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Access to Civil Justice†

INTRODUCTION

In over three-fourths of all civil trials in the United States, at least one litigant does not have representation.¹ This is particularly problematic because the basis of American litigation is the adversary system, and the adversary system depends on lawyers for its implementation. Under the adversary system, the litigation process is party-initiated and party-controlled. Unlike the “inquisitorial system” in many civil law countries where judges take control of the litigation, the major engine that propels the adversary system in the United States are lawyers for litigants. They are the ones that bear the responsibility for investigating and presenting the evidence and the arguments. And so, access to justice in the United States has come to mean access to legal representation.

Access to civil justice in the United States has broad implications. It can mean avoiding an unjust eviction or preventing a wrongful deportation. Civil justice issues are varied and the need for legal representation is severe.² But the costs of civil litigation can be extremely high even for those who have enough to pay for an attorney. Often, the costs of litigation may be prohibitive and exceed the judgment, causing the injured party to be dissuaded from bringing or defending an action.³ In the United States, the right to a waiver of court fees for indigent litigants in cases involving fundamental rights has been upheld by the Supreme Court, but the right to legal counsel in civil cases is more contested.

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† https://doi.org/10.1093/ajcl/avac020
2. See id.

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According to the 2020 World Justice Project’s Rule of Law Index, the United States is ranked number thirty-six out of 128 for access to civil justice, despite being one of the leading economies in the world.\(^4\) Some of the main constraints in the U.S. civil justice system include accessibility, affordability, and discrimination.\(^5\) One significant cause of the inaccessibility to civil justice in the United States is the general rule that each party to a lawsuit is typically required to pay for its own representation.\(^6\) This Report will focus primarily on cost and access to legal assistance in civil cases generally, recognizing however that the access to justice problems faced by racial minorities and women are even more problematic.

Because the United States is a federal system, this Report will also address both the federal and state landscape. State-level strategies of providing access to civil justice differ from federal efforts of doing so, largely because of the variations that exist across jurisdictions. Laws, practices, and strategies differ from state to state, resulting in a patchwork that leaves roughly 80% of the civil needs of low-income individuals unmet.\(^7\) However, recent trends in broadening access to civil justice at the state level present interesting lessons for redressing the intractable inaccessibility that hampers the U.S. legal system overall.

I. THE CONSTITUTIONAL LAW FRAMEWORK: IN PURSUIT OF “CIVIL GIDEON”

In the 1963 case of *Gideon v. Wainwright*, the U.S. Supreme Court established the constitutional guarantee that criminal defendants have access to legal counsel as a fundamental right, under the Due Process Clause of the Fourteenth Amendment.\(^8\) However, the command of *Gideon* has never been extended to the civil context, despite an ever-growing consensus to the contrary.\(^9\) The “Civil Gideon” movement in the United States seeks to address the reality that for many low-income individuals and families, a civil penalty can be just as devastating as a criminal penalty.\(^10\) For families that are at or below the poverty line, a civil judgment could mean the difference between stability and homelessness.\(^11\) Despite consistent efforts, advocates have

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\(^5\) Id. at 154.

\(^6\) Maureen Carroll, Fee-Shifting Statutes and Compensation for Risk, 95, Indiana L.J. 1021, 1022 (2020).


\(^9\) Daniel Richardson, Civil Gideon: Balancing the Access for All, 42 Vr. B.J. 33, 34 (2016).

\(^10\) Id.

\(^11\) Id.
determined that the most likely avenue to progress in the expansion for Civil Gideon is through legislative efforts and the states rather than through federal constitutional strategic litigation.

The right to counsel as a “fundamental right” in criminal cases opened the door for advocates to argue that the Due Process and Equal Protection Clauses of the Constitution should also result in a right to counsel for indigent litigants in civil court. The argument is especially cogent when the government is taking away an individual’s fundamental rights under the Constitution. But while U.S. courts have found that a parent’s “care, custody, and management” of their child is a fundamental right according to the Due Process Clause, the Supreme Court denied it as a means of achieving Civil Gideon.

In *Lassiter v. Department of Social Services*, the Supreme Court held that a mother who lost custody of her infant child to the Department of Social Services is not entitled as a matter of right to assistance of counsel under the Due Process Clause of the Fourteenth Amendment. Rather, the *Lassiter* majority held that appointment of counsel by the court should be done on a case-by-case basis. *Gideon*’s presumption of “only when an indigent litigant may be deprived of his physical liberty” has set the bar very high for indigent civil litigants to argue for a constitutional right to appointed counsel.

While there are many credible arguments as to why *Lassiter* should be overturned, several circumstances make it unlikely to occur anytime soon. Principally, the *Gideon* decision occurred during a phase of progressive judicial opinions, while *Lassiter* was decided during a conservative shift, a shift that will remain for years to come. Also, the presence of pro se clinics and assistance hotlines, have actually made it less pressing to argue that a constitutional right for counsel is needed in civil cases. Thus, as evidenced by *Nicole K. v. Stigdon*, a recent Seventh Circuit decision in which the plaintiffs claimed that the failure to supply legal counsel to children in dependency proceedings was a violation of the children’s due process and equal

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13. Zoom Interview with John Pollock, Coordinator, National Coalition for a Civil Right to Counsel (July 8, 2021).
15. Id.
16. Id. at 899–900.
19. Id. at 902.
20. Id.
protection rights, the court dismissed the argument, stating flatly “there is no ‘Civil Gideon’ principle for child-custody or child-welfare proceedings.”

Similar obstacles face arguments for expanding the right to counsel in civil hearings under the Equal Protection Clause of the U.S. Constitution. U.S. courts have customarily applied the Equal Protection Clause “by subjecting a law to heightened scrutiny when it discriminates between members of a suspect class.”23 When a suspect class is not involved, the law will be subject to the lowest review, “rational basis.” The Supreme Court, however, has never recognized wealth as a “suspect classification,” and therefore courts will only require a rational basis as to why it is in the government’s interest to not appoint universal counsel in civil proceedings.24 Since it is always easy for the government to supply a rational basis for its decisions, the Equal Protection Clause under the U.S. Constitution has not been a successful route for expanding the access to civil counsel.

State constitutions, however, can and have granted rights beyond those granted by the U.S. Constitution,25 and Civil Gideon arguments have found greater reception in state rather than federal courts. For example, Ohio,26 New Jersey,27 and Hawaii28 have all seen recent success in establishing a constitutional right to counsel in their respective state courts. The Ohio Supreme Court held that indigent parents faced with losing parental rights in an adoption proceeding in probate court are entitled to appointed counsel under the Equal Protection Clause of the United States and Ohio Constitutions. The court held that the right to counsel in adoption proceedings does involve a substantial right.29 In Re L.I. and H.D.K., the Hawaii Supreme Court held that “that parents have a substantive liberty interest in the care, custody, and control of their children that is protected by the due process clause of article I, section 5 of the Hawai‘i Constitution.”30 Therefore, once the Department of Health and Services (DHS) files a petition for custody over a child, that parent’s rights are substantially affected, and thus to protect indigent parent’s rights, an attorney must be provided.

Some states, however, such as Washington, have held that the judiciary is not the proper venue to determine the expansion of access to counsel. Rather, the view is that it is the legislature’s role to address

22. Id.
25. In Lassiter, the court recognized states could form their public policy to require higher standards than they believe tolerable under the federal Constitution. Lassiter, 452 U.S. at 34.
29. Y.E.F., 171 N.E.3d at 302.
30. L.I., 482 P.3d at 1083.
such a complex issue. In *King v. King*, the Washington Supreme Court held that a woman in a divorce proceeding whose husband was granted primary care of their child does not have a right to counsel.\(^{31}\) The court held “there is no right to counsel at taxpayer expense in a dissolution action,”\(^{32}\) and that to spend public money on actions beyond those mandated by the state and federal constitution is the job of the legislature, not the judiciary.\(^{33}\)

II. THE LEGISLATIVE FRAMEWORK

Ultimately the most successful pathway to ensure access has been through legislative initiatives.\(^{34}\) Indeed, when the Supreme Court decided *Lassiter*, over thirty states already had a statute that provided some form of appointed counsel. Today there are eighty active bills throughout thirty different states.\(^{35}\) State bills cover a wide range of various needs including immigration, forfeiture, parental rights, senior citizens’ rights, children’s rights, tenants’ rights, veterans’ rights, and healthcare.\(^{36}\) There are also six active federal bills that expand access to counsel for particularly at risk populations, such as children and vulnerable adults in immigration removal proceedings.\(^{37}\)

Such legislative action may have been spurred by the 2010 Model Act\(^{38}\) and the Basic Principles of a Right to Counsel in Civil Legal Proceedings passed by the American Bar Association (ABA) House of Delegates.\(^{39}\) The Model Act and Basic Principles provide guidance to states that are considering legislation to expand access to counsel in their state by suggesting different structures and best practices to make access to legal aid a right and not a limited form of charity.\(^{40}\) The Model Act declares “fair and equal access to justice is a fundamental right in a democratic society”\(^{41}\) but recognizes that establishing universal civil representation will need to be structured based on the

\(^{31}\) King v. King, 174 P.3d 659, 669 (Wash. 2007).

\(^{32}\) Id. at 667.

\(^{33}\) Id. at 398.

\(^{34}\) Brown, *supra* note 12, at 893, 906.


\(^{36}\) Id.

\(^{37}\) Id.


\(^{39}\) Id.

\(^{40}\) Id. at 9.

\(^{41}\) The ABA Model Access Act, *supra* note 38, at 7.
needs of the state. Therefore, the Act recommends that state judicial systems create “independent state access boards, to ensure that all eligible persons receive appropriate public services when needed.” Further, the Act narrows the meaning of universal access to counsel by stipulating that the right to assistance is only to apply when “basic human needs” are at stake, and defines basic human needs primarily as “shelter, sustenance, safety, health, and child custody.”

The Act inspired state and local legislative expansions of a civil right to counsel. Among the Act’s greatest successes is the California Sargent Shriver Civil Counsel Act, which extended the language from the ABA Model Act to establish the largest pilot program on civil counsel ever. The statute focused on “the basic needs” framework from the Act and has provided more than $58 million to seven legal aid programs and court partners in a seven county pilot examining the impact of increasing access to counsel for litigants in housing, domestic violence, conservatorships and guardianships, and child custody disputes.

New York City is also leading the way in access to civil justice as the first city to implement legislation that guarantees legal representation for all low-income tenants in New York City facing eviction in Housing Court and New York City Housing Authority (NYCHA) administrative proceedings. The law establishes a deadline of July 2022 for the implementation of a program which provides full representation for all tenants with a gross household income below 200% of the federal poverty guidelines. Those that are above the threshold are not guaranteed full representation, but they do qualify for a one-time, individualized legal consultation. The law also established an Office of Civil Justice (OCJ), which was created as an extension of the Department of Social Services (DSS), with the objective of overseeing and monitoring city-supported civil legal services in the representation of tenants. Since the phased-in rollout, twenty-five zip codes have been reached.

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44. Id.
46. Id.
48. Id.
49. Id.
50. Newton, supra note 47, at 23.
While there have been some major successes, legislation thus far have been piecemeal. By far, the most widespread objection to Civil Gideon is money.\textsuperscript{52} According to the ABA, “[f]inancial resource limitations remain one of the largest barriers preventing civil legal aid providers, even with their pro bono allies, from addressing the needs of low-income client communities.”\textsuperscript{53} Thus, while wealthier states, such as California, New York, and Massachusetts, will have more robust access to counsel that covers a range of matters,\textsuperscript{54} other poorer states, such as Alabama, Mississippi, and Arkansas, will remain limited and poorly funded.\textsuperscript{55} To avoid such discrepancies, Congress should establish a federal right to civil counsel which reaches across state boundaries, with implementation individualized based on the particular needs of each state.

IV. Fee-Shifting Statutes

Another legislative effort to close the civil justice gap is the enactment of fee-shifting statutes. Unlike other countries, litigants in the United States are responsible for their own attorneys’ fees, regardless of the success of the lawsuit. However, at both the federal and state level, one way fee-shifting statutes have been enacted to incentivize certain types of litigation deemed to promote the broader public interest.\textsuperscript{56} In these situations, if the plaintiff prevails in the action, courts may order the defendant to pay for the plaintiff’s reasonably incurred legal fees.\textsuperscript{57}

These fee-shifting statutes aim to provide for the market value of legal services rendered in the hope of allowing litigants to rely upon the potential award to obtain representation they may not be able to afford otherwise.\textsuperscript{58} In the pursuit of that aim, clients do not pay advanced fees like retainers; instead, attorneys collect payments after the case’s conclusion.\textsuperscript{59} Though providing access to justice is a definite motivating factor underlying the statutes, they also are underpinned by a desire for judicial efficiency: the threat of paying the other side’s

\begin{thebibliography}{9}
\addtolength{\itemsep}{-0.5pt}
\bibitem{Richardson} Richardson, \textit{supra} note 9, at 33, 34.
\bibitem{ABA} ABA Standing Commi. on Legal Aid & Indigent Defendants, \textit{Civil Legal Aid Funding, AM. BAR ASS’N}, www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/re-sources — information-on-civil-legal-aid-funding.html (last visited Sept. 14, 2016).
\bibitem{Carroll} Carroll, \textit{supra} note 6.
\bibitem{Id.} Id.
\bibitem{Fee-Shifting} Fee-Shifting, AM. BAR ASS’N, www.americanbar.org/groups/delivery_legal_services/reinventing_the_practice_of_law/topics/fee_shifting (last visited July 31, 2021).
\end{thebibliography}
legal fees can, at least theoretically, increase pressure to settle cases more quickly than an opposing party may have initially planned.\(^60\)

Attorney’s fee-shifting provisions at the federal level largely exist within civil rights, environmental protection, and consumer protection statutes.\(^61\) Some are one-way fee-shifting statutes, allowing only plaintiffs to recover fees should they win. This concentration naturally follows from the motivations behind these types of statutes—encouraging private litigation to further public policy and equalizing the imbalance between individual claimants and corporate or governmental opponents.\(^62\)

As for facially neutral language fee-shifting provisions, the Supreme Court has found that these federal fee-shifting statutes empower courts to direct fees if “the fee claimant was the ‘prevailing party,’ the ‘substantial party,’ or ‘successful.’”\(^63\) However, this does not necessarily preclude prevailing defendants from recovering attorney’s fees as well as successful plaintiffs, even in the civil rights context. The Court has interpreted the facially neutral language of fee-shifting statutes regarding both prevailing plaintiffs and defendants to require a “dual-standard.”\(^64\) The Court has reasoned that while Congress wanted to incentivize the bringing of civil rights claims by aggrieved plaintiffs, it also wanted to protect defendants from frivolous and burdensome litigation, and awarding fees to defendants and plaintiffs alike can adequately effectuate that end.\(^65\) Though different standards may apply to defendants than to plaintiffs in civil rights claims, both types of litigants can be awarded attorney’s fees under the federal statutory framework of fee-shifting.\(^66\)

Additionally, the Equal Access to Justice Act (EAJA) of 1980 allows fee-shifting to prevailing parties even in actions against the United States.\(^67\) This allowance is comprised of two categories. First, it holds the United States liable for paying the attorney’s fees of prevailing parties to an extent equal to that of any other party under traditional common law or statutory exceptions.\(^68\) Second, the EAJA provides that in all civil actions and in some agency adjudications brought by or against the United States, the government can be ordered to pay the attorney’s fees of the prevailing party, unless it proves that

\(^{60}\) Id.


\(^{62}\) Id.


\(^{64}\) See Christianburg Garment Co. v. Equal Employment Opportunity Comm’n, 434 U.S. 412 (1978) (stating that there are “strong equitable considerations” that point to the use of a dual standard in determining when fee awards are appropriate).

\(^{65}\) Id. at 420.

\(^{66}\) See id.; Hughes v. Rowe, 449 U.S. 5, 14 (1980); Brown v. Culppeper, 559 F.2d 274, 278 (5th Cir. 1977).

\(^{67}\) Awards of Attorneys’ Fees by Federal Courts and Federal Agencies, supra note 61.

\(^{68}\) Id. See also 28 U.S.C. § 2412(b).
“its position was substantially justified or that special circumstances make an award unjust.”

Fee-shifting statutes and rules vary widely across jurisdictions at the state level. However, despite this variance, state-level statutes can have an indelible impact on broadening access to civil justice. These state statutes often can focus more narrowly on practice areas too localized to fall within the purview of the federal government. For example, a Massachusetts fee-shifting statute provides for the one-way shifting of attorney’s fees in landlord-tenant disputes when the landlord is in violation and the tenant prevails in the case. Housing litigation generally presents high levels of inaccessibility to civil justice, as tenants facing eviction are oftentimes among those with the greatest difficulty in securing representation. Through this statute, though, Massachusetts is able to increase the likelihood of attorneys taking on tenants as clients by providing for eventual compensation when the tenant prevails in litigation. In this way, state-level fee-shifting statutes are well suited to address specific representational needs in a more tailored way than broader sweeping federal statutes are.

Despite the increased propensity of state-level fee-shifting statutes to address localized issues of representation and increase access to civil justice, many states lack fee-shifting statutes in contrast to the relatively robust framework in place at the federal level. Many advocates contend that states need to adopt and enact provisions that, at minimum, match the opportunities for fee-shifting granted by federal legislation. By aligning state public interest fee-shifting practices with their federal analogs, states will be able to strike the correct balance between providing for increased access to justice and disincentivizing frivolous and overly burdensome civil rights lawsuits directed at low-income defendants.

Furthermore, the notion of broadening the applicability of fee-shifting statutes have grown in popularity in recent years. While the current statutory framework largely restricts fee-shifting to particular areas of litigation, advocates aim to reconceptualize fee-shifting as operating outside the bounds of statutorily prescribed subject matter. Proposed statutes would allow for the discretionary

70. Fee-Shifting, supra note 59.
72. Fee-Shifting, supra note 59.
73. Id.
75. Id.
76. Id.
awarding of attorney’s fees by courts depending not on the nature of the litigated claim, but on the socioeconomic status of the litigants. The above proposal differs from the current model of fee-shifting, which relies upon the claim itself to dictate the availability of fee-shifting awards. Instead, this new framework would focus on the imbalance between low-income individual litigants and their usually well-financed adversaries, which is relatively consistent with the underlying purpose of fee-shifting statutes as originally conceived. Though this departure from traditional fee-shifting may appear too radical for many of the proposal’s critics, its advocates suggest that a statute such as this would remain tailored enough by excluding civil cases against natural persons and focusing instead on only corporate legal entities. Aiming primarily to broaden access to civil justice to rural and low-income areas, this new type of fee-shifting statute could revitalize fee-shifting at the state level, which continues to lag behind that of the federal system.

V. The Federal Legal Services Corporation

By and large, federal financial support for access for civil justice is accomplished through the Legal Services Corporation (LSC). Congress created the LSC in 1974, as a response to the growing need to provide equal access to civil proceedings. The LSC is the main funding which the federal government provides to assist low-income Americans access counsel in civil matters. The LSC is an independent nonprofit corporation which is led by a bipartisan board of eleven directors that are appointed by the President and confirmed by the Senate. The LSC is funded almost entirely by an annual appropriation by Congress. The appropriation is then distributed to eligible nonprofits providing direct civil legal aid services. Currently, there are 133 independent legal aid organizations with over 800 offices servicing every county in the United States and the American territories.

78. Id. at 79.
79. Id.
80. Id.
81. Id.
82. Id. at 80.
83. Buckwalter-Poza, supra note 1.
84. Id.
87. Id.
The LSC in the United States is the largest funder for civil legal services for low-income Americans.89 LSC funds serve households with annual incomes at or below 125% of the federal poverty guideline.90 In 2015, that meant that to qualify for LSC services, an individual could not make more than $14,713 per year, and $30,313 for a family of four.91 The shortfall between available legal services and the legal need of low-income communities is severe,92 and due to the recent pandemic, which caused hundreds of thousands to be unemployed and unable to pay their rent, advocates say it has worsened.93

The LSC refers to the unmet civil legal needs of low-income Americans and the available resources to meet those needs, as the “justice gap.”94 In a study of the justice gap in 2017 at least 86% of civil legal issues reported by low-income Americans received inadequate or no legal assistance.95 The most common civil legal problem areas were health, consumer and finance, rental housing, children and custody, education, disability, and income maintenance related.96 However, among those receiving assistance from an LSC, the top three types of civil legal problems related to family, housing, and income maintenance.97 It is estimated that in 2017 around 1.1 million low-income Americans will receive limited or no legal assistance for their legal issues, despite qualifying for LSC assistance.98 Reports contend that a lack of resources by LSC organizations renders them unable to fully address around 85%—97% of civil legal problems faced by those qualifying for assistance.99

The LSC also dictates restrictions on the use of LSC funding.100 Restrictions range from who can and cannot be sued by LSC attorneys, to what sort of claims LSC-funded organizations are authorized to bring.101 LSC organizations cannot use the funds to lobby government offices, agencies, or legislators, nor can they bring class-action

90. Id.
91. Id.
92. Id.
95. Id.
96. Id.
97. Id.
99. Id.
101. Id.
suits. These restrictions prohibit LSC attorneys from addressing systematic issues that many of their clients encounter. Further, they are also unable to “leverage the strength of mass claims to challenge wrongful conduct by powerful institutions or governmental entities.”

By alleviating some of the restrictions on LSC funding, legal aid advocates could expand access to civil justice for more clients. For example, LSC attorneys representing individuals facing unlawful debt collection, under the current restrictions, can assist individuals with their individual legal issue but cannot work to prevent the debt collector from continuing abusive and deceptive practices with other debtors.

This limitation precludes LSC attorneys from expanding their impact without having to utilize more resources.

In 2010, to supplement the Legal Services Corporation, the Department of Justice created the office for Access to Justice (ATJ), whose stated mission is to “help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.” ATJ staff work in the Department of Justice, throughout federal agencies, and with state, local, and tribal justice systems to assist increase access to counsel. In mid-2018, the Trump Administration effectively closed the office, thwarting efforts that started under the Obama Administration to improve the access to civil justice issue. However, in May 2021, U.S. Attorney General Merrick B. Garland under the new Biden Administration announced that the Justice Department will immediately begin the work to reinvigorate the office and restore the Justice Department’s role in efforts to expand access to counsel in civil proceedings for indigent defendants. The ups and downs of the ATJ office reemphasize the need to establish the right to counsel in civil cases as a constitutional right.

VI. State IOLTA Programs

Parallel to the federal Legal Services Corporation, state-based Interest on Lawyers’ Trust Account (IOLTA) programs provide a significant source of funding for legal aid organizations and other civil
In 2019, IOLTA programs raised over $270 million in revenue used to make grants to support civil legal aid across all fifty states. Funding over 1,000 civil legal aid organizations, state IOLTA programs play a crucial role in increasing access to justice at the state level. However, the overall efficacy of these IOLTA programs is hindered by their dependence upon external economic factors, such as fluctuations in the Federal Funds Target Rate.

Though IOLTA programs exist separately within each state, the mechanics of each are nearly identical. Generally speaking, lawyers often handle client funds for things like future attorneys’ fees, settlement checks, or court fees. In such cases, lawyers deposit the money into trust accounts, where the funds can earn interest for the clients. If the interest accrued reaches a substantial level, either because of an initially large deposit or because of a longer holding period, the client simply receives the interest earned from their money and that is the end of the story. Sometimes, however, when the funds are held for a short amount of time or if the initial deposit is declared nominal by statute in a given jurisdiction, the costs of collecting the interest can exceed the interest earned on the funds. In such cases, lawyers place the deposit into pooled trust accounts that contain other similarly situated client funds. Before the advent of IOLTA, pooled trust funds like these earned no interest, largely because of banking laws and the ethical issues related to attorneys profiting from held client funds. Now, as the result of changes in banking regulation and the creation of IOLTA, attorneys can place nominal or short-term client funds into interest-bearing trust accounts. Banks, then, send the interest earned on these funds to state IOLTA programs, which in turn, use these profits to fund civil legal aid and other “charitable causes.”

As such, the mechanics of IOLTA are relatively simple and even intuitive. The scheme is conceptually straightforward and presents an opportunity for civil legal aid funding that appears attractive to all

112. Bane, supra note 109, at 84.
114. Id.
115. Bane, supra note 109, at 86.
116. Id. See also *IOLTA Overview*, supra note 113.
117. Id.
118. Id.
119. Id.
120. Id.
parties involved. IOLTA, as opposed to traditional taxation-based funding programs, takes “sums so small that the value to the original owner, in practical terms, is zero.” Neither clients nor banks miss the zero value of that individual interest, yet when state-wide programs combine the sum total of IOLTA contributions, the resulting pool can total in the millions each year. Alongside this income generation, IOLTA also preserves the ethical and fiduciary duties attorneys are tasked with when handling client funds. In this way, IOLTA programs supply civil legal aid organizations with “as close to ‘free money’ as one could imagine.”

Despite the consistency of both purpose and general structure of these IOLTAs nationwide, individual states have established widely varied methods of authorizing and regulating IOLTA programs. Reflecting the individualized state rules of professional conduct, IOLTA regulation differs according to the statutory, regulatory, and court-ordered frameworks established within each state. While this variance may seem slight on its face, the implications of the differences can result in widely different IOLTA administration between jurisdictions. Regulations usually contain language concerning minimum IOLTA interest rates and banking institution eligibility, which can result in subtle, yet impactful differences in both fund collection and fund distribution between IOLTA programs and resultant civil legal aid funding in different states.

IOLTA programs in the United States began in the early 1980s, when minor changes in U.S. banking laws enabled the establishment of interest-bearing checking accounts. As a result, the Florida Bar Association launched the nation’s first state-based IOLTA program in 1981. After Florida’s success, California, Idaho, and Maryland followed in establishing their own state IOLTA systems. However, as IOLTA began to proliferate across the country, challenges to the program concept threatened to stymie any IOLTA efforts at expanding access to civil justice.

122. Id.
123. Id.
124. IOLTA Overview, supra note 113.
125. Stevenson, supra note 121, at 458.
127. Id. at 732–733.
128. Id. at 733.
130. Id.
131. Id.
132. Id.
Since the 1990s, IOLTA programs have faced a string of significant legal challenges.133 In four suits that reached the federal appellate level,134 conservative public interests groups challenged the constitutionality of the IOLTA structure.135 Challengers contended that IOLTA amounted to an unconstitutional government taking of private property in violation of the Fifth Amendment.136 The Supreme Court’s first encounter with IOLTA challenges resulted in a sharply divided Court issuing a remand, leaving the task of determining whether or not their system amounted to an unconstitutional taking to the lower courts.137 In doing so, the Court postponed its consideration of the constitutionality of IOLTA, leaving an uncertain loom over the IOLTA process and lawyers across the country.138 Eventually, the Supreme Court revisited the IOLTA problem in 2003, and this time held that IOLTA was in fact a taking, but one that was constitutionally legitimate.139 Finding that IOLTA served a broad and important public interest,140 the Court ruled that no just compensation was required.141 This decision put an effective end to litigation challenging IOLTA programs,142 enshrining the system as a constitutional means of expanding civil access to justice.

Since then, IOLTA programs have proliferated across the country, and today, IOLTA programs exist in all fifty states143 and are mandatory in all but five states.144 While these programs are mainly localized within each participating state, two national IOLTA organizations exist—the American Bar Association (ABA) Commission on IOLTA and the National Association of IOLTA Programs (NAIP). Both organizations strive to provide general support to existing IOLTA programs while also creating a centralized network capable of coordinating IOLTA assistance and work. The ABA Commission on IOLTA serves to “support the initiation and operation of IOLTA programs” across the country.145 In addition to advising the creation and operation

133. Stevenson, supra note 121, at 466.
135. Stevenson, supra note 121, at 466.
136. Id.
138. Stevenson, supra note 121, at 466 n.46.
140. Id. at 232.
141. Id. at 240.
142. See, e.g., Wieland v. Lawyers’ Trust Fund of Ill., 836 N.E.2d 166, 168 (Ill. 2005).
143. Bane, supra note 109, at 85.
144. Id.
145. IOLTA Overview, supra note 113 (“To support the initiation and operation of IOLTA programs, the ABA created the Commission on IOLTA in 1986. The ABA Commission on IOLTA, consisting of nine members: (1) collects, maintains, analyzes and disseminates information on programs involving the use of interest on lawyers’ trust accounts for the support of law-related public service activities; (2) makes recommendations for ABA policy on the creation and operation of IOLTA programs; (3) maintains liaisons with state IOLTA programs; and (4) oversees the IOLTA Clearinghouse, which provides information, materials and technical assistance on IOLTA program design and operation.”).
of state IOLTA programs, the Commission also supports IOLTA programs against constitutional challenges in courts.\textsuperscript{146} Similarly, the NAIP exists as a nonprofit organization composed of various legal aid funders.\textsuperscript{147} The NAIP “supports the growth and development of IOLTA programs” and is “the largest association of IOLTA programs and civil legal aid grant-makers in North America.”

Despite IOLTA’s ability to serve as a wellspring of funding for legal services, the program remains hampered by a fundamental lack of consistency.\textsuperscript{148} Because IOLTA revenue is generated from the interest earned on deposits, that revenue depends upon the central interest rate established by the Federal Reserve.\textsuperscript{149} The Federal Funds Target Rate (FFTR) has varied widely through the years since the beginning of state IOLTA programs,\textsuperscript{150} and the revenue raised by the programs has accordingly experienced steep fluctuations. The rate peaked as high as 20\% in the early 1980s\textsuperscript{151} and remained above 6\% through 2002.\textsuperscript{152} However, as the U.S. economy experienced recessions in both 2001 and 2008, the Federal Reserve attempted to encourage growth by setting record FFTR lows, decreasing the rate all the way to a range of 0\% to 0.25\%.\textsuperscript{153} As a result, bank interest rates plummeted and IOLTA funding fell alongside them.\textsuperscript{154}

From 2007 to 2011, the Federal Reserve’s attempts to create low borrowing rates resulted in increasingly lower interest rates at banks, causing IOLTA funding across the country to plunge by almost 75\% over that period.\textsuperscript{155} By 2013, IOLTA revenues had dropped by 88\%, in some regions, resulting in significant cuts to already dwindling resources. This direct dependence on interest rates is particularly troubling when viewed within the context of what drives their decreases. Plummeting interest rates are usually triggered by a need for economic growth, which in turn stems from poor economic conditions.\textsuperscript{156} This is particularly troubling because times of economic suffering are the exact times when the need for legal aid services are the highest. According to NAIP President David Holtermann, “[l]osses of this magnitude are a concern under any circumstance. It is particularly worrisome at a time when civil legal aid programs already are responding

\begin{footnotesize}
\begin{enumerate}
\item[146.] Id.
\item[148.] Bane, supra note 109, at 88.
\item[149.] Id.
\item[150.] James Chen, Federal Funds Rate, Investopedia (Sept. 12, 2021), www.investopedia.com/terms/f/federalfundsrate.asp.
\item[151.] Id.
\item[152.] Bane, supra note 109, at 88.
\item[153.] Id. at 88–89; Chen, supra note 150.
\item[154.] Bane, supra note 109, at 89.
\item[155.] Id.
\item[156.] Id. (”In 2013, Jane curran, executive director of the Florida Bar Foundation, which oversaw the nation’s first IOLTA program, said, ‘Our revenues have gone down 88% since rates dropped. That means cuts in programs, people, office.”’).
\end{enumerate}
\end{footnotesize}
to increased need from families whose housing, income, safety, and health have been negatively impacted.\footnote{157}

This dependence on fluctuating interest rates presents a chronic, yet unavoidable problem for IOLTA across the country.\footnote{158} As the economy suffers and the need for legal aid funding is greatest, IOLTA programs generate less revenue and legal civil aid funding diminishes.\footnote{159} This inconsistency breeds unpredictability within the legal aid community, severely hampering IOLTA’s ability to adequately provide independent and sustainable access to civil justice at the state level.

Recent reforms to IOLTA programs center around overcoming the weakness of the system’s dependence on fluctuating interest rates. One attempt to offset IOLTA reductions is by using supplemental methods of generating funds for legal services.\footnote{160} For example, some states have increased court fees, directing that revenue gain toward gaps in IOLTA left by decreased interest rates.\footnote{161} In Pennsylvania, a joint effort by the state supreme court and the state legislature raised court filing fees by $1, and this marginal increase in fees raised $2.8 million while in effect.\footnote{162} Other states have looked to increase attorneys’ professional fees, transferring the cost of civil legal aiding funding from the general public to private lawyers.\footnote{163}

Alternatively, some states have begun pioneering partnership programs with banks. For example, the Oregon Law Foundation (OLF) founded a Leadership Banks and Credit Unions program, through which the OLF partners with banks and credit unions to obtain better rates on IOLTA deposits.\footnote{164} By actively developing relationships with banks, the OLF encourages them to voluntarily provide higher interest rates on IOLTA accounts.\footnote{165} In return for commitments to higher rates, the OLF promotes participating banks both on its website and to lawyers seeking to open IOLTA accounts.\footnote{166} The partnership strategy proved successful when partner banks retained interest rates between 0.7% and 1%, even as the Federal Funds Rate dipped far lower.\footnote{167} Consequently, Oregon’s IOLTA interest rate is among the

\begin{itemize}
\item \footnote{157} Chen, \textit{supra} note 150.
\item \footnote{158} Stevenson, \textit{supra} note 121.
\item \footnote{159} Bane, \textit{supra} note 109, at 89.
\item \footnote{160} \textit{Id}.
\item \footnote{161} \textit{Id.} at 90.
\item \footnote{162} \textit{Id}.
\item \footnote{164} \textit{Id}.
\item \footnote{165} \textit{Id}.
\item \footnote{166} \textit{Id.} \textit{See also Leadership Banks & Credit Unions}, Or.\textit{LAW FOUND.} \url{https://olf.osbar.org/partners-in-justice/} (last visited Oct. 10, 2021).
\item \footnote{167} \textit{Id}.
\end{itemize}
highest in the country and program revenue has maintained a consistency that eludes traditional IOLTA system elsewhere.\textsuperscript{168}

Similarly, the Texas Access to Justice Foundation (TAJF) runs a Prime Partners program that seeks to incentivize banks to offer higher interest rates than required.\textsuperscript{169} The Prime Partners program requires participating banks to commit to paying a higher interest rate than the FFTR and rewards them by providing a slew of benefits, many of which directly drive business to the banks.\textsuperscript{170} In this way, IOLTA funding within the program finds a level of stability that is absent from its traditional application, providing legal aid services with funding that remains consistent despite broader economic shifts.

The distribution of \textit{cy pres} awards provides yet another method of providing funding to state IOLTA programs. \textit{Cy pres} awards refer to uncollected class action settlement awards in cases where distribution to class members is rendered economically impracticable due to the costs associated with distribution.\textsuperscript{171} In such cases, the problem of what to do with undistributed funds is left to the parties and to the courts, who oftentimes decide upon directing them to charitable organizations.\textsuperscript{172} Over the past decade, these \textit{cy pres} awards have become an increasingly important source of civil legal aid funding.\textsuperscript{173} Proponents of this trend cite the core focus of class action suits as aligning with efforts to expand access to justice, and a large body of case law supports the use of such funds toward that end.\textsuperscript{174} Additionally, twenty-one states have adopted statutes or court rules allowing for the distribution of residual class action settlements to legal aid programs like IOLTA.\textsuperscript{175}

A final potential option for overcoming IOLTA weaknesses is establishing mandatory minimum interest rates for IOLTA accounts that are not as directly tied to the FFTR.\textsuperscript{176} If, for example, states were to institute a statutory minimum rate for IOLTA accounts, the FFTR could drop to as low as 0%, yet IOLTA accounts could still enjoy slightly higher rates, allowing funding of legal services to continue

\textsuperscript{168} Id.
\textsuperscript{170} Id. at 5–6.
\textsuperscript{172} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id. California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington, and Wisconsin.
\textsuperscript{176} Bane, \textit{supra} note 109, at 95.
despite the economic conditions that caused the lowering of other rates.\textsuperscript{177} However, doing so would shift the costs of IOLTA programs to the banks themselves, likely disincentivizing participation and potentially worsening the funding plummet IOLTA programs already experience during economic downturn.\textsuperscript{178} Consequently, advocates for a statutory minimum insist that the program would see the most success when executed in conjunction with some type of partnership program that benefits banking institutions in a way that incentivizes participation and retains membership.\textsuperscript{179}

\textbf{VII. Market-Based Solutions}

\textbf{A. Third-Party Litigation Funding}

Outside of state IOLTA programs and other federal means of funding civil legal aid, other methods of expanding access to civil justice have developed in recent years. One such development that has garnered attention is third-party litigation funding. Commonly referred to as “litigation finance,” the practice refers to litigation that receives its funding not from the litigants themselves, but instead “from insurance markets, capital markets, or a private fund.”\textsuperscript{180} The practice may also include foundations or nonprofit organizations.\textsuperscript{181}

Generally, third-party litigation funding relies upon capital provided by others who lack a particular legal interest in the outcome of the litigation.\textsuperscript{182} The agreements are typically constructed as nonrecourse investments,\textsuperscript{183} meaning that if the funded litigant loses the case, the funder receives nothing.\textsuperscript{184} In this way, third-party litigation financing is particularly attractive to litigants, especially lower-income ones who would lack funding altogether otherwise. Within the practice, the plaintiff is usually the funded litigant.\textsuperscript{185}

The field has experienced rapid growth over the past decade.\textsuperscript{186} Litigation finance began in the personal injury context, as litigants contracted to receive financial assistance in exchange for an interest in the potential recovery.\textsuperscript{187} The practice began to rapidly expand into other areas of practice around 2010.\textsuperscript{188} Today, the litigation finance

\begin{footnotesize}
177. \textit{Id.} at 96.
178. \textit{Id.}
179. \textit{Id.}
182. \textit{Id.} at 2–3.
183. \textit{Id.}
185. \textit{Id.}
186. \textit{Id.}
187. \textit{Id.}
188. \textit{Id.} (Areas including intellectual property, antitrust, business contracts, and commercial arbitration).
\end{footnotesize}
industry has grown into a $5 billion market in the United States and is continuing to grow.\footnote{189}

Litigation finance can be divided into two main types of funding—consumer and commercial.\footnote{190} Consumer funding was the first to arrive in the United States and typically involves an individual person as the litigant.\footnote{191} This type of litigation finance focuses primarily on personal injury claims, divorce cases, and small claims where the plaintiff personally lacks funding.\footnote{192} Commercial funding, on the other hand, involves “business-to-business disputes, class actions, and mass tort litigation.”\footnote{193} Often operating with complex corporate litigation matters, commercial funded cases typically involve resources passing from a litigation finance firm or other commercial investment vehicle.\footnote{194} Accordingly, commercial litigation finance can involve high dollar amounts of third-party investment, which is increasingly coming from hedge funds and private equity firms, as well.\footnote{195}

Proponents of litigation finance argue that the funding method provides a litany of benefits poised to expand access to civil justice. First, litigation finance tackles the enormous costs of litigation, enabling low-income individuals as well as smaller business to pursue litigation that they could not afford otherwise.\footnote{196} Similarly, the practice appears to offer the opportunity to level the playing field between well-resourced defendants and less financially capable plaintiffs.\footnote{197} In these so-called “David vs. Goliath” disputes,\footnote{198} third-party funding serves as a valuable resource. Additionally, proponents of litigation finance remind any challengers that the lion share of funding agreements are nonrecourse.\footnote{199} While primarily easing the financial strain on the litigant, this nonrecourse structure also provides a benefit to attorneys and law firms by assuring them that their services rendered will be compensated for, no matter the outcome.\footnote{200}

190. Herschkopf, supra note 184, at 3.
191. Id.
193. Herschkopf, supra note 184, at 3.
194. Id.
195. MP McQueen, Inside the Battle Over Litigation Funding Regulation, LAW—N.Y.L.J. (July 12, 2019), https://plus.lexis.com/search?crid=35da8f63-027a-4864-b386-f7e44006a27a&pdsearchterms=LSNDUID-ALM-NYLAWJ-20190712INSIDETHEBA TTLEOVERLITIGATIONFUNDINGREGULATION&pdhysdef=1530671&pdsourcegroupingtype=&pdsearchsourcegroupingtype=NSU9671&pdsearchsourcegroupingtype=NSU9671&pdsearchsourcegroupingtype=NSU9671&pdsourcegroupingtype=NSU9671&pdsourcegroupingtype=NSU9671
196. Herschkopf, supra note 184, at 1.
197. Id.
199. Herschkopf, supra note 184, at 1.
However, third-party litigation funding has its opponents, too. Challengers critique the practice for just as many reasons, beginning with its propensity to dramatically increase the amount of litigation, including especially weak cases. Stemming from the common law doctrines against champerty and maintenance, concerns have grown regarding the potential for third-party funding of frivolous lawsuits. Similar to litigation finance presents the problem of prolonging litigation and may even discourage settlement or alternative dispute resolution. The worry that third-party litigation finance could be weaponized to manipulate outcomes through the provision of outsized funding remains at the core of the controversy surrounding the practice. Drawing from illustrations derived in the venture capital market, opponents of litigation finance contend that the “hyper-funding” of particular litigants beyond what is customary, or even profitable in the short term, could result in adverse parties settling for amounts that are suboptimal in relation to the merits of their claims.

Most critically, litigation finance threatens to upset the attorney-client relationship and undermine the independence of attorneys. While established ethical guidelines dictate that an attorney’s duty is to his or her client, the presence of a third party who is providing the funding for that attorney’s services could muddy the waters. Though the funder’s interest will likely hew closely to those of the litigant, that alignment may be incomplete, and critics of the litigation finance model point to the fact that the funder’s interest is purely based upon a targeted return on investment.

Despite both the benefits and the pitfalls of litigation finance, current regulations of the practice generally lack the comprehensiveness necessary to properly govern the nascent industry. Several states, however, have started passing legislation attempting to begin the process of governing litigation finance. These regulations can be separated into two broad categories: funding agreement regulations and investor-based regulations. Funding agreement

201. Herschkopf, supra note 184, at 1.
203. Herschkopf, supra note 184, at 1.
205. Id.
206. Herschkopf, supra note 184, at 1.
207. Jacobs & Jacobs, supra note 204.
208. Id.
209. Lewis, supra note 202, at 688.
210. Herschkopf, supra note 184, at 5.
211. Id.
regulations seek to place limits or requirements on the funding agreements themselves. \textsuperscript{212} For example, various courts across the country have ordered litigants and their attorneys to disclose the presence of third-party funding in a case, even sometimes requiring affirmation that the third party will not interfere with the ethical requirements of attorney service. \textsuperscript{213} Alternatively, investor-based regulations center upon requiring prospective litigation funders to obtain licenses and regulating advertising of litigation funding services. \textsuperscript{214}

Attempts at instituting third-party funding regulation have recently picked up pace at the federal level as well. In 2019, Senator Chuck Grassley introduced the Litigation Funding Transparency Act of 2019, which sought to amend Title 28 to require heightened “transparency and oversight of third-party litigation funding in certain actions.” \textsuperscript{215} Specifically, the bill targeted “any class-action or multi-district litigation,” and would require plaintiff’s attorneys to disclose any agreement they had with an outside party relating to payment contingent upon the lawsuit’s outcome. \textsuperscript{216} The Act was referred to the Senate Judiciary Committee, and a recent update from the Committee on Rules of Practice and Procedure indicated that a proposed rule change regarding third-party litigation funding remains under consideration. \textsuperscript{217}

Advocates have made additional calls for the institution of prospective rules that are minimally invasive, hoping to protect the ethical bedrock of the justice system while allowing third-party litigation funding to continue broadening access to civil justice. \textsuperscript{218} Proposed regulatory frameworks include advocating for statutorily mandated disclosures, mandatory provisions to be included in funding agreements, or even review and approval of litigation finance agreements. \textsuperscript{219} Alternatively, regulation could be less intrusive, focusing more on enabling the already burgeoning industry than inhibiting it. Such a framework could include “safe harbor rules” ensuring that agreements containing specific terms or criteria would be deemed satisfactory from the start. \textsuperscript{220}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{212} Id.
\item \textsuperscript{214} Herschkopf, \textit{supra} note 184, at 5.
\item \textsuperscript{216} Id.
\item \textsuperscript{218} Jacobs & Jacobs, \textit{supra} note 204.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id.
\end{enumerate}
\end{footnotesize}
B. Pro Bono Programs

The term “pro bono” derives from the Latin *pro bono publico*, meaning “for the public good.”

Within the U.S. legal system, pro bono legal services refers to legal representation rendered without fee, typically to individuals of limited means or nonprofit organizations that serve low-income individuals and communities. The fundamental purpose of pro bono work is to expand access to justice in underrepresented communities, and as a result of this purpose, pro bono programs play an integral role in providing legal representation to those unable to obtain it otherwise.

According to the Pro Bono Institute (PBI), participants in the 2018 PBI Law Firm Pro Bono Challenge reported performing an aggregated total of over 5 million hours of pro bono work, with more than 3.4 million of those hours serving those of limited means and organizations assisting them.

Pro bono efforts have increased steadily in recent years, with large portions of attorneys reporting that their pro bono hours had increased over the last five years, which has coincided with plummeting levels of public legal aid funding. Amidst the disruption caused by the COVID-19 pandemic, pro bono work saw a steep increase. As the pandemic disproportionately impacted low-income individuals and communities in the healthcare and unemployment contexts, many U.S. law firms utilized pro bono efforts to address these issues in real time, resulting in an increase of nearly double the amount of pro bono work performed since 2016.

Pro bono work, especially during times of economic crisis and the increased need for legal aid caused by such downturns, is essential for providing underrepresented individuals and communities access to legal services.

At the federal level, pro bono programs largely exist within the framework provided by the American Bar Association (ABA). The ABA

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222. Id.


issues the Model Rules for Professional Conduct (MPRC), which is a set of ethical guidelines providing both mandates and guidelines across a wide variety of topics with the legal profession.228 Because the ABA does not actually regulate practicing attorneys,229 these rules are not binding but can come into effect when individual states choose to adopt them.230 ABA Model Rule 6.1 establishes a professional responsibility on the part of all lawyers across the nation to provide pro bono services.231 According to this rule, every lawyer has an ethical duty to provide legal representation to those unable to pay, and the rule encourages lawyers to “aspire to render at least fifty hours of pro bono public legal services per year.”232 Though this rule is not binding, and thus carries no legal or statutory weight, the ABA has established a voluntary system that directs attorneys toward a goal of providing pro bono services on a yearly basis.233

To date, nearly every state has an ethical rule similar to ABA Model Rule 6.1 that calls upon lawyers to engage in pro bono legal services.234 However, New York is currently the only state to have implemented any sort of mandatory pro bono requirement, mandating that applicants for admission to the New York bar provide fifty hours of qualifying pro bono service prior to applying.235

Despite the deep and longstanding tradition of providing pro bono critical legal aid in the United States, many advocates feel that the demand for low-cost legal services still outweighs the supply.236 One proposed method of closing the gap comes in the form of instituting mandatory pro bono requirements at the federal level.237 Proponents of a mandatory pro bono requirement suggest that the ABA should replace Model Rule 6.1’s voluntary system in favor of a compulsory floor for yearly pro bono services.238 Such a system would likely bolster the amount of pro bono services rendered nationwide and, while

231. Id. r. 6.1.
232. Id.
236. See McGehee, supra note 233.
237. Id.
still failing to provide a complete solution to the legal need of low-income individuals and communities, could nevertheless signify a step in the right direction.\textsuperscript{239} However, critics of a mandatory pro bono requirement point toward constitutional dilemmas associated with mandating work without compensation\textsuperscript{240} and worries about a dip in quality of representation under a compulsory system.\textsuperscript{241} Furthermore, an ABA issued mandatory requirement would still require enactment at the state level, and implemented differently across jurisdictions, resulting in a patchwork system of pro bono requirements that would unnecessarily complicate the rendering of vital legal aid services.\textsuperscript{242}

Finally, other proposed changes to pro bono services in the United States focus on effective measurement of those services rather than the methods by which they are rendered.\textsuperscript{243} The legal profession generally chooses to measure the success of pro bono programs in terms of hours worked.\textsuperscript{244} However, this conceptualization of legal aid ranks input ahead of impact, failing to measure in terms of outcome.\textsuperscript{245} Proponents contend that by reframing the typical lens through which pro bono services are evaluated, lawyers and firms alike can more effectively address the actual issues at the core of their pro bono cases and innovate in ways that will better serve them.\textsuperscript{246}

\textbf{C. Litigation Insurance}

The insurance industry in the United States is a billion-dollar business.\textsuperscript{247} The variety of different types of insurance in the United States are varied, from health insurance to travel insurance to cover unexpected costs. However, legal expense insurance (LEI), while more common in Europe, is only just on the rise in the United States, with about 30\% of the population with a plan, about roughly ninety-eight million people.\textsuperscript{248} LEI is a form of insurance in which the insured is able to gain legal assistance from a private provider, with some or all expenses being covered by the insurer, depending on the insured’s coverage plan.\textsuperscript{249} Coverage plans include a range of services, usually

\begin{thebibliography}{99}
\bibitem{239} \textit{Id}.
\bibitem{240} \textit{Id}.
\bibitem{241} \textit{Id}.
\bibitem{242} \textit{Id}.
\bibitem{243} See Silverman & Evans, \textit{supra} note 223.
\bibitem{244} \textit{Id}.
\bibitem{245} \textit{Id}.
\bibitem{246} \textit{Id}.
\bibitem{248} \textit{The Canadian Bar Ass’n, Underexplored Alternatives for the Middle Class} (Feb. 2013), www.cba.org/CAAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/MidClassEng.pdf.
\end{thebibliography}
“for civil law matters other than family law, and sometimes for criminal or driving offences.” 250 LEI’s are distinct from “prepaid legal expense plans,” which cover future anticipated needs, such as drafting a will. Rather, LEI’s specifically cover unexpected events such as employment disputes, litigation, or criminal charges. 251 Policyholders pay a yearly premium for legal advice, information, assistance, and representation in particular defined situations based on the terms outlined in their policies. 252 Among some of the more well-known LEI companies in the United States are Legal Shield and Met Life. 253

Arguably, LEI may be a promising tool for improving access to civil justice in the United States. 254 For civil justice to be in reach, access to robust and timely legal advice and representation must also be attainable. 255 In the United States there is a population known as the “forgotten middle,” this population encompasses those who do not have a disposable income to spend on legal services, but earn too much or have too many assets to qualify for legal aid or pro bono assistance, thus leaving them without options to seek legal advice or representation. 256 LEI can be a potential resolution that can expand access to legal representation or advice so that more individuals seeking a legal resolution to their dispute can attain it. Finally, another method for reaching the forgotten middle, is by making legal services more accessible through technology. Zoom is leading the effort with its new platform, “LegalZoom.” 257 LegalZoom, which is primarily for small business owners, is an affordable alternative to LEI, described by its mission to “democratize law” and to “democratize the legal industry,” the platform is a one stop shop for legal advice for small business owners. 258

VIII. FUTURE TRENDS AND THE RISE OF TECHNOLOGY

Technology is a tool that can improve access to courts, and assist sharing information about cases, court facilities, and the judicial processes for litigants. 259 While the COVID-19 pandemic was not the disruption that courts wanted, many believe it was exactly what the courts needed. Prior to the pandemic, the judiciary was resistant

250. THE CANADIAN BAR ASS’N, supra note 248.
251. Id.
252. Id.
253. Id.
254. McNee, supra note 249.
255. Id.
256. Id.
to virtual proceedings and slow to incorporate technology into legal proceedings. As the pandemic forced the judicial system to reimagine and embrace new ways of operating, the court transformed into a potentially more accessible, transparent, and efficient branch of government.

In the U.S. Federal Circuit Court of Appeals, all cases scheduled for April through June of 2020 were conducted remotely and parties were no longer required to lodge a hard copy of documents if they had already been filed electronically. The court also provided live audio to access arguments, including the information on the Court’s website. In May 2020, the U.S. Supreme Court heard all oral arguments by telephone conference. Live audio was provided for multiple news outlets which facilitated livestream capability throughout various media platforms. District courts adopted a mixed approach of tactics to meet the needs of their dockets. The Western District of Washington held all virtual jury trials for civil lawsuits. Meanwhile, in the District of Connecticut the jury members in one civil case were selected virtually from home but came to the court for an in person trial. The long term role of virtual proceedings remains unclear. Virtual trials in civil cases remain a rarity, however in February 2021 a “how to” seminar for virtual proceedings by the Western District of Washington attracted more than 900 participants from across sixty district courts.

The incorporation of virtual trials has saved time and expenses for litigants and the judiciary because of decreased travel and general flexibility of witness and party availability. However, some representatives believe that moving proceedings online is detrimental to their clients. For example, Douglas Hiatt, a Seattle defense attorney, refuses to try cases remotely. Hiatt claims that many of his clients are poor, and therefore do not have access to internet or are illiterate, therefore making it more difficult for them to navigate the technology even if it was provided to them. Courthouses recognize the disparity

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262. Id.
263. Id.
264. Id.
265. Id.
267. Id.
268. Id.
269. Id.
271. Id.
in access, and therefore have organized Zoom kiosks, lent tablets to jurors, and some gave Defendants the option to log in at libraries or call by phone.\textsuperscript{272} However advocates believe that regardless of the court’s efforts, poor communities, which are more likely to be harmed by the justice system are less likely to have access to the necessary high quality technology for proceedings.\textsuperscript{273} An issue that will impact potential litigants in civil court as well. For example, Michigan Judge, Denis Langford Morris, stated that in some civil cases there are lawyers and clients that cannot afford broadband internet.\textsuperscript{274}

Another concern of virtual trials and the growing integration of technology in federal proceedings is jurors, witnesses, privacy, and security in the court room. Maintaining juror’s attention and focus has been a challenge for some. Jurors have been caught exercising, napping, talking to others off screen, and leaving to get food.\textsuperscript{275} A more serious concern is if jurors or witnesses are being coached or coerced offscreen. There is particular concern in civil domestic violence disputes; a judge on the appeals court stated, “I don’t know where they’re phoning in from, whether someone is exerting influence over them.”\textsuperscript{276} Lastly, while livestreaming trials allows more transparency for the public, concerns of cybersecurity and privacy are widespread.\textsuperscript{277} For example, by livestreaming videos of trials on YouTube and other platforms, the videos can easily be recorded and saved for future reference against a party’s wishes.

Small claims courts exist to solve some of the issues related to the oftentimes expensive and lengthy litigation process.\textsuperscript{278} In these courts, individuals with low dollar value cases can present cases to judges for adjudication, avoiding the formalities and expenses associated with traditional legal processes.\textsuperscript{279} However, due to the streamlined process, states set limits on the maximum dollar amount that can be adjudicated in small claims courts.\textsuperscript{280} Though typically limited to claims of $25,000 or less, small claims courts can serve a vital purpose in providing access to civil justice to litigants hoping to avoid expense and whose claims fall within their purview.\textsuperscript{281}

Technology has been touted as a potential agent of change in this underserved area of the law. In particular, recent trends indicate growing acceptance and utilization of online dispute resolution (ODR) applications

\textsuperscript{272}. Id.
\textsuperscript{273}. Reynolds, supra note 260.
\textsuperscript{274}. Id.
\textsuperscript{275}. Scigliano, supra note 270.
\textsuperscript{276}. Id.
\textsuperscript{277}. Reynolds, supra note 260.
\textsuperscript{279}. Id.
\textsuperscript{280}. Id.
\textsuperscript{281}. Id.
in the context of small claims. ODR applications seek to provide an online option for facilitating the crafting and exchange on settlement offers, some of which are specifically tailored to small claims courts. In Utah, for example, small claims plaintiffs are required to log onto the court’s ODR application within seven days of filing a complaint at risk of the case being dismissed for failure to participate in good faith ODR. Proponents of the use of ODR’s by small claims courts champion the way that it eliminates at least some of the need for legal representation in the first place, allowing small claims matters to be settled through a technological platform that does not require low-income litigants to provide funding.

However, opponents of non-lawyer legal services challenge the ultimate efficacy of litigating small claims matters using technology like ODR applications and worry that the recent trend of doing so actually works to disadvantage litigants and obscure the true lack of access to civil justice. Studies show that legal services short of the full, traditional attorney representation might succeed in affording litigants initial access to justice, but ultimately fail at delivering meaningful impacts on substantive case outcomes. In this way, these non-lawyer strategies of rendering legal services are criticized as being no more than half measures, failing to provide meaningful solutions.

Conclusion

This Report has focused on access to legal representation in civil cases. The reason is that the adversary system depends on lawyers for its implementation. Under the adversary system, the litigation process is party-initiated and party-controlled. And so, the lack of legal representation can have dramatic consequences for parties in court.

We have tried to provide but a snapshot of the myriad of ways that the United States has addressed the issue of legal representation for indigent civil litigants. Rejecting a federal constitutional right to civil representation, the United States has put together a patchwork of solutions—ranging from disparate federal and state legislations, public funding, to private and market-based solutions. Clearly, more work needs to be done. Until there is recognition on the importance of legal representation in civil cases as a constitutional right, the approach will remain patchworked. Access to justice in the United States is and will continue to be an inconsistent and unpredictable guarantee.

283. Id.
284. Id.
285. Id.
287. Id.