

# The Justice Gap

## Civil Legal Assistance Today and Tomorrow

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Alan Houseman June 2011



# Introduction and summary

There's a huge gap today between the legal needs of low-income people and the capacity of the civil legal assistance system to meet those needs. There's also severe inequality in funding among states. This “justice gap” was most recently demonstrated by a 2009 Legal Services Corporation report, “Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans.” Among the report's key findings:

- For every recipient of LSC-funded legal aid, one eligible applicant was turned away.
- Less than 20 percent of low-income Americans' legal needs were being met.

Without the services of a lawyer, low-income people with civil legal problems may have no practical way of protecting their rights and advancing their interests. As Congress declared when creating an independent organization to fund civil legal assistance in the Legal Services Corporation Act of 1974: “Providing legal assistance to those who face an economic barrier to adequate legal counsel will serve the best ends of justice and assist in improving opportunities for low-income persons” and will “reaffirm faith in our government of laws.”<sup>1</sup>

Civil legal aid providers help low-income people and supportive groups navigate various civil matters like housing evictions, home foreclosures, predatory lending, child support, custody, and domestic violence. They also help people access government benefits like Social Security, disability, unemployment insurance, food stamps, and health insurance.

Between 1965 and 1985 civil legal assistance was funded primarily by the Legal Services Corporation and other federal funding sources. The LSC is a private nonprofit corporation funded by Congress to provide grants to civil legal aid programs. Over the last two decades, states have increased their funding and involvement in the overall operation of the civil legal aid system. Since 1996 LSC and state funders have been moving from a locally based legal services delivery system toward a more comprehensive, coordinated, and integrated statewide system for getting civil legal aid to low-income people.

The current civil legal assistance system is a locally based system of independent staff-based service providers, supplemented by private attorney volunteer (pro bono) programs, law school clinical programs, and self-help programs. Providers are funded from a variety of places, of which less than a third today are federal sources and more than a third are state sources.

This report describes the state of civil legal services today and how we got here. It makes the following recommendations:

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### More funding

Congress should increase funding for the Legal Services Corporation to \$600 million within four years. The Obama administration should try to get federal agencies to increase their own funding for civil legal aid. And state advocates should seek to increase state funding through higher filing fees and general revenue dedicated to civil legal aid.

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### Better service delivery

We also need to improve the effectiveness and efficiency of the current system:

- Congress should eliminate unnecessary LSC restrictions on what programs can do.
- The LSC and state entities should develop concrete action plans to ensure training of and support for legal aid attorneys and managers.
- The LSC, Justice Department, American Bar Association, and state advocates should promote an increase in the number of private attorneys engaged in civil legal aid representation, and more effectively coordinate their time.
- The LSC and other funders should require legal aid programs to conduct ongoing self-evaluations and to use performance measures, and funders should likewise evaluate grantees for quality and effectiveness.
- The LSC and state funders should encourage innovative approaches to legal services and then help effective innovations replicate and scale up across the country.
- The LSC and the Justice Department should develop and institutionalize a research capacity within the legal aid system to study what works.
- Public and private supporters of civil legal aid should work to increase the number of access-to-justice commissions around the country.

A comprehensive reform agenda of the kind we recommend will require a coordinated and comprehensive effort among federal and state funders, the judiciary, the bar, and other stakeholders. Getting so many diverse stakeholders to work together will require leadership on the local, state, and federal levels and buy-in from the legal aid providers and pro bono networks.

# Background: Causes of the justice gap

Civil legal aid in the United States is provided primarily by approximately 500 independent, staff-based service providers, including 136 programs funded by the Legal Services Corporation. These programs are nonprofit entities that deliver civil legal aid by mostly full-time attorneys and paralegals who provide a variety of legal and related services including advice, brief service, court and hearing representation, community legal education, economic and community development, and policy advocacy.

While funders do make some restrictions, the legal aid programs themselves generally make key decisions about the area and client base they will serve, the mix of staff they employ, and the scope and type of services they will provide.

These core providers are supplemented by approximately 900 pro bono programs not funded by the Legal Services Corporation, most of them affiliated with state and local bar associations. More than 200 law school clinical programs and several hundred self-help programs also supplement the staff-based delivery system. In addition, approximately 20 state support organizations provide training and technical support to local legal aid advocates on key substantive issues. They also advocate before state legislative and administrative bodies on policy issues affecting low-income people.

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## A history of funding cuts and innovation growth

The civil legal aid system has evolved over time from a few urban programs to a complex but decentralized system that now covers all states and other U.S. territories. While there have been significant variations in Legal Services Corporation funding since it was established in 1975, it was cut by 25 percent in 1981 and by another third in 1996. That year, Congress imposed new and unprecedented restrictions on LSC grantees, beginning an unsuccessful effort by congressional critics to completely eliminate the nonprofit's funding over three years.

In response to that effort, some LSC-funded providers gave up their LSC funds or spun off non-LSC-funded affiliates. Many state-support entities were eliminated entirely. To survive, the 15 national support entities that had lost their LSC funds had to raise private money, often from major national foundations.

The legal services community has responded to funding challenges with innovative new delivery systems, such as technology-reliant hotlines. Courts and many civil legal aid programs developed ways to help self-represented (pro se) litigants understand the law, the filing process, and court procedures. Legal education for pro se litigants and advocates alike is published on local and statewide websites. A system of free electronic tax filing systems was developed to help low-income workers apply for the earned income tax credit. Several states began using video conferencing to connect clients in remote locations with local courthouses and legal services attorneys.

Another significant development was the formation of so-called access-to-justice commissions, typically panels that are established by state Supreme Courts and that coordinate delivery of legal services in partnership with the private bar, judicial and political leadership, and civil legal aid organizations. As of 2011, these commissions operate in 24 states and the District of Columbia. They have focused their efforts on increasing funding, expanding pro bono and self-help representation services, and ensuring people's right to counsel. The American Bar Association in 2006 adopted formal principles to guide the work of the commissions.

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## The state of funding for civil legal services

As of 2010 the country's civil legal assistance system was funded at \$1.5 billion:

- \$450 million to \$500 million was from the Legal Services Corporation and other federal sources.
- \$525 million was from state funding and state-sponsored Interest on Lawyer Trust Account programs. (see below)
- \$100 million was from local governmental sources.
- \$300 million to \$400 million was from private foundations, corporations, bar associations, individual and law firm contributions, and other private sources.

## Interest on Lawyer Trust Accounts

State and local funding of civil legal services has increased from a few million dollars in the early 1980s to more than \$500 million in 2010. This increase has until recently come from Interest on Lawyer Trust Account, or IOLTA, programs. These programs, which now exist in every state, distribute the pooled interest of client trust funds to civil legal aid programs and other access-to-justice initiatives. Client trust funds contain short-term deposits of clients held by lawyers in interest-bearing accounts, which are used to pay court fees, settlement payments, and similar client needs.

In the last decade, substantial new state funding has also come from general state governmental appropriations, as well as filing fee surcharges, state abandoned property funds, and other governmental initiatives. The level of such state and IOLTA funding varies from year to year depending on interest rates and on state fiscal conditions and policies. Low interest rates and a weak economy sharply lowered IOLTA funds between 2008 and 2010, and funding in 2011 will likely be lower than 2010. State appropriations for legal services may also be reduced, given significant deficits in many state budgets.

IOLTA programs have developed a number of strategies to increase funding:

- Forty-four states are no longer permitting lawyers to opt out of IOLTA programs.
- Thirty-two states have adopted “comparability” provisions which require that financial institutions pay IOLTA accounts no less than the interest rate generally available to non-IOLTA depositors at the same institution.
- Some states have restricted financial institutions to levy only “reasonable fees” to IOLTA accounts, forbidding fees that should be paid by the lawyer or law firm maintaining the account.
- Some states prohibit “negative netting,” or using earnings from one IOLTA account to pay fees on another.
- Some states formally recognize banks that agree to pay a higher rate on IOLTA accounts.

## Wide variety among states

While the various funding sources described above produce approximately \$1.5 billion a year in overall funding, there is enormous variation among the states. Legal Services Corporation funds are distributed according to census poverty data, but other funding sources are not distributed equally among states:

- Ten states have funding of more than \$50 per low-income person.
- Fourteen states have funding between \$30 and \$49 per low-income person.
- Seventeen states have funding between \$20 and \$29 per low-income person.
- Nine states have funding of less than \$20 per low-income person.

The lowest-funded states are in the South and Rocky Mountain states while the highest-funded states are in the Northeast, Mid-Atlantic, Midwest, and West.

### Political barriers

There are significant political barriers to expanded federal funding of civil legal assistance. Although the supportive Obama administration has sought increased funding for the Legal Services Corporation, Congress remains divided about its support.

During the recent debate over the 2011 spending plan, the House defeated an amendment that would have eliminated all funding for LSC grantees. Congress ultimately reduced the program's funding by only \$15.8 million, down from the \$70 million agreed to in the House.

We're likely to see similar efforts to completely eliminate LSC funding again during consideration of the fiscal year 2012 budget. While it's likely that the president and the Senate will protect the program from being eliminated, funding could be severely reduced. And the LSC could well face a genuine existential threat depending on the outcome of the 2012 election. Conservative think tanks such as the Heritage Foundation have long called for the elimination of the LSC, and the Bipartisan Policy Center's deficit-reduction report included it in a list of programs that could be terminated.

# Recommendations

While innovations in legal services delivery have improved the civil legal aid system and increased access to the courts, there remains a huge gap between the actual legal needs of low-income people and the capacity of the civil legal assistance system to meet those needs. Addressing this justice gap will require significant additional funding for civil legal aid programs and more effective use of resources.

This section spells out eight recommendations for policymakers and lawmakers who care about ensuring all Americans have access to justice.

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## Increase resources

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

- Federal government funds
- State and local governmental funds
- IOLTA funds
- Private bar contributions through lawyer giving campaigns and bar dues
- Other sources, such as class action residual funds and United Way campaigns

While the president has proposed increases in Legal Services Corporation funding for the last two years, they do not meet the basic justice gap between clients seeking assistance and those who need it. To return the LSC to 1980 levels would mean funding it at \$800 million a year. While that's the ultimate goal, the non-profit and the White House should set out a plan to increase LSC funding to \$600 million within four years.

Increased federal funding will remain essential for two reasons. First, support for civil legal services is a federal responsibility, and LSC continues to be the largest single funder and standard setter for the legal aid system. Second, as noted above, there are many parts of the country that have not yet developed sufficient non-LSC resources to operate their civil legal assistance program without federal support.

The Justice Department and LSC should work with the administration to find new funding streams and expand existing funding to civil legal aid from other federal departments, such as the health and housing agencies.

The remarkable expansion of state funding through increases in filing fees and general revenue appropriations must continue. This won't be easy because of the dire fiscal situation facing many states. Access-to-justice commissions, state bar associations, state funders, and justice leaders at the state level, however, must continue to make state funding for legal services a high priority, and push to expand filing fee surcharges and general revenue support. This is not an impossible task. For example, in 2010 the Wyoming legislature approved a \$10 surcharge on each filing in civil and criminal court that will create a \$1 million to \$1.5 million annual fund for indigent legal services. The Florida legislature appropriated an additional \$1 million, increasing state funding for civil legal aid to \$2 million.

Expanding IOLTA funding will largely depend on increasing interest rates. Still, state advocates should continue to pursue mandatory IOLTA contributions in the six states now without it. They should also push for "comparability provisions" in the 18 states that do not have them now, as well as the use of "reasonable fees," the elimination of "negative netting," and the developing of "honor roll" programs that recognize banks that pay high IOLTA interest rates.

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### Eliminate restrictions on civil legal aid

While lack of adequate funding is the most significant contributor to the justice gap, many low-income people don't have equal access to justice because legal aid attorneys are not permitted to provide the full range of services clients need, and are not permitted to serve large groups of low-income people. Congress should remove restrictions on representing aliens and prisoners. And it should allow LSC-funded recipients to bring class actions and engage fully in legislative and regulatory advocacy. Congressional restrictions that apply to non-LSC funding should be eliminated.

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### Boost training of legal aid attorneys and managers

The civil legal aid system must offer lawyers and paralegals the advocacy skills training, substantive knowledge, and professional development opportunities they need. Executive directors and managers must also have access to management and

administrative training. The Legal Services Corporation and state access-to-justice commissions should jointly examine training resources in place and develop an action plan to ensure adequate training and support is available in every state.

The training provided today varies greatly in quality and quantity, depending on a program's state and region. A few states such as New Jersey, Massachusetts, Ohio, Michigan, and California have a robust training system. But in many states there is no formal training system and little training of advocates or managers.

Each state should have a comprehensive system to monitor, analyze, and distribute information to all legal services stakeholders about relevant legal developments, such as new case law, court rules, and regulatory and legislative news. Attorneys, paralegals, and lay advocates working within each state's civil legal assistance system should have a forum to discuss common issues, emerging client problems, new substantive issues, client constituencies, advocacy techniques, and strategies to make the most effective and efficient use of resources.

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### Increase involvement of private attorneys

The demand for civil legal assistance cannot be met without the services of more private attorneys, both pro bono and paid. The Legal Services Corporation, Justice Department, and state access-to-justice commissions should join forces to increase the number of private attorneys engaged in civil legal aid representation, better deploy their talents, and more effectively coordinate with them.

LSC's new Pro Bono Task Force will be an important catalyst for this effort, which will entail more than tapping individual attorneys for work on a particular case, although in many parts of the country, that will remain a real challenge. The task force should also systematically gauge where private bar involvement can be most effectively utilized.

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### Improve evaluation and accountability

We need better ways to ensure legal aid programs use tested performance measures and engage in ongoing self-evaluation. We must also encourage funders to conduct evaluations for quality and effectiveness.

The Legal Services Corporation has a comprehensive performance-based evaluation system that incorporates standards developed by the American Bar Association. LSC periodically evaluates each of its 136 grantees using on-site review teams. These performance criteria are also used in all LSC funding decisions and are integrated into the funding application process. Many state funders—including Ohio, Michigan, Florida, New Jersey, Massachusetts, Virginia, and Maryland—use these or other performance criteria to evaluate the programs they fund.

### Better evaluation systems

More needs to be done. All major funders should institute a formal peer review evaluation system that uses peer colleagues from other legal services programs, law schools, the evaluation community, and the private bar to systematically review the work of each program over a three-to-five-year cycle. Legal services providers should also get technical assistance to troubleshoot specific problem areas and conduct overall program reviews. Providers should implement “program-owned evaluations,” or rigorous internal evaluations, to determine whether they’re accomplishing client goals.

Likewise, LSC and other major funders should encourage or even require programs to establish outcome-measurement systems keyed to program objectives. The funders should develop templates and tools to assist grantees to set goals and measure outcomes. This approach would encourage programs to be deliberate about what they are trying to achieve, give funders return-on-investment data, and provide them with a laboratory to discover what works.

### Better data

Better data are needed to make the case for increased funding and to ensure accountability to Congress and other government sources. The current data collected by LSC and most other funders are insufficient to either explain the breadth of services provided or to review their quality, efficiency, and effectiveness.

In developing any new data system, however, it’s important to recognize that civil legal aid providers differ from one another in what they do and how they do it. Data should not be used to narrow the type of activities that legal aid providers perform, and should not highlight case outcomes to the exclusion of other desir-

able outcomes achieved by a program. Data systems must also take into account the burdens of collecting, verifying, and storing information. Finally, any new data system should recognize that program effectiveness information may be viewed differently by federal and local officials, and so must be designed carefully to prevent its being used to narrow the activities of civil legal aid programs.

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## Encourage and stimulate innovation

The Legal Services Corporation, state funders, and access-to-justice commissions should encourage programs to take greater risks in developing innovative approaches to problem solving. Funders should then evaluate innovations, with an eye to replicating and scaling the ones that work.

The information technology revolution of the late 1990s and the subsequent LSC funding through its Technology Information Grants led to a number of new delivery approaches that are now widely used throughout the civil legal aid community, including hotlines, statewide websites, social networks for pro bono lawyers, computerized case management systems, and the HotDocs document assembly application.

Funders should be building on this success to encourage other innovations such as medical-legal partnerships. This innovation integrates lawyers into the health care setting to help patients navigate the complex legal systems for social interventions that improve health, such as utility shutoff protection in winter and mold removal from the homes of asthmatics.

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## Research effective delivery methods

The Justice Department or Legal Services Corporation should house a permanent research unit to study and pilot innovations for improving delivery of civil legal aid. One model is the Project for the Future of Equal Justice, a joint effort of the Center for Law and Social Policy and the National Legal Aid & Defender Association, which studied the effectiveness of centralized telephone legal advice, brief service, and referral systems.

The study compared “before” and “after” caseload statistics in programs that adopted hotlines to determine the effect of the hotline system on the number of

clients served and the levels of brief and extended services. It also surveyed hot-line clients to answer a variety of questions about the different legal outcomes and the characteristics of clients who experienced success.

Many civil legal aid systems in Europe and Canada have entities that conduct research on the civil legal aid system. The United States had such a component, the Research Institute, during the first era of the Legal Services Corporation from 1976 to 1981. It was shuttered during the funding and political crisis of 1981. Since then, only a limited amount of legal services delivery research has been undertaken.

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### Expand state access-to-justice commissions

The Justice Department and Legal Services Corporation should work with the American Bar Association to increase the number of access-to-justice commissions and similar state planning entities, and expand their role and focus consistent with the ABA's "Principles of a State System for the Delivery of Civil Legal Aid."

These commissions promote comprehensive and integrated state systems that ensure easy points of entry for all low-income clients. They coordinate institutional and individual providers and partners, allocate resources among providers, and provide access to a range of services for all eligible clients no matter their location, native tongue, or ethnicity.

## Next steps

Pursuing the funding and improvements agenda recommended in this paper will require a coordinated and comprehensive effort among federal, state, and other funders. Leadership is essential. The Justice Department and Legal Services Corporation should convene the key groups and begin to push forward.

As we have learned over the last 30 years, however, no one key player must lead. In addition to federal and state officials, access-to-justice commissions, the National Legal Aid & Defender Association, and the American Bar Association must be central players in any new initiative. Many other supporters of legal aid, including those in the academy and related fields such as the self-representation movement, should also be included and heard.

It's our hope that the growing awareness of the mounting "justice gap" creates the impetus for a serious reform agenda to coalesce today.

# Endnotes

<sup>1</sup> 42 U.S.C. § 2996 (1974).



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## About the author

**Alan W. Houseman** is CLASP's executive director, a position he has held since joining the organization in 1982. His expertise is innovative antipoverty strategies and civil legal assistance. He has written numerous articles, manuals, papers, and books on legal services, poverty law advocacy, and welfare policies, including *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States* (with Linda Perle). In addition to directing CLASP, Mr. Houseman is currently counsel to the National Legal Aid and Defender Association and is a leader of national efforts to preserve and strengthen the federal legal services program.

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