

REFORM IN THE DELIVERY OF CIVIL LEGAL AID: THE CASE FOR INCREASED USE OF INSTITUTIONAL PROVIDERS

I. Introduction

“Civil Gideon” refers to the right to court appointed counsel in civil proceedings.¹ It is named for *Gideon v. Wainwright*,² the 1963 Supreme Court ruling which, relying on the authority granted by the Sixth Amendment to the Constitution, established the right to court appointed counsel in criminal proceedings.³ There is, however, currently no equivalent acknowledged Constitutional right to legal representation in civil cases. In *Lassiter v. Dep't of Social Services*,⁴ the Supreme Court held that there is no categorical right to counsel for indigent litigants.⁵ *Lassiter* created a presumption against court appointed counsel unless the litigant was facing the risk of the loss of physical liberty.⁶ Nevertheless, the interests at stake in civil proceedings are often just as vital as, or even more important than, those at stake in criminal proceedings.⁷ For example, although a custody case is a civil proceeding, a parent involved in

¹ See Steven D. Schwinn, *A Right to Counsel on Appeal: Civil Douglas*, 15 TEMP. POL. & CIV. RTS. L. REV. 603, 606 (2006) (discussing the history of the Civil Gideon movement).

² 372 U.S. 335 (1963).

³ *Id.*

⁴ 452 U.S. 18 (1981).

⁵ *Id.*

⁶ *Id.*

⁷ Family law proceedings are the most common litigation in which plaintiffs, defendants, and interested parties have been allowed statutory rights to court-appointed counsel. Specifically Civil Gideon rights have been authorized in situations involving custody (AK, AZ, CA, LA, MD, MA, MI, NY, OR, TX, WA, WV, DC); neglect and abuse (IN, IA, KS, KY, MD, MS, NE, NV, NM, OK, SC, SD, UT, VA, WV, WY); domestic violence (AK, CA, NY); adoption (IL, KS, MD, MA, MO, NY, PA, SC); dependency and termination of parental rights (AL, AK, AZ, AS, CA, CO, CT, GA, HI, ID, IN, IA, FL, KN, KY, MD, MO, MS, MT, NC, NE, NV, NH, OK, OR, PA, SC, TN, TX, UT, VT, WA, WV, WY, DC); visitation (AK, AZ, CA, LA, MD, and MA); and divorce (DE, OR, VT, and DC). Civil Gideon rights have also been granted by statute in proceedings involving involuntary commitment for mental illness, drug, or alcohol abuse (AL, AK, AZ, CO, CT, DE, HI, IL, IA, KS, LA, MD, MA, MS, MO, MT, NV, NC, ND, PA, SC, SD, VT, and WI); involuntary quarantine (AK, CT, DE, MD, NC, SC, and WV); involuntary protective services (AL, CO, DE, IN, MA, SC, and TN); involuntary sterilization (CO, VT, and WV); and judicial bypass of abortion (AK, DE, FL, IN, MS, MO, NC, SC, and WI). A limited number of states have granted the right to court appointed counsel in proceedings involving civil arrest or imprisonment (NC and ND); individuals under disability to sue

such a case risks the permanent loss of custody of their child, but may not be afforded appointed counsel at state expense.⁸ In stark contrast, a defendant facing the possibility of criminal incarceration for even one day will be appointed counsel.⁹ In addition to child custody, civil proceedings also involve domestic abuse, involuntary commitment, and a range of other important issues.¹⁰ Without court appointed and publicly funded counsel, individuals who cannot afford to retain a lawyer are regularly forced to represent themselves in important civil matters against parties who have legal counsel.¹¹ The phenomenon of mandatory indigent self-representation in civil litigation often results in uneven and inefficient contests in which the party with greater resources has an unfair advantage.¹² In 2005 the Legal Services Corporation (LSC), a nonprofit organization established to provide legal assistance to low income clients, concluded that less than twenty percent of the legal needs of low-income Americans were being met.¹³

(MD); petition for special immigrant juvenile status (FL); release of mental health records(IN); military personnel (CO, WV, and by Federal Statute); civil rights claims(IL); housing discrimination(AZ, AR, CO, DE, and by Federal Statute); and school attendance(CO). Laura K. Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Case* CLEARINGHOUSE REV. J.L. & POL'Y, July-August 2006, available at http://www.brennancenter.org/dynamic/subpages/download_file_39169.pdf.

⁸ *Id.*

⁹ *Gideon v. Wainwright*, 372 U.S. 335, 348 (1963).

¹⁰ Laura K. Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Case* CLEARINGHOUSE REV. J.L. & POL'Y, July-August 2006, available at http://www.brennancenter.org/dynamic/subpages/download_file_39169.pdf.

¹¹ LAURA K. ABEL AND MAX RETTIG, CIVIL RIGHT TO COUNSEL: EQUALITY AND FAIRNESS IN THE COURTROOM, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/subpage.asp?key=40&init_key=143

¹² *Id.*

¹³ Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007* Center for Law and Social Policy (August 22, 2007) at 9, available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf see also 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/JusticeGap.pdf> (providing history and statistics concerning the legal needs of indigents in civil cases).

An increasing number of legal and political organizations, seeking to remedy the imbalance caused by lack of access to counsel for people who are unable to afford private representation, have advocated for Civil Gideon rights.¹⁴ As these rights are granted in a growing number of jurisdictions, the number of litigants entitled to mandated legal services will grow. It is important to determine how services will be delivered to these litigants in order to maintain a high standard of legal representation and avoid some of the inequities that currently exist in many jurisdictions with respect to the delivery of legal services.¹⁵

One of the primary types of organizations at the forefront with respect to leadership and coordination of legal aid reform in a growing number of states is the “state access to justice commission.”¹⁶ These commissions are statewide coalitions of legal aid providers and court and bar advocates.¹⁷ Created by state supreme court rule in many states, state access to justice commissions are involved in evaluating their state’s civil legal needs and developing delivery structures to meet those needs.¹⁸

The consensus among state access to justice commissions and other interested parties is that the establishment of more centralized delivery systems for legal aid will improve the overall quality of representation of low-income clients.¹⁹ Greater reliance on institutional providers will

¹⁴ LAURA K. ABEL AND MAX RETTIG, *supra* note 11.

¹⁵ See Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527 (2006) (analogizing successes and failures in implementing a right to counsel in criminal cases with potential difficulties and strategies in implementing a right to counsel in civil cases).

¹⁶ Allan W. Houseman, *The Future Of Civil Legal Aid: A National Perspective*, 10 U. D.C. L. REV. 35, 40 (2007).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See American Bar Association, Report to the House of Delegates, Principles of a State System for the Delivery of Civil Legal Aid (112B), Aug. 7, 2006, *available at* <http://www.abanet.org/legalservices/sclaid/downloads/06A112B.pdf> (providing goals and assessment guidelines for improving the delivery of civil legal aid).

allow for greater centrality and uniformity of the civil legal aid system. In the context of legal aid delivery, “Institutional provider” refers to the broad category of non-profit entities created specifically for the purpose of the delivery of legal aid.²⁰ Among these entities are non-governmental legal aid organizations (NGOs) that employ staff attorneys, law school clinical programs, programs that oversee and organize pro bono attorneys, and state offices such as public defenders offices or, ideally, civil legal aid offices modeled after public defender’s offices.²¹

Ultimately, the increased use of institutional providers as opposed to private attorneys will allow suppliers of civil legal aid to pool resources, employ a broader arsenal of advocacy mechanisms, and apply uniform standards to the administration and assessment of the delivery of civil legal aid.²² Institutional providers have access to resources such as training and supervision in specific areas as well as support from social workers and paralegals that may not be available to independent practitioners.²³ Attorneys operating in an institutional setting are better equipped to observe legal trends affecting their clients, and therefore more able to address systemic issues and questions of legal reform.²⁴

This comment will survey current and best practices with respect to the delivery of civil legal aid to indigent clients in the United States. This comment will also examine some of the forces that affect states’ efforts to implement legal aid delivery systems. First, the Background

²⁰ *Id.* at 3.

²¹ *Id.*

²² Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 544 (2006)

²³ *Id.*

²⁴ *See, e.g.*, National Consumer Law Center, http://www.consumerlaw.org/issues/cocounseling/why_cocounsel.shtml (discussing the NCLC’s consumer law reform efforts).

section will explore some of the primary methods currently used for organizing and providing civil legal services that are delivered to indigent clients. The Background section will also examine efforts by various bodies to establish standards for measuring the quality and efficiency of the delivery of civil legal aid. Finally, the Background section will consider the disparate ways in which oversight is used to apply standards to delivery.

Acknowledging the variety of methods by which civil legal aid can be provided, the Discussion section will offer a case study of two specific jurisdictions: Montana and Massachusetts. By some measures these states have pioneered the delivery of civil legal aid. Critically, both Montana and Massachusetts devoted considerable resources towards the establishment of centralized delivery systems and the use of a broad scope of legal service entities known as institutional providers. The Discussion section will place emphasis on how, in both of these jurisdictions, legal aid reform in the civil arena is linked to and often follows legal aid reform in the criminal arena.

Using the case study as a touchstone, the Analysis section will examine the rationale and structure of the reforms implemented in Montana and Massachusetts. The Analysis section will also identify some of the advantages of greater reliance on institutional providers and some of the specific successes of various institutional providers with respect to the delivery of civil legal aid. Finally, The Analysis section will advance some suggestions, based on the Background and Discussion sections, about the qualities of an ideal civil legal aid delivery system.

II. Background

A. How counsel is currently provided nationwide

In the United States, legal services for low-income people are delivered in a variety of ways that range widely with respect to quality and efficiency. Services may be provided by individual counsel appointed by the court, volunteering or assigned pro bono attorneys, or various types of institutional providers.²⁵ The institutional providers range from local to national organizations with varying funding sources, goals, degrees of state control, and resources. There are large disparities between jurisdictions in how frequently institutional providers are employed.²⁶ There is also a range in organizational structures between jurisdictions resulting in disparities in oversight and communication between bodies delivering legal aid.²⁷

This variation in delivery can be attributed to a variety of causes. Restrictions on funding have had a powerful impact on the delivery of civil legal aid. The LSC is the largest single funder of civil legal aid programs in the United States. However, a major turning point in the LSC's ability to adequately fund civil legal aid was precipitated by congressionally imposed funding cuts and restrictions in 1996.²⁸ The 1996 restrictions limited the categories of clients who are eligible for LSC funds.²⁹ The restrictions also limited the substantive areas of law and

²⁵ Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 545 (2006).

²⁶ American Bar Association Standards For The Provision Of Civil Legal Aid, Standing Committee On Legal Aid And Indigent Defendants (2006), at i., *available at* <http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2007.pdf>

²⁷ *Id.*

²⁸ Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007*, Center for Law and Social Policy (August 22, 2007) at 6-8 and 10, *available at* http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

²⁹ *Id.*

types of advocacy which LSC- funded programs are allowed to pursue.³⁰ In combination, the congressionally imposed restriction resulted in an overall decrease in funding granted to state legal aid systems.³¹ Decreased funding caused state systems to become increasingly disparate and fragmented in their civil legal aid delivery structures.³² At the same time, various states, in an effort to compensate for less LSC support, experimented with reform and novel methods of civil legal aid delivery.³³ Some jurisdictions have experienced successes in specific areas of delivery while many others have experienced problems with inefficiency, uneven delivery of services, or even poor quality of legal services.³⁴

In addition to creating disparities in the quality and consistency of legal aid in the United States, the diversity of delivery methods has also made it difficult to collect data on legal aid. As a result there is a dearth of precise and uniform information concerning exactly which institutions are responsible for indigent defense services and the exact methods of delivery which those institutions employ.³⁵ One informal survey counts approximately 864 staff-based institutional legal service providers.³⁶ This total includes 500 civil legal aid programs, 160 programs affiliated with the Catholic Legal Immigration Network, and 204 clinical law school

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See Carol J. DeFrances, Bureau of Justice Statistics, U.S. Dep't of Justice, State-Funded Indigent Defense Services, 1999, at 2 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf> (describing and comparing the different methods of providing representation to indigent defendants); see also Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007*, Center for Law and Social Policy (August 22, 2007) at 1, available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf. (discussing current structures and methods for the delivery of civil legal aid to indigent clients).

³⁶ Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007* Center for Law and Social Policy (August 22, 2007) at 1, available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

programs.³⁷ In addition to the 864 staff-based providers, 900 pro bono programs deliver civil legal aid to indigent client and are active nationwide.³⁸ Pro bono programs consist of bar association members and attorneys on pro-bono panels who receive referrals from institutional providers.³⁹

The various types of institutional providers delivering civil legal aid receive funding from a number of sources. The LSC funds and monitors 138 institutional providers.⁴⁰ The majority of overall funding comes from a combination of other sources. State and local governments, private bar associations, the United Way, Interest on Lawyer Trust Accounts (IOLTA) programs, and other federal government sources all contribute to the funding of civil legal aid.⁴¹ Providers receiving non-LSC funding range from full service providers to small organizations whose services are limited to particular populations, specific areas of law, or restricted services.⁴²

In addition to the network of institutional staff-based providers consisting of legal aid organizations, there are three other primary methods of civil legal aid delivery which are used separately or in combination.⁴³ First, some jurisdictions use individual private attorneys rather than attorneys employed by an institutional provider. These lawyers are assigned through pro bono programs or legal aid organizations, or, in some jurisdictions, the court may have a list of

³⁷ *Id.*

³⁸ *Id.* at 2.

³⁹ *Id.*

⁴⁰ *Id.* at 10.

⁴¹ *Id.* at 1.

⁴² *Id.*

⁴³ Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 542 (2006).

private bar members from which judges will appoint counsel.⁴⁴ A second primary method for the delivery of civil legal aid that does not rely on institutional providers is through large state contracts with for-profit firms.⁴⁵ Attorneys from these firms do not receive a salary from the state, but are paid by these firms which usually acquires the contracts through a bidding process.⁴⁶ Some of the drawbacks of contracting with firms are discussed in the analysis section of this comment.⁴⁷ Thirdly, public defender's offices, which are centralized institutional providers, employ their own full-time or part-time attorneys specifically for legal aid delivery.⁴⁸ These attorneys deliver services through public or private legal aid organizations, or directly through the office of the state public defender. The majority of public defenders' resources are focused on the delivery of criminal legal aid; however, in an increasing number of jurisdictions, attorneys employed by public defenders are also partially responsible for the delivery of civil legal aid.⁴⁹

A 1999 Department of Justice Study examined the indigent defense services of twenty-one states, comparing funding sources and methods of legal aid delivery.⁵⁰ The study focused only on states which received ninety percent or more of their funding for indigent criminal defense from the state government.⁵¹ Although this study focused primarily on criminal defense, it included statistics for civil defense. The study listed the percentages of civil cases handled by

⁴⁴ Carol J. DeFrances, Bureau of Justice Statistics, U.S. Dep't of Justice, State-Funded Indigent Defense Services, 1999, at 3 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf>.

⁴⁵ Abel, *supra* note 43, at 543.

⁴⁶ *Id.*

⁴⁷ See IV (A) *infra* (discussing the advantages of the use of institutional providers including the pooling of resources and employment of a broader range of advocacy mechanisms).

⁴⁸ DeFrances *supra* note 44, at 3.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* The twenty-one states surveyed accounted for twenty-seven percent of the U. S. population at the time.

contract attorneys, private attorneys, and public defenders respectively.⁵² In the twenty-one states surveyed, contract attorneys received the fewest civil cases.⁵³ Private attorneys by assigned counsel programs received approximately twice as many civil cases as contract attorneys.⁵⁴ Finally, public defender's programs received the most civil cases: approximately five times as many as contract attorneys.⁵⁵

B. Standards for the delivery of legal services.

In his article, *The Future of Civil Legal Aid: a National Perspective*, Alan Houseman lists three goals of a civil legal aid system equipped to meet the legal needs of low income persons.⁵⁶

In describing a successful civil legal aid system, Houseman states that:

[a] 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 about 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.⁵⁷

These three goals parallel the underlying principles listed in the American Bar Association's fifth set of *Standards for the Provision of Civil Legal Aid (ABA Standards)*.⁵⁸ The American Bar Association document sets forth specific suggestions for insuring the quality of legal

⁵² *Id.*

⁵³ *Id.* at 10. Contract attorneys in state funded systems received a total of 4,868 civil cases.

⁵⁴ *Id.* at 8. Private assigned counsel received a total of 11,324 civil cases

⁵⁵ *Id.* at 7. Public defender programs received a total of 26,628 civil cases.

⁵⁶ Allan W. Houseman, *The Future Of Civil Legal Aid: A National Perspective*, 10 U. D.C. L. REV. 35, 40 (2007).

⁵⁷ *Id.* at 36.

⁵⁸ See ABA Standards for the Provision of Civil Legal Aid (2006): Standard 1.2 (on Governing Body Members' Responsiveness to the Communities Served); Standard 1.3 (on Governing Body Communication with Low Income and Legal Communities); Standard 4.1 (On The Provider's Intake System), *available at* <http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2007.pdf>.

assistance.⁵⁹ The ABA document makes suggestions concerning provider standards for effectiveness and quality assurance.⁶⁰ The ABA document also provides guidelines for delivery structure and methods, relations with clients, internal systems and procedure.⁶¹ The LSC also has a set of performance criteria which are used as the basis for peer review evaluation of legal aid delivery programs.⁶² The LSC Performance Criteria encompass many of the same standards and methods promoted by the *ABA Standards* and makes frequent references to the *ABA Standards*.⁶³

Although access to education and information concerning legal options, rights, and responsibilities for low-income individuals has improved in recent years, the goals and standards associated with broad access to high-quality legal assistance providers are still far from being satisfied.⁶⁴ In her article, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, Laura Abel compares the difficulties of implementing quality standards in a civil context with difficulties of implementation encountered in the criminal context since *Gideon v. Wainwright* established a criminal right to counsel in 1963.⁶⁵ Abel notes three deficiencies that exist in both the criminal and civil arenas. First, attorneys assigned to low-income people often have little or no training in the area of law relevant to their client's case. Second, attorneys assigned to low-income people are often appointed too late to offer practical assistance. And,

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007* Center for Law and Social Policy (August 22, 2007) at 22, available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

⁶³ Legal Servs. Corp., LSC Performance Criteria (2007). available at <http://www.lsc.gov/pdfs/LSCPerformanceCriteria.pdf>.

⁶⁴ Allan W. Houseman, *The Future Of Civil Legal Aid: A National Perspective*, 10 U. D.C. L. REV. 35, 35 (2007).

⁶⁵ 372 U.S. 335 (1963).

third, attorneys assigned to low-income people are rarely able to provide adequate resources because they are attempting to fulfill an underfunded or unfunded mandate.⁶⁶ Abel lists six factors, drawn from the nation's implementation of right to counsel in criminal cases, which will also affect the provision of civil legal aid.⁶⁷ These factors include: (1) funding, (2) manner of providing counsel, (3) manner of appointing counsel, (4) judicial culture, (5) acceptance and enforcement of minimum standards for counsel, and (6) uniformity within a given state.⁶⁸ The manner in which counsel is delivered, whether by assigned private counsel or by staff-based institutional providers is inextricably linked to each of the other five factors.

C. Oversight of legal aid delivery

The mechanisms for deciding who delivers and oversees civil legal aid are also varied and inconsistent. Some states employing public defender programs are managed by a chief state public defender. Others are supervised by a series of chief public defenders, each with oversight responsibilities for a local county or judicial district.⁶⁹ Private attorneys may be appointed by either judges or assigned counsel programs.⁷⁰ The mechanisms for maintaining standards for the appointment of private attorneys also vary. In some jurisdictions all attorneys in the local bar appear on a list as candidates for appointment unless they request to be deleted from the list.⁷¹ Other jurisdictions require that attorneys are approved by program administrators or require

⁶⁶ Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 545-546 (2006).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Carol J. DeFrances, Bureau of Justice Statistics, U.S. Dep't of Justice, *State-Funded Indigent Defense Services*, 1999, at 2 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf>.

⁷⁰ *Id.* at 7.

⁷¹ *Id.*

attorneys to attend legal seminars and training before appointment.⁷² In some jurisdictions contracts for indigent defense are awarded to for-profit firms in a bidding process, whereas in other jurisdictions contracts are only awarded in cases involving public defender conflict.⁷³

LSC Programs use the LSC Performance Criteria and case management systems as a means of oversight.⁷⁴ Other programs use systems based on the LSC model⁷⁵ and a small number of jurisdictions have utilized outcomes measures in order to appraise whether specific goals are being met.⁷⁶ In some jurisdictions oversight of all of the various types of providers is managed by state justice communities. “State justice community” is a broad term encompassing any of the stakeholders interested in developing and improving an integrated statewide delivery system for legal aid.⁷⁷ This may include state access to justice commissions, LSC and non-LSC providers, pro bono programs, and members of the private bar and the state judicial system.⁷⁸ State justice communities are established in order to organize relationships between institutional and individual providers, conserve resources, and, ideally, provide a single point of entry for all clients.⁷⁹ In states where state supreme court rule, response to a petition, or request by a state bar has lead to the creation of state access to justice commissions, these commissions have played an important role in unifying state justice communities.⁸⁰ The 2006 ABA report to the house of

⁷² *Id.* at 8. It is unclear whether these same mechanisms applied to attorneys receiving civil cases by appointment.

⁷³ *Id.* at 9.

⁷⁴ Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007* Center for Law and Social Policy (August 22, 2007) at 22, available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

⁷⁵ *Id.* at 23.

⁷⁶ *Id.* at 22. Houseman lists the five states: NY, VA, MD, TX, and AR which report results for clients in specific cases to measure performance.

⁷⁷ Allan W. Houseman, *The Future Of Civil Legal Aid: A National Perspective*, 10 U. D.C. L. REV. 35, 40 (2007).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

delegates on the principles of a state system for the delivery of civil legal aid includes a self assessment tool specifically designed to measure whether state access to justice commissions are meeting *ABA standards*.⁸¹

III. Discussion of two jurisdictions on the forefront.

Reform in state systems of delivery of civil legal aid often occurs as the result of pressure to repair failing systems for the delivery of legal aid to criminal defendants.⁸² As a result of lawsuits and political pressure directed primarily at their deficiencies in providing adequate defense to indigent criminal defendants, both Montana and Massachusetts have moved to the forefront with respect to the delivery of civil legal aid.⁸³ The link between the delivery of legal aid in criminal and civil contexts is useful for examining reform in the civil realm. Some aspects of the delivery of civil legal aid may be specifically reformed in response to the study and reformation of the delivery of criminal legal aid. In other instances, reforms implemented in the structure and quality of delivery of legal aid to the criminally accused may de facto change the delivery of civil legal aid that is overseen or provided by the same body.

Montana and Massachusetts have each had their successes and failures in the civil aid arena, but both are currently widely considered to be pioneers of civil legal aid delivery. These two states are unique because they are in the minority of states that have a single body responsible for oversight of legal aid delivery. In both states the body responsible for oversight also has some degree of responsibility for administering services. An examination of these two

⁸¹ Report to the House of Delegates, Principles of a State System for the Delivery of Civil Legal Aid (112B), Aug. 7, 2006, available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112B.pdf>

⁸² Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 550-552 (2006).

⁸³ *Id.*

jurisdictions provides a starting point for understanding how the reformation of criminal aid systems can lead to the reformation of civil aid systems. Reform efforts in Montana and Massachusetts illustrate how different private and state institutions interact to deliver civil legal aid, and why, in many cases, the use of institutional providers is more efficient than the use of individual assigned counsel or contract attorneys.

A. Montana

Montana currently has a single body, the Montana State Office of the Public Defender (OPD), which acts as a point of entry for indigent clients.⁸⁴ The OPD also provides delivery and oversight of both criminal and civil legal aid.⁸⁵ Improvements in the quality of oversight and delivery that have made Montana's OPD a model organization in the realm of civil legal aid to indigent clients have come after legal pressure by advocates for legal aid.

In February of 2004, the American Civil Liberties Union filed a class action lawsuit against the state of Montana and seven counties therein.⁸⁶ The ACLU suit alleged that the Montana OPD failed to meet the mandate established by *Gideon v. Wainwright*⁸⁷ to provide quality counsel for low-income people accused of crimes.⁸⁸ The ACLU suit revealed various disparities that were the result of the poorly funded Montana public defender system.⁸⁹ For

⁸⁴ See Montana Office of the Public Defender, Summary, at A-312 (discussing the ACLU legal action against Montana as well as the basis, function, and goals of Montana's Statewide Office of the Public Defender), available at http://leg.mt.gov/content/publications/fiscal/ba_2009/lfd_a/pub_defender.pdf

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 372 U.S. 335(1963).

⁸⁸ Montana Office of the Public Defender, Summary, at A-312 (2006), available at http://leg.mt.gov/content/publications/fiscal/ba_2009/lfd_a/pub_defender.pdf

⁸⁹ See Pat Gervais, Public Defender: Costs, Organizations, LAD Audit, Report to Legislative Finance Committee, at 2 (2006) (assessing implementation of Montana's OPD), available at http://leg.mt.gov/content/publications/fiscal/interim/financecmty_june2006/Public_Defender_Costs.pdf

example, public prosecutors were provided much greater resources than public defenders.⁹⁰

Public defenders were only employed full time in some counties, while others relied primarily on contract attorneys.⁹¹

The ACLU further noted in its allegations that these and other inconsistencies combined with under-funding, resulted in a disproportionately high percentage of plea bargains.⁹² Moreover, there were a disproportionately high percentage of complaints that some of the accused waited an unacceptable amount of time before meeting their assigned counsel.⁹³ In 2004 the ACLU agreed to postpone its suit against Montana to allow time for remedial legislative action.⁹⁴ The Montana Legislature responded by charging the Law and Justice Interim Committee (LJIC), a bipartisan legislative committee involved in justice policy issues, with undertaking a comprehensive study of the ACLU allegations.⁹⁵ The LJIC was mainly concerned with granting the OPD a greater role in legal aid funding and provision decisions which had previously made primarily by local governments.⁹⁶

Pressure by the ACLU and the LJIC recommendations led the Montana legislature to pass the Montana Public Defender Act (Act) in 2005.⁹⁷ The Act not only benefits indigent litigants accused of crimes, but also has provisions which protect low-income civil litigants who

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 6.

⁹⁶ Montana Office of the Public Defender, Summary, at A-312 (2006), *available at* http://leg.mt.gov/content/publications/fiscal/ba_2009/lfid_a/pub_defender.pdf

⁹⁷ S.B. 146, Montana Public Defender Act, 2005 Mont. Laws 449, (partially codified at MONT. CODE. ANN. §§ 47-1-101—47-1-216).

can not afford counsel.⁹⁸ The Act provided for the reformulation of the Montana OPD which in addition to the administration of criminal defense, also oversees, and in some instances administers, civil legal aid.⁹⁹ The Act was the first bill nationwide specifically designed in response to the *Ten Principles of a Public Defense Delivery System (Ten Principles)* adopted by the American Bar Association (ABA) in 2002.¹⁰⁰ The Ten Principles were created to provide guidelines for the delivery of indigent defense services in light of nationwide deficiencies in this area.¹⁰¹ Although these principles were adopted as guidelines for delivery of public criminal defense, they address many of the same concerns about quality and consistency of assigned counsel as the ABA's 2006 *Standards for the Provision of Civil Legal Aid (ABA Standards)*.¹⁰² Specifically the *Ten Principles* call for, among other recommendations, the oversight and ongoing assessment of public defenders' performance as well as manageable caseloads for legal service providers.¹⁰³

⁹⁸ *Id.* Section 3 of the Montana Public Defender Act establishes that the OPD must provide effective assistance of counsel to persons in civil cases who are entitled by law to assistance of counsel at public expense. In Montana, this includes cases involving dependency and termination of parental rights as well as involuntary commitment for mental illness, drug, or alcohol abuse.

⁹⁹ *Id.*

¹⁰⁰ See American Bar Association, *Ten Principles of a Public Defense Delivery System* (February 2002) (discussing principles and goals for the delivery of legal aid to the criminally accused), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>. "The Attorney General's Office fully supported the ten principles adopted by the ABA and supported developing a system based on those principles." Law and Justice Interim Committee, Minutes, Public Defender Subcommittee of the fifty-eighth Montana Legislature (June 28, 2004), *available at* http://leg.mt.gov/content/committees/interim/2003_2004/law_justice/minutes/minutes_pub_def_sub_june_28%20-2004.pdf.

¹⁰¹ *Id.*

¹⁰² American Bar Association, *Standards for the Provision of Civil Legal Aid* (2006), *available at* <http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2007.pdf>.

¹⁰³ American Bar Association, *Ten Principles of a Public Defense Delivery System* (February 2002), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

The Act consolidated Montana's pre-existing system for public defense into a unified statewide system for assigning counsel.¹⁰⁴ Under the previous system, public defense was delivered by a relatively arbitrary combination of sources.¹⁰⁵ County courts controlled some judicial appointment of counsel.¹⁰⁶ In other instances staffed public defender offices provided counsel.¹⁰⁷ Finally, in some cases, firms who bid for contracts with the court provided counsel.¹⁰⁸ The new system is administered by the Montana Office of the State Public Defender (OPD) through eleven regional public defender offices around the state.¹⁰⁹ The new system is funded collectively by the state of Montana, its counties, and its cities.¹¹⁰ The system is supervised by an eleven-member State Public Defender Commission.¹¹¹ The members of the Commission are appointed by the Governor and consist of at least eight attorneys and at least two members of the general public who have never been attorneys.¹¹² The members of the general public are responsible for advocating for indigents and other qualified persons.¹¹³ In addition to responsibility for oversight, the Public Defender Commission hires the Chief Public Defender who is charged with supervising public defender attorneys statewide.¹¹⁴

Although creation of a more unified system is the primary goal of the Act, Its language allows for flexibility in the delivery of services. Services may be delivered “by state employees,

¹⁰⁴ Montana Office of the Public Defender, Summary, at A-321 (2006), *available at* http://leg.mt.gov/content/publications/fiscal/ba_2009/lfid_a/pub_defender.pdf.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 2005 Mont. Laws 449 § 4.

¹¹⁰ Sheri Heffelfinger, Public Defender: Information Packet *available at* http://leg.mt.gov/content/committees/interim/2005_2006/law_justice/staff_reports/InfoPacket.pdf.

¹¹¹ *Id.*

¹¹² 2005 Mont. Laws 449 § 5.

¹¹³ *Id.*

¹¹⁴ *Id.* at § 5.

contracted services, or other methods . . . in a manner that is responsive to and respective of regional community needs and interests.”¹¹⁵ Although public defenders are responsible for the delivery of the majority of legal services, sparsely populated counties may contract with private attorneys when necessary until the transition to a state employee based system is complete.¹¹⁶ However, those private attorneys are appointed by the regional public defenders and not by judges as they were before the passage of the Act. This measure provides an added level of oversight and helps to prevent purely political appointments.

The Act contains various measures to ensure that high quality representation is provided and to assess the quality of services on an ongoing basis. For example, the quality of legal services is maintained through the requirement that both contract attorneys and full-time public defenders meet a 115-page set of professional standards and attend continuing legal education and training sessions on relevant legal issues.¹¹⁷ Another quality control measure in Montana’s new legal aid system is the consistent approach to indigent determination. In determining whether indigents are eligible for appointed counsel, Montana uses a broad and uniform set of standards that applies to the delivery of legal aid in both the criminal and civil realms.¹¹⁸ The current screening standards eliminate confusion that existed under the old system where a person in need of legal assistance might be eligible in one county, but not in another. Furthermore,

¹¹⁵ *Id.* at § 3(4).

¹¹⁶ *Id.* at § 4.

¹¹⁷ *Id.* at § 6(9)(j).

¹¹⁸ *Id.* at § 14. Sections 14(a) and (b) state that an applicant is indigent if the applicant's gross household income, as defined in MONT. CODE. ANN. § 15-30-171, is at or less than 133% of the poverty level set according to the most current federal poverty guidelines updated periodically in the federal register by the United States department of health and human services under the authority of 42 U.S.C. 9902(2); or the disposable income and assets of the applicant and the members of the applicant's household are insufficient to retain competent private counsel without substantial hardship to the applicant or the members of the applicant's household.

counsel is appointed prior to final indigence determination in order to eliminate the long waiting periods that existed under the old system.¹¹⁹

The goal of maintaining consistent and effective representation is addressed by requiring that, if the client meets eligibility standards, the same attorney will represent that client until the case is completed.¹²⁰ Supervision of quality and monitoring of the issues faced by the indigent defense delivery system is provided for by the submission of a biennial report to all three branches of state government.¹²¹ The report includes important statistics such as: caseload, staffing, expenditure and other data as specified in the Act.

In addition to the institutional and structural changes in the Montana system that have improved civil legal aid as a secondary result of improvement in the criminal system, the Act has provisions specifically relating to the delivery of civil aid. The Act mandates that the Office of State Public Defender provide civil legal aid to litigants in civil cases who are entitled by law to assistance of counsel at public expense.¹²² Currently, litigants in child abuse and neglect, juvenile delinquency, involuntary commitment, and guardianship cases are all entitled to appointed counsel by Montana Statute.¹²³ The broader and fairer definition of “indigent” provided in section fourteen of the Act applies equally to criminal and civil litigants.¹²⁴ Section

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 2005 Mont. Laws 449 § 6(9).

¹²² *Id.* at § (3)(1).

¹²³ *Id.* at § 15.; Laura K. Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Case* CLEARINGHOUSE REV. J.L. & POL’Y, July-August 2006, available at

http://www.brennancenter.org/dynamic/subpages/download_file_39169.pdf.

¹²⁴ 2005 Mont. Laws 449 § 14.

sixteen creates a training coordinator position that provides public defenders with information regarding current legal issues in civil as well as criminal law.¹²⁵

In addition to the services provided by the OPD, legal needs of indigent litigants in Montana are met by the Montana Legal Services Association (MLSA), which provides legal services for cases involving landlord/tenant law, Social Security Disability and other public benefits, family law, domestic violence, bankruptcy, Native American law, migrant workers' legal issues, consumer matters, and housing discrimination and other civil rights.¹²⁶ The services MLSA can provide are restricted by the receipt of federal money through the Legal Services Corporation.¹²⁷ MLSA does not handle any criminal cases, auto accidents, personal injury, business-related matters, or cases where an attorney's fee may be available.¹²⁸ The centralized infrastructure adopted by the Act may have been influenced by the infrastructure already in place in Montana because of the MLSA.¹²⁹

Montana's specific focus on the *Ten Principles* has allowed the state to implement consistent and meaningful reforms in the delivery of legal aid. In 2000 Montana solidified its commitment to reform by joining the increasing number of states with access to justice commissions and by forming the Montana Equal Justice Task Force.¹³⁰ Furthermore the LJIC continues to research and make recommendations to all of the stakeholders concerning the civil

¹²⁵ *Id.* at § 16.

¹²⁶ Montana Legal Services Association, <http://www.mtlsa.org/RTF1.cfm?pagename=About%20Us>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Law and Justice Interim Committee, Minutes, Public Defender Subcommittee of the fifty-ninth Montana Legislature (June 29, 2006), *available at*

http://www.leg.mt.gov/content/committees/interim/2005_2006/law_justice/minutes/min_June29_06.pdf

¹³⁰ Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007* Center for Law and Social Policy (August 22, 2007) at 24, *available at* http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

legal needs of indigent defendants.¹³¹ Among these areas researched by the LJIC are available technology for the enhancement of civil legal services, statutory incentives to encourage legal providers to become involved in civil legal aid, and determinations about necessary levels of public funding for civil legal aid.¹³²

B. Massachusetts

Massachusetts is a second state that has a single body responsible for oversight of both criminal and civil legal aid.¹³³ Like Montana, Massachusetts also made significant legislative change with respect to the delivery of civil legal aid following lawsuits and political pressure directed primarily at deficiencies in the indigent criminal defense system.¹³⁴ Since 1983 Massachusetts has had a single fifteen member state agency, the Committee for Public Counsel Services (CPCS), which oversees the provision of legal services to indigent litigants in criminal and some civil cases.¹³⁵ Although the CPCS already provided a more unified infrastructure for the delivery of civil legal aid than many jurisdictions, the overall delivery of legal aid to

¹³¹ SJR 6: Background Report on Civil Legal Services in Montana, A Report To The Law And Justice Interim Committee, Prepared by Sheri S. Heffelfinger, Research Analyst (September 2005), *available at*:

http://leg.mt.gov/content/committees/interim/2005_2006/law_justice/staff_reports/SJR6_Background.pdf.

¹³² *Id.*

¹³³ The Spangenberg Group, *Indigent Defense in Massachusetts: A Case History of Reform* (August 2005), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/MAindigdefreform2005.pdf>.

¹³⁴ *Id.* See also National Legal Aid and Defender Association, *A Strategic Plan to Ensure Accountability and Protect Fairness in Louisiana's Criminal Courts*, at 13 (September 22, 2006) (discussing the Massachusetts model as a basis for reform in Louisiana), *available at*

http://www.nlada.org/DMS/Documents/1159279328.66/Strategic%20Plan%20--%20FINAL%20REPORT%20_September%2022%202006_.pdf.

¹³⁵ In Massachusetts a right to counsel for indigent defendants has been granted in civil cases involving adoption, custody, visitation, involuntary commitment for mental illness, drug, or alcohol abuse, and involuntary protective services. Laura K. Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Case* CLEARINGHOUSE REV. J.L. & POL'Y, July-August 2006, *available at*

http://www.brennancenter.org/dynamic/subpages/download_file_39169.pdf

indigents was substandard. Thus, like Montana, Massachusetts responded to political and legal pressure by reforming its system of indigent legal aid delivery.

In Massachusetts several distinct developments led to the reforms which culminated in a 2005 bill that restructured the Massachusetts system of indigent defense.¹³⁶ First, attorneys dissatisfied with the rates they received as court appointed counsel began refusing to take new cases. Second, in 2004, CPCS and the ACLU of Massachusetts initiated actions in both the Holyoke District Court and the Supreme Judicial Court (SJC) on behalf of indigent criminal defendants being held in lieu of bail and without counsel by order of judges.¹³⁷ Massachusetts's high court held that the petitioners' constitutional right to the assistance of counsel was being denied. The court further held that if counsel is unavailable for more than seven days defendants must be released and that all charges must be dropped after more than forty-five days without access to counsel.¹³⁸ Finally, private attorneys working pro bono filed a petition in the SJC alleging that the entire statewide Massachusetts system of indigent defense was unconstitutional.¹³⁹ This suit included civil child welfare cases in addition to criminal cases.¹⁴⁰

The bill that resulted from pressure by private attorneys and the ACLU mandated several important reforms in Massachusetts's legal aid system.¹⁴¹ The bill doubled the number of public defenders in the state.¹⁴² The bill also increased the funds available for indigent defense

¹³⁶ Act of July 29, 2005, 2005 Mass. Legis. Serv. 129 (West) (providing counsel to indigent persons).

¹³⁷ *Nathaniel Lavalley, et al. vs. The Justices of the Springfield District Court*, 442 Mass. 228 at 230 (2004).

¹³⁸ *Id.* at 232.

¹³⁹ *Arianna S., et al. v. Commonwealth of Massachusetts, et al.*, SJ-2004-0282 (filed June 28, 2004).

¹⁴⁰ *Id.*

¹⁴¹ Act of July 29, 2005, 2005 Mass. Legis. Serv. 54 (West) (providing counsel to indigent persons).

¹⁴² *Id.* at § 7.

services.¹⁴³ Finally, the bill established a commission to study the provision of counsel to indigent persons.¹⁴⁴ The commission created by the 2005 Act studied many of the same issues studied by the LJIC in Montana.¹⁴⁵ As in Montana, although this study was primarily focused on representation of indigent criminal defendants, the results have implications for the defense of indigent civil litigants as well. The Massachusetts commission noted the frequency of cases in which neither public staff nor private counsel was available for appointment, finding that insufficient hourly fees had a negative impact on the availability of counsel.¹⁴⁶ The commission also studied the adequacy of procedures for indigency determination and for the assessment and collection of counsel fees.¹⁴⁷ The commission also looked at the ratios of representation by public defender staff to representation by court-appointed private counsel, in each practice area and in each county.¹⁴⁸ Finally the commission studied the feasibility and potential benefits of providing indigent representation predominantly through public defender staff as opposed to private counsel.¹⁴⁹

Following some of the commission's recommendations, Massachusetts passed a bill in July of 2005 to reform the state's indigent defense system.¹⁵⁰ The bill established eleven pilot projects to increase the number of public staff attorneys to handle district court cases.¹⁵¹ These

¹⁴³ *Id.*

¹⁴⁴ *Id.* at § 6. *see also* Malia Brink, *Indigent Defense*, 29 CHAMPION 56 (sept./Oct. 2005) (discussing passage of the Massachusetts reform bill).

¹⁴⁵ The Spangenberg Group, *Indigent Defense in Massachusetts: A Case History of Reform* (August 2005) at 4, available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/MAindigdefreform2005.pdf>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Act of July 29, 2005, 2005 Mass. Legis. Serv. 54 (West) (providing counsel to indigent persons).

¹⁵¹ *Id.* at § 5.

projects are each staffed by ten attorneys, one investigator, and two support staff handling district court cases.¹⁵² With respect to direct impact on the delivery of civil legal aid, the bill instructed CPCS to employ an additional twenty attorneys responsible for family law cases and juvenile court cases.¹⁵³ In 2005 Massachusetts created a state access to justice commission to ensure the continued monitoring and reform in the area of delivery of civil legal aid.¹⁵⁴

In addition to oversight, CPCS is responsible for the monitoring and enforcement of standards of the delivery of legal services in each of Massachusetts's counties.¹⁵⁵ Legal representation of indigent defendants is provided collectively by 2,400 private attorneys known as bar advocates and a full-time public counsel division with thirteen regional offices and approximately 110 staff attorneys.¹⁵⁶ Most district court cases, including misdemeanor cases and initial appearances in some felony cases, are handled by bar advocates.¹⁵⁷ Bar advocates provide legal services in over ninety percent of the over 200,000 new criminal and civil cases assigned to CPCS each year.¹⁵⁸

Unlike Montana, Massachusetts focuses less on delivery of civil legal aid by staff attorneys, and more on consistent oversight of and management of private attorneys providing

¹⁵² *Id.* at § 7.

¹⁵³ *Id.*

¹⁵⁴ Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007* Center for Law and Social Policy (August 22, 2007) at 24, available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

¹⁵⁵ *Id.*

¹⁵⁶ See National Legal Aid and Defender Association, *A Strategic Plan to Ensure Accountability and Protect Fairness in Louisiana's Criminal Courts*, at 13 (September 22, 2006) (discussing the Massachusetts model as a basis for reform in Louisiana), available at http://www.nlada.org/DMS/Documents/1159279328.66/Strategic%20Plan%20--%20FINAL%20REPORT%20_September%2022%202006_.pdf.

¹⁵⁷ The Spangenberg Group, *Indigent Defense in Massachusetts: A Case History of Reform* (August 2005), available at

<http://www.abanet.org/legal/services/downloads/sclaid/indigentdefense/MAindigdefreform2005.pdf>.

¹⁵⁸ *Id.*

both criminal and civil legal aid. The thirteen CPCS regional public defender offices, staffed by full-time public defenders, are only responsible for the delivery of services to criminal defendants in superior court or felony-level cases.¹⁵⁹ There are, however, two CPCS family law offices with full-time staff representing parents and children in child protection, abuse, and neglect cases.¹⁶⁰ CPCS also employs twelve local bar advocate programs, spread throughout the state, to provide oversight of the private bar advocates.¹⁶¹ Bar advocates contract individually with their local bar advocate program to provide representation in criminal and juvenile delinquency cases.¹⁶² CPCS oversight extends to private attorneys accepting appointments in children and family law cases.¹⁶³ CPCS also trains and certifies bar advocates based on standards that are considered some of the best in the nation.¹⁶⁴ Judges are only allowed to appoint counsel from the list of CPCS-certified attorneys.¹⁶⁵

Massachusetts has gone further than almost any other state in defining the roles of and expectations for court-appointed counsel. Massachusetts's progress appears to be the result of the powerful administrative role of CPCS. The use of a single body working with institutional providers eliminates some of the disparities in availability and quality of service that exists in other states. CPCS' enhanced oversight of bar advocates provides individual attorneys with some of the training and assessment advantages that are usually associated with institutional providers.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Concurrently with the establishment of the CPCS, The Massachusetts Legal Assistance Corporation (MLAC) was established by the State Legislature to fund legal services to indigent civil litigants.¹⁶⁶ MLAC, as the largest provider of funds for civil legal aid programs in Massachusetts, makes grants to civil legal aid programs and non-profit legal services organizations (LSOs) that in turn provide free legal services to indigent Massachusetts residents.¹⁶⁷ The MLAC has worked in concert with the CPCS. The combined efforts of the two organizations provide the vast majority of civil legal services to indigent litigants in Massachusetts. Furthermore, due to the work of these organizations, Massachusetts has one of the few state systems which has preserved capacity for state-level advocacy, coordination, and information dissemination. Despite LSC funding cutbacks, Massachusetts has been able to increase training and to develop very comprehensive state support systems.¹⁶⁸

IV. Analysis: A closer look at the benefits of institutional providers in the delivery of civil legal aid

Montana and Massachusetts have improved their legal aid systems by establishing public defender's offices which administer services to both criminal and some civil litigants and provide oversight and referral for the delivery of civil legal aid. There is little statistical data available specifically comparing the successes and failures of different methods of delivery for civil legal aid.¹⁶⁹ However, an examination of the rationale and structure of the reforms

¹⁶⁶ Massachusetts Bar Association, *Lawyers Journal*, *Joining Hands for Equal Justice*, <http://www.massbar.org/for-attorneys/publications/lawyers-journal/2007/june/joining-hands-for-equal-justice>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Various organizations, such as the LJIC in Montana, have been charged with assessing the quality of legal aid to indigent criminal defendants as a precursor to reform. As discussed in section III of this comment, that reform has led to reform in the area of civil legal aid. However, since civil legal aid is generally a secondary beneficiary, there is generally no research on specific successes and failures of different methods of delivery in the civil legal aid.

implemented in these states, as well as of successes in some other jurisdictions, supports a movement towards greater reliance on the use of institutional providers. Analysis of the *ABA Standards for the Provision of Civil Legal Aid (ABA Standards)*¹⁷⁰ and an extension of Laura Abel's analogy to the delivery of criminal legal aid also support this shift.¹⁷¹ Increased reliance on institutional providers for the provision of legal services, rather than on private individual or contract attorneys, will foster a higher overall quality of representation for low-income clients.¹⁷²

An ideal system might utilize a separate state entity specifically for the purpose of initial intake of clients in need of civil legal services. This office should also be primarily responsible for oversight, delivery, and referral of services.¹⁷³ Employing state oversight of institutional providers for civil legal aid would eliminate some of the confusion and uncertainty that currently exist in this area in many jurisdictions. Oversight by a single state body employing institutional providers would allow for aggregation of the resources directed at the delivery of civil legal aid,¹⁷⁴ development of more uniform assessment standards,¹⁷⁵ and expansion of the breadth of advocacy choices available for legal aid providers.¹⁷⁶

¹⁷⁰ American Bar Association Standards For The Provision Of Civil Legal Aid, Standing Committee On Legal Aid And Indigent Defendants (2006), *available at* <http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2007.pdf>

¹⁷¹ Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 543 (2006).

¹⁷² Allan W. Houseman, *The Future Of Civil Legal Aid: A National Perspective*, 10 U. D.C. L. REV. 35, 40 (2007).

¹⁷³ *See, e.g., Access To Justice in Central And Eastern Europe*, European Forum on Access to Justice, Organized by the Public Interest Law Initiative. (2002), at 36-38, *available at* http://www.justiceinitiative.org/db/resource2/fs/?file_id=12585. (discussing the Israeli system which employs a nationwide public defenders office for criminal legal aid and a parallel system for the delivery of civil legal aid).

¹⁷⁴ *Id.*

¹⁷⁵ Abel *supra* note 171, at 544.

¹⁷⁶ Houseman *supra* note 172, at 66.

A. The increased use of institutional providers will allow providers of civil legal aid to pool resources and employ a broader arsenal of advocacy mechanisms.

Effective delivery of civil legal aid depends on efficient use of monetary resources, access to ancillary support resources, and knowledge of specific legal areas and specific client populations. One of the main impediments to the widespread delivery of meaningful civil legal aid to low-income clients is a lack of funding.¹⁷⁷ Institutional providers can pool resources for fundraising and provide a clear recipient for funders. Additionally, a more organized delivery system employing institutional providers will allow for more efficient use of existing funds. Although the LSC is the largest single funder of civil legal aid programs in the United States, the 1996 congressionally imposed funding cuts and restrictions have diminished the previously existing state civil aid support structures.¹⁷⁸ A small number of non-LSC funded civil legal aid organizations supported by disparate sources have formed to augment the declining support structure.¹⁷⁹ Although these providers may have greater autonomy, there is also a lack of uniformity and competition for the same resources among organizations with the same goals.¹⁸⁰ When a statewide body is primarily responsible for the delivery of legal aid or when a statewide body provides oversight and facilitates communication between various institutional providers the result will be greater efficiency and a more cost effective use of resources.¹⁸¹ It is often the

¹⁷⁷ Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007* Center for Law and Social Policy (August 22, 2007) at 8, available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

¹⁷⁸ *Id.* at 6-8 and 10.

¹⁷⁹ Robert Echols and Alan W. Houseman, Using the ABA Principles of a State System for the Delivery of Civil Legal Aid: Why Program Directors Should Care, at 16 (2007), available at <http://www.nlada.org/DMS/Documents/1176145694.58/MIE%20journal%20spring%2007%20aba%20civil%20principles-2.pdf>.

¹⁸⁰ *Id.* at 1 and 10.

¹⁸¹ In the winter 2005-2006 Child Welfare Watch, Andrew White asserts that the greater access to resources afforded to institutional providers saves money by shortening litigation time. Andrew White, *The State And City Must Invest*

case that lack of communication between organizations with similar goals leads to costly repetition of legal research. Institutional providers can circumvent this problem by serving as central databases for information about a given area of law.¹⁸²

The consistent and centralized approach to legal services inherent in institutional provision increases the instances of adequate representation for both plaintiffs and defendants in a variety of situations. Consistent representation for both parties is not only economical for the entities providing aid, but can also have a positive economic impact on the entire court.¹⁸³

Various types of support services including: paralegals, social service providers, training programs, investigators, and technological resources are necessary for effective delivery of legal aid. Support services help attorneys use their time and resources more efficiently, foster relationships with individual clients and those clients' communities, and understand and gain expertise in specific areas of law.

In *Civil Legal Aid in the United States: an Update for 2007* Alan Houseman cites the lack of sufficient support and training as major shortcomings in the civil legal aid system.¹⁸⁴ In the winter 2005-2006 *Child Welfare Watch: Litigation and Administrative Practice Course Handbook Series*, Andrew White, of the *Center for NYC Affairs*, notes that private attorneys are less likely to have the support provided by consistent assessment, specialized training, social

In a New System Of Institution-Based Representation For Parents, CHILD WELFARE WATCH 210 PLI/CRIM 77, 81 (Winter 2005-2006).

¹⁸² See, e.g., National Consumer Law Center, http://www.consumerlaw.org/issues/cocounseling/why_cocounsel.shtml (discussing the NCLC's research database originating from a long history of reviewing consumer law and policy).

¹⁸³ See Daniel S. Manning, Development of a Civil Legal Aid System: Issues for Consideration, available at http://www.justiceinitiative.org/db/resource2?res_id=102840 (noting evidence from divorce courts that cases where one party is unrepresented take much longer to resolve).

¹⁸⁴ Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007* Center for Law and Social Policy (August 22, 2007) at 8-9, available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

workers, investigators, or paralegals.¹⁸⁵ White blames predominant reliance on individual practitioners for the poor quality of mandated legal services to indigent parents in family court juvenile proceedings in New York.¹⁸⁶ Although these attorneys may be experienced and proficient generally, they may not be experienced in the required area of law.¹⁸⁷ Furthermore, private attorneys rarely have time or adequate connections with social services agencies to establish sufficient lawyer-client relationships or attend service plan review conferences and case planning meetings.¹⁸⁸ According to Mimi Laver, director of legal education at the American Bar Association's Center on Children and the Law, institutional providers allow for “a system of supervision and mentoring, [with] more seasoned attorneys who can help new ones, and people who already know the system and services available to [clients].”¹⁸⁹

In addition to having advantages in forming relationships with individual clients institutional providers are also in a superior position to have meaningful professional relationships with entire communities.¹⁹⁰ Institutional providers’ greater capacity to work with specific populations or communities results from goals and resources tailored to a given group and from the existence of greater incentives to work with community organizations and local agencies.¹⁹¹ For example, the Montana Legal Services Association (MLSA) engages in ongoing assessment of the legal needs of the state’s Native American population and has designed a

¹⁸⁵ Andrew White, *The State And City Must Invest In a New System Of Institution-Based Representation For Parents*, CHILD WELFARE WATCH 210 PLI/CRIM 77, 81 (Winter 2005-2006).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 98

¹⁹⁰ Daniel S. Manning, Development of a Civil Legal Aid System: Issues for Consideration, at 6, *available at* http://www.justiceinitiative.org/db/resource2?res_id=102840.

¹⁹¹ *Id.* at 7.

project in conjunction with Americorps specifically for dispute resolution in this population.¹⁹² In New York, the Bronx Defenders, New York City's first institutional provider of mandated legal services to indigent family court litigants, employs a holistic approach to community relations.¹⁹³ The Bronx Defenders' office regularly uses interaction with social workers and investigators as part of its advocacy arsenal and runs a debate center for local high school students.¹⁹⁴ The Legal Aid Society of New York City performs community outreach by periodically sending its attorneys to New York City area detention centers to inform unrepresented detainees about their legal rights.¹⁹⁵

Institutional organizations that focus on a specific area of law will likely have expertise in that area that surpasses that of a provider who takes a wide range of cases, or receives case assignments sporadically. For example, The National Consumer Law Center (NCLC) is a non-profit Non-Governmental Organization (NGO) which has been able to successfully address complex financial legal issues which disproportionately affect low income clients.¹⁹⁶ Success in the realm of complicated issues such as predatory lending and equity stripping require the coalescing of resources for recognition, relief, and prevention.¹⁹⁷ The same issues were successfully addressed in Minnesota, where various institutional legal aid organizations partnered together to employ a multi faceted approach of representation.¹⁹⁸ This coalition of

¹⁹² Montana Legal Services AmeriCorps VISTA Project, Changing The World, One Community At A Time, <http://www.lawhelp.org/Program/3332/AboutUs.cfm?pagename=AboutUs>.

¹⁹³ The Bronx Defenders, Advocacy Tools, http://www.bronxdefenders.org/?page=content¶m=advocacy_tools

¹⁹⁴ *Id.*

¹⁹⁵ Legal Aid Society of New York, Civil Practice, <http://www.legalaid.org/en/getinvolved/volunteerprobono/civilpractice.aspx>.

¹⁹⁶ National Consumer Law Center, http://www.consumerlaw.org/issues/cocounseling/examples_litigation.shtml.

¹⁹⁷ *Id.*

¹⁹⁸ ABA/ NLADA 2005 Equal Justice Conference, Pro Bono And Legal Services Partnering To Combat Predatory

organizations practiced community education and diversion to prevent low income homeowners from falling prey to illegal lending practices.¹⁹⁹

Individual attorneys may not always notice that complex legal issues such as predatory lending are developing into larger legal trends. For instance, solo attorneys may receive one or two cases related to predatory lending amidst a highly diverse caseload. It is far more likely that an institutional provider like the NCLC, set up specifically to deal with consumer advocacy, will recognize trends after observing repeated and related complaints.²⁰⁰ This single entry point of intake provides the basis for gathering data, and for legal research in cases, such as predatory lending, where there may be little case law because they are likely to be resolved by settlements.²⁰¹ Furthermore, this type of trend spotting lends itself to broad advocacy. Trend-spotting attorneys can use their expertise to attempt to develop laws tailored to solve related problems.²⁰²

In *Civil Legal Aid in the United State: an Update for 2007* Alan Houseman notes an increased use of various technologies in the delivery of civil legal aid.²⁰³ Among these technologies are websites and telephone hotlines that can provide clients with legal information

Foreclosure Practices, available at

http://www.nlada.org/Training/Train_Civil/Equal_Justice/2005_Materials/28_2005_Duhl_Outline.

¹⁹⁹ *Id.*

²⁰⁰ National Consumer Law Center, http://www.consumerlaw.org/issues/cocounseling/examples_litigation.shtml.

²⁰¹ See Cotchett, Pitry, and McCarthy, News, http://www.cpsmlaw.com/new_filings.shtml (discussing the infrequency with which cases involving credit collection practices go to trial).

²⁰² See, e.g., National Consumer Law Center,

http://www.consumerlaw.org/issues/cocounseling/why_cocounsel.shtml (discussing the NCLC's consumer law reform efforts).

²⁰³ Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007* Center for Law and Social Policy (August 22, 2007) at 2-3, available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

and referrals.²⁰⁴ In Massachusetts, the MLAC funds the Massachusetts Law Reform Institute (MLRI). The MLRI maintains a statewide legal service website and the Legal Advocacy and Resource Center (LARC), which provides a free legal advice and referral hotline.²⁰⁵ These technologies allow clients who would not otherwise be able to interact with attorneys because of schedule, proximity, or transportation restrictions to have access to at least some degree of legal services.

Without the funding power and oversight provided by a uniform entity such as the MLAC, the use of technology that is not kept current can generate poor quality legal services or other issues.²⁰⁶ The fact that an increasing number of states are employing a single statewide hotline number for referral services supports a movement towards uniformity in this area.²⁰⁷ Staff based organizations can maintain, evaluate, and improve these technologies. Use of current and unified legal technologies not only assists with representation, but also saves money by providing the public education and answers to questions that can avoid unnecessary litigation.

B. The increased use of institutional providers will assure uniform standards for the administration and assessment of the delivery of civil legal aid.

In an effort to address disparities and inconsistencies in the delivery of civil legal aid, the Montana legislature specifically used the *Ten Principles of a Public Defense Delivery System* (*Ten Principles*) when drafting the Montana Public Defender Act. These *Ten Principles*, which have served as general guidelines for reformation in the realm of public criminal defense, were

²⁰⁴ *Id.* at 3.

²⁰⁵ Massachusetts Legal Aid Directory, Massachusetts Legal Assistance Corporation (2003), available at http://www.masslegalservices.org/docs/LS_directory_03.pdf.

²⁰⁶ See *In Re Reynoso*, No. 04-17190 (9th Cir. February 27, 2007) (finding that the use of web-based bankruptcy preparation software constituted unauthorized practice of law).

²⁰⁷ Houseman *supra* note 203, at 4.

the basis for the ABA's *Principles of a State System for the Delivery of Civil Legal Aid (Civil Principles)*.²⁰⁸ Both the Montana Legislature's use of ABA guidelines and the ABA's continued revision of guidelines in the civil as well as criminal contexts demonstrate a movement towards increased uniformity in the delivery of legal aid. Guidelines that apply to a whole state system, rather than to individual smaller jurisdictions, add weight and authority to advocates' attempts to assess performance of the delivery of legal services. The use of statewide assessment standards eliminates any possibility that guidelines are created to fulfill a narrow set of interests belonging to program directors or other affected parties.²⁰⁹ This impartiality is increased by involving non-lawyer members of the community in the assessment and delivery process. For example, Montana requires that two non-lawyer indigent advocates be members of its eleven-member State Public Defender Commission.²¹⁰

When non-institutional providers are employed they may have motivations that are directly at odds with high quality representation. For example, contract attorneys accepting large case loads benefit from cutting costs, and therefore are likely to devote minimal time and research to each case.²¹¹ Because both contract attorneys and individual attorneys are often balancing appointed or pro bono legal services with a large case load, the former, which is usually less lucrative, will often be given less attention.²¹² Poor quality representation by court

²⁰⁸ Robert Echols and Alan W. Houseman, *Using the ABA Principles of a State System for the Delivery of Civil Legal Aid: Why Program Directors Should Care*, at 16 (2007), available at <http://www.nlada.org/DMS/Documents/1176145694.58/MIE%20journal%20spring%2007%20aba%20civil%20principles-2.pdf>.

²⁰⁹ *Id.*

²¹⁰ 2005 Mont. Laws 449 § 4.

²¹¹ Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 543 (2006).

²¹² *Id.*

appointed individual attorneys is well documented in the realm of indigent criminal defense.²¹³ There is evidence that judges often appoint counsel based on political biases.²¹⁴ It may even be the cases that there is a tendency for judges to appoint the least competent attorneys to represent indigent criminals.²¹⁵ Montana dealt with this problem by passing legislation that shifted the responsibility of appointing contract attorneys, in the jurisdictions where contract attorneys are still used, from judges to regional public defenders.²¹⁶

Although the *Civil Principles* are designed to apply to private attorneys as well as to institutional providers, staff attorney programs are better equipped for evaluation and accompanying supervision because they are composed of groups of attorneys trained in and focusing on related legal endeavors.²¹⁷ The consistency and existence of internal quality control procedures in institutional providers also add to the ease of auditing by the funding agency.²¹⁸ Both Montana and Massachusetts were able to institute consistent statewide measures to assess the quality of legal aid and the eligibility of potential clients because of the centrality of their oversight.²¹⁹

²¹³ See Stephen B. Bright, *Neither Equal Nor Just: The Rationing And Denial Of Legal Services To The Poor When Life And Liberty Are At Stake*, NEW YORK UNIVERSITY SCHOOL OF LAW ANNUAL SURVEY OF AMERICAN LAW Volume 1997, page 783 (1999), available at <http://www.schr.org/reports/docs/counselnyu.pdf>. (discussing poor representation in criminal cases where appointed attorneys representing low income clients may receive half of their usual compensation).

²¹⁴ *Id.* at 23. A study of homicide cases in Philadelphia revealed that judges there appointed attorneys to defend cases based on political connections, not on legal ability.

²¹⁵ *Id.* at 4.

²¹⁶ 2005 Mont. Laws 449 § 4(2).

²¹⁷ Daniel S. Manning, Development of a Civil Legal Aid System: Issues for Consideration, available at http://www.justiceinitiative.org/db/resource2?res_id=102840

²¹⁸ *Id.*

²¹⁹ S.B. 146, Montana Public Defender Act, 2005 Mont. Laws 449, (partially codified at MONT. CODE. ANN. §§ 47-1-101—47-1-216); Act of July 29, 2005, 2005 Mass. Legis. Serv. 54 (West) (providing counsel to indigent persons).

It is conceivable that the way that the substantive goals of the *Civil Principles*, including consistent oversight, ability to influence policy, and greater cultural competence show an inherent inclination towards the use of institutional providers. The second principle, calling for a full range of provision of services in all forms, requires “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.”²²⁰ The recognition and analysis of systemic issues depends largely on the existence of support services and on a single point of entry for low-income clients. The *Civil Principles* mandate that “[s]ervices are delivered in a culturally competent manner” is also better served by access to a broad support system.²²¹

C. Institutional Providers are more likely than individual attorneys to achieve far reaching social policy goals.

In *Civil Legal Aid in the United State: an Update for 2007* Alan Houseman cites the lack of organizations able to provide the full range of services, including those restricted by the LSC, and a lack of advocacy, in his list of deficiencies in the current civil legal aid system.²²² Institutional providers can influence laws and help to achieve social policy goals that are favorable to low income people.²²³ The recent Congressionally imposed LSC restrictions aim to prevent legal aid lawyers from handling systemic cases that influence policy by prohibiting them

²²⁰ American Bar Association, Report to the House of Delegates, Principles of a State System for the Delivery of Civil Legal Aid (112B), Aug. 7, 2006, available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112B.pdf>.

²²¹ *Id.*

²²² Allan W. Houseman *Civil Legal Aid in the United States: an Update for 2007* Center for Law and Social Policy (August 22, 2007) at 8, available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf.

²²³ Daniel S. Manning, Development of a Civil Legal Aid System: Issues for Consideration, at 3, available at http://www.justiceinitiative.org/db/resource2?res_id=102840.

from taking class action lawsuits or engaging in legislative lobbying.²²⁴ However, staff based organizations that do not receive LSC funding, or that engage in impact litigation with non-LSC funding, are in a better position than private attorneys to impact policy. For example, The NCLC, because of its concentrated expertise in consumer services, credit, bankruptcy, and preservation of home ownership, has been able to influence financing practices nationwide through class action suits.²²⁵ The issue of recognizing trends related to these complex legal issues is also necessary for the formation of class action suits and the collection of relevant data for legislative lobbying.

V. Conclusion

As states' legal aid systems recover from the LSC funding cuts of the 1990s, many states are experimenting with varied and novel methods, structures, and assessment tools for use in legal aid delivery. A growing number of states are establishing access to justice commissions and communities, the natural result of which is increased centrality in the realm of legal aid delivery. Although these reform efforts often originate to address criminal legal aid, they are increasingly affecting the delivery of civil legal aid. As state access to justice communities in some states address the delivery of civil legal aid many of them stress reliance on institutional providers. This emphasis on the use of institutional providers allows these jurisdictions to take advantage of consolidated resources, both monetary and support related. This emphasis also creates a more predictable climate for applying uniform assessment standards. As a result of increased uniformity and access to a broader range of resources, institutional providers are in a

²²⁴ *Id.* at 8.

²²⁵ National Consumer Law Center, http://www.consumerlaw.org/issues/cocounseling/examples_litigation.shtml.

better position than independent practitioners to observe legal trends affecting their clients, employ a broader range of advocacy tools, and use the limited resources afforded to civil legal aid in the most efficient manner.