal Aid of Orange County, https://secure.icandocs.org/.

[13] A recent directory lists 130 court-based self-help programs throughout the country. See National Center for State Courts Web site, http://www.ncsconline.org/WC/Publications/ProSe/contents.htm.

[14] A 2005 directory lists more than 400 separate self-help assistance programs sponsored through legal aid programs with pro se initiatiaves. See AARP Legal Advocacy Group, *Pro Se Legal Services Directory*, Sept. 2005.

Many legal aid programs now operate legal hotlines, which enable low-income persons who believe they have a legal problem to speak by telephone to a skilled attorney or paralegal and receive advice and brief service. Legal hotlines may provide answers to clients' legal questions, analysis of clients' legal problems, and advice on solving those problems, so that the client can resolve the problem with the information from phone consultation. Hotlines may also perform brief services, when those are likely to solve the problem, and make referrals if further legal assistance is necessary. Hotlines are now being used in more than 148 programs in 49 states, the District of Columbia, and Puerto Rico.[15] Some focus on particular client groups, such as the elderly; others serve the low-income population in general. There are 54 statewide hotlines in 38 states, 14 regional hotlines, and 10 local hotlines.

Finally, more and more states now have a central phone number (or several regional phone numbers) that clients can call to be referred to the appropriate program or to obtain brief advice about their legal problems.

There are no national data on the number of clients serviced by civil legal aid, the types of cases that are handled, and the services provided. The only national data is from the 138 LSC-funded programs. According to 2006 data reported to LSC, LSC programs provided services in 895,488 cases. The vast majority of services provided were counsel and advice (57.5 percent) and brief service (18 percent). Three and a half percent of cases involved an administrative agency decision, and 9.8 percent involved a court decision. The largest category of cases was family law cases (37.9 percent), followed by housing (24.9 percent), income maintenance (11.8 percent) and consumer (11.2 percent).[16]

II. ELIGIBILITY AND RESTRICTIONS

Eligibility

Legal aid programs funded by LSC have limitations on the clients that they can serve, primarily relating to financial eligibility and status as an alien. Many legal aid programs that do not receive funding from LSC often have financial eligibility guidelines as well. These guidelines often mirror the LSC guidelines, but some are more generous or more restrictive, depending on the program's priorities or on restrictions imposed by funders.

While LSC programs may use funds from non-LSC sources to serve individuals or groups who do not meet the LSC financial eligibility guidelines, LSC funds may be used only to provide legal assistance to clients who meet the guidelines. The 2007 annual eligibility guidelines for LSC are set out in the following chart:

[15] The data reported here is available in the State-by-state Legal Hotline Directory, available on the Technical Support for Legal Hotlines Project Web site, sponsored by the Administration on Aging and the AARP Foundation, http://www.legalhotlines.org.

[16] Legal Services Corporation, *2006 Fact Book*, 11-16.

Legal Services Corporation 2007 Poverty Guidelines[17]

Size of Household	48 Contiguous States and the District of Columbia	Alaska	Hawaii
1……	$12,763	$15,963	$14,688
2……	17,113	21,400	19,688
3……	21,463	26,838	24,688
4……	25,813	32,275	29,688
5……	30,163	37,713	34,688
6……	34,513	43,150	39,688
7……	38,863	48,588	44,688
8……	43,213	54,025	49,688
For each additional member of the household in excess of 8, add:	4,350	5,438	5,000

LSC programs set their own asset ceilings for individual clients; these ceilings may be waived under certain circumstances. Programs may serve individuals who meet the asset ceilings and whose income is below 125 percent of the current official federal poverty guidelines, which are revised annually by the U.S. government. In addition, under certain circumstances programs may serve individuals who meet the asset ceilings and whose income exceeds 125 percent of the poverty guidelines. They also may serve, without regard to income, those individuals who are seeking to maintain benefits provided by governmental programs for low-income individuals or families or whose income is primarily devoted to medical or nursing home expenses. LSC programs also may serve individuals whose income does not exceed 200 percent of the poverty guidelines if they are seeking to maintain or obtain certain governmental benefits or if the program has determined that they should be financially eligible based on certain other specified factors.[18]

LSC-funded programs also are permitted to provide legal assistance to organizations of low-income persons, such as welfare rights or tenant organizations. To qualify for LSC-funded assistance, either (1) the client organization must lack the means to retain private counsel, and the majority of its members must be financially eligible under the LSC regulations; or (2) the organization must have as its principal activity the delivery of services to financially eligible members of the community.

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

[18] 45 CFR 1611.

LSC-funded programs are permitted to serve financially eligible individuals who are U.S. citizens or who are members of specified categories of aliens. [19] These include:

1. Lawful permanent resident aliens
2. Any alien who is either married to a U.S. citizen, the parent of a U.S. citizen, or an unmarried child under the age of 21 of a U.S. citizen—assuming such alien has filed an application for adjustment of status to permanent residency and such application has not been denied
3. Aliens granted asylum
4. Aliens granted refugee status
5. Aliens granted conditional entrant status
6. Aliens granted withholding of deportation
7. H-2A nonimmigrant temporary agricultural workers (concerning the worker's employment contract)

In addition, LSC-funded programs are permitted to provide legal assistance to aliens who are victims of domestic violence, trafficking, sexual assault, and certain other criminal activity; they also may provide assistance to some of these individuals' family members. LSC programs cannot assist undocumented aliens; aliens seeking asylum, refugee status, or conditional entrant status; or other categories of aliens, not listed above, who are legally in the U.S., including students and tourists. Unlike the financial guidelines discussed above, these alien eligibility guidelines apply to LSC programs regardless of whether the particular funds in question are from LSC or from another source.

Furthermore, LSC programs are not permitted to provide certain services to prisoners. Programs cannot participate in civil litigation on behalf of a person incarcerated in a federal, state, or local prison; and they cannot participate in administrative proceedings challenging the conditions of incarceration.[20] LSC programs also are not permitted to represent persons convicted of or charged with drug crimes in public housing evictions when the evictions are based on threats to the health or safety of public housing residents or employees.[21]

Unlike civil legal aid plans in most developed countries, neither LSC nor most state funders impose a formal "merit test" on applicants for service and representation.[22] Nor do they require a "significance test."[23] Programs may impose their own criteria for service, such as providing only advice and brief service in certain kinds of cases, or providing assistance only in particular categories of cases or with regard to specific issues. But the decision to limit service is a program-by-program decision, not a decision made by LSC, state IOLTA programs, or most

[19] 45 CFR 1626.
[20] 45 CFR 1637.
[21] 45 CFR 1633.
[22] A merit test requires some degree of possible success, such as the reasonable likelihood, reasonable probability, or reasonable possibility of success.
[23] A significance test usually is expressed as a significant or substantial interest, and it is sometimes measured against a hypothetical "modest income litigant" and whether such a person would hire a lawyer in a particular case.

other major institutional funders. Some other funders limit the use of their resources to certain clients or types of cases, such as domestic violence victims.

LSC and state funders also do not require co-payments or client contributions from the clients served; civil legal aid programs generally do not impose these, either. In fact, LSC prohibits its programs from using co-payments for clients eligible for LSC-funded services. In addition, since the U.S. legal system is not generally a "loser pays" system, civil legal aid clients and programs are not usually required to reimburse an opponent's legal fees and costs if they lose.

Restrictions

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

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

The U.S. Congress has imposed some restrictions on what types of cases civil legal aid programs funded by LSC can bring and on what types of advocacy they can pursue, even with non-LSC funds. LSC-funded providers are precluded from advocacy and representation before legislative bodies or in administrative rulemaking proceedings, except in a few circumstances. In addition, LSC programs cannot initiate, participate, or engage in any class actions. They cannot claim, collect, or retain attorneys' fees from adverse parties, even when the fees are otherwise permitted by statute. LSC programs are prohibited from representation in redistricting cases and from participating in any litigation with regard to abortion. Prior to 1996, there were some restrictions on what LSC-funded legal services programs could do, particularly with LSC funds. But the 1996 restrictions specifically prohibit LSC grantees from using funds available from non-LSC sources to undertake those activities already restricted when using LSC funds.
In other words, all of an LSC grantee's funds, from whatever source, are restricted.[24]
Nevertheless, these restrictions do not cover most of the work that LSC programs can do on behalf of the low-income community. LSC-funded programs can continue to provide

[24] For a more detailed discussion of the restrictions, see Alan W. Houseman, "Restrictions By Funders and the Ethical Practice of Law," 67 *Fordham L. Rev*., 2189-90.

representation in more than 95 percent of the cases they were able to undertake prior to the imposition of the latest restrictions.

III. THE JUSTICE GAP

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

In 2005, LSC completed a study that used three different methodologies to examine whether there was adequate funding to meet the legal needs of the low-income population.[25] First, LSC asked its grantees to document over a two-month period—from March 14, 2005 to May 13, 2005—the potential clients who came to their offices whom the programs could not serve due to lack of resources. The LSC "unable to serve" study established that for every client who receives service from an LSC grantee, one applicant is turned away due to the program's lack of resources.

Second, the study carefully analyzed nine studies, undertaken in individual states over the previous five years, of the civil legal problems faced by low-income residents. It examined these state-level studies for nationally applicable conclusions, and it compared their results to a 1994 national study on the same subject by the American Bar Association (ABA).[26] The states included Illinois (2005), Montana (2005), Oregon (2000), Vermont (2001), New Jersey (2002), Connecticut (2003), Massachusetts (2003), Washington (2003), and Tennessee (2004).[27] All nine of these state studies were based on the methodology of the 1994 ABA study, which remains the most recent *national* study of the legal needs of low-income Americans.[28]

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

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

[26] ABA Consortium on Legal Services and the Public, *Legal Needs and Civil Justice, A Survey of Americans, Major Findings from the Comprehensive Legal Needs Study*, 1994, http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf.

[27] Legal Services Corporation, *Documenting the Justice Gap*, 9-12.

[28] Legal Services Corporation, *Documenting the Justice Gap*, 2. 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. ABA Consortium on Legal Services and the Public, *Legal Needs and Civil Justice*, 7-8. The nine state studies each used a survey questionnaire based on 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. Legal Services Corporation, *Documenting the Justice Gap*, 11.

- 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;[29] the ABA study found one legal need per year, per household.[30]

- 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.[31] While the ABA study found that help was received for only 21 percent of all problems identified, the comparable findings in the recent state studies were even lower.

In short, the nine state studies demonstrated that less than 20 percent of the legal needs of low-income Americans were being met.[32] Eight of the nine studies found an unmet legal need greater than the 80 percent figure determined by the ABA in its 1994 national survey.[33]

Finally, the LSC *Justice Gap* study totaled the number of legal aid lawyers in both LSC and non-LSC funded programs and compared this to the total number of attorneys providing civil legal assistance to the general population in this country.[34] In adding up the number of legal aid attorneys serving the poor and comparing that to the LSC-eligible population, it was determined that there is, at best, one legal aid attorney for every 6,861 low-income persons.[35] In contrast, the ratio of attorneys delivering civil legal assistance to the *general* population is approximately one for every 525 persons, or 13 times more.[36]

The study concluded, "It is clear from this research that at least 80 percent of the civil legal needs of low-income Americans are not being met. Moreover, 50 percent of the eligible people seeking assistance from LSC-funded programs in areas in which the programs provide service are being turned away for lack of program resources."[37]

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

While the lack of adequate funding and providers is the most significant component of the justice gap, there are two other, related major inadequacies in the civil legal aid system. First, in many

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[29] Legal Services Corporation, *Documenting the Justice Gap,* 9, 11-12.
[30] Legal Services Corporation, *Documenting the Justice Gap,* 13.
[31] Legal Services Corporation, *Documenting the Justice Gap,* 9, 13.
[32] Legal Services Corporation, *Documenting the Justice Gap,* 13.
[33] Legal Services Corporation, *Documenting the Justice Gap,* 9.
[34] Legal Services Corporation, *Documenting the Justice Gap,* 15.
[35] *Ibid.*
[36] *Ibid.*
[37] For a description of the conclusions of the *Justice Gap* study, see the executive summary, which begins on page 2.

states, there are few, if any, non-LSC providers ensuring that low-income persons have access to the full range of services that they need. Second, state advocacy, training, and support are insufficient in many states and totally inadequate or nonexistent in many others.

A significant gap in the civil legal aid system in the United States, and particularly in the many states with limited non-LSC resources, is the lack of providers that can (1) serve prisoners, aliens, and others who cannot be represented by LSC funded providers; (2) bring class actions and effectively and strategically use attorneys' fees statutes; and (3) engage in advocacy in all relevant forums, including legislative and administrative rule-making and policymaking forums. In large parts of the country, such providers do not exist—or, if they exist, they are small, under-funded, and unable 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.[38]

A final component of the justice gap is the lack of statewide support and coordinated advocacy. Historically, LSC and some IOLTA funders have sought to ensure coordination and support for all legal providers and their partners, along with a central focus on statewide issues of importance to low-income persons, including representation before legislative and administrative bodies.

The 1996 congressional funding decision resulted in a loss of more than $10 million in state support funding, and this has taken a large toll on the state support structure that was previously in place.[39] Many of the state support units and the regional training centers that were part of larger programs have been eliminated. In a number of states, there has been no state-level policy advocacy, no significant training of staff, no information sharing about new developments, no litigation support, and no effective coordination among providers. Several new entities have been created to carry on state-level advocacy, particularly policy advocacy. However, virtually all of these new entities are severely underfunded and under-staffed. Several of the remaining freestanding state support programs have survived; but, with a few exceptions, they have not made up the loss of LSC funds.[40]

[38] Some have turned to the courts to address this fundamental challenge, initially culminating in the United States Supreme Court decision in *Velazquez v. LSC*, which struck down one part of the restriction that prohibited representation of clients in welfare cases in which a challenge to a welfare law or regulation was necessary. 531 U.S. 533 (2001). The remaining 1995 restrictions were upheld. There are other ongoing cases that are challenging LSC rules on "program integrity." The program integrity provision, Public Welfare, requires that LSC programs "have objective integrity and independence from any organization that engages in restricted activities." 45 C.F.R. § 1610.8 (2005). The regulation sets out criteria by which LSC will measure compliance; it is these criteria and their implementation that are being challenged. When these cases are resolved, they may have an impact on the restrictions on the use of non-LSC funds by LSC programs.

[39] Houseman, *The Missing Link*, 6.

[40] A few states—including California, Florida, Massachusetts, New Jersey, Washington, and 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.

IV. FUNDING

Where We Are Today

The United States civil legal aid system is not funded by one principal source. Although LSC is the largest single source of funding, it is not a source of funding for most of the system. According to information provided by the Project to Expand Resources for Legal Services, a project of the ABA's Standing Committee on Legal Aid and Indigent Defendants, the total amount of legal aid funding in the 50 states at the beginning of 2007 was $1,044,726,069. This total does not take into account funding in the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Micronesia, or 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.
In the 50 states, funding is as follows, broken down by source:

LSC	$ 291,375,769
Other public (federal and local)	$ 220,175,000
State government	$ 180,462,500
IOLTA	$ 123,924,000
Foundations	$ 71,699,500
Private lawyer contributions	$ 62,303,000
Other	$ 94,786,500

If we include funding from LSC for Puerto Rico, the District of Columbia, and the territories—along with the non-LSC funding for the District of Columbia—the total United States funding for civil legal assistance is approximately $1,090 billion.[41]

LSC funds are distributed according to the 2000 census data on individuals living below the poverty line—in 2006, $8.61 per poor person. But the other funding sources are not distributed equally among states; as a result, funding per poor person ranges $9.55 to more than $76. (The average is about $28; the median is about $23.) The lowest-funded states are in the South and the Rocky Mountain states, while the highest-funded states are in the Northeast, Mid-Atlantic, Midwest, and West. Eight states have total funding exceeding $50 per poor person, while 11 have less than $20. Attachment 1 illustrates the dramatic differences in civil legal aid funding.

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

[41] This estimate is based on funding for Puerto Rico at $20,573,462, American Somoa at $449,813, Guam at $1,106,036, Micronesia at $2,092,873, and the Virgin Islands at $1,086,672—as reported by the Legal Services Corporation, *Fact Book 2005*, 6-7; it is also based on a funding estimate for the District of Columbia of $20 million.

Grant Year	Annual LSC Appropriation in Actual Dollars	What the LSC Appropriation Would Have Been if it Had Kept Up With Inflation	Percentage Change From 1980 (Using 1980 Dollars)
1980	**300,000.000**	**300,000,000**	**0.0%**
1981	**321,300,000**	**331,004,146**	**-2.9%**
1982	**241,000,000**	**351,219,424**	**-31.4%**
1990	**316,525,000**	**475,649,712**	**-33.5%**
1995	**400,000,000**	**554,737,587**	**-27.9%**
1996	**278,000,000**	**570,998,079**	**-51.3%**
2002	**303,841,000**	**626,878,350**	**-51.5%**
2005	**330,804,000**	**704,055,010**	**-53%**
2006	**326,577,984**	**717,888,563**	**-54.5%**
2007	**348,500,000**	**733,178,279**	**-52.5%**

Over the last 25 years, there has been a radical shift in funding from LSC and federal sources to a far more diversified funding base, including substantial increases in funding from state sources. As a consequence, the United States civil legal aid program has moved from a federally based system to a state-based one. Many legal services providers have developed the ability to generate significant additional revenue at the state and local levels.

While LSC funding has continued to decline, overall funding has grown, even when adjusted for inflation. However, there is high variability among states in terms of success in attracting funding. The gap between the highest- and lowest-funded states, illustrated in Attachment 1, is so wide that talking about average funding on a national level is almost meaningless.

As many commentators have pointed out, the United States system is funded far below the level of funding provided by most of the other Western, developed nations.[42] Even at the lower end,

[42] 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.* S83 (2001).

Germany and Finland invest more than three times as much of their gross domestic product (GDP) as the United States does in serving the civil legal needs of lower-income populations. At the higher end, England spends 12 times as much of its GDP as the United States does to provide civil legal aid to its citizens. New Zealand spends five times more than the United States, and the Netherlands more than seven times as much. Most Canadian provinces also spend significantly more than the U.S. does on civil legal aid. But even though the U.S. is far behind virtually all developed countries with a civil legal aid plan, it is important to recognize that, over the last decade, the U.S. system has grown from approximately $700 million to more than $1.09 billion (including the District of Columbia, Puerto Rico, and the territories).

Future Funding

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

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

Federal funding through LSC

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

Supporters of substantially increasing federal funding for civil legal assistance will have to overcome significant political barriers. LSC leadership has made significant progress in developing a stronger bipartisan consensus in favor of funding for LSC.[43] But the political leadership of the United States remains divided about whether there should continue to be a federal program. In addition, there are substantial efforts underway to reduce U.S. domestic discretionary spending generally 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 (specifically, the Iraq and Afghanistan wars) and homeland security.

However, the Congress elected in 2006 has had a substantial positive effect on LSC funding, enacting a $22 million dollar increase for FY 2007. We anticipate another substantial increase

[43] John McKay, "Federally Funded Legal Services: A New Vision of Equal Justice Under Law," 68 *Tenn. L. Rev.* 101, 110-11 (Fall 2000).

for FY 2008, although Congress has not completed work on the relevant appropriation bills, and the president has threatened a veto (over not LSC funding but other funding in the bills).[44]

State IOLTA and governmental sources

Since 1982, civil legal assistance funding from state and local governments has increased from a few million dollars to more than $370 million.[45] Until recently, this increase was primarily through IOLTA programs, which have now been implemented in every state.[46] Recently, however, IOLTA programs have faced decreasing funds because of lower interest rates and increases in bank fees. For example, IOLTA funding went down from 2003 to 2006:

2003:	$133,228,000
2004:	$126,676,500
2005:	$113,905,000
2006:	$107,650,000

In 2007, it rose again to $123,924,000. We expect substantial increases in the next several years.

IOLTA programs are developing new initiatives to expand revenue in many states. These initiatives include capturing the general rise in interest rates, changes in IOLTA rules in some states, and aggressive negotiation work with financial institutions in others. It appears that these efforts 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,[47] filing fee surcharges, state abandoned property funds, punitive damage awards, and other governmental initiatives.[48] State governmental increases are likely to

[44] On July 26, the House of Representatives increased funding for LSC by $28 million over funds received in FY 2007. The Senate has not acted, but the Senate Appropriations Committee has approved a $42 million increase for FY 2008.

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

[46] 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*. 538 U.S. 216 (2003). The Court held that although the IOLTA program does involve a taking of private property—interest in escrow accounts that was owned by the depositors—for a legitimate public use, there was no violation of the just compensation clause of the Constitution, because the owner did not have a pecuniary loss.

[47] According to a 2007 report by the ABA Project to Expand Resources for Legal Services, 35 states have income for civil legal aid from court fees and fines, and 29 states have some form of funding from state appropriations. For example, in early 2007, New York adopted a budget that more than doubled state funding for civil legal aid, adding an additional $8 million to the $7 million allocated in past years; New Mexico increased from $200,000 to $2.5 million; the District of Columbia allocated $3.2 million for civil legal aid; and New Jersey is now at $16.4 million.

[48] 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 exists at the state as well as the federal level. For example, in 2000, 2001, and 2002, efforts were made in Virginia to impose the LSC restriction on state funds. Washington State did impose LSC restrictions on state-appropriated funds in 2004.

continue as long as state financial conditions remain in good shape. At the moment, state revenue growth remains strong enough to support spending demands generally, and revenue balances are being restored to levels adequate to addressing another fiscal downturn. Only a few states are experiencing "tight fiscal conditions" today, in contrast with 21 states during the 2001–2003 economic recessions.[49] However, it is impossible to predict future state spending—on civil legal aid or in other areas—both because state fiscal conditions may change and because the federal government may continue to shift more costs to state governments.[50]

Right to counsel in civil cases at state expense

In the United States, there is no general right to state-funded counsel in civil proceedings. The Constitution does not explicitly provide such a right, although the 14th Amendment does prohibit a state from depriving "any person of life, liberty, or property, without due process of law" or denying "to any person within its jurisdiction the equal protection of the laws." In *Gideon v. Wainwright*, the Supreme Court held that there must be counsel in criminal cases in which the defendant faces imprisonment or loss of physical liberty.[51] But the Court refused to find a constitutional right to counsel in *civil* cases when first faced with the issue in 1981. In *Lassiter v. Department of Social Services*, the Court held in a 5-4 ruling that the due process clause does not provide for the guaranteed appointment of counsel for indigent parents facing the termination of parental rights.[52] Rather, "the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings is to be answered in the first instance by the trial court, subject, of course, to appellate review."[53]

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

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[49] National Governors Association & National Association of State Budget Officers, *The Fiscal Survey of States*, June 2006, http://www.nasbo.org/Publications/PDFs/FiscalSurveyJune06.pdf, vii, 2.

[50] For example, under the president's budget proposal for 2007, grants to state and local governments would decline from FY 2006 to 2007 by $6.7 billion, or 2.8 percent, after adjusting for inflation. These shortfalls may be difficult for states to handle. State services have not returned to their pre-recessional (i.e., pre-2001) levels; and, with few exceptions, state governments will not be able to absorb the proposed continuing reductions in federal aid without instituting program cuts or tax increases. Iris J. Lav, *Federal Grants to States and Localities Cut Deeply in Fiscal Year 2007 Federal Budget*, Center on Budget and Policy Priorities, Feb. 7, 2006, http://www.cbpp.org/2-7-06sfp.pdf, 1.

[51] 372 U.S. 335 (1963).

[52] 452 U.S. 18 (1981).

[53] *Lassiter*, 452 U.S., 32.

In limited categories of cases, some state legislatures have enacted statutes requiring state-funded counsel to be appointed for one or more parties;[54] and the highest courts in some states have judicially decided that state-funded counsel should be provided as of right to some parties.[55] These state-funded counsel provisions and court rulings are generally in the family law and civil commitment areas. There are a few federal statutory requirements for appointment of counsel in civil cases, but these are very limited.

Thus, in the vast majority of civil cases, there is no constitutional or statutory right to state-funded counsel. Based on the usual caseloads of most general civil legal aid providers, it would be fair to conclude that there is no statutory right to counsel in more than 98 percent of the cases that would directly involve low-income persons as defendants or plaintiffs.[56]

Most commentators believe that the current make-up of the United States Supreme Court will prevent any significant developments at the federal level. Instead, most action is focused at the state level in a few states. Major initiatives are underway in Maryland, Wisconsin, Washington, and elsewhere to litigate a constitutional right to civil counsel at state expense.[57] So far, there have not been any recent major state court decisions expanding the right to counsel in civil cases beyond the family law areas described above. There was, however, a vigorous dissent in a recent case before Maryland's highest court. In *Frase v. Barnhart*, the Maryland Court of Appeals refused to reach the issue of the right to counsel, but three of seven justices stated in a concurring opinion that the court should have addressed the question and decided in favor of a civil right to counsel in certain cases.[58] In addition, there are significant efforts to develop more expansive

[54] Laura K. Abel & Max Rettig, "State Statues Providing for a Right to Counsel in Civil Cases," 40 *Clearinghouse Review* 245 (July-Aug. 2006).

[55] A thorough exploration of state cases since *Lassiter* is found in Clare Pastore, "Life after Lassiter: An Overview of State-Court Right-to-Counsel Decisions," 40 *Clearinghouse Review* 186 (July-Aug. 2006). See also 92 A.L.R.5th 379 (2001 & Supp. 2006), which provides detailed analysis of state court cases involving termination of parental rights and the developments subsequent to *Lassiter*; Bruce A. Boyer, "Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham," 36 *Loy. U. Chi. L.J.* (2005), 36, which notes that 40 states now provide free counsel for parents in state-initiated termination-of-parental-rights actions, up from 33 at the time of the *Lassiter* decision; Rosalie R. Young, "The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter," 14 *Touro L. Rev.* 247 (1997), particularly note Tables I and II at p. 276-77.

[56] Data from LSC tracks the number and type of cases that LSC-funded programs bring. According to 2005 data, for example, LSC-funded programs provided some kind of legal assistance in 906,338 cases. They provided legal assistance in only 2,097 termination of parental rights cases, or .0023 of the total cases, and in 895 mental health cases, or .0010 of the cases brought. Even assuming there is a statutory or constitutional right to civil counsel in all of these cases, then LSC-funded entities handled only .004 of the total cases, or less than 1 percent. If we assume that there is a statutory right to counsel in some other categories of cases, it is doubtful that the total number of cases reaches 1 percent. Most state funders do not require collection of this level of case-type data. When non-LSC-funded programs have collected similar data, the percentages historically have tracked the data of LSC-funded programs.

[57] See 40 *Clearinghouse Review* (July-Aug. 2006), which discusses various theories and state initiatives throughout the volume.

[58] 840 A.2d 114 (Md. 2003). For a discussion of this case and the ongoing Maryland efforts, see John Nethercut, "Maryland's Strategy for Securing a Right to Counsel in Civil Cases: Frase v. Barnhard and Beyond," 40 *Clearinghouse Review* 238 (July-Aug. 2006).

state statutes that provide for the right to counsel in civil cases at state expense in situations that go far beyond the few areas that now provide for such counsel.[59]

It is likely that efforts to expand and develop the civil right to counsel at state expense will intensify. Not only is there increasing interest among civil legal aid advocates, as illustrated by the *Clearinghouse Review* volume on this subject, but there is likely to be increasing bar attention as well. In 2005, the president of the ABA established the Commission on Access to Justice in Civil Legal Aid. One if its two tasks was to develop a policy statement on the right to counsel at public expense in civil cases. The commission's recommendation was endorsed by the ABA House of Delegates at its 2006 annual meeting in August.[60] The policy statement provides:

> RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.[61]

California has recently proposed a pilot project and model statute. California Chief Justice Ronald M. George endorsed a resolution on the right to counsel in civil matters by the Conference of Delegates of the California Bar Association. At his request, Governor Arnold Schwarzenegger's proposed budget includes $5 million for a pilot project to provide representations in evictions, custody disputes, and other civil cases in which important rights are at stake. In addition, a task force of the California Access to Justice Commission released model legislation creating a civil right to counsel in certain cases.

V. SUPPLEMENTS TO THE STAFF ATTORNEY SYSTEM

Pro Bono

Pro bono efforts are the primary supplement to the staff attorney system and, in many respects, an integral and integrated part of that system. Pro bono efforts in the United States continue to expand and engage more private attorneys, providing greater levels of service. LSC requires that each LSC-funded provider expend 12.5 percent of its LSC funding for private attorney involvement.[62] There are also substantial efforts by both the ABA and state and local bar associations to increase pro bono activity among all segments of the practicing bar, including government attorneys and corporate counsel.

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

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

[61] American Bar Association, *Report the House of Delegates*, 1. Emphasis removed.

[62] The requirement is imposed by LSC through its regulatory authority. See 45 CFR 1614.

In addition, the Pro Bono Institute's Law Firm Pro Bono Project challenges large firms around the country to contribute 3 to 5% percent of their total billable hours to the provision of pro bono legal services. At present, 150 law firms have signed on to the challenge.[63] The Pro Bono Institute also has just initiated the Corporate Pro Bono Challenge—a simple, voluntary statement of commitment to pro bono service by corporate legal departments, their lawyers, and staff.

While there is no reliable data about how much pro bono activity is actually going on, states are starting to measure it, either through surveys or through mandatory reporting requirements. Periodically, *The American Lawyer* magazine surveys the 200 largest law firms on the amount of pro bono performed during the prior year and on the number of lawyers in each firm who participate. In 2005, 183 firms reported an aggregate of 93,175 lawyers who provided 3,335,375 hours of pro bono legal services to individuals and organizations that could not afford to hire lawyers. These figures represent only 18 percent of practicing lawyers nationwide, and they do not account for the work done by solo practitioners and those in small and medium-sized firms.[64]

In addition, the ABA's Standing Committee on Pro Bono and Public Services recently issued a new report on a 2004 survey of 1,100 lawyers throughout the country in private practice, corporate counsel, government, and academic settings. The study found that two-thirds of respondents provided free pro bono services to people of limited means and organizations serving the poor, and 46 percent of the lawyers surveyed met the ABA's goal of providing at least 50 hours of free pro bono services.[65]

Pro bono work is an ethical aspiration in the U.S. It is included in Rule 6.1 of the ABA Model Rules of Professional Conduct and has been adopted by most states in their state ethical rules. The ABA Model provides as follows:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and (b) provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to

[63] Information is available from the Pro Bono Institute. See http://www.probonoinst.org.

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

[65] ABA Standing Committee on Pro Bono and Public Service, *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers*, August 2005, http://www.abanet.org/legalservices/probono/report.pdf.

persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Rule 6.1 is not mandatory but aspirational. While a few states have required that all members of the bar report annually on their pro bono activity, a survey put together by the ABA Standing Committee on Pro Bono and Public Service found that most states have no mandatory reporting requirements.

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

In addition to mandatory reporting efforts, much is happening at the state level to expand pro bono services for low-income persons. A number of states have modified their rules of professional conduct to promote pro bono service. The highest courts of several states have been very involved in promoting pro bono, using their formal judicial authority—provided under state law—to create formal statewide pro bono systems. For example, state-level commissions and local committees—with judicial or joint bar-judicial leadership—have been created by supreme court rule in Indiana, Maryland, Nevada, and Florida. Also, several states have 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

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

However, law schools have continued to focus on equal justice. In December 1999, the Association of American Law Schools (AALS) created an equal justice project—Pursuing 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 project's centerpiece was a series of 19 equal justice colloquia convened at law schools across the United States during the 2000-2001 academic year. The colloquia drew more than 2,000 attendees and were followed by a plenary session at the 2001 AALS annual meeting. The results of this effort are catalogued in a March 2002 AALS report.[66]

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

VI. SELF-HELP LITIGANTS AND PRO SE DEVELOPMENTS

One significant development in civil legal aid in the United States is the rapid expansion of efforts to help people who are attempting to represent themselves in courts. These are described as "pro se," "self-help," or "self-represented" litigants. Historically, parties in high-volume courts such as traffic, housing, and small claims courts consisted primarily of pro se litigants. More recently, pro se litigants have also begun to dominate domestic relations courts in many jurisdictions. There may 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 that programs to assist pro se litigants have on the courts and on the litigants, or whether self-represented litigants who receive assistance are more likely to obtain a favorable court outcome.[67]

Two 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. with regard to pro se litigants. In the first, Kathleen Sampson reports on a survey by the American Judicature Society of representatives from the National Conference on Pro Se Litigation in 1999. In the survey, 44 states reported on some efforts to assist the self represented. Sampson divides the states into three categories of assistance: (1) 11 states had comprehensive program that included statewide

[66] Association of American Law Schools Equal Justice Project, *Pursuing Equal Justice: Law Schools and the Provision of Legal Services,* March 2002, http://www.aals.org/equaljustice/final_report.pdf.

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

or widespread assistance for self-represented litigants—including a Web site, regular education programs, institutionalization of the program, and often helpful court rules; (2) 19 states had partially integrated programs, with some of the characteristics of the comprehensive states; and (3) 14 states had emerging programs, offering very limited assistance. Six states did not respond to the survey.[68]

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.[69]

More information about self-help programs can be found at http://www.selfhelpsupport.org, an online resource where pro se and self-help programs can access and share the resources they need to maximize their effectiveness.[70]

While many courts have developed self-help programs, these vary widely.[71] Some routinely provide broad ranges of information resources, and many provide training for judges in how best to facilitate access for the self represented. Some courts provide electronic document-assembly services, while others provide clinics and individual informational services. These services have

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[68] 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.

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

[70] 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 its library includes approximately 800 documents. An interesting effort to change how courts operate is found in Richard Zorza, *The Self-Help Friendly Court*, National Center for State Courts, 2002.

[71] A recent directory lists more than 130 such programs—see note 13.

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

Many U.S. civil legal aid programs are devoting substantial time and resources to address the issue of assistance to pro se litigants. Many legal aid programs throughout the country operate self-help programs independently or in conjunction with courts. We do not have accurate data on how many such programs exist, but we do know that they cover a wide range of services.[72] Some programs simply provide access to information about the law, legal rights, and the legal process—in written form, on the Internet, on video, through seminars, or through in-person assistance. Others actually provide individualized legal advice and, often, legal assistance in drafting documents and advice about how to pursue cases. Many programs provide forms for use by persons without legal training (both in print and via the Internet), and some also provide assistance in completing the forms.

VII. ENSURING QUALITY

In the United States, efforts are made to ensure the quality of civil legal services, through case management systems, standards and performance criteria, and peer review onsite examination of the overall effectiveness of programs (based on the standards and performance criteria). Generally, outcome measures have not been used extensively, although five state IOLTA/state funding programs require their grantees to report on outcome measures.[73]

Recently, the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID) revised the ABA Standards for Provision of Civil Legal Aid.[74] These were presented to and adopted by the ABA House of Delegates at its August 2006 meeting. The revised standards provide, for the first time, guidance on limited representation, legal advice, brief service, support for pro se activities, and the provision of legal information. They also include new standards for diversity, cultural competence, and language competency.

LSC has also completed a revision of the LSC Performance Criteria, which were originally developed in 1992 as a tool to evaluate LSC programs through a peer-review system.[75] These criteria have been the framework for much of the program evaluation that has gone on in civil legal aid, both by LSC and by peer reviews conducted by others for the program. Some IOLTA and state funders also use staff and peers from programs to monitor and evaluate their grantees, based on the standards and criteria. All LSC-funded providers are required to utilize case management systems, and many non-LSC providers utilize similar systems.

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[72] A 2005 directory lists more than 400 such programs—see note 14.

[73] 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 (e.g., "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.

[74] http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2006.pdf.

[75] http://www.lsc.gov/pdfs/LSCPerformanceCriteriaReferencingABAStandards.pdf.

Finally, many civil legal aid programs have developed their own evaluation systems, which are designed to help individual programs perform better and better market what they accomplish. Some programs have developed rigorous internal evaluation systems, including the use of outcome measurements, to evaluate whether they are accomplishing what they set out to do for their clients. The programs have used a variety of creative techniques to conduct their outcome evaluations, including focus groups, client follow-up interviews, interviews of court and social service agency personnel, courtroom observation, and court case file review. In California, the Legal Services Trust Fund, which is the state IOLTA funder, and the Administrative Office of the Courts (AOC) have teamed up to support the development of a tool kit of program self-evaluation tools, for use by programs as a part of the statewide system of evaluation.[76] The Management Information Exchange (MIE) Technology Evaluation Project (TEP) has also developed a tool kit, which programs can use to evaluate their Web site and their use of video conferencing and legal workstations, which serve clients through "virtual law offices."

VIII. STATE JUSTICE COMMUNITIES

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

One of the most effective ways to develop, expand, and institutionalize comprehensive, integrated state systems for the delivery of civil legal aid is through the establishment of state Access to Justice Commissions. These commissions are created by state 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 state supreme court based on nominations by the other entities. They are conceived as having a continuing existence, rather than being blue-ribbon bodies created to issue a report and then sunset. They have a broad charge to engage

[76] 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, partnerships 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.

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.

The Washington State Access to Justice Board, the California Access to Justice Commission, and Maine's Justice Action Group have each existed for a decade or more. Several other Access to Justice Commissions 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—Vermont's Access to Justice Coalition and the New York State Equal Justice Commission—also bring together the courts, the bar, and legal aid providers, though in somewhat different structures. Between April 2004 and July 2007, new Access to Justice Commissions were created by state supreme court order in Alabama, Arkansas, Mississippi, New Mexico, Oklahoma, the District of Columbia, Georgia, Massachusetts, and West Virginia.

These Access to Justice Commissions have focused on the following activities:

- 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
- Expanding efforts to educate federal legislators about the need for increased LSC funding and state policymakers about the need to augment state-level funding—through state appropriations, filing-fee surcharges, voluntary or mandatory bar-dues contributions, improvements in IOLTA, and other means
- Increasing pro bono participation among private attorneys—through pro bono initiatives such as mandatory reporting, rule changes, pro bono attorney-recruitment campaigns, Web sites, conferences, and statewide data collection
- Creating and expanding loan-repayment assistance programs for young attorneys with substantial student-loan debt, which serves as a barrier to taking relatively low-paying jobs in civil legal aid organizations
- Assisting efforts to bring together the bar, the courts, legal aid providers, and others to make the courts more accessible and user friendly and to address the challenges posed by the self represented—through comprehensive plans, reports and evaluations, training and education, simplification of rules and forms, courthouse support, Web- 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

Recent steps taken by the ABA are likely to result in the commissions' activities increasing over the next several years. In addition to developing an ABA position on the right to counsel in civil cases, the ABA Commission on Access to Civil Legal Aid was charged with expanding Access to Justice Commissions and state access to justice initiatives. The commission produced a document that sets out 10 principles for state civil legal aid systems; it was adopted by the ABA House of Delegates in August 2006. The ABA Principles of a State System for the Delivery of Civil Legal Aid were developed to provide guidance to state Access to Justice Commissions and

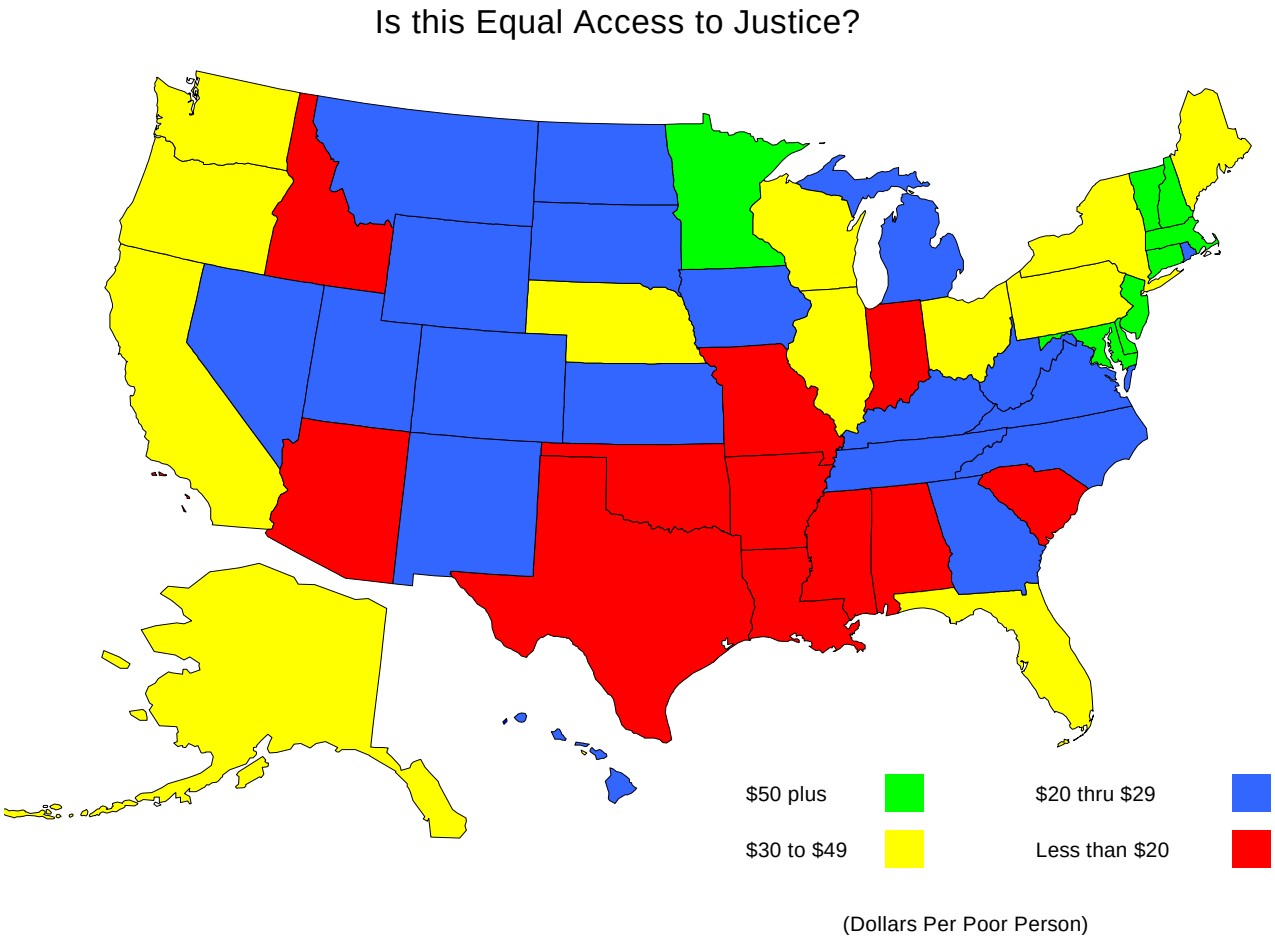
similar entities in assessing their state systems, planning to expand and improve them, and ensuring ongoing oversight of their development.[77] These are included as Attachment 2.

IX. CONCLUSION

This report provides an overview of the civil legal aid system in the United States as of mid-2007. Since 2005, there have been some very positive developments—including increased federal funding through LSC and increased state funding through IOLTA and state general revenue appropriations. There has been a renewed emphasis on quality, through both the revision of the ABA Standards for the Provision of Civil Legal Aid and the revision of the LSC Performance Criteria. More state Access to Justice Commissions have been created; a blueprint for what they should attempt to accomplish has been developed by the ABA; and there is renewed focus on creating a comprehensive state system for the delivery of civil legal aid. We have continued to see innovations and improved efforts to expand access—so that more low-income people know about their legal rights and options and receive advice about how to proceed to resolve their legal problems. Even so, most areas of the country lack the funding and available pro bono assistance to provide low-income persons who need them with legal services, and especially with extended representation. As a result, many low-income persons who are eligible for civil legal assistance are unable to obtain it. Progress has been made in the efforts to achieve equal justice for all, but the U.S. is a long way from reaching that goal.

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

Attachment 1
States' Total Civil Legal Aid Funding Per Poor Person



Attachment 2
ABA Principles of a State System for the Delivery of Civil Legal Aid

The Goal

A state's system for the delivery of civil legal aid provides a full range of high quality, coordinated and uniformly available civil law-related services to the state's low-income and other vulnerable populations who cannot afford counsel, in sufficient quantity to meet their civil legal needs.

The Principles

A state's system for the delivery of civil legal aid achieves the goal if it:

1. Provides services to the low-income and vulnerable populations in the state.

The state's system for the delivery of civil legal aid provides services to low-income people and others who face financial or other barriers to access to justice including: those who cannot be served through federally funded programs for reasons such as their income level, immigration status or because they are incarcerated; the elderly and people with mental or physical disabilities; and those facing particular barriers to access to civil legal services, such as people who are homeless or institutionalized, children, migrant workers, Native Americans, and people lacking proficiency in English.

2. Provides a full range of services in all forums.

A full range of services includes information about legal rights and responsibilities; options for services; outreach and community legal education; legal advice and brief services; support and assistance for individuals capable of representing themselves; representation in negotiation and alternative dispute resolution; transactional assistance; representation in administrative and judicial proceedings; extended representation in complex litigation and on systemic issues; and representation before state and local legislative and administrative bodies that make laws or policies affecting low-income and vulnerable people.

3. Provides services of high quality in an effective and cost efficient manner.

The state system provides low-income persons and others who cannot afford counsel with high quality civil legal aid services to meet their legal needs. All providers in the state comply with standards of practice and ethics developed by the state, and

institutional providers[78] comply, where appropriate, with state and national standards of practice such as the American Bar Association Standards for Providers of Civil Legal Aid to the Poor and the Legal Services Corporation Performance Criteria. Programs and individuals providing services are evaluated by funders or other appropriate entities, and engage in their own evaluations. Staff compensation and workload are reasonable to enable the provision of uniformly high quality, effective and productive services. All individuals participating in providing, supporting or managing civil legal aid receive ongoing training and participate in professional and leadership development activities. An appropriately diverse staff is recruited, trained, supported, supervised and provided the necessary tools, including current technology, to provide high quality, effective and cost-efficient legal services. Management information and information about new development in the law disseminated to all advocates and managers. Support is provided on state legal issues and advocates coordinate their work on behalf of the client community. Services are provided in a cost efficient manner to maximize access and limit unnecessary administrative and other costs.

4. Provides services in sufficient quantity to meet the need by seeking and making the most effective use of financial, volunteer, and in-kind resources dedicated to those services.

The state system has available the resources to provide the quantity of services necessary to meet the legal needs of the low-income and other vulnerable populations who cannot afford counsel in the state. To do so, the system maximizes services by effectively developing, leveraging and utilizing all potential financial, volunteer and in-kind resources. The system makes the best use of these resources to ensure the effectiveness and the cost efficiency of the system. Potential sources of funding for civil legal assistance include federal, state, and local governments; court fee surcharges and fines; interest on lawyer trust accounts (IOLTA); attorney registration fees or dues assessments; add-ons to bar dues; grants from courts or bar associations; lawyer fund raising drives; other private donations; pro hac vice and similar fees; cy pres awards; client co-payments; foundation and corporate grants; attorneys' fees; planned giving; endowment funds; and capital campaigns. Potential sources of volunteer resources include private attorneys, corporate counsel, retired attorneys, government attorneys, law schools and law students, other professionals, and lay volunteers. Potential sources of in-kind resources include federal, state, and local governments, corporations, non-profits, and other private entities and individuals. Local, regional, and program-based efforts to build resources are coordinated with statewide efforts to maximize overall resources.

5. Fully engages all entities and individuals involved in the provision of those services.

[78] "Institutional providers" is a term used to refer to nonprofit organizations that are established to provide civil legal aid services—including staff attorney programs, pro bono programs, law school clinical programs, and divisions of larger organizations that provide civil legal aid services.

The state's system for the delivery of civil legal aid fully engages in the delivery of civil legal aid services all those who are involved in the provision of law-related services, including legal aid providers, private attorneys (working pro bono or for compensation), court personnel, law school clinics, human services agencies, paralegals, lay advocate and other public and private individuals and entities that provide legal services to low- income and other vulnerable people who cannot afford counsel in the state.

6. Makes services fully accessible and uniformly available throughout the state.

The ability of low-income and vulnerable people to obtain civil legal assistance consistent with these principles does not depend on where that person resides in the state.

7. Engages with clients and populations eligible for civil legal aid services in planning and in obtaining meaningful information about their legal needs, and treats clients, applicants and those receiving services with dignity and respect.

The state system, including all those involved in delivering services and providing support, treats clients and others who receive civil legal services with dignity and respect. Services are delivered in a culturally competent manner. To guide coordination and planning, the system obtains meaningful information from, and interacts effectively with, low-income and vulnerable people and groups representing them. Guidance is sought from all communities that face disparate treatment and unique barriers to the justice system, including new and emerging populations and categories of clients and potential clients.

8. Engages and involves the judiciary and court personnel in reforming their rules, procedures and services to expand and facilitate access to justice.

The judiciary ensures that the courts are accessible and responsive to the needs of all residents, including low-income and vulnerable populations and those facing financial, physical and other barriers to access. The judiciary examines its rules and procedures to ensure that they do not create barriers to the courts and, where necessary, changes them to expand and facilitate access. Courts provide a range of services including assistance to pro se litigants where appropriate to enable all residents to obtain access to the courts in matters before the court.

9. Is supported by an organized bar and judiciary that is providing leadership and participating with legal aid providers, law schools, the executive and legislative branches of government, the private sector and other appropriate stakeholders in ongoing and coordinated efforts to support and facilitate access to justice for all.

The organized bar and the courts provide active leadership and support for efforts to expand access to civil justice. Their involvement includes participation with legal aid providers, the executive and legislative branches of government, IOLTA and other state funders, the private sector and other appropriate stakeholders in formal structures and/or specific initiatives dedicated to this goal. State Access to Justice Commissions have proved to be an effective model for institutionalizing bar and judicial leadership and support. The organized bar has a special obligation to provide leadership for efforts to maximize pro bono services.

10. Engages in statewide planning and oversight of the system for the delivery of civil legal aid to coordinate and support the delivery of services and to achieve the principles set forth above.

The state system for the delivery of legal aid develops and maintains the capacity to plan and oversee its civil legal assistance delivery system so that the principles set forth above are achieved. Planning and oversight should be open and inclusive and include individuals who are experienced with and sensitive to the ethnic, racial and cultural makeup of low-income and vulnerable populations in the state. Appropriate staffing and other resources are provided for statewide planning. Effective communication initiatives are developed to increase public awareness of the availability of and need for legal aid throughout the state. Participants work together in a coordinated and collaborative manner to provide a full range of high-quality services efficiently and in a manner that maximizes available resources and eliminates barriers to access. Participants work with their counterparts in other states to learn from their experiences in improving the provision of civil legal assistance. Participants also work with the American Bar Association and other national legal aid entities and institutions involved in improving civil legal aid to gain a national perspective on their work, take advantage of collective resources and participate in the national efforts to achieve equal justice for all. Legal needs, including new and emerging legal needs, are identified, and effective and cost efficient methods of addressing them are developed. Research and evaluation of civil legal aid delivery methods and providers are undertaken to assure the quality, efficiency and effectiveness of the services provided and the system responds appropriately to the results.