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Reducing the Civil "Justice Gap" by Enhancing the Delivery of Pro Bono Legal Assistance to Indigent Pro Se Litigants: A "Field" Assessment and Recommendations

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REDUCING THE CIVIL "JUSTICE GAP" BY ENHANCING THE DELIVERY OF *PRO BONO* LEGAL ASSISTANCE TO INDIGENT *PRO SE* LITIGANTS: A "FIELD" ASSESSMENT AND RECOMMENDATIONS

*Andrew H. Cohn**

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I. REDUCING THE JUSTICE GAP

This Article analyzes and assesses certain mechanisms for potentially increasing the availability of civil legal assistance in the United States in order to help confront an ever-growing "justice gap" for "indigent" populations[1] whose numbers are increasing. There are many voices that have called for greater focus on the "justice gap" in civil legal assistance in the United States. My aim in this Article is to draw upon several decades of experience with a wide variety of civil legal assistance programs, including state-, federal-, and privately-funded initiatives, in order to analyze the more effective programmatic elements, and make recommendations based on those analyses.

This Article first provides information on some of the background factors generating the "justice gap" and then focuses on three areas related to improving civil legal assistance to indigent *pro se* litigants: (1) the use of hotlines, especially those serving double duty as the intake source for other civil legal assistance programs; and two different service delivery mechanisms, namely (2) online legal advising, and (3) so-called Lawyer-for-a-Day programs. The latter two share an organizational principle which takes into account the resistance of the private bar to open-ended commitments to *pro bono* civil legal assistance for indigent populations, a factor that will also be explored in further detail.

II. CIVIL LEGAL ASSISTANCE FOR INDIGENT POPULATIONS—ABSENCE OF CONSTITUTIONAL ENTITLEMENT

On March 18, 1963, the U.S. Supreme Court in the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963) overturned its earlier decision in *Betts v. Brady*, 316 U.S. 455 (1942) which had held that in non-capital cases, unless the defendant was impaired by illiteracy or mental limitations or unless the case was unusually complicated, there was no need for a court-appointed attorney in state court criminal proceedings. In *Gideon* the Supreme Court held that assistance of counsel desired by a criminal

1. References to "indigent" mean persons in households at or below 125% of the Federal Poverty Guideline published in the Federal Register by the Department of Health and Human Services (HHS). *See* ANNUAL UPDATE OF THE HHS POVERTY GUIDELINES, 81 Fed. Reg. 4036, 4036 (Jan. 25, 2016).

defendant who could not afford to hire counsel, was a fundamental right under the U.S. Constitution, binding on the states, and essential for a fair trial and due process of law.

I will not dwell on Gideon other than to note that after the Supreme Court overturned his conviction, he was retried in Florida with appointed defense counsel and was acquitted by a jury after one hour of deliberation. In a letter of thanks that Gideon wrote to the *pro bono* team of lawyers who took his case to the Supreme Court, he stated: "[E]ach era finds an improvement in law . . . something new for the benefit of mankind."[2]

With Gideon's prediction in mind we turn to the gap in *civil* legal assistance for indigent populations in the United States. First, there are substantial grounds for concluding it is very unlikely that there will be a "civil *Gideon*," including: (1) many civil matters are primarily private disputes, such as landlord-tenant matters (in the absence of government ownership of housing),[3] or divorce and child custody matters where the government's involvement is present, but rarely predominates,[4] and (2) many civil matters involve "agency adjudications" by state, federal or other governmental agencies where there is enormous variety in the nature of the benefits at stake and substantial practical difficulties framing civil legal assistance as a constitutional right in each context. While the issue is not foreclosed and a "civil *Gideon*" might be enunciated in certain limited areas (such as the removal of children from parental custody), there is no comprehensive immediate remedy in sight. Accordingly, it is more productive to focus instead on alternative ways of improving civil legal assistance since such civil matters affect people's lives in profound ways.

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2. ANTHONY LEWIS, GIDEON'S TRUMPET 81 (1964). *See also* Katerina P. Lewinbuk, *There Is No App For That: The Need for Legal Educators and Practitioners to Comply with Ethical Standards in the Digital Age*, 24 U. FLA. J.L. & PUB. POL'Y 321, 335 (2013).

3. Government involvement can occur where public housing authorities are the landlord entities, where Federal Housing Administration (FHA) financing and restrictive covenants are implicated or where so-called Section 8 certificates are involved.

4. Many states guarantee families a hearing within a prescribed time period after the removal of a child from parental custody based on allegations of abuse or neglect. For example, in Massachusetts state law guarantees families whose child has been removed from parental custody by the Department of Children and Families (DCF) a hearing within 72 hours of the removal, as a critical check on the power of the state to remove children based on claims of abuse or neglect. Michael Levenson, *State Failing on Granting Quick Hearings in DCF Cases*, B. GLOBE, May 6, 2016, https://www. bostonglobe.com/metro/2016/05/05/parents-must-wait-days-weeks-for-due-process-after-children-taken-away/GS349cRs8YzqAc0fQPGI0K/story.html. However, the number of abuse cases has increased sharply in the recent past and child protection officials cannot find enough lawyers to handle the matters within the required time period. *Id.* "Economic stress, in particular, disrupts family relations, fosters withdrawn and inconsistent parenting, and directly increases chronic stress among children." ROBERT D. PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS 130 (2015).

III. BACKGROUND TO THE CIVIL LEGAL ASSISTANCE CRISIS

Several interrelated factors have together resulted in an emerging crisis in civil legal assistance. When the Great Depression of the 1930's struck world economies, including the United States, one result was a substantial increase in governmental involvement in individuals' lives. Some areas of government involvement, such as immigration, marriage and child custody, had been subject to regulation in prior periods. But in the course of the last 85 years many areas of new regulatory involvement have proliferated, largely in response to societal needs and transformations. Social security, veteran's affairs, health care, disability and unemployment assistance are just some of the areas where substantial programmatic increases have occurred. During this same time period there have been substantial changes in income and resource levels, with an ever-widening income and wealth gap. One result is that lower-income and indigent portions of the U.S. population are more deeply involved with, and dependent upon, governmental programs, and administrative decisions regarding benefits and entitlements have profound impacts on people's lives, with a concomitant need for civil legal assistance to redress error.[5]

These trends have also been occurring in conjunction with substantial population growth. In the mid-1960s, at the time of President Johnson's Great Society Programs, the U.S. population was approximately 200 million.[6] Now, 50 years later it is over 320 million.[7] A substantial portion of the growth has been from immigration[8] and elderly populations' increased longevity has also strained household budgets and government programs.[9]

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5. *See, e.g.*, Nicholas Kristoff, *Opinion: U.S.A., Land of Limitations?*, N.Y. TIMES, Aug. 9, 2015, at SR 1; Jill Lepore, *Richer and Poorer: Annals of Society; Accounting for Inequality*, NEW YORKER, Mar. 16, 2015, at 26-32; Stephanie Coontz, *Opinion: The New Instability*, N.Y. TIMES, July 27, 2014, at SR 1; Annie Lowry, *Changed Life of the Poor: Better Off, But Far Behind*, N.Y. TIMES, May 1, 2014, at 1; *see also* ELIZABETH KNEEBONE & ALAN BERUBE, CONFRONTING SUBURBAN POVERTY IN AMERICA ch. 2 (2013).

6. The U.S. population as of July 1, 1965: 194,302,963. POPULATION DIVISION, U.S. CENSUS BUREAU, HISTORICAL NATIONAL POPULATION ESTIMATES: JULY 1, 1900 TO JULY 1, 1999 (2000), https://www. census.gov/population/estimates/nation/popclockest.txt.

7. The U.S. population as of December 1, 2015: 322,561,729. U.S. CENSUS BUREAU, POPULATION DIVISION, MONTHLY POPULATION ESTIMATES FOR THE UNITED STATES: APRIL 1, 2010 TO DECEMBER 1, 2016 tbl. 1, (2015), https://factfinder.census.gov/faces/tableservices/ jsf/pages/productview.xhtml?src=bkmk.

8. E.g., in the decade 1990-2000 New York City population increased by approximately 685,714 people. *See* NYC PLANNING, DECENNAL CENSUS – CENSUS 2000, https://www1.nyc.gov/ site/ planning/data-maps/nyc-population/census-summary-2000.page.

9. Life expectancy in 1960 was 69.7 years. Life expectancy in 2014 was 78.8 years. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CTR. FOR DISEASE CONTROL AND PREVENTION AND NAT'L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2015, at 22014 tbl. 15 (2016), https://

These trends—and the forces giving rise to them—have substantially increased the legal vulnerability of large portions of the population. Since 1980 there has also been shrinkage in welfare entitlements and other "safety net" programs, resulting in greater precariousness for large numbers of people.[10] Some of the shrinkage of safety net programs has been achieved through changes in regulations that are somewhat arcane from the perspective of individual recipients. In addition, there have been social changes at the family level: according to the Pew Research Center, in 1960 there were 73% of children younger than 18 years of age who were living in a home with two married heterosexual parents in their first marriage.[11] By 2014, 46% of children under 18 did so. When we look at under-18 children living in mother-only families: in 1960 it was 8% and now it is around 24%.[12] This data must be considered against major population increases, so many more households are involved. There are also many different and new types of households that have emerged. More of these households have issues with child custody, visitation and support issues, as well as other domestic relations issues such as dissolution of marriage and child protection (and spousal protection), all of which involve the civil legal system.

The increased role and impact of governmental agencies in the lives of ever-larger portions of the population, the concomitant proliferation of regulation, and the diminished economic capacity of the elderly and lower-income populations have led to vast increases in civil proceedings, both in courts and within government agencies which make their own adjudications. A very large proportion of such civil legal matters are conducted *pro se*, because these indigent litigants in most cases cannot afford counsel.[13]

American Bar Association studies indicate that almost 21% of the U.S. population (67 million individuals) qualify for federally funded legal assistance.[14] This is nowhere near the number of indigents in need of legal

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www.cdc.gov/nchs/data/hus/hus15.pdf#015.

10. *See, e.g.*, IFE FLOYD ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, TANF CONTINUES TO WEAKEN AS A SAFETY NET (2017), http://www.cbpp.org/research/family-income-support/tanf-continues-to-weaken-as-a-safety-net.

11. GRETCHEN LIVINGSTON, FEWER THAN HALF OF U.S. KIDS TODAY LIVE IN A 'TRADITIONAL' FAMILY, PEW RESEARCH CTR. (Dec. 22, 2014), http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family.

12. CHILD TRENDS DATABANK, FAMILY STRUCTURE: INDICATORS ON CHILDREN AND YOUTH 3 (2015), http://www.childtrends.org/?indicators= family-structure (last visited July 12, 2016).

13. *See* Barry, *infra* note 46, at 1879 n.1, 1884.

14.

> Despite the Legal Services Corp.'s efforts . . . limited resources force local offices to turn away more than half of all eligible applicants seeking help, while the number of Americans who qualify for federally funded legal assistance

assistance. When such vulnerable populations become involved in civil legal proceedings there is often a crisis in their lives. Soldiers returning from combat zones, people with disabilities, and individuals facing foreclosure or eviction are just some of the groups in need. "The civil legal problems of low-income people involve essential human needs," such as safe and habitable housing, protection from abusive relationships, access to necessary health care, disability payments to help lead independent lives, family law issues including child support and custody actions, immigration status, and relief from financial exploitation.[15] While the trends described above have not emerged overnight, they have become more pronounced in recent decades, and there is an increased awareness of the profound impact civil proceedings can have on people's lives—and that unmediated outcomes raise concerns about *access to justice*.

The civil law system in the United States is an adversarial system: the goal is to prevail; and if there is no law-trained opponent then prevailing is much easier; that may feel "good" for the prevailing proponent, but systemically for the poor it can feel like "railroading,"[16] which delegitimizes the justice system in the eyes of significant numbers of people.[17] Earlier efforts to provide civil legal assistance to more

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> continues to grow. In federal fiscal year 2015, which begins Oct. 1, 2014, the number is expected to reach 67 million individuals, or roughly 21 percent of the U.S. population.

Rhonda McMillon, *Harsh Reality: As More Americans Qualify for Free Civil Legal Services, the ABA Steps Up Calls for Increased LSC Funding*, 100 A.B.A. J. 67 (2014).

15. *See* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGalnAmerica2009.authcheckdam.pdf [hereinafter DOCUMENTING THE JUSTICE GAP IN AMERICA (2009)].

16. In Massachusetts the Boston Bar Association (BBA) survey found that "60% of the judges who responded felt that lack of representation negatively impacted the court's ability to ensure equal justice to unrepresented litigants because they are hindered in the presentation of evidence." B. BAR ASS'N STATEWIDE TASK FORCE TO EXPAND CIVIL LEGAL AID IN MASS., INVESTING IN JUSTICE: A ROADMAP TO COST EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 3 (2014), http://www.bostonbar.org/docs/default-document-library/statewide-task-force-to-expand-civil-legal-aid-in-ma---investing-in-justice.pdf. Judges also expressed the view that if they are to maintain their role as a neutral and fair arbiter, there is a limit to how much they can facilitate or assist *pro se* litigants' inadequacies. *Id.* at 29.

17. As an example, one can point in the United States to a large number of state jurisdictions which have "small claim" courts or procedures where relatively low dollar amount disputes can be handled. *See* THOMSON REUTERS, SMALL CLAIMS FILINGS (2016), *available at* SURVEYS Westlaw 0020 Surveys 14; *see also* SMALL CLAIMS COURT, FINDLAW, http://litigation.findlaw.com/going-to-court/small-claims-court.html (last visited July 12, 2016). The original purpose was to facilitate access to informal dispute resolution for individuals and small businesses, without attorneys (though the use of attorneys was not prohibited). Interview with retired Judge Raymond Dougan (Nov. 12, 2015) [hereinafter Dougan Interview]. What has

happened in some jurisdictions (*e.g.*, Massachusetts) is that delinquent credit card debt is sold by the credit card companies (and resold) to debt collection enterprises which buy these credit card claims—in the form of computer printouts which consist of little more than the amount owned and the name and address of the debtor. The attorneys for these debt collection enterprises send out thousands of complaints from small claim courts. As a result, in many small claim courts, 75% of all court proceedings are debt collection claims. *Id.* Many debtors fail to show—they cannot take time off from work or they are unable to pay—they are defaulted. (A recent examination done by the greater Boston area grantee of the U.S. Legal Services Corporation found that up to 30% of defendants in debt collection cases were not served, largely because plaintiffs' counsel sent the summons and complaint to outdated addresses and in some cases to people with the same or similar name who were not the debtor. Interview with Joanna Allison, Acting Executive Director of Volunteer Lawyers Project of the Boston Bar Association (July 15, 2016) [hereinafter Allison Interview]). What ensues is either wage garnishment proceedings or—something that is easier for the debt collection attorneys—allowing notices of the judgment to be sent and then after a period of nonpayment the debt collection attorneys are entitled to issue—a "capias" writ for arrest and incarceration: and then people rush in to pay, with interest and collection costs:

> The Notice [of default] shall further state that if the defendant fails to appear on that date and the plaintiff does appear and states under oath or in writing under the penalties of perjury that payment has not been made as ordered, the court may immediately issue a capias to bring the defendant before the court without the need for prior service of an Order to Show Cause pursuant to Rule 9(a). The Notice of Judgment and Order form shall also advise the parties that they are not required to appear in court on that date if payment has been made as ordered. Following the payment hearing the court may amend its previous order to pay or issue a new order.

MASS. UNIF. SMALL CLAIMS RULE 7 (2009).

> [Further, a] debtor arrested on a capias after court has adjourned may be lodged with the keeper of the lock-up in the city or town in which he is arrested, or lodged with the keeper of the common jail. Said keeper shall receive the debtor from the arresting officer and hold the debtor until the next sitting of the court issuing the capias, at which time the officer shall call for the debtor and take him before the court. The debtor shall be allowed a reasonable time to procure sureties for his recognizance to appear before the court issuing the capias at the next sitting of court.

MASS. ANN. LAWS ch. 224, § 18 (LexisNexis 2016). But note what the burden of the debt collection agencies would be were a legally-trained adversary present: to obtain a judgment the debt collection enterprise must show the instrument constituting the debt because an account stated "cannot be made the instrument to create a liability where none before existed, but only determines the amount of a debt where liability exists." Chase v. Chase, 78 N.E. 115, 115 (Mass. 1902); *see also* NAT'L CONSUMER LAW CTR., SUBSTANTIVE DEFENSES TO CONSUMER DEBT COLLECTION SUITS 2 (2010), http://www.masslegalservices.org/system/files/library/Substantive_Defenses_to_Consumer_Debt_Collection_Suits_t.pdf. But rarely do debt collection attorneys have evidence of the instrument constituting the debt; all they have is a computer printout. Where civil legal aid programs have been set up—for example, the lawyer-for-a-day [LFAD] programs explored later in this Article—debtors who come to court can be quickly advised to raise the objection to the claim. Dougan Interview, *supra.* While many debtors still fail to appear, among

vulnerable, indigent populations were largely through legal aid societies; these were a patchwork of legal assistance programs, primarily located in urban areas. A significant move to increase civil legal aid came in 1965 when the federal government began to make grants to legal aid organizations. This funding helped to increase the focus on civil legal assistance as a critical element in "access to justice." Congress explicitly recognized this need in establishing the U.S. Legal Services Corporation in 1974: "providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justices, assist in improving opportunities for low-income persons" and "reaffirm faith in our government of laws."[18]

In 1980 the Legal Services Corporation (LSC) conducted a study to examine the civil legal resources available to populations in need and determined that over 40% of indigent populations lived in areas not served by any legal services programs, and many of those remaining had only minimal access. The 1980 study was used to obtain funding from Congress to achieve a "minimum access" to civil legal services—which LSC defined as 2 lawyers, with appropriate support, per 10,000 low-income people. For fiscal year 1981 funding of $321,300,000 was achieved, but the very next year the amount was cut by 25% and the "minimum access" funding level has never been reached.[19] The funding level for the Legal Services Corporation has been subject to budget pressures and has not kept up with inflation or the growing needs of indigent litigants over the years.[20]

This reduction in civil legal assistance funding has occurred against

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those who do, the presence of a few LFAD representatives provide a salutary counterweight. Some debtors come and say to the LFAD program "no, I don't want help; I owe the money and I'll pay." *Id.* For other debtors, they may have already paid but the claim was resold without reflecting the payment, or the high interest rate on credit card debt and the collection fees have made the sum unmeetably large, and the presence of LFAD program advice—to request evidence of debt—complicates the ability to get an easy judgment and most often results in a satisfactory settlement being quickly reached. *Id.*

18. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378.

19. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 2 (2d ed. 2007).

20. By 2005, LSC funding was at half the "minimum access" level for the eligible indigent household—that is, households with income at or below 125% of the official government poverty level (published by the U.S. Department of Health and Human Services). *Id.* "To be eligible to receive legal assistance from an LSC-funded program, clients must earn an income less than 125 percent of the federal poverty level." Michael J. Belaen, *Change We Need: Why Enacting the Civil Access to Justice Act of 2009 Is Necessary to Expand Legal Aid for the Poor*, 31 HAMLINE J. PUB. L. & POL'Y 329, 334 (2009). In certain limited circumstances, such as heavy medical debt, LSC will approve eligibility up to 200% of the federal poverty level. 45 C.F.R. § 1611.3 (2016); *see also* 81 Fed. Reg. 4036; LEGAL SERVS. CORP., LSC FUNDING, http://www.lsc.gov/lsc-funding (last visited July 12, 2016) (FY 2013 = $340,876,165; FY 2014 = $365,000,000; FY 2015 = $375,000,000).

the backdrop of economic trends reflecting further erosion of the income of moderate and lower-income populations. In 1989 the American Bar Association's Consortium of Legal Services determined it would be useful to conduct "a sophisticated national survey"—one that accurately reflects "the complexity of legal needs and the levels of intervention necessary" in order to develop "sound polices and resources allocation principles" and to plan and reevaluate "the current delivery systems for low and moderate income clients."[21] The study was conducted by Temple University's Institute for Survey Research and ultimately involved 3,000 interviews in 48 states.[22] For low-income persons the most frequently reported categories of civil legal needs were in the following areas:

- Personal finances and consumer problems, with creditors and insurance companies and inability to obtain credit;
- Housing and property including unsafe conditions, disputes about utilities, and disagreements with landlords;
- Family and domestic relations including marital dissolution, and child support;
- Employment-related issues including discrimination in hiring or problems with compensation or working conditions;
- Physical and economic injuries.

In addition to the federal LSC, a broad variety of other programs have developed over many decades to address civil legal assistance problems. For example, states have funded civil legal aid programs directly or through public-private partnerships.[23] Such programs have staff attorneys

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21. *See* INST. FOR SURVEY RESEARCH AT TEMPLE UNIV. ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/legalneedstudy.authcheckdam.pdf.

22. *Id.*; Alaska and Hawaii were not included nor were the 2.5% of the population in prisons, hospitals, nursing homes, military barracks or homeless persons.

23. It should be noted that there are a number of different ways that states fund civil legal assistance. While some of that funding comes from general budget allocations (*e.g.*, in Massachusetts, one-third) a substantial portion is funded through IOLTA (Interest on Lawyer Trust Accounts) programs that are mandated by most state supreme courts. IOLTA is mandatory in all states except Alaska, Kansas, Nebraska, Virginia, and South Dakota. *Status of IOLTA Programs*, AM. BAR ASSOC., http://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs.html (last updated Dec. 4, 2014).

> IOLTA programs are created either by order of a jurisdiction's highest court order or by state statute. There are three types of programs: (1) Mandatory, in which all lawyers in the jurisdiction who maintain client trust accounts must participate; (2) Opt-out, in which all lawyers participate unless they affirmatively choose not to participate; and (3) Voluntary, in which

who endeavor to handle civil legal assistance issues for indigent populations. For example, in Massachusetts the Massachusetts Legal Assistance Corporation (MLAC) is a non-profit corporation created by the state[24] to assist low-income people in obtaining civil legal aid; MLAC is funded primarily by state government appropriations and income distributed from IOLTA funds pursuant to Massachusetts Rule of Professional Conduct.[25]

In 2004, the LSC undertook to examine "the extent to which the need for LSC-funded [civil legal] services is not currently being met in light of the impact of other available resources, such as pro bono, non-LSC providers, and state and private funding."[26] Three methodologies were utilized: (1) a national count of people seeking legal help from LSC-funded providers who are denied services because programs lack sufficient resources; (2) analysis and comparison of recent state legal needs studies (conducted in 9 states[27]); and (3) a national count of legal aid attorneys and a comparison of the ratio of legal aid attorneys to the low-income population with the ratio of private attorneys providing civil legal services to the general population. Published in 2005, the Legal Services Corporation study ("Documenting the Justice Gap in America") found the following:

- The LSC-funded network remains the primary source of civil legal aid for low-income people.
- Nationally, on average, each legal aid attorney (including those funded from all sources, not just LSC funding) served

lawyers must affirmatively decide to participate.

Id. However, since IOLTA is affected by levels of economic activity there can be very substantial fluctuations in available funding. For example, in Massachusetts in 2007 IOLTA generated $31.8 million directed to civil legal aid; yet after the recession which began in 2008, IOLTA dropped precipitously and was only about $4.5 million in 2014. B. BAR ASS'N STATEWIDE TASK FORCE TO EXPAND CIVIL LEGAL AID IN MASS., INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 2 (2014), http://www.bostonbar.org/docs/default-document-library/statewide-task-force-to-expand-civil-legal-aid-in-ma---investing-in-justice.pdf [hereinafter BBA STATEWIDE TASK FORCE REPORT].

24. MASS. ANN. LAWS ch. 221A, § 2 (LexisNexis 2016).

25. *See* MASS. R. PROF'L CONDUCT r. 1.15(g)(4) (2016), http://www.mass.gov/obcbbo/RPC.pdf; *see also* BBA STATEWIDE TASK FORCE REPORT, *supra* note 23, at 1.

26. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2005), http://www.ohiolegalservices.org/public/legal_problem/courts-hearings/documenting-the-justice-gap-in-america/documentin g-the-justice-gap-lsc-sept-2005.pdf/view [hereinafter DOCUMENTING THE JUSTICE GAP IN AMERICA (2005)].

27. "Oregon (2000), Vermont (2001), New Jersey (2002), Massachusetts (2003), Connecticut (2003), Washington (2003), Tennessee (2004), Illinois (2005), and Montana (2005)." *Id.* at 912.

6,861 persons. (In comparison there was a private attorney for every 525 people in the general population.)

- Conservatively, only 20% of those requiring civil legal assistance actually received it.
- A substantial majority of low-income people with civil legal problems did not have and cannot get legal assistance.[28]

In 2009 the LSC updated this earlier "Justice Gap" report; the 2009 update confirmed the 2005 findings.[29]

There continues to be ongoing focus on the unmet civil legal needs of indigent populations. The ABA has a Standing Committee on Legal Aid and Indigent Defendants (SCLAID); there is increasing awareness that while LSC funding is, and remains, important, a more comprehensive approach is needed as well.

In 2010 the Department of Justice (DOJ) created an Office for Access to Justice; this effort was focused in part on expanding access to civil legal aid.[30] The director of the DOJ's Office for Access to Justice has reported that (based on the low-income standard of 125% of the federal poverty guideline),

> [A]pproximately 20% of Americans are eligible for free civil legal aid, and by age 60 nearly four in five people will experience some kind of economic hardship, such as relying on a government program that provides assistance for the poor or living at least one year in poverty or very close to it. An estimated 75-80[%] of litigants have to represent themselves in court.[31]

On September 24, 2015, President Obama formally established the White House Legal Aid Interagency Roundtable (LAIR) on the eve of the United Nations' adoption of its "2030 Sustainable Development Goals" one of which involves making justice accessible to all.[32] The LAIR

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28. *Id.* at 17-18.

29. DOCUMENTING THE JUSTICE GAP IN AMERICA (2009), *supra* note 15, at 4.

30. "The U.S. Department of Justice established the Office for Access to Justice (ATJ) in March 2010 to address the access-to-justice crisis in the criminal and civil justice system." OFFICE FOR ACCESS TO JUSTICE, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atj (last visited July 12, 2016).

31. WHITE HOUSE LEGAL AID INTERAGENCY ROUNDTABLE, *Expanding Access to Justice, Strengthening Federal Programs: First Annual Report of the White House Legal Aid Interagency Roundtable* 9 (2016), https://www.justice.gov/atj/page/file/913981/download.

32. LAIR was originally launched by the White House Domestic Policy Council and the DOJ. Press Release, White House, Presidential Memorandum—Establishment of the White House Legal Aid Interagency Roundtable (Sept. 24, 2015), https://www.whitehouse.gov/the-press-office/2015/09/24/presidential-memorandum-establishment-white-house-legal-aid-interag ency [hereinafter Establishment of White House LAIR].

Memorandum encourages "Federal departments and agencies to collaborate, share best practices, and consider the impact of legal services on the success of their programs [by doing so] the Federal Government can enhance access to justice in our communities."[33]

LAIR is one of many recent governmental steps/efforts that reflect "the nationwide access to justice crisis in the civil justice system."[34] Americans "cannot afford to hire a lawyer even when faced with life-altering events such as the potential loss of a home, health care, a job, or an education. They cannot afford to hire a lawyer even when they are the victims of domestic violence or elder abuse and desperately need the courts for protection."[35] The director also noted:

When the Department of Veterans Affairs surveyed homeless veterans, it found that four of their top 10 unmet needs had legal solutions. If the VA's programs to help homeless veterans don't include legal aid, it will be much harder to meet their needs and for the program to be successful. The same is true of many federal programs that work to end poverty or protect vulnerable populations.[36]

LAIR has five major tasks, several of which involve improving coordination among federal programs that assist vulnerable populations and working toward Goal 16 of the U.N. Sustainable Development Goals. The other tasks directly relate to the issues in this article:

- Increase access to justice for individuals and families regardless of wealth or status;
- Develop policy recommendations for improving access to justice at all levels of government; and
- Conduct research and hand down best practices for civil legal aid and indigent defense.[37]

The civil legal assistance crisis is not only a significant issue for affording access to justice for indigent defendants, but also a major problem for courts and judicial proceedings.[38] As indicated, the

33. *Id.*

34. Kathryn Alfisi, *Ensuring Justice for All: The White House Plan*, D.C. BAR (LAWYER, May 2016), https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2016-white-house-access-to-justice.cfm.

35. *Id.*

36. *Id.*

37. *Id.*

38. Unrepresented litigants are a growing problem for many courts. Judges have noted that lack of legal representation consumes court staff time in assisting *pro se* litigants and results in unclear presentation of evidence by litigants without counsel. *See, e.g.*, BBA STATEWIDE TASK FORCE REPORT, *supra* note 23, at 3. Judges also report that unrepresented litigants slow judicial proceedings and further clog crowded dockets. Interview with retired Probate Court Judge Edward Ginsburg (Mar. 15, 2016).

availability of civil legal aid has been effectively diminished due to increasing pressures from the growing U.S. population, widening income inequality, and greater numbers of people depending on state and federal programs.

The civil justice gap summarized above has been recognized for a considerable period. Judges, clerks, court administrators and attorneys have been aware of the large and steady increase in *pro se* litigants in U.S. courts.[39] There have been wide arrays of suggestions made by state-level commissions including both the judiciary, bar associations, and legal services organizations.[40]

IV. RANGES OF RESPONSE

Federal and state level "access to justice" commissions and initiatives all seek change, primarily in four areas:

- Increasing funding for existing legal services programs;
- Increasing the level of pro bono work by private attorneys;
- Reducing justice system (court and administrative agency) barriers for pro se litigants;[41] and

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39. *See, e.g.*, *Trial Court Set to Study Pro Se Dilemma*, NAT'L L.J., July 31, 2000; Bruce M. Balter & Michael J. Simone, *Accommodating Pro Se Litigants in Civil Court*, N.Y.L.J., Nov. 13, 2000; Stewart W. Gagnon, *The Pro Se Party Creating Burden on Texas Family Law Courts*, TEXAS LAWYER, July 21, 2003.

40. *See, e.g.*, CHARLES L. OWEN ET AL., INSTITUTE OF DESIGN AND CHICAGO-KENT COLL. OF LAW, ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS 15 (2002), https://www.Kentlaw.iit.edu/ Documents/Institutes%20and%20Centers/CAJT/access-to-justice-meeting-the-needs.pdf [hereinafter NCSC Court Access Study].

41. There are many varied suggested changes focused on the courts themselves, with the potential to increase access to justice. The National Center for State Courts (NCSC) sponsored a major and thorough-going study in 2002. *See id.* The NCSC Court Access Study noted that some court reform to date has, ironically, made it harder for *pro se* litigants to use the courts:

> Civil justice reform in the United States has failed to address the problems that self-represented litigants experience and create for judges and court staff. The traditional reform mechanism has been to give judges greater control over the legal process by imposing case management rules on attorneys. Such reforms sidestep the needs of self-represented litigants. Moreover, traditional court reforms may actually exacerbate the problems of self-represented litigants by making the legal process more complex, and thus less easily navigated by litigants without lawyers.

Id. at 4. The NCSC Court Access Study also identified many factors restricting *pro se* litigants use of courts, including economic barriers (of cost), complexity of the court process, lack of knowledge by *pro se* litigants, language barriers, inconsistent information about the process in alternative media, feelings of intimidation and distrust, the time commitment and burden to take

- Using emerging technologies to facilitate the other efforts.[42]

V. METHODOLOGIES FOR ENHANCING PRIVATE BAR *PRO BONO* INVOLVEMENT IN CIVIL LEGAL AID TO INDIGENT POPULATIONS

This Article addresses primarily (2) and (4), with primary focus on ways of enhancing the level of *pro bono* involvement by the private bar (because this is a large pool of an essentially free resource). Staff attorneys working at legal service centers funded directly or indirectly by state sources face the same overwhelming demands for civil legal assistance as LSC-funded centers. In both there are efforts to "recruit" expanded participation on civil matters from the private bar.[43] Indeed, in many jurisdictions the private bar contributes substantial amounts of free legal advice to various civil legal aid programs; and in some, the time donated by private attorneys working *pro bono* for those who cannot afford a lawyer often exceeds the dollar amounts expended by state and federal governments for civil legal assistance each year.[44] There are, however, major structural difficulties in substantially expanding such *pro*

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off time from work. *Id.* at 15, 16. From a system change perspective there are the hurdles of (a) lack of uniformity—laws governing *pro se* litigation vary from state to state and court systems vary in (i) size and in the types and volume of cases, (ii) the demographics of residents, (iii) the age of the court system and (iv) its institutional adaptability to change; and (b) the costs of reform—resource availability for court changes vary widely and courts seldom have large discretionary funds for reforming obsolete systems. *Id.* (These important issues are beyond the scope of this Article.).

42. *See, e.g.*, Douglas A. Blaze & R. Brad Morgan, *Toward More Equal Access to Justice: The Tennessee Experience*, 10 TENN. J.L. & POL'Y 163 (2015); *see also, e.g.*, Tracey Roberts, *Web-Based Tools to Enhance Access to Legal Services: Legal Aid-GA.org and GeorgiaAdvocates.org*, GA. B.J., Dec. 2003, at 46-48; Mike Monahan, *Enhancing Pro Bono and Civil Legal Services Delivery*, GA. B.J., Dec. 2007, at 78-79.

43. This Article's emphasis on ways to increase *pro bono* involvement of the private bar in civil legal assistance for indigent *pro se* litigants is not to be used, and should not be used, as a basis to decrease government funding for civil legal aid. The staff attorneys who operate and practice in civil legal assistance programs (CLA Programs) are the core leadership in civil legal aid for those who cannot afford access to justice; the leadership, training and administrative expertise of these staff attorneys not only serves vulnerable populations directly, but also supports the programmatic framework which makes possible innovative programs for increasing *pro bono* involvement of the private bar in civil legal assistance. The enhancement of *pro bono* civil legal aid recommended by this article is an adjunct for augmenting, not replacing government-funding civil legal assistance programs. *Cf.* Kevin J. Curnin et al., *The Year Ahead in Pro Bono, U.S. and Abroad*, LAW 360 (Jan. 8, 2015), http://www.law360.com/articles/608866/print?section=california ("The continuing heavy toll from deep budget cuts in England will be watched closely not only in the U.K. but throughout Europe. Pro bono legal aid has risen in response, but cannot replace what's been lost, and so the poor will suffer for it.").

44. *See* Lonnie Powers, *Celebrating Pro Bono Month*, MASS. LEGAL ASSISTANCE CORP. (Dec. 24, 2014), http://mlac.org/tag/equal-justice/; *see also* BBA STATEWIDE TASK FORCE REPORT, *supra* note 23.

bono assistance, from court rules, to intake, to administration; these issues will be explored later in this Article.

VI. BACKGROUND TO THE CHANGES PROPOSED

The programmatic changes proposed in this Article toward enhancing *pro bono* civil legal assistance by the private bar are best understood against the backdrop of existing "Civil Legal Assistance Programs" (CLA Programs) since elements of many of these programs are involved in the programmatic suggestions. The descriptions below are not intended to be comprehensive, but rather to provide perspective for better understanding the recommendations in this Article.

VII. LEGAL AID OFFICES

These are offices with federal (LSC), state and/or private funding, which have staff attorneys who provide civil legal assistance to individuals meeting applicable income (and property ownership) guidelines. These CLA Programs have many variations, from providing direct one-on-one staff representation of indigent clients in need, to presenting periodic *pro se* clinics where information is provided to indigent *pro se* litigants, to supervising volunteer attorneys carrying out similar tasks.[45]

VIII. PRO SE LEGAL CLINICS

These are sometimes run by CLA Programs or by bar associations, in each case sometimes involving law school clinical programs. The *pro se* clinics occur periodically with the aim of giving guidance to unrepresented litigants. The clinics usually involve presentations by experienced staff attorneys (from CLA Programs), law professors, volunteer private attorneys and sometimes law students. A 1999 study in the *Fordham Law Review*[46] characterized the work of such clinics as follows:

Pro se clinics provide general information about the law,

45. CLA Programs may involve volunteer attorneys in each of these various endeavors. Under LSC guidelines all LSC-funded offices must dedicate 12.5% of their budget to "private attorney involvement" (PAI). 45 C.F.R. § 1614.2 (2016).

46. Margaret Martin Barry, *Accessing Justice: Are* Pro Se *Clinics a Reasonable Response to the Lack of* Pro Bono *Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879 (1999).

> procedure, and practice to a group of litigants or prospective litigants who share a common category of legal issues. The idea is to provide sufficient information to allow participants to understand and access the type of pleadings required, basic rules such as service of process, basic information that the court will require to render a decision and a sense of the range of remedies available.[47]

The Fordham study examined *pro se* clinics in ten jurisdictions in the United States.[48] The vast majority of the clinics in each of the jurisdictions were focused on matrimonial issues including marriage dissolutions, custody and child support; a few *pro se* clinics also included bankruptcy, small claims, collections and landlord-tenant matters.[49] Most clinics meet monthly although a few meet more frequently.[50]

Given the shortfalls in availability of civil legal aid for indigent individuals, no program aimed at such *pro se* litigants can be considered "unuseful." Nevertheless, my discussions with CLA Program professionals involved in such periodic *pro se* clinical programs reveal several criticisms including, (a) the advice is not at the point of advocacy so the persons attending must retain the information provided; (b) written material which is sometimes provided is useful, but is bound to be somewhat generic and not directly addressed to each person's case; and (c) rarely can case-specific advice be given in light of a program which only has limited, if any, advising resources.

IX. SELF-HELP FORM DOCUMENTS

There are available in many locations' online "libraries" containing user-friendly form documents, such as those generated by the "Self-Represented Litigation Network."[51] The forms are designed to be applicable to particular courts and agencies. The use of form documents has been most helpful to *pro se* litigants where the applicable courts cooperate in the effort to create court-approved documents.[52] However,

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47. *Id.* at 1883.

48. Arizona, Florida, Missouri, Texas, Maryland, California, New Mexico, New York, Colorado, and the District of Columbia. *Id.*

49. Barry, note 46, at 1882.

50. *Id.* at 1896, 1899, 1905, 1908.

51. SRL Interactive Court Forms by State (NCSC 2016), SELF-REPRESENTED LITIGATION NETWORK, http://www.srln.org/node/850/srl-interactive-court-forms-state-ncsc-2016 (last visited July 14, 2016).

52. E.g., at the time (1999) of the FORDHAM LAW REVIEW assessment of *pro se* clinics, a self-help center affiliated with the Maricopa County (Arizona) court had an active inventory of 430 court-approved documents. Barry, *supra* note 46, at 1892; *see infra* text accompanying note

some judges continue to "express ethical concerns about their intervention with *pro se* litigants" and generally prefer to recommend litigants seek legal representation.[53] Self-help, court-approved documents are rarely the exclusive source of civil legal assistance for *pro se* litigants; they are a useful adjunct to other CLA Programs.

X. "UNBUNDLED" LEGAL SERVICES

Most states have approved rules of professional conduct and civil procedure allowing attorneys to take on "Limited Assistance Representation" or "Limited Scope Representation" (collectively, LAR).[54] In LAR the attorney's commitment to the client is only for a specific legal "event" such as filing an answer or conducting a trial. The original aim of such LAR programs is to facilitate and encourage fee-based legal representation by the private bar at much lower cost without taking on full legal representation. While there has been some use of LAR by the private bar, in a number of jurisdictions more extensive use has occurred by CLA Programs through which trained volunteer attorneys or legal staff at such CLA Programs handle in-court representation of indigent clients for specific proceedings.[55]

XI. COURT SERVICE CENTERS

These are usually information desks in lobbies or other public spaces within court buildings staffed by court-affiliated personnel to help guide and answer questions for *pro se* litigants coming to court.[56] These centers also endeavor to provide answers and give brief guidance to *pro se* litigants. There are obvious benefits to having additional court personnel present to guide and provide information at the time proceedings are scheduled to occur, and such centers are helpful to *pro se* litigants,

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84; *see also* Self-Help Forms and Resources, JUDICIAL BRANCH OF ARIZ. MARICOPA CNTY., http://www.superiorcourt.maricopa.gov/SuperiorCourt/LawLibraryResourceCenter/ (last visited July 14, 2016).

53. Barry, *supra* note 46, at 1896.

54. The American Bar Association has aggregated these civil procedure rules and professional conduct rules for reference. *Rules*, *Unbundling Resource Center*, A.B.A, http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html (last visited July 12, 2016) (ALA. R. PROF'L CONDUCT 1.1, 1.2, 4.2, 4.3, 6.5; ALA. R. CIV. P. 11, 87; COLO. R. PROF'L CONDUCT 1.2, 4.2, 4.3, 6.5; COLO. R. CIV. P. 11(b), 12.1; UTAH R. PROF'L CONDUCT 1.2(c), 4.2(b), 4.3(b), 6.5; UTAH R. CIV. P. 5(b)(1), 74(b), 75).

55. Interview with Maureen McDonagh, Director, Wilmer Hale Legal Services Center of Harvard Law School (Mar. 14, 2016).

56. Barry, *supra* note 46, at 1891, 1898, 1904

especially those who are indigent. The benefits of court service centers stem from the staff being a regular part of the court, including the following factors:

- The paralegals are very familiar with the physical locations within the particular court and its procedures;
- The paralegals are known to the clerks' offices and other court personnel;
- The paralegals usually have immediate access to court files that allow them to determine case status and history in a *pro se* litigant's case; and
- Subject to time limitations, the paralegals are able to quickly review papers and give brief orientation as to process; and, at their best, can give *pro se* litigants quick clues about their case.

As agencies of the court, service centers must be open to all, irrespective of income or legal training; however, court service center employees can only provide information; they cannot give legal advice. Accordingly, while such court service centers can and do make *pro se* litigants (especially first-time litigants) feel less "at sea," the occasions when the service center personnel can review papers and question *pro se* litigants about their cases and provide some guidance is necessarily limited by both the time available and restrictions against legal advice. Such service centers are rarely able to leverage efforts of volunteer attorneys.[57] In addition, the staffing costs of such centers at a time when there are budget pressures on all courts suggest that staffing at such centers will not be enlarged.[58]

XII. "HOTLINE" TELEPHONE ADVISING

Hotlines have continued in effect as a source of legal guidance to *pro se* litigants for several decades. The agencies that staff the hotlines face very large demand, a manifestation of the general crisis in *pro se* civil

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57. A CLA Program could cooperate with a court service center and make available trained attorney volunteers under the supervision of a CLA Program staff attorney. Allison Interview, *supra* note 17.

58. For example, in the early 1990s the Maricopa County (Arizona) Superior Court, concerned about helping both the public and judges who had to comprehend *pro se* pleadings, hired a paralegal to assist *pro se* litigants. "The paralegal was able to serve between five to ten people per day using court-approved forms. This type of assistance, however, became too costly to maintain. Court administrators found that because the court could only employ one paralegal, many litigants were turned away." Barry, *supra* note 46, at 1892.

litigation in the United States.[59] My involvement with CLA Programs and with many experienced practitioners in such programs indicates the following limitations on the efficiency and effectiveness of hotlines:

(1) It takes a substantial amount of time to give hotline advice, often shrinking the availability of time for other callers; as a result, phone wait times are frequently so long that many callers become discouraged and hang up;

(2) Such long wait times are difficult for indigent persons who often pre-purchase relatively limited numbers of "minutes" for phone use;

(3) Most indigent *pro se* litigants are no longer phone-centric; their "phone" is more typically a cell phone that is used in limited time frames, and more often as a web-connection;[60] 4. Since the hotline "advisor" is generally not seeing the litigant's court papers, this lack diminishes effectiveness: e.g., sometimes the *pro se* litigant's "paper" has defects or procedural problems that can create "openings" which would enable a lawyer to devise a helpful mini-strategy;

(4) Oral advice given to indigent laypersons in distress is often ineffective; the listener has diminished ability to absorb the advice because the personal legal matter for which aid is sought is often a source of anxiety and stress. There is a substantial body of evidence indicating that being in a stressful situation impairs cognitive skills;[61]

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59. Telephone Interview with Professor Gordon Shaw, Director, Cmty. Legal Aid (Dec. 14, 2015) [hereinafter Shaw Interview].

60. "The model set up in [1996-97] . . . was that the telephone was to be the preferred and primary way clients would access [civil legal assistance] services. It is now obvious that a telephone-centric intake system is not consumer-friendly. Low-income persons are increasingly relying on mobile phones with limited minute plans as their only telephone. Moreover, the reliance on limited telephone intake hours is problematic for working persons who may only have short windows of time during the work day to call. Meanwhile, access to the internet has grown considerably among the low-income community." *Report of the Massachusetts Legal Aid Programs' Intake Task Force* 7 (Nov. 2, 2012) [hereinafter *Intake Task Force Report*]. The shift over the past two decades to cell phones (and the internet via such phones) is significant. In 1998, 36% of households had a cellular phone. JULIE SIEBENS, U.S. CENSUS BUREAU, EXTENDED MEASURES OF WELL-BEING: LIVING CONDITIONS IN THE UNITED STATES: 2011, at 11 (2013), http://www.census.gov/prod/2013pubs/p70-136.pdf. This figure had nearly doubled by 2005, and in 2011, 89% of all households had a cellular phone. *Id.* As of January 2014, 84% of Americans with household income less than $30,000 per year have cell phones. PEW RESEARCH CENTER, CELL PHONE AND SMARTPHONE OWNERSHIP DEMOGRAPHICS, http://www. pewinternet.org/data-trend/mobile/cell-phone-and-smartphone-ownership-demographics (last visited July 12, 2016). As of January 2014, 90% of American adults have a cell phone. As of October 2014, 64% of American adults have a smartphone.

61. *See, e.g.*, LIAM DELANEY ET AL., INST. FOR THE STUDY OF LABOR (FORSCHUNGSINSTITUT ZUR ZUKUNFT DER ARBEIT), EFFECTS OF STRESS ON ECONOMIC DECISION-MAKING: EVIDENCE FROM LABORATORY EXPERIMENTS 3 (2014), http://ftp.iza.org/dp8060.pdf ("We find that exposure to stress significantly increases the degree of discounting displayed by individuals, and leads to large reductions in the respondents' willingness to learn . . . ."); *see also* Nicholas Kristoff, *It's*

(5) If the hotline advice is far in advance of the proceeding, the *pro se* litigant often has difficulty remembering even well delivered advice, in part because the hotline advice is often delivered as a verbal rendition of legal paradigms[62]; and

(6) More subtly, the layperson in need of help who cannot process all the helpers' phone advice has a diminished sense of self-efficacy. The "helping" role thus can undermine rather than guide and empower.

XIII. "HOTLINE" AGENCIES AS INTAKE FOR CLA PROGRAMS

There is another important distinction to be made about hotlines, that is, whether the agency operating the hotline is also part of a CLA Program engaged in direct advocacy work. Where that is the case, the hotline can also serve a direct intake function for the CLA Program and benefit from the ongoing interaction between the provision of hotline advice and the active handling of advocacy for *pro se* litigants.[63]

Where the agency operating a hotline is *not* part of a CLA Program directly engaged in legal advocacy work for *pro se* indigent litigants,

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Not Just About Bad Choices, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/opinion/Sunday/nicholas-kristof-its-not-just-about-bad-choices.html, ("A . . . line of research has shown that economic stress robs us of cognitive bandwidth. Worrying about bills, food or other problems, leave us less capacity to think ahead . . . so poverty imposes a mental tax."). Sendhil Mullainathan and Elder Shafir have explored the impact of economic stress. SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013). In one of their examples, farmers in India tested about 10 points lower on I.Q. tests prior to completion of a harvest (on which the farmers are heavily economically dependent) than afterward when they have successfully sold and/or stored their crops. *Id.* at 57-59. Also, in psychology experiments with lower-income people where they are asked to imagine a relatively small car repair bill, there is no adverse impact on I.Q. test performance but when they are asked to imagine a larger car repair bill that creates a financial "emergency"—because it is much more difficult to find immediate funds to cover the cost—they perform significantly lower on intelligence measuring tests. *Id.* at 49-51, 136-37.

62. Personal communication Gordon Shaw, Professor of Law at Western New England School of Law and Director of Client Access, Community Legal Aid (CLA); Shaw Interview, *supra* note 59. Forty-five minutes on a hotline call is often more information that can be absorbed by persons who are calling with a legal crisis in their lives. Prof. Shaw said of his many years manning a "hotline": the "most profound experience" was that "while people appreciated the time that was taken, and it was often extensive, they were not going to do anything I told them." In the course of my work with the Lawyer For a Day Program in the Boston Housing Court for more than 15 years, I have encountered *pro se* litigants who have previously received hotline advice; often the persons have poorly transcribed notes or a general remembrance of things they might consider doing but they rarely have a clear plan of action that they can implement on their own.

63. For example, Maryland Legal Aid operates a senior hotline which serves all its CLA Program offices throughout the state, and this enables Maryland Legal Aid to provide both intake (for appropriate cases) and referral where case representation is not appropriate. *See* ELDER RIGHTS, MD. LEGAL AID, http://www.mdlab.org/get-help-services/elder-rights (last visited July 12, 2016).

there are a number of additional limitations. *First*, since none of the hotline employees are directly involved in the advocacy process, they lack the continuing information flow (from judges, clerks and other advocates) that an advocacy organization regularly obtains from direct client work.[64] *Second*, where the hotline endeavors to serve many organizations as intake source, there is a greater likelihood of incorrect eligibility determinations. *Third*, the intake information gathered by the hotline has to be rechecked by the advocacy organization to which the client is referred, so there is at least partial (and sometimes substantial) duplication of effort compared to what would occur if there was less separation between advocacy and intake. *Fourth*, the hotline model starts with the aim of rendering advice, not merely conducting a screening intake, so the hotline provider has a regular pattern of dealing with hotline callers for a much longer time period; in some cases, an average of 45 minutes. By contrast, CLA Programs which do intake without hotline advice are able to complete the intake/screening process in 10-12 minutes.[65]

In sum, where a hotline is not directly conducted by a CLA Program which also conducts civil legal assistance advocacy work but instead the hotline serves *two* distinct functions: one, as provider of hotline legal advice to callers, and two, as "intake" for *other* CLA Programs aiming to serve indigent *pro se* litigants, then there can be major structural inefficiencies. For example, the LSC-funded CLA Program where the author of this article serves on the board, found that when it used a separate hotline as source of intake, the flow of referral intake from the separate hotline organization was insufficient to keep busy all the *pro bono* attorneys who regularly volunteer to provide civil legal assistance to indigent *pro se* litigants. Considering the extensive need and significant number of vulnerable indigent *pro se* litigants, it was inadvisable to continue to utilize a separate hotline to conduct intake for the CLA Program.[66] As the Intake Task Force Report concluded: "Intake systems should not be confused with hotlines . . . . [I]ntake is a core

64. Community Legal Aid (CLA) of Western Massachusetts regularly rotates agency personnel (serving the civil legal assistance programs) through intake where they answer phones and enter intake data from callers; the advocacy program work of such personnel helps to inform their intake questioning of potential *pro se* litigants and make the intake process more effective. Shaw Interview, *supra* note 59.

65. *Id.* As indicated, Community Legal Aid of Western Massachusetts switched from a hotline service which also performed intake, to an intake-only call-in line.

66. Since no call-in line that serves to feed intake via a CLA Program will be without "wait time," the intake call-in line can use such wait time to state guideline eligibility, make suggestions as to websites to consult and other resources which may be available. CLA Programs that have made the switchover from hotline-as-intake to direct intake have found that they are effectuating, in part, a referral function albeit in a less time-consuming fashion than the hotline their direct intake has supplanted. Shaw Interview, *supra* note 59.

component of every legal service delivery system. A legal hotline is a form of service delivery—a limited assistance delivery model . . . . In this regard, hotlines are intentional but not indispensable."[67]

There is another reason case intake and information gathering is often better done by a CLA Program with staff attorneys and administrative assistants who have expertise with the civil legal assistance programs themselves: in order that cases made available for private bar volunteer attorneys are "vetted" and filtered in advance—for income and case eligibility and factual details.[68] This helps leverage the use of private bar attorneys who want to devote *pro bono* time helping indigent litigants since such volunteers want to spend *pro bono* time on substantive, not administrative issues.

In a world with severe limits on resources for civil legal assistance, hotlines can serve a function for persons who do not qualify under state and federal guidelines for CLA Programs. That was the initial impetus to hotlines' origin. However, two constraints are converging: one, there are greater limits on resources available to provide civil legal assistance to indigent populations, and two, with population growth and increasing income inequality there are ever larger numbers of indigent persons in need of civil legal aid. As a result, intake must occur more quickly, not in 45-minute calls that apply to both eligible and ineligible persons. That is why an intake that is as close as possible to the level of advocacy is more efficient, and separate hotlines do not function effectively or efficiently as a service delivery model for civil legal assistance to *pro se* litigants.

Accordingly, combining hotline advising (a legal service) with intake referral to separate CLA Programs (a function in a delivery system) is suboptimal and should not be utilized.[69]

XIV. ONLINE CIVIL LEGAL ASSISTANCE

Emerging online advice models that are being adopted by many states seem likely to provide more efficient and more cost-effective programs. In 2011 the Tennessee Alliance for Legal Services in conjunction with the Tennessee Bar Association began an experiment with implementing an interactive online legal service. As an efficient way for Tennessee attorneys to fulfill *pro bono* service, the program achieved quite rapid success and the concept has experienced other state adoptions including Alabama, Arizona, Mississippi, Indiana, Minnesota, South Carolina, and

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67. *Intake Task Force Report*, *supra* note 60, at 6.

68. Allison Interview, *supra* note 17.

69. *Id.* at 8 ("Hotlines should not be used as a stop gap when other parts of the delivery system are under-resourced.") (emphasis in original).

West Virginia.[70] In brief summary, the online legal service programs work generally as follows:

- Lawyers desirous of fulfilling *pro bono* service enroll with the online system; the website program facilitates the administrative tasks to complete the enrollment process.[71]
- Individuals seeking legal advice online must submit their names and addresses and other background information (income eligibility testing is a pre-condition for use of the program.)[72] Once qualified, individuals then provide their questions to the program on the website, and the questions as well as the individuals' names, addresses, and contact information are posted where lawyers participating in the online system can see them. The questions can cover any of a broad constellation of legal specialties.
- Lawyers "pull down" as many questions as they want to answer; once "pulled down" the question no longer shows on the website. However, the lawyer has only 72 hours to answer a "pulled down" question; failure to answer within the time period results in the question being reposted to the online website and the website operating agency, e.g., the bar association, can keep track of attorneys who fail to answer in a timely manner.[73]
- Lawyers are entitled, but not obligated, to contact the individual "questioners" directly and if they do then the matter is off the website and becomes a private client undertaking

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70. *See, e.g.*, ALA. ACCESS TO JUSTICE COMM'N, ABOUT ALABAMA LEGAL ANSWERS, http://www.alabamalegalanswers.org/Home/About (last visited July 12, 2016); S.C. BAR PRO BONO PROGRAM, ABOUT SC LAW ANSWERS, http://www.sclawanswers.org/Home/About (last visited July 12, 2016); Marilyn Odendahl, *Too Few Pro Bono Attorneys in Rural Communities;* IND. LAW. (Nov. 79, 2012), http://www.theindianalawyer.com/too-few-pro-bono-attorneys-in-rural-communities/PARAMS/article/30039 (stating that the IBF Launched Legal Assistance Website to Help Low-Income Hoosiers).

71. Some states adopting the online systems have elected to keep lawyers' names and addresses private from the public. Other states have elected to make the lawyers' names and addresses public, with the idea that if that "privacy" issue becomes an impediment to lawyer recruitment it will be easier to move to anonymize lawyer information than to go in the opposite direction. Telephone Interview with Rochelle Hahn, Co-director, Mass. Law Reform Inst., Inc. (June 28, 2016) [hereinafter Hahn Interview].

72. For example, the Massachusetts equivalent program Massachusetts Legal Answers Online (MLAO), places a limit of 200% of the federal poverty level—which is the same "guideline level" utilized for LSC-funded civil legal aid programs (in Massachusetts). *Frequently Asked Questions from Volunteer Attorneys*, A.B.A. MASS., https://mass.freelegalanswers.org/attorneyfaq#Eligibility (last visited June 28, 2016).

73. Hahn Interview, *supra* note 71.

governed by applicable attorney-client rules.[74]

- Questions which are answered online remain available (with the answer) on the server and are preserved but are removed from the public website so that the website is continually refreshed.[75]

Other states including Massachusetts, are initiating similar websites for their attorneys.[76] The American Bar Association (ABA) acting through its Standing Committee on *Pro Bono* and Public Service has further advanced the goal of fostering adoption of such online systems in all 50 states by two significant actions: first, the ABA has obviated the need for state online systems to operate their own server (as certain initial state systems had to do); specifically, the ABA has established and is covering the operational cost of a "national" server, thereby enabling state online systems to operate their state online system as a portal on the national server and to thereby save substantial administrative and operational costs.[77] Second, by working with the National Legal Aid and Defender Association (NLADA) the ABA is enabling each state to have a one million dollar malpractice policy that covers every lawyer who provides answers on each state's online *pro bono* website; all legal advice provided on the website is covered.[78] If a lawyer contacts a questioner and a direct attorney-client relationship ensues, that advice is not covered [but is covered by the lawyer's malpractice policy].[79] With that ABA/NLADA support many other states have commenced initiating similar online websites.

By comparison to hotlines, such state-level online legal assistance systems have many positive advantages: (a) the process of the asking for advice and the providing of advice can take place at any hour and is more likely to fit the work schedule of lower-income people; (b) the advice is in written form so the questioner has a written guideline to work with instead of his or her own hastily written notes from a hotline's oral flow of information; (c) follow-up questions can be asked online in an interactive mode; although the online interaction is not in real time, it

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. In addressing conflicts, state online systems treat the advice given as a limited scope representation governed by ABA Model Rule of Professional Conduct 6.5, which provides that a "lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter" is subject to conflict rules only if the lawyer personally knows that the representation of the client involves a conflict of interest. MODEL RULES OF PROF'L CONDUCT R. 6.5 (1983).

nevertheless affords the opportunity for clarification and additional explanation; (d) referrals to other resources can be passed on in a written form that is more readily useable; (e) hotlines have a hard time pre-screening callers and there are often high percentages of callers who are ineligible under federal or state guidelines; online websites require the submittal of income eligibility information as a pre-condition for access and use; (f) the number of people who can be served is not limited by the number of people manning the telephone hotline at any one time; instead websites leverage the availability and skillset of the *pro bono* resources of the private bar.[80]

There are two additional societal trends militating in favor of moving away from phone-centric hotlines toward online systems to enhance civil legal assistance programs: (1) increased access to web-based technology: the number of Americans having sufficient "computer literacy" access to the internet is more widely spread[81] and (2) increased expectations of computer-supported interactions: more people have had direct and often daily experience with computer-supported transactions, such as banking and other businesses.[82] This creates the potential for individuals, especially *pro se* litigants, to become more willing to use web-based systems.

Such state-level online advising websites are also in structural alignment with what this article considers an essential principle for leveraging increased *pro bono* civil legal assistance by the private bar for indigent populations, namely, taking into account *the potential reluctance of the private bar to take on* pro bono *civil legal assistance cases because of the open-ended nature of a case representation.*[83]

This principle has not been given sufficient consideration in designing *pro bono* programs involving the private bar. Most CLA Programs utilizing volunteers from the private bar endeavor to pass on indigents' cases for full representation.[84] State rules of professional conduct

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80. To the extent there may be issues regarding recruitment of sufficient numbers of private attorneys to serve as legal resources for an online advising system, some states which have ongoing continuing legal education (CLE) requirements are experimenting with giving CLE credits to attorneys who participate as resources for the online system.

81. According to the Pew Research Center, 87% of American adults use the internet in 2014, up from 14% in 1995. PEW RESEARCH CTR., INTERNET USE OVER TIME, PEW, http://www.pewinternet.org/data-trend/internet-use/internet-use-over-time (last visited July 12, 2016). In 2014, 77% of households with income less than $30,000 year use the internet. *Id.*

82. E-commerce sales as a percent of total retail sales continue to increase. U.S. CENSUS BUREAU NEWS, QUARTERLY RETAIL E-COMMERCE SALES 1ST QUARTER (2016), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

83. Allison Interview, *supra* note 17.

84. Of course, sometimes the private *pro bono* attorney can resolve the issue with a letter or a phone call. (This is a point which also applies to Lawyer-for-a-Day Programs described below: my experience likewise confirms that the potential involvement of a *pro bono* volunteer

effectively prohibit attorneys from "abandoning" a client representation without leave of court.[85] Accordingly, while substantial numbers of private attorneys are willing to take on *pro bono* a civil legal assistance case that is vetted and referred by a CLA Program, there will be many more private attorneys and private law firms that will be concerned about the potentially unlimited time commitment taking an indigent's individual civil legal aid case may entail. This "concern" can have the effect of limiting the pool of available private bar *pro bono* volunteers. The state-level online advising websites address this concern (1) by avoiding the formation of a full attorney-client relationship and (2) by allowing the volunteer attorney to control the amount of time that is devoted to the advising task. In addition, these advising websites generally facilitate the "matching" of the questioners' legal topic area with the advising attorneys' areas of expertise.[86] All these structural alignments should be considered when planning programs to increase

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attorney frequently induces reasonable settlements.).

85. *See, e.g.*, CAL. R. PROF'L CONDUCT r. 3-700(A) (2015):

> (A) In General.
> (1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.
> (2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700 (D), and complying with applicable laws and rules.

MASS. R. PROF'L CONDUCT r. 1.16(c), (d), (2016):

> (c) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned.

MODEL R. PROF'L CONDUCT r. 1.16(c) (AM. BAR ASS'N 2017):

> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

86. Hahn Interview, *supra* note 71.

private bar *pro bono* efforts.

XV. GIVEN RESOURCE LIMITATIONS IT IS ESSENTIAL TO LEVERAGE THE TIME AND RESOURCES OF THE PRIVATE BAR

There are severe funding limitations at both the state and federal (LSC) levels for providing civil legal assistance through full-time staff attorneys. Cooperative programs that involve private bar attorneys are a necessary adjunct to improving the level of civil legal assistance for indigent populations. However, that obvious point does not provide sufficient programmatic guidance for how to utilize the *pro bono* contributions of the private bar most effectively. The structuring principle outlined above should be a fundamental guide: prime focus should be on private bar volunteer opportunities that obviate the risk of an open-ended attorney-client relationship and thereby promote greater *pro bono* involvements.

One effort to address this limitation has been to encourage the private bar to consider Limited Assistance Representation (LAR) where the referred case is only handled for a specific legal task. However, my experience with volunteer attorney *pro bono* programs indicates several reasons LAR does not serve well as a means to overcome the "open ended risk" of taking a case:

(1) LAR requires the specific tasks to be undertaken by the attorney to be specified in the special LAR documents signed by the client and served on the other side; (2) since most civil legal assistance cases referred by CLA Programs lead to initial phone contact between the volunteer *pro bono* attorney and the client, it is administratively complex and time-consuming to get LAR documents signed; (3) often at the outset, the private bar volunteer attorney will not know whether a matter will need to go to trial or can be resolved by a phone call or a letter or a negotiated settlement agreement, so it is hard to specify the LAR task accurately in advance. Accordingly, LAR is often not an effective "cure" for the private bar's concern about an open-ended attorney-client relationship with a *pro se* litigant. By comparison, online *pro bono* advising systems implicitly address this concern and avoid formation of an open-ended attorney-client relationship with indigent *pro se* litigants.

XVI. LAWYER-FOR-A-DAY PROGRAMS: ANOTHER PRIVATE BAR VOLUNTEER OPPORTUNITY THAT OBVIATES THE RISK OF AN OPEN-ENDED ATTORNEY-CLIENT RELATIONSHIP AND THEREBY PROMOTES GREATER *PRO BONO* INVOLVEMENT

CLA Programs should also consider adding to their "arsenal" of volunteer attorney opportunities another type of *pro bono* program, which *does not* involve specific case assignments of open-ended duration, but instead involves only a specific time commitment. We refer to such programs as they are sometimes called: "Lawyer-for-a-Day" Programs (LFAD Programs).[87]

LFAD Programs have several essential elements:

> (1) The programs are often located at, or adjacent to, the courts or agencies where adjudications are occurring, such as in court buildings or in public spaces adjacent to agency offices or hearing rooms. This, of course, requires cooperation of the courts or agencies involved. The present civil legal aid crisis for indigent *pro se* litigants and the significant number of "access to justice" commissions have substantially enhanced the cooperative posture toward establishing such programs.[88]

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87. *E.g.*, N.Y. STATE UNIFIED COURT SYS., *Volunteer Lawyer for the Day Program—Housing*, N. Y. COURTS, https://www.nycourts.gov/ courts/nyc/housing/vlfd_housing.shtml (last visited July 12, 2016) ("The Civil Court of the City of New York operates the Volunteer Lawyer for the Day (VLFD) Program, which is designed to assist unrepresented tenants and landlords appearing in nonpayment cases in the Housing Court's Resolution Part. The VLFD program is an unbundled legal services program where the representation begins and ends the same day."). Another example is the LFAD Program in Cook County, Illinois:

> Under current program operations all participating law firms schedule their volunteer lawyers to be on site to represent otherwise *pro se* petitioners seeking emergency *exparte* Orders of Protection. Potential clients are linked to volunteer lawyers who interview the individual and determine whether they will agree to accept the case that day.

CIR. CT. OF COOK COUNTY DOMESTIC VIOLENCE DIVISION, ORDER OF PROTECTION PRO BONO REPRESENTATION PROGRAM 1, https://www.illinoislegalaid.org/sites/default/files/attachments/Order%20of%20protection%20pro%20bono%20representation.pdf, (last visited July 12, 2016).

88. In establishing the LFAD Program in Massachusetts Housing Courts to address the large number of *pro se* litigants dealing with landlord-tenant issues, the Housing Court judges noted that although the vast majority of *pro se* litigants are tenants, there are some *pro se* landlords for whom a non-paying tenant could be a personal financial crisis, e.g., if the landlord is lower-income and owns a two- or three-family house, the absence of rent from a single tenant would jeopardize the landlord's ability to pay the mortgage. To address this situation the staff attorney from the LFAD Supervisory Agency will advise all *pro se* Landlords who meet applicable income guidelines. This arrangement satisfied the Housing Court Judges' concerns about a balanced

(2) The LFAD programs are most efficient and effective if they are each oriented around a particular area of law—landlord-tenant law, veterans issues, or social security cases, for example.

(3) Attorney volunteers, by reason of their "in the hall" advising, are not deemed to have taken on full representation of the persons they advise as clients. For court-centered LFAD Programs this likely will necessitate a *standing court order or rule* that attorney participants in LFAD programs are not thereby deemed to have made a formal appearance.[89]

(4) To further ensure that a full representation attorney-client relationship is not formed it is recommended that there should be a signup sheet (in English and any other languages the *pro se* litigants commonly use) which states that the volunteer attorney advising in the LFAD clinic is only in a temporary attorney-client relationship but not the advisee's attorney. This signup sheet should also contain a place to fill in the name and address of the *pro se* litigant and the applicable docket or case number; the latter information will facilitate the ability of the LFAD program to keep count of the number of persons served by the program and to track outcomes.[90]

(5) Each participating private volunteer attorney only commits to a specific *pro bono* "donation" of time during which he or she the participates in the LFAD advising program, e.g., 8:30 a.m. to 1:00 p.m. several days per month. When the time period is over the volunteer attorneys return to their private practice *without* having acquired any clients or formed attorney-client relationships.[91]

(6) The LFAD program requires organizational involvement and leadership from experienced attorneys. These can come from state-funded or LSC-funded CLA Programs or from the ranks of retired judges (such as an LFAD clinic in several small claims courts or similar courts

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LFAD program.

89. *See, e.g.*, HOUSING COURT STANDING ORDER 1-01: LAWYER FOR A DAY PROGRAM, MASS. COURT SYSTEM, http://www.mass.gov/courts/case-legal-res/rules-of-court/housing/standingorder1-01.html (last visited July 12, 2016).

90. Allison Interview, *supra* note 17.

91. LFAD standing court orders or agency rules do not preclude a volunteer from deciding to take on the matter as a formal representation, either as a full client relationship or as a Limited Assistance Representative (LAR). *See* Massachusetts Courts System, *Supreme Judicial Court Order Regarding Limited Assistance Representations* (Apr. 10, 2009, eff. May 1, 2009) ("each Trial Court Department Chief Justice, may, with the approval of the Chief Justice for Administration and Management, make Limited Assistance Representation available in the Divisions of his/her Trial Court Department"), http://wwww.mass.gov/courts/case-legal-res/rules-of-court/sjc/lar.html. Private law firms that participate in LFAD Programs report that encouraging younger associates to spend some time in LFAD clinics provides "real world" exposure to court or agency proceedings, and provides substantive advising opportunities without the risk of client cases having to be brought back to the firm's office where such cases might impose time and effort burdens of unpredictable magnitude. Interview with Honorable Jeffrey Winik, First Justice of the Boston Housing Court (May 12, 2014) [hereinafter Winik Interview].

which address the debt collection cases currently flooding such courts[92]), or any combination of these (each an "LFAD Supervisory Agency"). While the LFAD Supervisory Agency will need to provide one or more staff persons to serve as guide and resource for the volunteer attorneys in the LFAD Program, there is great leverage from such an arrangement, with often more than a dozen volunteers and only one staff attorney. Of course, some administrative assistance is needed by the LFAD Supervisory Agency to coordinate the days on which volunteers attend.

(7) Because LFAD Programs are best organized around particular court proceedings or agencies, there is a more predictable range to the types of issues that arise. This enhances the ability of the LFAD Supervisory Agency to provide periodic training sessions on the particular area of law and the likely issues to arise. (The training sessions are most usefully done at locations such as private law firms where a large number of volunteers from the particular law firm sources can be trained at the same time.) Training manuals containing (i) examples of case time lines, (ii) major precedents, and (iii) relevant statutes can also be made available in advance to the volunteering law firms to photocopy and distribute to the training session attendees.[93]

In addition, the LFAD Supervisory Agency can prepare and have available at the applicable court or administrative agency standard forms (with "check-the-box" alternatives) that can increase the number of *pro se* litigants seen by the private volunteer attorneys during their LFAD Program participation period. As indicated, the leverage of private bar volunteers provided in LFAD Programs stems in major part from the absence of the formation of an attorney client-relationship. While volunteer attorneys have the discretion in complex matters to undertake Limited Assistance Representation (or even to take the matter on as a full representation case), the vast bulk of volunteer attorney participation in the LFAD Program is advising the *pro se* litigant as to how best to present their own case.

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92. Retired Judge Dougan, in cooperation with the Volunteer Lawyers Project of the Boston Bar Association (VLP), is directing LFAD Programs for debt collection cases in three (3) small claims courts in eastern Massachusetts; the author, a board member of VLP, is personally familiar with these LFAD Programs. *Cf.* Thomas B. Scheffey, *Debt Debate; Judicial Branch, Consumer Attorneys Square Off Over New Statute*, CONN. L. TRIB., June 25, 2012, at 1; Marc G. Perlin & John M. Connors, *Commentary: Act Redefines Small Claims Awards and Process Service*, MASS. LAW. WKLY., Mar. 23, 2011.

93. It should also be noted that as LFAD Programs become an established element in the civil legal aid repertoire, private attorneys and private law firms become regular participants and thereby acquire background and expertise in the area(s) of law typically confronted in the program and can thereby assist in the training of new volunteers.

XVII. IMPORTANT TRAINING ELEMENTS FOR ATTORNEYS PARTICIPATING IN LFAD PROGRAMS

The leverage and advisory role of LFAD Programs means that most of the *pro se* litigants are not actually represented by counsel and instead receive a rapid review of their case and guidance from the volunteer attorney about how best to present the matters. This arrangement raises several special (and interrelated) factors for consideration in training *pro bono* volunteers for participation in the LFAD Program.

XVIII. BACKGROUND PREPARATION OF *PRO BONO* VOLUNTEER ATTORNEYS FOR PARTICIPATION IN AN LFAD PROGRAM

There are details of the interview (and strategic assessment process) in an LFAD Program that require special focus in the preparation of volunteer attorneys for participation. As part of that specific training, it will also be helpful for the volunteer attorney to be briefed on several broader policy considerations.

IXX. GENERAL POINTS OF GUIDANCE FOR *PRO BONO* VOLUNTEER ATTORNEYS PARTICIPATING IN AN LFAD PROGRAM

A. *Justice as Process*

First, it is essential to keep in mind that LFAD Programs require the cooperation of the court or governmental agency, with which the program will function. This cooperation is generally forthcoming due to the "flood level" of civil matters on very crowded dockets. It also makes it important for volunteer attorneys who participate to understand the perspective of court judges and agency ALJs: that justice is not only about outcome; it is also importantly about process. And not just the abstract elements of "due process"—such as right to respond to claims and have a hearing—but a process in which the lay participant has an opportunity to feel his or her voice has a chance to be expressed.

One reason this is helpful in training is that our legal culture has tendencies toward considering any legal proceeding solely as a contest with winners and losers, where a loss is failure. From this viewpoint, justice is all about outcome, and failure to win is just failure. Such a viewpoint can cause a volunteer to listen too selectively, looking only for "winning points" in the *pro se* litigant's narrative (of which there may, on occasion, be few), and thereby to show less interest or attentiveness if the narrative fails to preview a "rock solid" basis for victory. Of course, the volunteer's role is in major part aimed at finding elements in the *pro*

se litigant's narrative that will afford stronger support for his or her case. But too narrow a focus on "justice as outcome" can make the volunteer come across to the *pro se* litigant as "grading" the narrative, deciding up front if it is a "winner" or a "loser." This is unhelpful in two respects: it tends to provide less room for the litigant to give full voice to his or her narrative; it also fails to take into account how such self-expression can be experienced as an element of justice—a fair opportunity to be heard.

Viewed in the context of "justice as process" the volunteer can still be looking for winning points, but can also give feedback when there are few or no "winners"—guidance as to which points are stronger and which weaker. The volunteer can also be frank and informative about the likelihood of victory and can make procedural suggestions, such as a recommendation to try mediation first where the litigant's narrative may evoke more sympathy for the situation than it would at a trial or adjudication where the absence of strong legal points (in light of applicable statutory or case law precedent) will yield a weaker chance of success. A volunteer can be helped to make these distinctions in working with *pro se* litigants with an eye toward giving a preview and guidance without squelching self-expression. The volunteer is in a dual role empathic listener and legal guide. And the impact of nuanced listening can be profound.[94]

In sum, when one explains to attorney volunteers that "justice as process" is the view which prevails among most judges, that perspective can help the volunteers re-examine their own role as part of an LFAD Program. It will facilitate listening to a *pro se* litigant's voice and narrative in a manner that is more sympathetic and better able to give interactive feedback, not just score-keeping about arguments. In this manner one can readjust perspectives on *pro se* litigants' narrative voices and in so doing this can have positive impacts on enhancing their self-efficacy and their perceptions of the civil justice system.

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94. *See* THE VOICE OF WITNESS READER: TEN YEARS OF AMPLIFYING UNHEARD VOICES 13 (Dave Eggers ed. 2015). Empathic listening also extends recognition from the volunteer attorney to the *pro se* litigant, recognition of what the person has been through, their resilience, their grit and courage. *See* Eliza Griswold, *Upending the Narrative of the Great Man of History*, SMITHSONIAN MAG., Dec. 2013:

> If journalism is the first draft of history, then the voices of the witnesses are [its] pith . . . . Once you connect with someone, once you acknowledge that your understanding of an issue can be broadened and challenged, it is transformative . . . for the interviewer and the person who is being interviewed.

B. *Degree of "Fit" Between the Pro Se Litigant's Narrative and Useful Legal Paradigms*

Judicial views regarding the interaction between indigent *pro se* litigants' narratives and the effectiveness of these narratives within formal judicial proceedings contain programmatic insights that are difficult for judges to express publicly.[95] These views depend on the type of court or agency proceeding. When probate and family courts address marital and child custody issues, the factual narratives of *pro se* litigants are generally relevant to the issues to be decided (except that judges report *pro se* litigants spend excessive time casting blame and crafting "self-defensive" positions about their own less-than-stellar behavior). In such situations a volunteer attorney at a LFAD Program may face an easier time in listening to, and guiding, the *pro se* litigant's narrative.[96] A reminder to minimize criticism of the other co-parent need not detract from guidance about portions of the narrative to emphasize.

By contrast, in housing courts where eviction proceedings predominate, many portions of narratives related by *pro se* litigants do not fit into legally useful paradigms (*e.g.*, loss of job or the sudden illness of a family member who requires care, do not mesh effectively with statutory schemes or existing case law precedent where non-payment of rent is involved). As a result, for volunteer attorneys who are new participants in LFAD Programs in housing courts, there is a common tendency at the intake phase to treat the *pro se* litigant's narrative as not "fitting" and therefore not useful. The propensity is to ignore the individual's narrative voice and to probe only for "legally useful" facts, such as whether there are violations of explicit or implied covenants of habitability or whether code compliance was requested in advance of rent default. Part of this is necessary and worthwhile, but it tends to close out the voice of the *pro se* litigant, attempting merely to canalize the narrative into a "fact pattern."

C. *Availability of Mediation and its Impact in an LFAD Program: Enhancing the Likelihood of Settlement*

Mediation programs exist in multiple formats and in different administrative and judicial contexts.[97] The "access to justice" crisis in

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95. I have obtained information about such views from being a participant observer in LFAD Programs, from interviewing judges who preside over crowded urban courts and from speaking with staff attorneys at CLA Programs.

96. Interview with Edward Ginsburg, retired Prob. Court Judge (Mar. 15, 2016).

97. For example, "Massachusetts Trial Court offers court-connected ADR as an alternative to litigation in every Trial Court Department. Alternative Dispute Resolution (ADR) is a generic term used to describe certain processes in which an impartial third person assists parties in settling

civil legal assistance for *pro se* litigants has generated pressure for increasing the availability of mediation services because such services can leverage the capacity of courts (and agencies) to handle crowded dockets and the large flow of civil cases and because mediation often is oriented around, and frequently results in, settlements.[98] There are additional benefits where the mediation services are court or agency-affiliated, because in such circumstances *pro se* litigants are more likely to experience the mediation process as part of one's "day in court."

When the court or administrative agency around which a LFAD Program is oriented has an adjunct mediation program that is a major strategic asset for the LFAD Program and the *pro bono* volunteers assisting *pro se* litigants for several reasons:

> (1) Where there is relatively poor "fit" between the *pro se* litigant's narrative and the operative legal paradigm, an emotionally compelling narrative may have more "traction" in mediation toward generating a settlement.
> (2) Relatedly, it may be easier for the *pro bono* attorney to provide guidance to the *pro se* litigants about their narrative because there will be less pressure to emphasize solely "legal paradigm" points and therefore the *pro bono* volunteer's suggestions may have more flexibility to provide guidance about emotionally compelling elements of the *pro se* litigant's narrative which utilize the person's own voice.
> (3) The presence of a mediation program leverages the available time of the *pro bono* volunteer attorney participating in the LFAD Program because in referring a *pro se* litigant to mediation there can be advance discussion of what the litigant could consider a reasonable settlement, recognizing that if mediation fails the *pro se* litigant can return to the LFAD Program for further trial-specific advice.
> (4) The presence of LFAD Program *pro bono* volunteer attorneys increases the likelihood the opposing party's counsel will agree to mediation since such party's counsel is aware of the presence of the volunteer civil legal assistance and the potential for the *pro bono* volunteer attorney (or the LFAD Supervisory Agency) to take a case to trial—via LAR or otherwise. As a result, the

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a case without the need for trial." ALTERNATIVE DISPUTE RESOLUTION, MASS. CT. SYS., http://www.mass.gov/courts/programs/adr/alternative-dispute-resolution.html (last visited July 12, 2016); *cf.* Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873 (2012), http://scholarship.law.marquette.edu/mulr/vol95/iss3/7; Yishai Boyarin, *Court-Connected ADR—A Time of Crisis, A Time of Change*, 95 MARQ. L. REV. 993 (2012), http://scholarship.law.marquette.edu/mulr/vol95/iss3/12.

98. Winik Interview, *supra* note 91.

opposing party's counsel is more likely to settle. (Of course, it would not be possible to take all cases to trial, but the existence of the possibility in each case can serve as a "general deterrent" in multiple situations simultaneously). For example, in an LFAD Program in the Boston Housing Court with which the author is familiar, settlements are achieved in the substantial majority of cases where non-payment of rent was the result of a temporary setback in the life of the *pro se* litigant. (If the tenant has not been abusive or engaged in inappropriate activity, there is a structural advantage in favor of settlement: if the Landlord "wins" possession in the eviction proceedings, zero back rent will be paid. If a settlement agreement is reached with a multi-month payback of overdue rent, the landlord is better served economically, especially since the settlement agreement is usually in the form of an "Agreement for Judgment" in which the failure of the tenant to make the repayment schedule will entitle the landlord to possession (*i.e.*, an order of eviction for breach of the Agreement for Judgment, without having to go through the preliminary procedures of summary process). For this reason it is essential that the LFAD Program or the mediator ascertain that the repayment schedule is realistic in light of the financial capacity of the *pro se* litigant. Housing Court judges have confirmed that the presence of an LFAD Program in their courthouse has substantially improved the quality and feasibility of settlement agreements).[99]

D. *LFAD Program Forms: A Dual Role in Facilitating the Service Capacity of Volunteer Attorneys and in Enhancing the Pro Se Litigant's Voice*

Another major aid in LFAD Programs is having available form documents covering as fully as possible the range of legal actions that may be necessary and likely. These forms can be utilized to both train *pro bono* volunteers as well as to facilitate the brief interview process with *pro se* litigants. An especially effective form to create and have available is the so-called "check-the-box form" of Answer responses, with guiding comments about the legal issue for each element on the form. This combination of background explanation in a checklist format helps cover all potential issues. It can also help elucidate issues as to which the *pro bono* volunteer lawyer can empower the *pro se* litigant to emphasize in his or her narrative.

99. Housing Court judges have confirmed in interviews and bar association discussions that the presence of an LFAD Program in their courthouse has substantially improved the quality and feasibility of settlement agreements. Winik Interview, *supra* note 91.

XX. Specific Comments About Interviews with Pro Se Litigants in an LFAD Program

A. *The Effectiveness of the "Voice" of the Pro Se Litigant Depends in Part on the Volunteer Attorney*

In the limited time available to the volunteer attorney in the LFAD Program, he or she needs to obtain and assess the facts and issues—from a combination of reviewing the legal papers the pro se litigant brings with him or her, and interviewing the pro se litigant.

Because an LFAD Program is not a "full representation" which gives rise to a customary attorney-client relationship, it will be useful to analyze elements of the brief interview process and to outline suggestions that may be of use.

(1) It is helpful that the interview, although time-limited, is close to the point of advocacy. As a result, the *pro se* litigant is focused, and his or her thoughts are directed to the issue at hand. Acknowledging that focus by inquiring "what is your issue today?" will reflect both attention to the issues and a desire to listen to the *pro se* litigant's narrative.

(2) The *pro se* litigant almost always has brought legal papers present for review. (If the litigant's personal narrative were the sole source of information [as it often is with "hotlines"] a lot of volunteer attorney time would be lost because of the need to cross-question about the sequence of facts that may affect procedural elements in the case.) With papers available for review, the volunteer attorney can cycle between them and the *pro se* litigant's narrative. Usually, it is better to first ask for, and listen to, the *pro se* litigant's narrative and get a general idea of the situation and then pause the person with a "thank you that was helpful. Now let me review the papers and then I can ask you further questions." This way of listening can serve to manifest openness to letting the person engage in their own narrative (which gives a sense of self-efficacy) and, with the paper review, manifest an intent to focus on that person's specific case.

(3) Listening during the interview should endeavor to take into account whether the *pro se* litigant is experiencing the process for the first time. If not, then the listening can be more focused on the legal strength of the narrative, the *pro se* litigant's organizational ability and the other factors described below.[100]

(4) One of the skills to be taught volunteer attorneys participating in LFAD Programs is assessing from the *pro se* litigant's narrative their

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100. If the legal proceeding is a first for the *pro se* litigant then the pro bono volunteer needs to be sensitive to the fact that the litigant's encounter with the volunteer is a first opportunity for the litigant to voice his or her version, and this encounter may be experienced by the *pro se* litigant as a part of the court experience.

organizational skills, ability to speak effectively, and likely ability to respond effectively to questioning by the judge or opposing advocate.

B. *Assessment of Narrative Skills and Impact of Resolution Mechanism*

Based on this brief interview "data" and on an assessment of (1) the *pro se* litigant's ability to relate a coherent and effective narrative and (2) what form of resolution mechanism is available, (*e.g.*, mediation or trial), the *pro bono* volunteer lawyer can:

- Provide suggestions to the *pro se* litigant about (a) points to emphasize (and others to deemphasize) in the narrative, including those points, if any, which have the most legal "traction" and (b) pointers about the sequence of what will occur in mediation (or in court). For example, where there is an emotionally compelling personal narrative that relates to falling behind in the payment of rent, the volunteer attorney can explain: the judge will want to hear some of that background and you should explain that. In addition, you need to raise the following points about the physical condition of the apartment and the security deposit.
- Provide the less effective *pro se* litigant—who has the availability to mediation and whose narrative is sympathetic (even if it does not have strong legal traction)—guidance that the *pro se* litigant's case is stronger in mediation than at trial, and let mediation proceed without intervention or consider being present at mediation. Such a presence will use up more volunteer time that could be spent on advising other *pro se* litigants so the decision needs to take that factor into account in consultation with the LFAD Supervisory Agency.[101]
- Finally, depending on the type of proceeding, the volunteer attorney can be looking for opportunities to structure a settlement.

Volunteer evaluation, even as it guides and tells us what to de-emphasize, provides support for the *pro se* litigant and a chance for the litigant to learn about essential principles, in a way that can hopefully make the process feel more just. The brief interactive interview—listening, reviewing papers, asking clarifying questions, giving points to emphasize—can function as a form of short-term attorney-client relationship. If the interactive interview

101. In situations where mediation is not available (or in situations where the *pro se* litigant's likely effectiveness even in mediation may be deeply suboptimal), the volunteer lawyer or an LFAD Supervisory Agency can choose to appear (pursuant to LAR).

is done well; the *pro se* litigant can feel he or she has been taken seriously.[102]

Within government agencies (*i.e.*, non-court systems) the potential availability of settlement arrangements may be more limited and LFAD Programs oriented toward such agency proceedings need to take account of how a settlement process fits with agency operations. For example, in Social Security Administration (SSA) matters, the primary context in which a settlement is possible is in "overpayment waiver" cases—where the SSA previously paid the beneficiary too much and now wants the overpayment returned. There an LFAD Program could assist in the negotiation of a settlement agreement about payback times and the amount of installments. Such agreements can be negotiated with a SSA claims representative at a local office and can be memorialized in a confirming letter. SSA does not typically enter into a form settlement agreement with a beneficiary.

By contrast the issue of whether a person is disabled under SSA's regulations can rarely be resolved through negotiation. However, SSA can make a disability determination *prior* to an administrative hearing before an Administrative Law Judge (ALJ) if sufficient documentation of medical and functional impairment is provided. Due to resource limitations most CLA Programs do not have the capacity to help *pro se* litigants until they reach the ALJ hearing stage. However, LFAD Programs (*i.e.*, with *pro bono* volunteers making time-limited commitments) could help at earlier stages.

C. *The Impact of Training on Pro Bono Volunteer Attorneys*

While it is not easy to condense this methodology into a relatively short "intake" type interview, it is achievable. It helps to emphasize to volunteer attorneys in LFAD Programs that with rare exceptions *pro se* litigants remain *pro se*, and that the intake interview is a way such litigants can be empowered to orient their narratives (their voice) toward somewhat more legally useful directions in a process that enables them to feel validated.

With training about the interview process, the volunteer can help the *pro se* litigant in ways that do not exclude his or her voice. Training volunteer attorneys who participate in LFAD Programs involves readjusting their perspective on indigent *pro se* litigant's narrative voices and helping the volunteer attorneys to understand the positive impacts from such a readjustment, such as enhanced self-efficacy and enhanced

102. Theoretically, a hotline could achieve the same result as an LFAD Program interview if enough time were available to get all the details. But that elongates the hotline service time, often averaging 45 minutes and less effective.

perception of the justice system.

In sum, LFAD Programs are designed to leverage and enhance the availability of volunteer attorney *pro bono* services while being realistic about the functional limitations of the private bar and its institutional anxiety about the uncontrollable commitments of time individual civil legal aid cases can sometimes involve. It is essential to deal with these realistic anxieties of the private bar, their willingness to help, their pride in helping, but also the concerns and business realities.[103]

XXI. CONCLUSIONS

The U.S. Justice system faces many challenges in providing civil legal assistance for indigent populations for which there is no precedent establishing a right to counsel. There is growing policy awareness of the "access to justice" gap for large portions of the populations who cannot afford formal representation. These access to justice needs far outstrip the capacities of legal aid offices—funded by states, the Legal Services Corporation or other sources—to meet demand of indigent *pro se* litigants.

Hotlines, especially those which provide both detailed telephone legal advice and intake referrals for other civil legal aid programs are becoming less effective and efficient.[104] Intake closer to the level of advocacy

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103. An example of failing to consider concerns of the private bar is the recent (2016) backlash which had the effect of aborting a pilot project of the American Bar Association. *See* Susan Beck, *ABA Abandons Rocket Lawyer Venture Amid Attorney Backlash*, LEXIS, Feb. 23, 2016. Specifically, the ABA leadership approved a pilot project called "ABA Law Connect," which was a joint venture with "Rocket Lawyer," a company with investment backing from Google Ventures. *Id.* "Rocket Lawyer" wanted to take a mass market approach to helping consumers consult with lawyers and by creating legal documents they needed. *Id.* The aim was to provide small businesses with affordable legal services while offering lawyer members of the ABA the opportunity to serve new clients. *Id.* Under the proposed program customers would pay less than $5.00 (US) to ask an ABA member lawyer *one* on-line question and a follow-up question; beyond that the lawyer and client could bargain for further services. *Id.* Starting in October 2015 the pilot venture was tested for three months in three states: California, Pennsylvania and Illinois. *Id.* It was shut down in January 2016 after state bar associations challenged the program in large measure because of fears it would take business away from state and local bar referral services (which charge small referral fees that generate income for bar association functioning). *Id.* While one might be disappointed with the failure of the ABA Law Connect venture with Rocket Lawyer, it also underlines the necessity of designing civil legal assistance programs involving the private bar in a manner that leverages such private bar resources with realism and practicability. That is another reason this article urges greater proliferation of LFAD Programs.

104. *Intake Task Force Report*, *supra* note 60, at 6 ("Intake systems should not be confused with hotlines . . . . [I]ntake is a core component of every legal service delivery system. A legal hotline is a form of service delivery—a limited assistance delivery model. . . . In this regard hotlines are intentional but not indispensable."); *id.* at 8 ("hotlines should not be used as a stop

improves the flow of cases to civil legal assistance programs. Emerging state-level online civil legal advice websites appear to afford a more effective model for advising vulnerable populations about civil legal matters; these online advising systems are less expensive to run and allow *pro se* litigants to make inquiries at time of their choosing. They also permit *pro bono* volunteer attorneys to control the timing and level of effort they provide.[105] This predictability and the absence of a full attorney-client relationship are important elements in designing new *pro bono* programs for *pro se* litigants. A prime example of civil legal assistance programs fitting this paradigm are so-called "Lawyer for a Day" programs (LFAD Programs) which are designed around particular courts systems or governmental agencies and which allow *pro bono* volunteers to make regular predictable time commitments without formation of an attorney-client relationship and the unpredictable level of *pro bono* service such "full rep" relationships can entail.

Judges in courts serving indigent populations face extremely crowded dockets and are increasingly interested in encouraging successful expansion of *pro se* volunteer assistance programs to help alleviate the significant press of cases. This is where LFAD programs can have an enormous impact, especially if they leverage the expertise of the *pro bono* volunteer attorneys by facilitating *pro se* litigants' capacity to use their own voices to address their needs.[106] One element of such facilitation is training volunteer attorneys to use the intake interview in ways that empower *pro se* litigants to transform their narratives toward legally useful paradigms and guide them toward more effective self-representation. Where such training programs have been in effect for a number of years, judges handling case dockets involving a large number of *pro se* litigants report better outcomes and more workable settlements.[107] They also confirm that process is often as important as outcome, and that fostering a sense of self-efficacy for indigent *pro se* litigants is a keystone for justice and a support for democratic values.

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gap when the other parts of the [legal assistance] delivery system are under-resourced").

105. Allison Interview, *supra* note 17.

106. Winik Interview, supra *note* 91.

107. *Id.*

SCHEDULE I

The types of cases which CLA Programs handle for indigent populations generally include the following areas of law:

Housing/Landlord and Tenant Rights; Eviction Defense
Home Foreclosures Prevention
Bankruptcy/Debt Relief
Defense against Guardianship & Conservatorship for Elders
Guardianship of Adult Incapacitated Persons
Guardianship of Minors
Divorce including Domestic Violence and Safety Planning for Abuse Prevention; Restraining Orders; Custody and/or Safe Visitation
Child Support/Child Support Modification
Access to Job Training
Access to Tax Credit Advice
Employment; including (i) Wage and Hour Claims, (ii) Unemployment Compensation, and (iii) Temporary Workers Rights, Parental Leave, Unemployment and Public Policy Campaigns for Paid Sick Days
Paternity
Benefits: including (i) Emergency Shelter and Transitional Housing, (ii) Health Care (including Medicaid or Other public insurance programs) and (iii) Getting and Keeping Social Security or SSI
Department of Transitional Assistance (DTA) Benefits, Food Stamps, Cash Benefits
Nursing Home Issues
Immigration Support
Wills, Trusts and Estates