

## **The Legal Aid Funding Crash: How Low Is Too Low?**

*“Equal justice under law is . . . perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists . . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status.”*

*Lewis Powell, Jr., U.S. Supreme Court Justice*

### **Summary**

Over the past five years, this Committee has brought renewed legislative attention to the legal needs of poor people in California, and the struggles facing the nonprofit legal aid organizations that play a crucial role in helping to meet the promise of our national pledge to ensure equal justice for all. In a series of oversight hearings, the Committee has examined the persistent and widening "justice gap" between the legal need of those who cannot afford a private lawyer and the resources we provide to address those needs. In response to those hearings, the Committee has crafted a string of bills intended to address the justice gap – including AB 2301 of 2006 (establishing the Justice Gap Fund), AB 1723 of 2007 (IOLTA interest rate comparability), and AB 590 of 2009 (civil representation pilot) – aided by distinguished legal and judicial leaders organized by the California Commission on Access to Justice and the State Bar.

A new development threatens to undermine these efforts. For over 30 years, the primary mechanism on which the state has traditionally relied to fund legal aid programs has been the Interest On Lawyer Trust Accounts (IOLTA) program, which collects bank interest paid on client trust funds held by all California attorneys where the funds do not warrant setting up a separate account, either because they are small in amount or are held for a short period of time. The recent collapse of financial markets and the dramatic plunge in interest rates now poses an unprecedented challenge to the premise that legal aid programs can rely on IOLTA funding to maintain their essential mission. Unless interest rates rise quickly or other steps are taken, legal aid programs in California will be provided with only a fraction of their usual IOLTA support, and most cannot expect to replace that loss with other sources of funding.

California is not alone in its reliance on IOLTA funding, nor is it unique in its suffering as the result of the free-fall in interest rates. Virtually every state has faced the same emergency. Many of responded with a variety of efforts to staunch the hemorrhage. Most of the methods adopted in other states, such as IOLTA comparability and voluntary charitable giving programs, have already been employed in California; others such as court filing fees and *pro hac vice* fees are unavailable as a practical matter because they have been dedicated to other purposes. A prior, although less severe, drop in IOLTA revenue 15 years ago was a precipitating factor in the historic creation of the Access Commission. Similar concerted and creative action may be needed now.

## **California Continues To Suffer Under An Overwhelming "Justice Gap" In the Availability of Legal Services**

There is a dire need for civil legal services for poor Californians – especially underserved groups, such as elderly, disabled, children and people needing assistance with English. By many measures, California suffers from an overwhelming "justice gap" between the legal needs of low-income people and the legal help they receive.

Legal aid providers are currently able to address only a fraction of the demand for help. Because of insufficient resources, legal services programs can offer assistance in only a few types of cases; many poor and moderate-income Californians do not qualify for services; and most of those who meet the strict eligibility limits and seek assistance regarding problems for which a legal services office provides service are nevertheless turned away, simply for lack of staff. Even those who receive services are frequently under-served with brief advice and consultation, rather than full and fair representation.

Eighty Percent of Eligible People Are Denied Legal Services, Simply For Lack of Resources. For every client served by a legal aid organization in California, roughly four others who reached a legal services organization and met strict eligibility limits were turned down, simply because of insufficient resources. (See attached chart.)

Poor Californians Have Far Less Access to Legal Services Than The General Public. Expressed in terms of the number of lawyers available, the figures are equally stark. The Access Commission reports that the number of legal aid attorneys available to assist the low-income population is a tiny fraction of the number of private attorneys providing civil legal services to the general population. According to federal poverty data, there was one legal aid attorney in 2006 for every 8,373 poor people in California. By contrast, the number of attorneys providing legal services to the general population is approximately one for every 240 people – nearly 35 times higher. In other words, one-half of one percent of California lawyers is available to serve approximately 17 % of the population.

Negative Consequences For The Administration of Justice. The unavailability of civil legal services not only disadvantages people with legal problems, it also burdens the justice system itself and impairs the administration of justice. This is certainly an issue in the criminal context as well, but in the civil system the Judicial Council reports that California courts are facing an ever increasing number of parties who go to court without legal counsel, largely because they cannot afford representation. Unrepresented litigants typically are unfamiliar with court procedures and forms as well as with their rights and obligations, which leaves them disadvantaged in court and consumes significant court resources. By requiring greater judicial resources, unrepresented parties also exacerbate the shortage of judicial officers.

As the California Commission on Access to Justice has observed, a lack of representation detracts from public confidence in the justice system when the financial situation of a party is more likely than the merits of an issue to determine the outcome. Court opinion

surveys show that public trust and confidence are negatively affected by impressions of procedural unfairness, and that the opportunity for people to be heard in a meaningful way is the biggest impediment to improved sense of procedural fairness. Disturbingly, opinion surveys show that more than two-thirds of Californians believe low-income people usually receive worse outcomes in court than others.

The Judicial Council reports that the number of unrepresented litigants has expanded greatly in recent years. Although hard information on the number of pro se or “pro per” parties may not be available, the Judicial Council indicates that over 4.3 million of California’s court users are unrepresented

Commenters have noted that the dramatic increase in the number of parties that appear in court without a lawyer directly followed significant restrictions in federal funding for legal services organizations imposed by Congress in 1995. In effect, the policies of the federal government have simply shifted the cost of responding to the legal needs of poor people from federally-funded legal services programs to state-funded court and related legal services, and of course also put pressure on other social programs.

### **Numerous Reports By The California Commission On Access To Justice Over The Past Decade Document The Need For Action**

Inspired by Chief Justice Ronald George, the California Commission on Access to Justice was established in 1997. It is noteworthy that the creation of the Access Commission came immediately after the last significant decline in IOLTA funding in the mid-1990s.

Composed of 24 members reflecting a cross-section of judges, lawyers, academic, business and community leaders and other experts on the delivery of legal services and the administration of justice, the Access Commission has led the effort to document the need for equal access, and to make the courts and legal services more available to the poor.

Over the past ten years, the Commission has issued a series of reports and recommendations, and has helped to advocate for and shepard the development of new policy responses to improve access equality. Unfortunately, despite significant efforts and important progress, these reports have remained remarkably consistent during this period, with the Commission repeatedly reiterating many key findings – most notably that the overwhelming majority of legal needs are not being addressed, with troubling consequences for society and the courts – and recommendations to dramatically increase funding for legal services programs and other measures to close the justice gap.

1996 Needs Study. In 1996, a precursor to the Access Commission published the results of its three-year study in a report entitled *And Justice For All: Fulfilling the Promise of Access to Civil Justice in California*. The report concluded among other findings:

- The Legal Needs of Three Out of Four Poor Californians Are Not Being Met.

- Pro Bono Services and Financial Contributions Can and Should Be Increased But Cannot Alone Meet California's Unmet Legal Needs.
- Funding for Legal Services Must Be Increased Dramatically.
- California Has Just As Great a Responsibility to Ensure Adequate Counsel Is Provided to All As It Does to Supply Judges and Courthouses.
- Near-Poor and Moderate-Income Californians Also Require Increased Access to Civil Legal Services.
- Self-Help Services Should Be Increased Until Adequate Legal Representation Can Be Provided.

2002 Assessment of Needs and Responses. After five years of study following the issuance of the 1996 report, the Commission on Access to Justice published a report in 2002, entitled *The Path to Equal Justice*. While noting that California had begun to take the first steps toward addressing justice inequality – among them the Legislature's establishment of the Equal Access Fund in the 2000-2001 state budget, establishment of court self-help services for unrepresented parties, and development of more cost-effective systems for delivering legal services – the Commission reported that low-income Californians continue to face dismal circumstances, and the number of people in poverty (and thus the number of potential legal aid clients) had jumped 30 percent.

The Commission reported that the justice gap in 2000 had begun to shrink, from \$440 million in 1996 to \$384 million in 2000. Yet, even with the increased funding and the diminishing access gap, the Commission found that just 28 percent of the legal needs of the state's poor and lower-income residents were being addressed at the time of the report. Some of the new funding, the report found, simply compensated for a loss in federal funding and state trust fund (IOLTA) support. In addition, California continued to lag far behind other industrial states in its funding of legal services for the poor.

Like the 1996 report, the Commission's 2002 report recommended the following steps:

- Additional Funding Is Needed To Meet At Least 50 Percent Of The Legal Needs Of The Poor
- Financial and Pro Bono Contributions by Legal Profession Should Be Increased
- Self-Help Should Be Expanded and Improved
- Language Services Are Essential to Access
- Urban/Rural Equity

2007 Action Plan. At this Committee's request, the Commission prepared a third report in 2007, finding that the need for civil legal assistance continues to far exceed the level of resources provided.

Specifically, the Commission reported that as of 2005 the current “justice gap” figure was \$394.1 million. While California has made some important gains in terms of overall resources, the Commission found that legal aid programs are still not able to provide even a minimal level of legal advice and assistance for approximately two-thirds of the legal needs of California's poor. Even for the one-third of the legal need that is being addressed, it is often addressed with brief services and advice, rather than with the full representation that low-income Californians often need and deserve. Indeed, full representation by an attorney continues to be beyond the reach of many, and arguably, even further beyond reach than in 1994, when the Commission began looking at legal needs, as the cost of living and legal fees have continued to increase disproportionately to any increase in incomes. As a result, the Commission reported, thousands of Californians who cannot obtain legal services are prevented from having meaningful access to justice, and, consequently, too often lose their homes, their possessions, their livelihoods, even their dignity. Access to justice is not meaningful, the Commission concludes, when there remain such inadequate resources to meet the need.

Among other recommendations, the Commission called for:

- Substantial Additional State Funding – doubling the Equal Access Fund appropriation by at least \$10 million for FY2007-2008 and increasing it in every subsequent year to close the justice gap by 2016.
- Increased IOLTA Revenues.
- Fund Pilot Projects To Provide A Continuum Of Service, Including Full Representation, For High Priority Needs.
- Use Cy Pres Funds To Support Legal Services.
- Increasing and Supporting Pro Bono.
- Increasing Resources in Rural Areas.

### **Legislative Initiatives Taken By the Assembly Judiciary Committee**

The Access Commission's 2007 report was prepared in response to AB 1739 (Judiciary) of 2005.

The Committee carried forward an Access Commission recommendation in AB 2301 of 2006 to authorize the State Bar to collect voluntary charitable donations by lawyers to the Justice Gap Fund, discussed further below.

The Committee also authored AB 1723 of 2007 to improve the interest rate on IOLTA accounts by providing for comparability with rates provided by financial institutions for other investments. That measure reformed the rules for the IOLTA program by which banks pay interest on lawyer trust accounts. Under the bill, lawyers are allowed to deposit the funds in new types of accounts that pay higher interest, and banks are required to treat lawyers the same as other customers for whom these types of accounts have been available for many years. At the time it was enacted, AB 1723 was expected to generate another \$1 million per month for legal services programs, despite a declining economy. Unfortunately, those results have not yet been seen, although such an increase would have meant even more dramatic losses when interest rates collapsed in 2008.

Last year, the Chair of the Committee authored AB 590 (Feuer) to create a pilot program beginning in 2011 to provide counsel to indigent parties who need assistance in critical civil cases involving basic human needs, as recommended by Chief Justice George and the Access Commission.

### **The Unforeseen Collapse Of Bank Interest Rates Since Has Caused IOLTA Funding To Drop 75% To A Record Low**

When it prepared its last report in 2007, the Access Commission could not have anticipated the decimation of interest rates that would soon follow. As a result, IOLTA revenue has dropped 75 percent from \$20.1 million in 2007-08 to a record low estimated to be \$5 million in the current year 2010-11.

By using reserve funds, the State Bar has so far helped legal aid programs avoid the full brunt of the revenue plunge. However, total distributions using reserve funds have nevertheless diminished markedly, from \$15.5 million in the 2008-09 funding cycle to an estimated \$6 million in the next (2011-12) funding cycle – a drop of over 60 percent. As indicated on the attached chart provided by the State Bar, this temporary buffering of the impact program has required increasing reliance on the IOLTA program's limited reserve funds. Worse, it is expected that these reserves will soon be virtually exhausted. At this point it is not clear what plans the State Bar or the Access Commission may have to respond to the crisis in the absence of significant fund reserves. Without reserve funds to cushion the impact, it is not clear how legal aid programs will absorb the potentially catastrophic decline in funding.

Because IOLTA funding is generated by interest on lawyer trust accounts, it obviously depends directly on bank interest rates. As shown on the attached chart supplied by the State Bar, over the last 20 years IOLTA revenue has risen and fallen from a high of \$21 million in the 1990-91 funding cycle to the projected record low of \$5m in the current 2010-11 funding cycle. It appears that a similar, if less severe, crisis has occurred only once before, when IOLTA revenue declined to a previous record of \$7.4 million in 1994-95. Shortly thereafter, the Access Commission was formed to develop new responses to the legal needs of the poor.

State Bar "Peak Your Interest" Campaign. The State Bar has endeavored to maximize the potential for IOLTA revenue, despite the feeble interest rate, through its "Peak Your Interest" campaign. The goal of this effort is to convince banks that it is in their interest to increase the yield on IOLTA accounts – either because it is the right thing to support legal services, because their customers demand it, or to receive public recognition as a leadership bank. Banks can “Peak their interest” by increasing rates or eliminating or reducing fees. Banks that agree to become a Leadership Bank by paying at least 1 percent net interest on all accounts, or by paying a rate that results in a million dollars more than the bank would pay in an annual period than if it paid its comparable rate.

The campaign includes multiple strategies to increase the visibility of IOLTA rates. In order to demonstrate to banks that attorneys notice and care both about high “leadership” rates, part of the campaign is to educate attorneys about IOLTA rates and expand the cadre of “attorneys for IOLTA.” Another part of the campaign is targeted efforts to bring larger banks with particularly low rates online, utilizing key Access Commission contacts, and names generated through outreach efforts. Another part of the campaign is to recognize banks at events and in the media.

To date, a few banks have opted to demonstrate their commitment to their communities by joining the ranks of "Leadership Banks," although these have unfortunately been mostly smaller institutions that do not hold a significant amount of IOLTA accounts. As of February 1, 2010, the list of leadership banks is as follows: US Bank, First Commerce Bank, Borel Private Bank & Trust, Umpqua Bank, Security Bank of California, Center Bank, Valley Business Bank, Mission National Bank, Santa Cruz County Bank, Summit State Bank, Bank of Sacramento, PremierWest Bank, Community Bank of San Joaquin, Montecito Bank & Trust, San Luis Trust Bank, Bank of the Sierra, Alta Alliance Bank, American Riviera Bank, Excel National Bank, Pan American Bank, American United Bank, Commercial Bank of California, and Bancorp Bank.

### **Justice Gap Fund Campaign**

As the result of AB 2301 of 2006, the State Bar established the Justice Gap Fund to promote charitable giving by lawyers. This program collects contributions by individual attorneys to support legal services via the State Bar’s annual membership dues collection process and by contributions made online at the State Bar's web site.

This effort, lead by Hon. Douglas P. Miller, Associate Justice of the Fourth District Court of Appeal, has brought together important leaders from across the legal profession, including large and small private law firms, corporate counsel, legal aid lawyers, and those in the public sector. A full report of all the activities of the Justice Gap Fund Committee would be far too lengthy for this report, but it includes email campaigns, advertising, direct appeals, public presentations, awards, op-eds, and other publicity by prominent members of the bench and bar.

In 2008, its first year of operation, the fund generated an additional \$1 million for legal aid programs throughout the state. Unfortunately, despite great efforts by all involved,

donations dropped by 20 percent to \$800,000 in 2009, and have declined approximately another 20 percent thus far in 2010, to approximately \$665,000 as of March 31 (the deadline for payment of Bar dues this year, which is the milestone by which virtually all contributions are usually received.) The percentage of participating lawyers continues to decline as well, from 5.6% of bar members in the first year of operation, to 4.6% last year, and 4% in 2010. The Bar projects that donations will continue to decline next year, to an estimated \$600,000.

The performance of the Justice Gap Fund is by no means a reflection on the talented and dedicated volunteers who have organized and lead this program, nor does it imply that California lawyers are less charitable than those in other states. The Committee's research indicates that every state that has adopted a voluntary giving program through their attorney license fee statements have had little success. It may be that the best time to approach lawyers for a charitable donation is not when they are required to pay their license fees. The request may be particularly difficult in January and February when California State Bar dues are collected – a period that is generally recognized as the least productive for charitable campaigns.

### **Responses To IOLTA Declines In Other States**

Of course, the interest rate plunge has affected every state in the country, most of which, like California, rely principally on IOLTA funding to support their legal aid organizations. The dramatic failure of IOLTA programs has caused alarm in many states, along with steps to intervene. (*See "Interest Rate Drop Has Dire Results for Legal Aid," New York Times, January 19, 2009.*)

Like California, a number of states have adopted interest rate comparability rules to increase IOLTA receipts. Many have also adopted programs, like the State Bar's "Peak Your Interest" campaign to encourage banks to voluntarily increase rates or waive fees.

One of the most common approaches has been to increase court filing fees to provide supplemental funding to legal aid. Maryland was the most recent to join this list, nearly doubling civil filing fees with a surcharge designated for the support of legal aid groups. Other states, such as Alabama, have raised funds by increasing the *pro hac vice* fees that out-of-state attorneys must pay to appear in court. In California, both of these fees have been raised in recent years for the purpose of stemming the courts' budget shortfall.

Other states have imposed other kinds of fees. One state (North Carolina) has imposed a new fee on continuing legal education (CLE) providers. Some have raised attorney license fees specifically for the purpose of funding legal aid programs. A number of states, such as Pennsylvania, Texas and Wisconsin, have done so after unsatisfactory experience with voluntary programs. Others like Illinois and Massachusetts (proposed) have done so specifically in response to the IOLTA funding crisis. Minnesota has had such a fee since 1997, but recently increased it from \$50 to \$75 per attorney because of the decline in IOLTA revenues.



A growing number of states have looked to attorneys to help address legal needs not by increased fees but by providing pro bono services or making financial donations to legal aid organizations that are recognized as contributing to their pro bono goals. Some states specifically recognize that charitable contributions can be considered toward meeting pro bono goals under rules based on ABA Model Rule of Professional Responsibility 6.1. California currently has such a policy under Bus. & Prof. Code section 6073, and the State Bar is considering a rule 6.1 proposal.

A related movement has been to require lawyers to report their pro bono contributions and services. While both pro bono services and financial contributions are universally voluntary, some states have required lawyers to file mandatory reports showing their hours of pro bono work and dollar contributions to legal aid organizations each year. Tennessee was the most recent state to do so this year, bringing the total number of "mandatory reporting" states to at least 8 since Florida first adopted this policy in 1994. It has been reported that states that have adopted this approach have achieved substantial increases in both the amount of pro bono work and financial contributions.

California has not considered such a pro bono reporting proposal. California does ask lawyers and law firms with large state contracts to certify that they will make "good faith efforts" to provide pro bono services (financial contributions are not recognized) at specified targets based on the dollar value size of the contract or the size of the firm. (Bus. & Prof. Code section 6072.) Although the actual number of hours of pro bono services performed is to be taken into account by the state agency in determining whether the good-faith efforts goal has been satisfied, the Committee's research indicates that data on pro bono performance is generally not requested or maintained by state agencies, and the statute may not well known or enforced.

Some states have discovered a new source of funding by dedicating a percentage of *cy pres* residuals remaining from unexpended funds left over from class cases where not all proceeds can be distributed. California law currently allows such undistributed residual funds to be to promote justice for all Californians but does not designate a percentage. (Code of Civil Procedure section 384.)

## **Conclusion**

California legal and judicial leaders have demonstrated great concern to ensure that our national pledge of "justice for all" is honored and observed, and those associated with the Access Commission have been prominent and eloquent in describing the justice gap and taking steps to help reduce it. With the unprecedented collapse of the financial markets on which the state's IOLTA program depends as the most significant funding mechanism to ensure equal access to justice, it seems clear that the immediate future holds peril for poor Californians and the legal aid organizations that serve them unless other measures can be taken if interest rates do not quickly rebound.

-- Kevin G. Baker, Deputy Chief Counsel, Assembly Judiciary Committee, April 20, 2010