

DELAWARE ACCESS TO JUSTICE COMMISSION

REPORT OF THE SUBCOMMITTEE ON THE EFFICIENT DELIVERY AND ADEQUATE FUNDING OF LEGAL SERVICES TO THE POOR

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Suzanne Grant (Co-Chair)
Donald J. Puglisi (Co-Chair), Puglisi & Associates
Rick Alexander, Esq., Morris Nichols Arsht & Tunnell LLP
Richard Heffron, Delaware State Chamber of Commerce
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Spencer Price, Office of the Controller General

Reporters

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Nathan Emeritz, Esq., Morris Nichols Arsht & Tunnell LLP
Katherine Neikirk, Esq., Supreme Court of Delaware
Wali Rushdan, II, Esq., Fox Rothschild LLP

Lorelly Solano, Research Assistant

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EXECUTIVE SUMMARY

The justice gap is the difference between the level of legal assistance available and the level that is necessary to meet the needs of low-income people. Based on survey data and Delaware's 2015 population, over 140,000 Delawareans are eligible for free legal services under a 125% poverty level standard. However, legal aid organizations have the resources to serve the civil legal needs of only one-eighth of Delaware's low-income population, leaving a large justice gap. Those not able to get legal counsel must represent themselves, and an unrepresented party is at a distinct disadvantage, regardless of the merits of his or her case.

The Delaware Access to Justice Commission (the "Commission") was formed in 2014. It established three subcommittees to address civil law issues that affect Delawareans. This is the report of the Subcommittee on the Efficient Delivery and Adequate Funding of Legal Services to the Poor. This Subcommittee was charged with: (1) analyzing the efficiency of the delivery of legal services by Delaware organizations that provide such services to low-income people; (2) suggesting areas where the efficiency might be improved; (3) determining whether there would be funding gaps even if existing resources were used in the most efficient manner; and (4) identifying and recommending sources of increased funding for Delaware's legal aid organizations.

Three non-profit organizations—Community Legal Aid Society, Inc. ("CLASI"), Delaware Volunteer Legal Services ("DVLS"), and Legal Services Corporation of Delaware ("LSCD")—are primarily responsible for the delivery of civil legal services to low-income Delawareans. Given their financial and personnel resources, these organizations are very effective in providing legal services to low-income people. CLASI, LSCD, and DVLS have a high degree of cooperation and coordination. Our analysis indicates that any consolidation amongst the three legal services providers will not result in systemic cost savings. On the other hand, some operational efficiencies may be obtained by having certain non-legal services provided by a common party. For example, it may be possible to derive operational efficiencies through common payroll, accounting, technology support, and grant writers and fundraising staff. We recognize and support the efforts of the three organizations to bring joint-fundraising activities under the umbrella of the Combined Campaign for Justice ("CCJ"). We also recommend that consideration be given to selecting the best-in-class

portal/triage system and best case management system for use across all three service providers. This would allow for economies of scale in system acquisition and maintenance.

Accessing the legal system can be a daunting task. Facilitating access into the Delaware legal services system is in need of much improvement. The current primary portal is telephone based and has limited availability. In today's world, this system should be operating 24/7 and be available online as well as by telephone. While improvement of the current system is under review, the pace of that consideration and technology implementation needs to be greatly accelerated. In addition, the Delaware Courts must improve court access for low-income Delawareans who are self-represented. They should establish internet portals and stand-alone kiosks to facilitate litigant access to court services and provide real-time assistance for navigating the litigation process.

Even with improved efficiencies to the legal aid system, the justice gap will remain large. Interest on lawyer trust accounts ("IOLTA") will continue to be an important source of funding for legal aid organizations. However, IOLTA funding is depressed due to record low interest rates and, due to variability in interest rates, is a volatile source of funding. Delaware's legislative support for legal aid is above the national average. While advocacy should be made for increased legislative funding, the State's budgetary outlook clouds the prospects for material increases in such support.

Delaware law firms and individual members of the Delaware bar, through their contributions to the CCJ, are among the nation's leaders in providing funding to a state's legal aid organizations. With the addition of a full-time development director, the CCJ should be able to increase its funding support to legal aid organizations by increasing the percentage of Delaware bar members who contribute to the campaign, improving the retention rate of those who currently contribute, and increasing the average contribution made by contributing members.

We believe there are a number of untapped sources of funding to support Delaware's legal aid organizations. First, *pro hac vice* fees are a significant source of legal aid funding in other states. An increase in those fees in Delaware could be dedicated to legal aid organization funding. Second, class action residual ("*cy pres*") funds are allocated to legal aid

organizations in over half the states, with a number of states requiring as much as 50% of *cy pres* funds going to legal aid organizations in those states. We strongly recommend that a similar allocation of *cy pres* balances to legal organizations be established in Delaware by legislative action. Thirdly, and very importantly, foundation and other private sector support for funding legal aid organizations must be actively and aggressively pursued. Legal aid to low-income people is a societal issue that requires support beyond members of the legal community. We endorse the efforts of DVLS, LSCD, CLASI, and the CCJ, with the support of the Longwood Foundation, to create the position of Chief Development Officer for the CCJ. This position will allow for the focused and efficient seeking of grants and foundation and other private sector funds that can be used across the three primary legal services organizations.

Lastly, to improve the efficiency of and increase funding available to organizations that provide legal aid to low-income Delawareans, coordinated and effective leadership will be required from the legal aid organizations themselves, the Courts, the Delaware bar, and the ATJ Commission.

I. INTRODUCTION

“Equal justice under law is not merely a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal in our society...it is fundamental that justice should be the same, in substance and availability, without regard to economic status.” U.S. Supreme Court Justice Lewis Powell, Jr.

“The majority of Americans who come to court do so without a lawyer, left by their economic circumstances to face life-altering events—such as losing their home, the custody of their children, or even the privilege to reside in the United States—without legal assistance. More than 50 million Americans technically qualify for federally funded legal assistance, but over half of those who actually seek such assistance are turned away because available funding is so low. Similarly, for those living just above the qualifying line, even basic legal needs are beyond reach. There continues to be a substantial “justice gap” between truly meeting the needs of low- and moderate-income people and the resources available for civil legal services.” (U.S. Department of Justice, 2016).

A. The Justice Gap

A comparison of the two quotes shown above suggests that there is a clear divergence between the ideal and the real in the American legal justice system. Empirical and anecdotal evidence supports the premise that there is a justice gap in America. The justice gap is the difference between the level of legal assistance available and the level that is necessary to meet the needs of low-income people. Consider the following:

- Less than one in five legal problems experienced by low-income people is addressed with the assistance of a private attorney or a legal aid lawyer.
- Due to lack of funds, one federally-supported legal aid organization, with a nationwide presence, provides services to less than half the people who seek its help.

- National and state studies have consistently found that approximately 80% of the legal needs of low-income people go unmet.

As noted in “Call to Action: Achieving Civil Justice for All, Recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee” (2016) (the “Call to Action”), litigants with meritorious claims and defenses often fail to achieve fair legal outcomes because it is beyond their financial means to litigate. That report stated, “The idealized picture of the adversarial system in which both parties are represented by competent attorneys who can assess all legitimate claims and defenses is, more often than not, an illusion.”

B. The Importance of Access to Legal Assistance

Closing the justice gap is more than a philosophical ideal. The legal issues that people face can have life altering implications. A 2014 American Bar Association-sponsored study by Rebecca L. Sandefur (“Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study”) found: (1) people reported that almost half of the civil justice situations they experienced resulted in significant negative consequences such as feelings of fear, a loss of income or confidence, damage to physical or mental health, or verbal or physical violence or threats of violence; (2) only 20% of the people reported seeking legal aid from a third party outside their immediate social circle due to cost or because they did not understand their situations to be legal; and (3) legal situations most commonly reported involved livelihood and financial stability and rental housing, such as eviction or problems with housing conditions. Low-income people were far more likely than middle- or high-income people to incur at least one civil justice situation annually. People in low-income households are more likely than others to experience negative consequences from civil justice situations, including adverse impacts on health, confidence, and income. The provision of legal assistance lowers rates of domestic violence. Use of an attorney increases the probability for a person to maintain child custody, for potential child support, and for alimony. It reduces the likelihood of eviction, loss of government benefits, and asset repossession. There is substantial evidence that the outcomes for unrepresented litigants are often less favorable than those for represented litigants.

There are clear societal benefits from the investment in an effective legal aid system. Legal services for victims reduce costs due to medical care for physical injuries and mental health care, lost productivity, and lifetime earnings. Effective legal assistance to victims can result in savings to insurance companies, hospitals,

law enforcement and the criminal justice system, domestic violence shelters, and homelessness systems. A Massachusetts study found that for every dollar spent representing families and individuals in housing court, Massachusetts would save \$2.69 in other services such as emergency shelter, health care, foster care, and law enforcement. A New York City study found that it costs \$2,500 to provide a lawyer for a family facing eviction, or \$45,000 to shelter that homeless family.

As the “Call to Action” noted, “Navigating civil courts, as they operate now, can be daunting. Those who enter the system confront a maze-like process that costs too much and takes too long.” Finding ways to enable low-income people to more effectively navigate this maze is one of the goals of the access to justice movement.

C. The Delaware Access to Justice Commission

As noted by the U.S. Department of Justice, the mission of access to justice (“ATJ”) initiatives is to help the justice system efficiently deliver outcomes that are fair and accessible to all, regardless of wealth and status. In the view of the American Bar Association (the “ABA”), ATJ commissions try to expand access to civil justice for low-income and other disadvantaged people by identifying legal needs, developing strategies to meet them, and evaluating programs. Key issues addressed by ATJ commissions include: funding for civil legal aid; civil legal aid planning, delivery, and support; right to counsel in civil legal matters; self-representation; pro bono and public service; limited scope representation; language access; and lawyer-loan repayment programs.

There are at least 37 registered ATJ commissions in the United States. The Delaware ATJ Commission was established on December 15, 2014, by order of the Supreme Court of the State of Delaware. The Delaware ATJ Commission established three subcommittees to address civil law issues that affect Delawareans: (1) the Subcommittee on Judicial Branch Coordination in Helping Pro Se Litigants; (2) the Subcommittee on Promoting Greater Private Sector Representation of Underserved Litigants; and (3) the Subcommittee on the Efficient Delivery and Adequate Funding of Legal Services to the Poor. This report presents the findings and recommendations of the Subcommittee on the Efficient Delivery and Adequate Funding of Legal Services to the Poor.

D. This Subcommittee’s Charge

The scope of this Subcommittee’s charge is to:

- Analyze the efficiency of the delivery of legal services by Delaware organizations that provide such services to low-income people;
- Suggest areas where that efficiency might be improved;
- Determine whether there would be funding gaps even if existing resources were used in the most efficient manner; and
- Identify and recommend sources of increased funding for Delaware’s legal aid organizations.

In the sections that follow, this report first examines the justice gap in Delaware, followed by an overview of the funding of legal aid to low-income Delawareans. The report then discusses the major providers of legal aid to low-income people in Delaware. The efficiency of the delivery of legal aid services in Delaware is evaluated, with recommendations made for improvement. Finally, suggestions for increasing funding to legal aid organizations in Delaware are made.

II. THE JUSTICE GAP IN DELAWARE

A. Poverty in Delaware

In 2015, Delaware’s population was approximately 946,000 people. An estimated 11.7% of that population—over 110,000 people—lives below the federal poverty level. This percentage has been relatively stable for a number of years. The federal poverty level is a function of both income level and number of persons living in a household. As a point of reference, based on 2016 federal financial eligibility guidelines, the federal poverty level for a three-member household is \$20,160. That is an increase of \$370 over the 2014 federal poverty level of \$19,790 for a family of two adults and one child in the 48 contiguous states and the District of Columbia.

B. Poverty, Justice Gap, and Access to Justice in Delaware

The poverty level is important in the context of the justice gap since the eligibility for free civil legal assistance is largely a function of a person or family’s income relative to a specified multiple of the federal poverty level. That is, access to free legal assistance through legal aid organizations is, in most cases, limited to people whose income is less than 125% of the federal poverty level. For 2016, that would be \$25,200 for a three-person household. For certain types of legal

situations, the limit can be 200% or 300% of the poverty level. Based on the extension of various survey findings to Delaware's 2015 population, over 140,000 Delawareans are eligible for free legal services under the 125% poverty level standard and over 260,000 Delawareans would be eligible for free legal services under the 200% poverty level standard.¹

Of course, not all who qualify for free legal aid receive it. According to the Delaware Bar Foundation ("DBF"), legal aid organizations are able to serve the civil legal needs of only 1/8th of Delaware's low-income population, leaving a very large justice gap. That gap results in people either not availing themselves to the courts or representing themselves in court. There is considerable evidence of pro se or self-representation. Data for FY 2014 from Delaware's Court of Common Pleas shows that defendants were pro se in 99% of consumer debt cases, 92% of debt action cases, and 66% of breach of contract cases. Self-representation is also rife in Delaware's Family Court where, in FY 2014, litigants represented themselves in 79% of custody cases, 72% of divorce cases, 47% of guardianship cases, 75% of protection from abuse ("PFA") cases, 88% of PFA contempt cases, and 97% of visitation cases.

Self-representation is asymmetric between defendants and plaintiffs. Based on 2014 data from Delaware's Court of Common Pleas, plaintiffs have attorneys in 85% of the cases while defendants have attorneys in only 11% of the cases. This asymmetry creates an imbalance of power between the litigants. The court itself is limited in its ability to introduce some degree of countervailing power to enhance the fairness of the process. Thus, the unrepresented party may be at a distinctive disadvantage, regardless of the underlying merits of his or her case.

III. FUNDING LEGAL AID IN DELAWARE

A. Delaware's Expenditure on Legal Aid

As a state, Delaware is rather generous compared to other states in the overall support given to legal aid to low-income people. Based on an analysis done in 2012, Delaware's per capita low-income person expenditure on legal aid

¹ Although the class of moderate income people is as large as the number of people in poverty, they are not qualified to receive help from traditional programs for legal assistance. People who do not meet the government definition of poor but who lack the resources to afford private legal services are called the "legally indigent."

was in the top quintile in the United States. Delaware's expenditure per capita was \$51.39.

Delaware's support for legal aid to low-income people exceeds the national average in most categories of funding source. In 2014, for example, Delaware's legal aid funding exceeded the national average in the categories of support from state legislative funding, Interest on Lawyer Trust Accounts ("IOLTA"), and the legal community.

B. The DBF and the Combined Campaign for Justice

Two Delaware organizations have special but limited positions in the legal aid funding process in Delaware: the Delaware Bar Foundation ("DBF") and the Combined Campaign for Justice ("CCJ"). Each will be discussed in turn.

DBF administers Delaware's IOLTA program, which is a major source of funding for legal aid in Delaware. IOLTA refers to interest accruing on lawyers' aggregated escrow accounts that contain client deposits which are small in amount or held for a short period of time. Interest collected on participating accounts is transferred to the DBF and distributed in the form of grants that are intended to promote and improve legal services to the poor. DBF evaluates grant applications from legal aid organizations and makes funding recommendations to the Delaware Supreme Court, which approves the funding. In June 2010, the Delaware Supreme Court entered an order making participation in the IOLTA program mandatory and requiring that IOLTA funds be held in financial institutions approved by the DBF. Those institutions must provide interest-rate comparability to IOLTA accounts, which assures that those accounts receive a competitive interest rate. In FY 2014, DBF awarded grants totaling \$650,000.

DBF also recommends the allocation of other funds to Delaware's legal aid organizations. For example, the DBF allocates funds received from the State through a line item in the State budget, which for FY 2013-2017 has been \$600,000 per year. The DBF also recommended the allocation of funds from a number of legal settlements that involved the State and private-sector parties.

The Combined Campaign for Justice is a coordinated effort by the Delaware State Bar Association and Delaware's legal aid organizations to raise contributions from members of the Delaware bar. The CCJ has proven to be very successful, with Delaware law firms and individual members of the Delaware bar being generous in their annual giving. In fact, through the CCJ, Delaware law firms and

individual members of the Delaware bar have the highest per capita giving by attorneys amongst all the states in the nation. Total annual giving has approximated \$1 million in recent years.

IV. DELAWARE'S LEGAL AID ORGANIZATIONS

The legal aid network in Delaware consists of the Delaware courts (the "Courts"), the Delaware State Bar Association ("DSBA"), the DBF, Legal Help Link, and three non-profit legal service organizations: Community Legal Aid Society, Inc. ("CLASI"); Legal Services Corporation of Delaware ("LSCD"); and Delaware Volunteer Legal Services, Inc. ("DVLS").

General legal information is provided online by the Courts through the Delaware Courts Online Citizen Help Center (the "Help Center"). The Help Center has links to Delaware's various courts, where additional information particular to each court can be obtained. The Help Center also provides information on access to legal representation through the legal aid organizations and guidance for self-represented litigants.

The Legal Help Link ("LHL") is a collaborative effort among DVLS, CLASI, and LSCD, as well as the DSBA and the Delaware Law School ("DLS") at Widener University. DVLS manages and runs the day-to-day operations of the LHL, while DLS provides human resources and facilities. LHL is designed to enable prospective clients determine if they are eligible for client services. Eligible callers are transferred to the applicable organization. If none of those organizations handles the type of case at issue, or if the caller is not income-eligible, LHL staff will complete a Lawyer Referral Service form for the DSBA. Callers are also referred to various social service organizations for non-legal issues. Calls for the Senior Legal Hotline also come through the LHL.

LHL receives between 30,000 and 40,000 calls a year. Upon eligibility, low-income Delawareans are referred to DVLS, LSCD, or CLASI. Due to budget constraints, LHL has been operating only 5.5 hours a day, four days a week. DVLS is exploring the use of technological improvements for LHL, particularly the use of online screening. However, an advantage of LHL is the availability of a client talking with a live person. Thus, any technological improvements will most likely be a supplement to, rather than a replacement of, LHL.

LHL receives funding from the IOLTA program. For FY 2017, DVLS has requested an \$88,000 grant from DBF for the LHL program.

A. CLASI

CLASI is a private, non-profit law firm. It provides legal services in each of Delaware's three counties to low-income clients who have housing, public benefits, consumer, immigration, and family law problems. It also provides legal assistance to the elderly, disabled, and victims of housing discrimination.

CLASI has a 37-person staff, including 15 attorneys and 12 paralegals. Twenty-seven of the 37 staff members are based in New Castle County.

CLASI's budget for 2017 is approximately \$4.0 million, with 81% of that budget for personnel costs. CLASI's funding comes from a variety of sources, including IOLTA, Federal and State grants, and private contributions, including support from the CCJ.

In 2015, CLASI handled 2,729 cases and presented 103 legal education workshops to approximately 4,300 community members. Also in 2015, CLASI attorneys and paralegals assisted 159 clients, affecting at least 474 household members, in housing matters, including evictions, access to housing programs, and housing quality issues. In 2015, CLASI prevented eviction for 50 households, keeping 157 people, including 88 children, from becoming homeless.

In FY 2015, the overall success rate after trial for victims who filed for Protection from Abuse Orders ("PFAs") was 35%. CLASI represented 15% of the victims who filed for PFAs and those clients were successful in 85% of their trials.

CLASI in FY 2015 also provided advice and/or representation to 305 victims of domestic violence. Victims represented by CLASI obtained 114 PFAs. It represented 470 households headed by single women with children, representing 36% of CLASI's total caseload. It assisted 210 clients with public benefits problems, providing help to 295 children living in client households.

In 2015, CLASI assisted 108 clients with Medicaid and Medicare problems, helping 288 household members. It also represented 528 elderly with their legal problems.

B. LSCD

LSCD is a private, non-profit corporation that was established to provide free legal services to poor and low-income Delawareans. It receives a grant from Legal Services Corporation by way of an appropriation from the U.S. Congress. LSCD was created to receive federal funding that, because of congressional restrictions, would not otherwise be available to other legal aid organizations.

Priority legal needs addressed by LSCD involve problems that significantly affect a person's income or assets, health, housing, or safety, education, family integrity, or ability to live independently. The types of cases handled by LSCD include: bankruptcy petitions; consumer finance problems, e.g., repossessions, deceptive trade practices, fraud, debt collection activities, and fair credit reporting actions; housing problems, e.g., eviction, foreclosure, unsafe conditions, code violations, and utility cut-offs; and unemployment benefit programs.

The model used by LSCD for the delivery of legal services to low-income Delawareans is a staff attorney model, with the use of paralegal and other support staff, and the use of Private Attorney Involvement—a panel of private attorneys who have agreed to provide services to LSCD at reduced rates. LSCD has 18 staff members, including 9 attorneys, with 14.5 of the staff in Wilmington and the remainder in Dover.

In 2015, LSCD provided legal services in over 1,420 cases, helping over 3,850 people. Thirty-five percent of those cases involved consumer/finance issues and 61% housing issues, with the bulk of those cases being landlord/tenant matters or mortgage foreclosure.

LSCD is funded by the federal Legal Services Corporation, IOLTA, the CCJ, and various other sources. Its budget for FY 2017 is approximately \$1.6 million, with 47% of that amount coming from Legal Services Corporation and 26% from IOLTA. Eighty-two percent of LSCD's expenditures are personnel-related.

C. DVLS

DVLS is dedicated to providing quality pro bono legal services to low-income Delawareans. DVLS recruits, trains, and mentors attorneys who are willing to serve as pro bono counsel for indigent individuals with meritorious legal

problems. It has approximately 700 pro bono volunteers. In addition, as noted above, DVLS also manages the LHL.

DVLS provides assistance in the following types of cases: PFA and other family law matters for victims of domestic violence; private housing matters; custody, visitation, and divorce cases; and estate planning. It does not handle consumer law issues. Legal assistance in family law cases involving domestic violence is the area of greatest need for DVLS clients.

In CY 2015, 3,396 individuals received representation, advice, or referral through DVLS programs and LHL. In that same time period, pro bono attorneys closed 538 cases and provided more than 2,300 hours of service. DVLS staff attorneys closed 219 cases and logged over 1,000 hours of services. If a billing rate of a modest \$250 per hour were applied to those hours, the value of services rendered would be over \$800,000.

DVLS's budget for FY 2017 is approximately \$756,000, with personnel costs representing over 92% of the overall budget. It has requested that over 45% of the overall budget be funded by the IOLTA program. In addition to IOLTA, DVLS receives funding from United Way, CCJ, State grant-in-aid, other grants, and private donations.

V. EFFICIENCY OF DELIVERY OF LEGAL AID IN DELAWARE

A. Evidence on the Efficiency of Delivery of Legal Aid

Evidence on whether the delivery of legal services to low-income Delawareans is efficient is largely anecdotal. There appear to be no quantitative metrics for measuring and evaluating such efficiencies.² That being said, the following observations, based on interviews with numerous parties involved in the Delaware legal system, are worth note.

First, CLASI, LSCD, and DVLS are in frequent communication with one another and coordinate their operations. This coordination results in limited redundancies in the providing of legal services to low-income Delawareans. The three organizations act in a manner that supports cooperation rather than

² The State of Washington has developed Performance Standards for Legal Aid. Those standards could be adapted to the needs of legal aid organizations for self-assessment and peer review. However, the results from that instrument would be predominantly qualitative and subjective.

competition, whether it is for clients or funding. Frequent consultations among the three service providers facilitate the setting of service priorities, intake and screening guidance, and referral procedures.

Second, at least some funding sources are unique to a given legal service provider. For example, only LSCD is eligible to receive federal funds from the Legal Services Corporation. That funding limits the types of legal services LSCD provides and, thus, limits other sources of funding to LSCD. However, the other legal services organizations are able to pursue some of the funding that is precluded to LSCD. Thus, it does not appear that consolidation amongst any of the legal services providers would result in systemic cost savings.

Third, there is a portfolio effect by having three more-or-less independent legal service providers. That is, the alternate funding sources that are, at least in part, unique to the different organizations should smooth the provision of legal services to the poor over time. When a particular organization has reduced or eliminated funding for a particular program, the other organizations may be able to pick up the slack through their own funding sources or human resources.

Notwithstanding the above, this Subcommittee has identified areas where the efficiency of the overall system of delivery of legal services to low-income Delawareans can be improved. Those recommendations are presented in the next section of this report.

B. Recommendations for Efficiency Improvement

1. Operational Efficiencies

Personnel costs represent the vast majority of the expenses of the legal aid providers. Based on the discussion above, this Subcommittee does not identify any consolidation of the legal aid organizations that would result in personnel cost savings. However, all three organizations stressed the need for additional non-legal staff support that, in turn, would allow skilled attorneys to focus on the delivery of legal services and increase the impact of legal aid funding. It may be possible to consolidate some administrative or back-office services. For example, it may be feasible to have common payroll, accounting, and technology support across the primary legal service providers.³ While the three legal services

³ We have not investigated whether restrictions imposed on LSCD funding might limit how much pooling of services can be done.

organizations do some joint grant writing, grant writers and fundraising staff common to the three organizations is also worthy of consideration, as is the recruitment of volunteers to support these areas.⁴ The Subcommittee is aware that the three organizations have obtained a grant for the CCJ to hire a development director that would seek private-sector funding for all three service providers. That is a very worthwhile endeavor and the concept should be considered for other activities, as well.

The Subcommittee notes that DBF has a funds allocation role while the CCJ has a funds raising role. There would be little if any cost savings from merging of their activities. The on-going role of the ATJ Commission is unclear. However, if the ATJ Commission is going to adopt on-going administrative duties, it could then consider whether those duties should incorporate the roles now played by the DBF and CCJ. Alternatively, the ATJ Commission could further study the roles played by the DBF and CCJ and make recommendations of other activities these organizations might provide.

The Subcommittee sees some inefficiencies in the technology used by the three legal services organizations. If there is one best portal/triage system or one best case management system, it should be used across all three service providers. This would allow for economies of scale in system acquisition as well as in system maintenance. We recognize, however, that these organizational changes should be led and adopted on a voluntary basis through coordination among the management teams at the legal aid organizations. We also note that the DBF has been investigating alternative portal systems and plans in the relatively near future to make its recommendations to the legal aid organizations.

2. Legal Access Efficiencies

The ability of low-income people to receive needed legal services must not be hampered by difficulty in accessing those services. As noted above, LHL is the primary portal for entry and triage into the Delaware legal aid system. It operates solely by telephone on a limited availability and relies primarily on a law student workforce, which is becoming increasingly less available. While LHL has the advantage of having a live-person with whom to talk, the LHL provides legal system access that is woefully inadequate in a world that operates on a 24/7 basis

⁴ Many organizations, such as the University of Delaware, have full-time grant writers and graduate students in need of professional experience who could be tapped as sources of volunteer grant-writing talent.

and increasing use of the internet and mobile phones. While consideration is being given to online access to the legal system, the pace of that consideration and technology implementation needs to be accelerated. There are systems utilized in other states that provide for online inquiry concerning legal services eligibility and direction to the appropriate service organization. Such a system should be a priority for implementation in Delaware.

The Courts must improve court access by low-income Delawareans, particularly those who are self-represented. As noted in the “Call to Action”, courts must simplify court-litigant interface and screen-out technical complexities to the greatest extent possible. Courts should establish internet portals and stand-alone kiosks to facilitate litigant access to court services. Courts should provide real-time assistance for navigating the litigation process. The growing prevalence of smart phones enables participants to join audio or video conferences from any location. To the extent possible, courts should expand the use of telephonic communications for civil case conferences, appearances, and other straightforward case events. These comments were made by the “Call to Action” across all courts and the extent to which they are applicable to Delaware must be evaluated and responded to.

3. Legal Services Efficiencies

This Subcommittee agrees that representation by an attorney is to be preferred in most situations to self-representation. However, we are also confident that, regardless of the incremental funds that can be allocated to the legal aid organizations or however successful Delaware will be in attracting more pro bono lawyers, there will remain a substantial justice gap, thus failing to assist a substantial number of income-eligible Delawareans. Additional support must be provided to self-represented litigants. We recognize that there is another subcommittee that is examining the matter of pro se litigants. We will largely defer to their analysis and recommendations on this matter, but not before noting the following.

First, consideration should be given to expanding the pool of people who are qualified to provide legal and quasi-legal services to low-income Delawareans. That pool could include lawyers who have been licensed in other states but now reside in Delaware and who are not practicing law here. That pool could also include licensed legal assistants and navigators, such as are found in Washington and in New York. These people would **not** provide legal advice or representation. Rather they would help low-income people in need of legal services better navigate

what is for many a totally bewildering legal system. It may be desirable to limit this assistance to specific types of legal issues. In a somewhat similar vein, limited scope practice, or the unbundling of legal services, may provide for attorneys who want to design their practices to satisfy discrete legal issues rather than full representation.⁵

Second, efforts to make low-income people aware of potentially available legal services should continue. Presentations to social services organizations and different forms of advertising, e.g., social media, printed materials, and radio and television, will enable people to be aware of legal services and where to turn for assistance.

Third, consideration should be given to an expansion of the right of legal assistance to a broader array of legal issues confronting Delawareans, in general, and low-income Delawareans, in particular. In 2015, the Civil Justice Strategies Task Force (“CJSTF”) of the State Bar of California recommended that the State Bar support efforts to secure universal representation, starting with the following four areas: (1) landlord/tenant; (2) family; (3) domestic violence; and (4) immigration. As the CJSTF report noted, there is a nationwide movement underway to guarantee a right to counsel in certain civil legal cases.⁶ The right to counsel is modeled after the U.S. Supreme Court case of *Gideon v. Wainwright*, which guaranteed a right to counsel in criminal cases and, thus, is sometimes called “Civil Gideon.”

The CJSTF report also noted that the ABA unanimously adopted a resolution supporting the right to counsel in cases involving basic human needs. The resolution was co-sponsored by 13 state bar associations and later its goals were adopted by six additional states.

Specification of the areas of law to which Civil Gideon should apply in Delaware is beyond the scope of this report. But determination by the ATJ Commission of those areas of law and the criteria that litigants would have to meet

⁵ We note that the legal aid organizations support the idea of expanding opportunities for those able to provide legal services. In particular, they suggest that one concrete way to do this is by making some changes to expedite the Supreme Court Rule 55 provisional admission process for law school graduates and lawyers admitted elsewhere to practice under supervision in a limited fashion for CLASI, DLS and LSCD.

⁶As reported in The New York Times on September 26, 2016, the New York City Council in September 2016 held a hearing on a bill that would make New York City the first jurisdiction in the country to guarantee an attorney for any low-income tenants facing eviction.

to qualify for assistance is highly recommended. The provision of legal counsel in cases subject to Civil Gideon would be funded by the State through the Administrative Office of the Courts. The Courts could then engage attorneys by either contract or employment. The broader the types of cases covered by Civil Gideon, the greater would be the impact on reducing the justice gap in Delaware.

V. ADEQUATE FUNDING FOR LEGAL AID IN DELAWARE

It is clear to this Subcommittee that regardless of the improvement in the efficiency of the delivery of legal services to low-income Delawareans, a significant justice gap will remain. The total FY 2017 budget across LHL, DVLS, CLASI, and LSCD is approximately \$6.44 million, with the bulk of that money going to personnel costs, particularly the cost of attorneys. More attorneys are needed to help close the justice gap and the way to retain more lawyers is a combination of additional pro bono counsel and the employment of additional attorneys by the three legal aid organizations. In this section, we first review and make recommendations regarding current funding sources for legal aid in Delaware. We then review and make recommendations regarding funding sources not currently used in Delaware but that are used in other states. The goals are to both increase the level of funding and the stability or smoothing of funding. The latter is very important since it facilitates planning and support for particular categories of legal issues faced by low-income Delawareans. Finally, we make recommendations pertaining to organizing efforts to increase funding for legal aid in Delaware.

A. Current Sources for Funding of Legal Aid in Delaware

The primary current sources of funding for legal aid to low-income Delawareans include IOLTA, State legislative funding, other public funding, and the CCJ.

1. IOLTA Funding

Delaware has a very successful IOLTA program, especially in comparison to other states. In 2014, the Delaware IOLTA program provided almost \$8 of funding per poor person in Delaware. That figure is well above the national average.

The IOLTA program should be continued, as should efforts to assure that investible fund balances and interest rates earned are maximized. But the IOLTA

program is not without its problems. First, the amount of interest available for allocation will depend on the level of investible balances. Those balances fluctuate over time. Second, and more of a factor in recent years, the funds available for allocation to the legal aid organizations are dependent on the level of interest rates earned on investible fund balances. Record low interest rates in the United States are exacerbating IOLTA earnings. While interest rates may rise in the future, there is no assurance as to when that will occur or the levels to which interest rates may rise. Thus, IOLTA will always be a volatile source of funding for legal aid organizations.

2. State Legislative Funding

Delaware's State annual legislative-based funding for legal aid organizations exceeds the national average on a per poor-person basis. As noted earlier, Delaware has provided in its operating budget a \$600,000 annual allocation to legal aid organizations for each year FY 2013 through FY 2017. In addition, the State has provided additional funding through Grants-in-Aid, e.g., CLASI received \$200,000 in FY 2017. Regarding the funding provided in the operating budget, the allocation is a "one-time contingency" and must be formally renewed by the legislature. The longstanding appropriation for Delaware's legal aid service providers was eliminated in the FY 2018 Budget Act, but other funding was earmarked for FY 2018 only. Future appropriations are uncertain.

In addition to the operating budget appropriation, the State has provided funding through the Grants-in-Aid bill. Unfortunately, there were 20% across the board budget cuts in the FY 2018 Grants-in-Aid bill; CLASI's funding was cut from \$200,000 in FY 2017 to \$160,000 in FY 2018. Grants-in-Aid funding was also reduced for DVLS, from \$82,112 in FY 2017 to \$65,689 in FY 2018.

There is no doubt, however, that a strong case can be made for the need for increased funding. Thus, while the need is evident, current fiscal realities make increased funding uncertain.

3. Other Public Funding

Other public funding is available from the State and Federal governments. Delaware's legal aid organizations have been quite successful in securing this type of funding. Delaware's per capita legal aid funding from other public providers is almost \$12, which is well in excess of the national average.

State funding is available from grants provided by various State agencies. The level of funding available under these grants varies considerably over time. However, Delaware's legal aid organizations have been active in seeking and successful in receiving such grants. Dedicated grant writers representing the legal aid organizations on a collective basis may facilitate the securing of additional State-related grants. However, the amount of potential funding from such an effort is not at all clear.

Federal funding for legal aid comes from a number of sources. As noted earlier, LSCD receives federal-based funding from Legal Services Corporation. In addition, the legal aid organizations compete for other federal grants. It is not clear what the untapped funding from federal grants may be. However, as is the case with State-related grants, dedicated grant writers seeking funding that could extend to a given legal aid organization or across all legal aid organizations may prove to be successful and is one that we highly recommend.

4. CCJ Funding

Through their contributions to the CCJ, law firms and individual members of the Delaware bar have been generous in supporting funding of legal aid organizations. The per capita poor person contributions of the Delaware legal community to the CCJ in 2014 exceeded \$8, which is well above the national average, with approximately \$1 million in total raised. In terms of sources of funding in recent years, approximately 25% comes from Delaware law firms, an estimated 25% from individual members of the bar, and the remainder from foundations, special gifts, and attorneys who are not members of the Delaware bar. Support from Delaware law firms and individual members of the Delaware bar is the second largest source of legal aid funding in Delaware.

The hiring of a dedicated development officer for the CCJ provides an opportunity to significantly increase fundraising by the CCJ. There are approximately 4,400 members of the Delaware bar, with 773 contributing to the CCJ in 2015, for a participation rate of less than 20%. At present, the retention rate on attorney giving, i.e., the percentage of attorneys who give in one year and then again in the following year, is approximately 75%. The dedicated development officer should seek to increase the participation rate and the retention rate, as well as the average amount donated by the individual lawyers. As an example, if the participation rate was increased to 75% and the average amount contributed by the additional participants was \$250.00, over \$630,000 additional funding would be available for legal aid to low income Delawareans.

B. New Funding Sources for Legal Aid in Delaware

Compared to many other states, Delaware's sources of funding for legal aid services to low-income people comprise a rather narrow list. Sources of legal aid funding that have been successfully tapped in other states but are either untapped or used to a minimal extent in Delaware include: court filing fees or fines; *pro hac vice* fees; *cy pres* rule or statute; annual bar dues; and foundation and other private support.

1. Court filing fees and fines and tax supplements

Court filing fees and fines provide a source of legal aid funding in 33 states and the District of Columbia, but not in Delaware. Delaware court filing fees and fines already include add-ons for a variety of social services. Including legal aid organization support in that list merits consideration. In addition to being a source of incremental funds, it should be a relatively stable funding source. A drawback to this approach is that it may further burden those who can least afford the fine or fee increase. Thus, any filing fee or fine increases should be evaluated with a considerable measure of caution.

Among the legal issues faced by low-income people are those related to domestic violence and housing. Consideration should be given to initiating or expanding tax or fee surcharges that have bearing on those issues. For example, a portion of the fee for marriage licenses is used to support services to victims of domestic violence. At present, \$15 of the \$25 fee for a certified marriage license/certificate copy is allocated into the Domestic Violence Fund, to be administered by the Criminal Justice Council. CLASI and DVLS have been recipients of grants from that fund. In FY 2016, CLASI and DVLS received a total of more than \$90,000 from the fund. An additional \$10 per license/certificate copy could provide an additional \$60,000 per annum for aid to victims of domestic violence.

Similarly, there could be an increase in the real estate transfer tax that could be distributed to legal aid organizations for assistance to low-income people with housing-related legal problems.⁷

⁷ We note that the stability of funds from these sources may be uncertain since they are dependent on supplemental special fund transfers.

2. Pro hac vice fees

Pro hac vice fees are paid by non-members of the Delaware bar for the privilege of practicing before the Delaware courts. Twelve other states allocate to legal aid organizations a portion of the *pro hac vice* fees they collect. Given the preeminence of the Delaware Courts, the desire of non-Delaware lawyers to practice before the Courts on a case-by-case basis should be very inelastic to any increase in *pro hac vice* fees, thus assuring both incremental funding and stable levels of funding. Further, unlike some other court fees, *pro hac vice* fees are generally not regressive. Those who retain non-Delaware counsel to represent them before the Delaware Courts are typically well-funded. Their cases tend to be more complicated and use Court and State resources that might otherwise be available for low-income Delawareans.

Pro had vice fees are estimated to total \$1.66 million for FY 2016 and represent fees collected from approximately 4,000 attorneys. Increasing the fee by just \$50, with the increment allocated to the CCJ for distribution to the three legal aid organizations, would provide \$200,000 in incremental funding for legal aid to low-income Delawareans.

3. Cy pres funds

The *cy pres* doctrine originally referred to the disposition of funds in a situation where a gift was made by will or trust and the named recipient of the gift does not exist, has dissolved, or no longer conducts the activity for which the gift was made. Under the *cy pres* doctrine, the estate or trustee would contribute the funds to an organization that comes closest to fulfilling the intent of the gift. The use of the term has evolved so that it now generally refers to the allocation of residual funds from class action settlements or judgments. The residual funds, which arise for a variety of reasons, are unclaimed or cannot be economically distributed to class members or other intended recipients.

As noted in a 2016 Report to the House of Delegates of the ABA's Standing Committee on Legal Aid & Indigent Defendants, Commission on Homelessness & Poverty, Commission on Interest on Lawyers' Trust Accounts, National Legal Aid and Defender Association (the "2016 Report"), it is not uncommon for excess funds to remain after a distribution to class members. Those funds may result from an inability to locate class members or class members failing or declining to file claims or cash settlement checks. They also arise when the cost of distributing funds to class members exceeds the amount to be distributed.

The 2016 Report went on to state, “The fundamental purpose of every class action is to offer access to justice for a group of people who on their own would not realistically be able to obtain the protections of the justice system. This purpose is closely aligned with the mission of every civil legal aid and access to justice initiative across the nation.”

Federal and state courts throughout the United States have long recognized that allocating *cy pres* funds to legal aid organizations is a valid and legal use of those funds. Twenty-one states now provide for such an allocation by either statute or court rule.⁸

The 2016 Report stated that awards of class action settlement funds should follow 5 principles: (1) compensation of class members should come first; (2) *cy pres* awards are appropriate where cash distributions to class members are not feasible; (3) *cy pres* recipients should reasonably approximate the interests of the class; (4) *cy pres* distributions should recognize the geographic make-up of the class, and where circumstances dictate should be made on the basis of such factors; and (5) legal aid and access to justice organizations should be considered *cy pres* recipients.

Consistent with the above, at its annual meeting in August 2016, the ABA adopted the following resolutions:

RESOLVED, That the American Bar Association urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improved access to civil justice for persons living in poverty.

FURTHER RESOLVED, That before class action residual funds are awarded to charitable, non-profit or other organizations, all reasonable efforts should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible.

⁸ Among the states that have enacted relevant statutes are California, Illinois, Nebraska, Oregon, South Dakota, and Tennessee. States that have adopted relevant court rules include Colorado, Hawaii, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Montana, New Mexico, North Carolina, Pennsylvania, Washington, and Wisconsin.

According to the 2016 Report, a number of states have promulgated either laws or court rules requiring that a minimum percentage of *cy pres* awards be allocated to non-profit organizations that promote access to legal services for low-income individuals. Some of those states and the percentage allocations are as follows: Colorado, 50%; Illinois, 50%; Indiana, 25%; Kentucky, 25%; Montana, 50%; Oregon, 50%; Pennsylvania, 50%; South Dakota, 50%; and Washington, 50%.

Extrapolating the *cy pres* experience in other states to Delaware is problematic for a number of reasons. First, the *cy pres* programs in other states are relatively new and steady-state funding data is not available. Second, it is not clear what the level of *cy pres* funds is in Delaware or whether that level is stable over time. Data on the dollar value of class action settlements in Delaware is not readily available. However, at least one other state has been very progressive in addressing funding needs of legal aid organizations and has a robust *cy pres* program. If the experience of that state were extended to Delaware, over \$150,000 would be available for allocation to Delaware's legal aid organizations. Given the class action litigation that takes place in Delaware, particularly in the Court of Chancery, it is quite likely that the potential funding from this source exceeds that amount.⁹

The Delaware Department of Finance is of the view that class action residuals are unclaimed property and subject to Delaware's escheat laws. Thus, we recommended that provisions for the distribution of *cy pres* funds to legal aid organizations be established through legislation. The legislation would provide clarity for litigants and the courts and would encourage parties to include appropriate *cy pres* provisions in settlement agreements. It could also encourage adoption of a *cy pres* doctrine by the federal courts sitting in Delaware.

Administratively, *cy pres* funds could go to the CCJ for distribution by the DBF or directly to the DBF for further distribution to Delaware's legal aid organizations. Alternatively, they could go to the ATJ Commission for determination of further distribution. In any case, the ATJ Commission should be charged with developing an educational campaign for the *cy pres* program. The

⁹ While the discussion above has targeted residual funds from class action settlements, the funding sources behind the *cy pres* concept have been applied to other areas, as well, in other states. Those areas include unclaimed trusts and estates, sanction awards, and white collar criminal cases.

ATJ Commission can draw on the educational and other informational materials already prepared by other states that initiated *cy pres* programs.

4. Bar Dues

Nineteen states provide for a portion of state bar dues to be allocated to civil legal aid funding. In seven states, that allocation is mandatory. In eight states, the contribution is voluntary and attorneys are allowed to opt-out. Fifteen states provide for a voluntary add-on.

It is likely that a bar dues allocation in Delaware, whether mandatory, voluntary with an opt-out, or voluntary with an add-on, would, to some extent, pirate funds away from the CCJ. Of course, it is not possible to estimate the extent of that potential pirating. If Delaware were to implement any bar dues-type program it should be a voluntary add-on fee. Such an approach would minimize the pirating impact. In any event, it is not likely that any bar dues program will provide a material increase in legal aid funding as those individual lawyers who do not contribute to the CCJ would most likely not opt-in. As noted earlier in this report, an effective director of development for the CCJ should be able to significantly increase funds available for legal aid to low-income Delawareans. Those efforts should be monitored. If they are successful, there might not be a need for a bar dues-type program. If not, a bar dues-type program can be reconsidered at the appropriate time.

5. Foundation and private support

Delaware's legal aid organizations recognize that foundation and other private support is a largely untapped source of funding. That realization led to the securing of a Longwood Foundation grant to create the position of Chief Development Officer-Combined Campaign for Justice (the "CDO"). The position was filled in late 2016.

The responsibilities of the CDO include: (1) an annual fundraising campaign; (2) major gifts and planned giving; (3) grant writing and application; and (4) communications. While it is unclear what the potential level of funding is from this initiative, it is critically important and holds the prospect of being a significant source of legal aid funding, as has been shown to be the case in a number of other states. It has the advantage of tapping previously unsolicited sources of funds and recognizes that the legal aid to low-income people is a societal issue that requires support beyond members of the legal community.

Further, the use of a central person to represent the various legal aid organizations is a very efficient use of resources. Thus, this Subcommittee strongly endorses this effort.¹⁰

C. Organizing Efforts for Increased Funding for Legal Aid

States that have been most successful in securing additional and stable funding for legal aid to low-income people are characterized by strong leadership for those efforts. That leadership in Delaware must come from four sources: the legal aid organizations; the Courts; the Delaware bar; and the ATJ Commission.

The legal aid organizations know their funding needs and the real-life stories behind those needs. They need to tell those stories to those people, e.g., legislators, members of the bar, foundations, and the public, who have power over the allocation of funding to support legal aid to low-income Delawareans.

The courts, usually through the leadership of the chief justice of the state supreme court or its equivalent, in other states have played a very prominent and critically important role in securing funding for legal aid organizations in their states. The Delaware Courts, through the Chief Justice of the Delaware Supreme Court, must be a strong advocate for legal aid funding if efforts to increase resources are to be successful. This is particularly true in the areas of *pro hac vice* fee increases, lawyer contributions to the CCJ, and *cy pres* awards. That support is also needed for technology improvement and expansion of the base of pro bono attorneys and legal and quasi-legal assistance to pro se litigants.

The DSBA must be an active and forceful advocate for increased funding to legal aid organizations. Its members must be willing to think outside the box in a search for shared solutions to the justice gap problem.

Finally, the on-going role of the ATJ Commission must be determined. In other states, ATJ commissions have been major agents for change and have, in some cases, absorbed responsibilities previously housed in other organizations, such as the courts.

All of the above should provide their support to:

¹⁰ In a similar vein, LSCD has suggested that the ATJ Commission might want to consider whether it or the Administrative Office of the Courts should apply for a grant from the National Center for State Courts, for strategic planning and assessment purposes.

- Secure, in general, additional and more stable funding for civil legal aid;
- Proposals for the right to civil legal counsel for designated types of legal issues;
- Develop rules or statutes for the *cy pres* doctrine;
- Improved use of technology and access to the legal system by self-represented litigants; and
- Encourage private sector financial support for organizations that provide legal assistance to low-income Delawareans.