

Testimony of

# The Honorable Lora J. Livingston

May 22, 2008

STATEMENT OF  
THE HONORABLE LORA J. LIVINGSTON  
on behalf of the  
AMERICAN BAR ASSOCIATION  
before the  
COMMITTEE ON JUDICIARY  
of the  
UNITED STATES SENATE  
on the subject of  
"Closing the Justice Gap:  
Providing Civil Legal Assistance to Low-Income Americans"

May 22, 2008

Mr. Chairman and Members of the Committee:

I am Lora Livingston, a state trial court judge from Austin, Texas. I submit this testimony at the request of the President of the American Bar Association, William H. Neukom of Seattle, Washington, to voice the Association's views with respect to closing the "justice gap" to ensure access to justice for all, not just those who can afford a lawyer. The ABA believes that this objective must largely be achieved by strengthening the Legal Services Corporation ("LSC" or "Corporation") and we appreciate the opportunity to discuss this important program, which serves a critical role in ensuring equal justice for all.

The American Bar Association ("ABA"), the world's largest, voluntary professional organization with more than 413,000 members, is the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.

I started my legal career as a Reginald Heber Smith Community Lawyer Fellow, assigned to a legal aid office in Austin, Texas, and I testify today in my capacity as a member of the ABA's Standing Committee on Legal Aid and Indigent Defendants ("SCLAID" or "Standing Committee"). Former Texas Supreme Court Justice Deborah Hankinson chairs this committee. She is in trial today and sends her regards and regrets that she cannot be here. Given your Committee's interest in learning a judge's perspective on the provision of legal aid for the poor, I am pleased to report that the Standing Committee includes a total of five judges among its ranks: Montana Supreme Court Chief Justice Karla Gray, former California State Court of Appeals Judge Earl Johnson, Jr. and Juanita Bing Newton, a New York City trial court judge.

The Standing Committee and its members serve the ABA and the nation by examining issues relating to the delivery of civil legal assistance and criminal defender services to the poor. It maintains close liaisons with state and local bar association leaders, provides information and helps develop policy on civil legal aid and indigent defense. It advocates for and works to ensure the availability of legal assistance and defender services for indigent persons through a variety of activities and projects. Among many other activities, in 2006, the ABA adopted as policy the Standing Committee's "Standards for the Provision of Civil Legal Aid." The Standards, which outline aspirational guidelines for the operation of legal aid providers and the provision of service by their practitioners, can be found on the ABA website at: <http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2007.pdf>.

## I. ACCESS TO JUSTICE IN AMERICA

#### A. ABA is a Long-Time Leader in Access to Justice Issues

The American Bar Association has supported the effort to provide legal services to the poor since the establishment of the Standing Committee on Legal Aid and Indigent Defendants in 1920. Supreme Court Justice Lewis F. Powell, while serving as ABA President in 1964, called for a major expansion of the nation's legal services for the poor, ultimately leading in 1974 to the creation of the Legal Services Corporation. As Senator Edward Kennedy notably pointed out in his 2006 commencement address at the University of Virginia School Of Law,

To understand how revolutionary [Powell's] . . . idea was, you have to know that when my brother became President in 1961, there was no national legal services program. There had long been legal aid and public defender offices in many cities, and a few privately-funded groups made poverty law a part of community development organizations. But hardly any taxpayer dollars supported them.

In 1964, as part of President Johnson's Great Society, Congress enacted a genuine anti-poverty program in the Office of Economic Opportunity, and, under Sargent Shriver, it became a source for legal services funding throughout the country.

That program filled such an obvious need that 5 years later, when the incoming Nixon administration tried to abolish it, the bar and many of us on Capitol Hill were able not only to save the program but to create the Legal Services Corporation as an ongoing federally-funded program. Ironically, President Nixon himself signed that bill into law as his last legislative act before resigning as President. (Congressional Desk, March 18, 2006.)

Promoting meaningful access to legal representation and the American system of justice for all persons regardless of their income or social condition continues to be one of the ABA's primary organizational goals. The ABA has strongly opposed past efforts to eliminate or significantly reduce access to legal services for the poor, working at the same time to build broad bipartisan support for LSC throughout the Congress and throughout the country.

The depth and breadth of that support will be apparent today from the two letters introduced for the record by Senator Cardin showing support in Congress and across the nation for LSC: the first, on behalf of Senator Kennedy, is a bipartisan letter signed by more than 55 Senators in support of at least \$400 million in funding for LSC in FY 2009; and the second is a letter signed by the 50 state bar association presidents, plus the District of Columbia and two territories, also urging Congress to provide at least \$400 million for LSC in FY 2009. The state bar letter is linked on the ABA website at: <http://www.abanet.org/poladv/abaday08/resources/StateBarToSenate.pdf>. The bar association letter truly signifies the extent of the national support and urgent need for increased funding for LSC.

#### B. The Legal Services Corporation Plays a Vital Role in the Justice System

The Preamble to the U.S. Constitution states that the first enumerated function of government is to "establish justice." This program is an important component of our democratic system of government. Justice and fairness are bedrock principles of our democracy. President Washington wrote that "The due administration of justice is the firmest pillar of good government." But the justice system cannot retain the respect and popular support so essential to its functioning if it is apparent that access to justice is dependent upon one's wealth or place of residence. A comprehensive, national system providing civil legal services to the nation's poor must be maintained and strengthened.

For more than 30 years, the Legal Services Corporation has been a lifeline for Americans in desperate need. For poor Americans, LSC-funded legal aid programs have been there at times when they had nowhere else to go. Here are just a few examples of the clients served by LSC-funded programs throughout the country:

? Mrs. Smith, a widow, residing in Pennsylvania was referred by the Area Agency on Aging to Laurel Legal Services (LLS) for representation in a mortgage foreclosure action. The mortgage holder claimed that the mortgage could be foreclosed because the mortgagor, her late husband, was deceased. LLS successfully argued that Mrs. Smith was protected from foreclosure because, as spouse, she stood in her husband's position under the mortgage, and federal law protects the mortgagor until the death of the mortgagor, sale of the residence or the mortgagor's absence from the residence for a year. LLS was able to settle the case by having Mrs. Smith assume the mortgage. A pro bono attorney assisted with the federal court aspects of this case. (The Pennsylvania Lawyer, May/June 2008, pg. 60.)

? Lone Star Legal Aid's Hurricane Disaster Relief Project, which began days after Hurricane Katrina made landfall in August 2005, has closed more than 10,000 hurricane-related cases through the end of 2007. These cases cover every imaginable legal issue. Families and individuals continue to face multiple, simultaneous legal problems as a result of the loss of homes, jobs and health care benefits. Hurricanes Katrina and Rita have significantly expanded the needs of many already eligible clients and created a new group of clients. LSLA's service area absorbed 250,000 new potential clients from Louisiana, more than any legal aid program in the country.

Today, 50 million Americans qualify for federally funded legal assistance. Many of these individuals have significant legal needs and may suddenly be poor because of natural disaster, loss of a job, the break-up of their family, housing loss or uninsured medical care. While the need for civil legal services has increased, LSC funding and our ability to ensure access to the justice system falls far short.

Here are just a few reasons why LSC-funded local legal aid programs warrant strong support:

? LSC-funded programs provide basic legal services for low-income persons in every Congressional district in the country. LSC disburses 95% of its annual federal appropriation to 137 local legal aid programs nationwide. Boards consisting of leaders in the local business and legal communities set the priorities for and oversee these programs, which provide basic civil legal services to the poor.

? LSC-funded programs provide assistance to those who suddenly qualify for and need legal assistance, such as when natural or national disaster strikes. September 11 families, flood victims, and hurricane evacuees have received legal assistance ranging from identity verification to family law issues. There are continually new issues that require legal assistance that disproportionately affect low-income families, including consumer fraud and now the mortgage foreclosure crisis; foreclosures are forcing both low-income home owners and renters from their homes.

? LSC-funded legal aid lawyers preserve and protect American families; many low-income military families qualify for legal aid. Local legal aid programs make a real difference in the lives of millions of low-income American families by helping them resolve everyday legal matters, including family law, housing, and consumer issues, and by helping them obtain wrongly denied benefits such as social security and veterans' pensions. Soldiers and their families most often seek help with estate planning, consumer and landlord/tenant problems and family law.

? LSC-funded programs prevent a long-term reliance on other government programs, many of which have also suffered funding cuts. People who are unable to resolve basic legal problems are more likely to experience greater hardships and require assistance from public social services programs.

? LSC-funded programs are the nation's primary source of legal assistance for women who are victims of domestic violence. Legal aid programs identify domestic violence as one of the top priorities in their caseloads. While domestic violence occurs at all income levels, low-income women are significantly more likely to experience violence than other women, according to the U.S. Bureau of Justice Statistics. Recent studies also show that the only public service that reduces domestic abuse in the long term is a woman's access to legal aid.

## II. Legal Needs Studies Document that the Poor Cannot Access the Justice System

### A. ABA 1993 Comprehensive Legal Needs Study & Results

In 1993, a Temple University report commissioned by the American Bar Association reported that, despite the combined effort of legal services programs and the private bar, only 20% of the civil legal needs of the poor were being met. The ABA Legal Needs study found that, on average, low-income households experience approximately one serious legal problem each year. This study revealed that 80% of these legal needs go unaddressed. An executive summary of this seminal report is located on the ABA website at: <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>.

### B. Recent State-Based Legal Needs Studies Repeat Earlier Findings

Since 2000, twelve states have conducted legal needs studies. Wisconsin, Utah and Arizona have most recently completed their own studies. Other state studies were conducted in Connecticut, Illinois, Massachusetts, Montana, New Jersey, Oregon, Tennessee, Vermont and Washington State. These studies can be obtained through the ABA Resource Center on Access to Justice Initiatives at:  
<http://www.abanet.org/legalservices/sclaid/atjresourcecenter/resourcematerials.html>.

Each state found that the level of legal need compares to the level found by the ABA in 1993. These studies also independently report that the combined efforts of the private bar and publicly funded legal services providers address no more than 20% of the serious legal problems of the poor. These state-specific studies also determined that low-income households average of up to three new legal needs each year.

Significantly, at least one state study suggested that there are likely to be economic returns from providing prophylactic legal aid. The University of Wisconsin LaFollette School of Public Affairs estimated that every dollar spent toward increasing representation for victims of domestic violence will yield about \$9 in net benefits to victims or reduction in costs that would otherwise have to be borne by government. This finding cannot be emphasized enough given the current federal and state budget constraints.

#### C. Number of People Living in Poverty, Experiencing Legal Programs and Turned Away by Legal Services Offices Continues to Grow

Today, 36 million Americans struggle to get by on incomes below the federal poverty line, and another 14 million Americans hover just below 125% of the poverty line; thus 50 million Americans are eligible for legal services from LSC. This is a marked increase in the number of eligible clients from just ten years ago, when 45 million Americans were eligible for LSC-funded representation.

The LSC's 2005 study, "Documenting the Justice Gap in America," which was discussed in detail today by the Corporation witnesses, reports that one in every two eligible clients who seeks assistance from a federally funded legal aid program is turned away because of lack of resources. Given the lack of resources, LSC-funded programs are only able to serve about one million clients per year. This study, however, was conducted prior to the 2005 hurricane season, and did not take into account the newly poor as a result of Hurricanes Katrina, Wilma and Rita. Since then, additional natural disasters have occurred and the mortgage foreclosure crisis has significantly increased the need for legal assistance.

Various legal needs studies show that, on average, poor households will experience at least one, and perhaps as many as three, serious legal problems each year. Yet, as noted, at least 80% of those problems will go unaddressed. Solvable legal problems snowball for persons living in poverty, as they lack the resources to address what start out as simple problems.

It is common knowledge in communities nationwide that legal aid is rarely available to those in need. Yet, in the last year for which statistics are available, over two million people came to federally funded legal aid offices for help. Over half were turned away for lack of resources. Surely, many people simply gave up and never bothered to apply for help.

### III. Essential Elements of a System Providing Equal Justice

#### A. Equal Justice Requires Adequate Resources

##### 1. Ensuring Access to Justice Requires Greater Federal Resources

Federal resources have not kept pace with inflation. In 1981, LSC for the first and only time achieved sufficient funding to reach the longstanding goal of providing two lawyers for every 10,000 poor people. If the \$321 million 1981 appropriation for LSC had kept pace with inflation, LSC would now have \$759 million. LSC's FY 2008 appropriation is only \$350.5 million. More than 55 Senators and every State Bar Association president, plus the District of Columbia and two territories, strongly urge Congress to provide LSC with at least \$50 million more in funding for FY 2009.

## 2. States Provide Uneven Resources for Access to Justice

Most, but not all, state governments are now full partners in the efforts to provide legal aid to the poor. Forty-six states provide legislative appropriations in varying amounts that supplement federal funding provided through LSC.

All states now operate Interest on Lawyer Trust Account (IOLTA) programs that harness the earning power of money by aggregating small quantities of funds that would otherwise not be able to earn interest for anyone. However, IOLTA resources are very unstable; they rise and fall quickly with interest rates and the level of deposits to IOLTA accounts.

The government, at all levels, has the fundamental responsibility to ensure fair and equal justice. In the long term, ABA encourages legislatures and courts to recognize this responsibility to provide for justice in matters where basic human needs are at stake, and to accord a right to counsel when such assistance is essential to a just result in all cases - both criminal and civil.

When legal help is not available, as judges, my colleagues and I see in our courts every day that justice is not always served. People are simply unable to navigate the system and to make claims and obtain fair outcomes when they are forced to advocate for themselves against sophisticated government or private institutions.

Further, when a poor litigant lacks legal help, the courts themselves become much less efficient. Judges do their best to insure that a just result is achieved, but it can be very difficult to do so without the assistance of counsel to find facts and correctly apply the law.

## 3. The Organized Bar is an Active Partner in Serving the Legal Needs of the Poor

The organized bar at all levels strongly supports efforts to provide legal services to the poor. The ABA, and state, local, specialty and territorial bar associations are tireless in urging members of the profession to voluntarily contribute pro bono legal services to the poor; nearly 70% of the members of the bar provide pro bono services. The average lawyer donates close to 40 hours of free service to persons of limited means each year.

The ABA sponsors many entities and organizations that encourage pro bono participation and work to increase access to justice:

? The ABA Center for Pro Bono assists ABA members and the legal community in developing and supporting effective pro bono legal services in civil matters as part of the profession's effort to ensure access to legal representation and the American system of justice.

? The ABA Resource Center for Access to Justice Initiatives, established in 2006, provides assistance to the more than 26 states that have created access to justice commissions and works with other states in support of similar initiatives. The commissions involve leaders of the bar, the judiciary and other community leaders in designing and finding resources for more effective civil legal services systems. State and local communities are fully engaged and stand ready to work with the Congress in broadening access to justice.

? The ABA Standing Committee on Legal Assistance for Military Personnel (LAMP) helps the military and the Department of Defense improve the effectiveness of legal assistance provided in civil matters to an estimated nine million military personnel and their dependants. America's soldiers and their families are one of the neediest groups in terms of civil legal assistance. In response to the military activations following the September 11 tragedy, this Committee instituted the program "Enduring LAMP," which provides legal assistance to service personnel who have been deployed. In recent years, as American commitments to and casualties from the Iraq and Afghanistan conflicts have surged, so too have attorney pro bono commitments to active-duty service members and veterans. A number of large firms have significantly increased their pro bono assistance to veterans. The Walter Reed scandal of a year ago precipitated a number of new pro bono veteran initiatives.

It is clear that the organized bar is actively involved in providing access to justice for all. Some have suggested over the years that the private bar alone, or only with state funding, can ensure access to justice for the poor. Such a suggestion would only result in further rationing - and denying - justice. The level of need is too overwhelming. The ABA Legal Needs study and recent state studies consistently report that despite the combined efforts of LSC-funded programs, state, local and private funding and pro bono efforts, between 70 and 80 % of the legal needs of the poor are unmet. As the late, legendary lawyer John Pickering emphasized in previous Congressional testimony,

My firm [Wilmer, Cutler and Pickering] and I have long been involved in providing pro bono legal services for the poor. Last year, my firm received the ABA's Pro Bono Publico award and just last month I was awarded the ABA Medal, the highest award given by the ABA, in recognition of my leadership role in providing legal services to the poor and the elderly. . . . I emphasize what I said in my acceptance speech when I received the ABA Medal: despite the efforts of my firm and others throughout the country, the legal problems of the poor cannot be addressed without a strong, well-funded Legal Services Corporation.

(Legal Services Corporation Oversight Hearing, House Judiciary Committee, Subcommittee on Commercial and Administrative Law, September 29, 1999.)

#### B. LSC Provides a Strong Organizational Infrastructure

The Legal Services Corporation is a model private-public partnership. The core federal funding provides for client intake and screening, referral of cases, responding to emergency matters, training pro bono lawyers, and handling cases when no private lawyer can do so. LSC leverages and facilitates the utilization of private resources - both in-kind, pro bono services and private funding.

A civil legal aid system should function efficiently and effectively, maximizing the use of public funds devoted to insuring access to justice. LSC disburses 95% of its annual federal appropriation to 137 local legal aid programs nationwide. Boards consisting of leaders in the local business and legal communities set the priorities for and oversee these programs, which provide basic civil legal services to the poor.

Since Justice Powell first moved the ABA in 1964 toward supporting this legal services model to today, the ABA has played a significant role helped by articulating clear standards for the operation of civil legal aid programs. The ABA set forth these standards in 1961, and updated them several times, including as recently as 2006. The most recent recommendations included in the ABA's "Principles of a State System for the Delivery of Civil Legal Aid" are available at:

<http://www.abanet.org/legalservices/sclaid/downloads/06A112B.pdf>.

#### IV. CONCLUSION

The ABA strongly supports the Legal Services Corporation and its role in helping secure access to justice for all Americans. There are a few who continue to criticize or oppose LSC, going back decades. While LSC management can always work to improve its internal organization and oversight of and guidance for its grantees, one point remains certain -- the single greatest deficiency of the Legal Services Corporation is the lack of adequate resources to meet the needs of the 80% of the poor who currently cannot be served. Local legal services offices are functioning much like hospital emergency rooms, engaging in legal triage as they attempt to cope with the enormous unmet legal needs.

It is in the interest of all of us to see that these legal needs are resolved in a peaceful manner and that respect for the rule of law is strengthened. "Liberty and justice for all" is our proud national credo, but it is empty rhetoric without significantly more resources to ensure a comprehensive national delivery system for civil legal aid.

Thank you and I would be happy to respond to your questions.