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# *JUST SERVICES*

Balancing the Scales of  
Legal Services Funding  
in Massachusetts



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### **I. Overview**

Led by the Massachusetts Legal Assistance Corporation (MLAC) and the Boston Bar Association, advocates for legal services are calling for more than a tripling of state funding of the MLAC over the next three years. The MLAC provides grants to state entities that offer legal services to the poor.

The magnitude of the request reflects the widely shared belief that “available legal services for persons of limited means are woefully inadequate to meet the need for legal assistance in significant legal matters.”<sup>1</sup> This is despite the fact that total funding of state legal services has grown by almost 10% annually over the last five years and is now about \$57 million per year from all sources.

Legal-services advocates point to studies that purportedly “well document the need for additional resources to provide representation in civil cases to those unable to afford private counsel.”<sup>2</sup> However, a careful examination of the data and of the history of legal services creates, in the vernacular of attorneys, reasonable doubt in the case for increased funding. From this record, it appears that the poor neither need – nor stand to benefit from – a tripling in state funding.

Contrary to the argument of legal-services advocates, existing studies do not show conclusively the existence of a significant number of unmet legal needs. Indeed, these studies show that the number of such needs is relatively small. We cannot be certain, either, that the new funds would go to meet the needs of the poor. Indeed, there is good reason to believe that they would go for purposes quite unrelated, and even antithetical, to those needs.

### *Background*

The Massachusetts Constitution codifies the Commonwealth’s commitment to provide each citizen access to civil justice:

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<sup>1</sup> Supreme Judicial Court Committee on *Pro Bono* Legal Services to *Massachusetts Lawyers Weekly*, 16 March 1998 (Boston), 26.

<sup>2</sup> *Ibid.*

Every subject of the Commonwealth ought to find a certain remedy, by having recourse to laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; and without delay; comfortably to the laws.<sup>3</sup>

At the federal level, Congress codified its own commitment to that same principle by establishing the Legal Services Corporation (LSC) in 1974.<sup>4</sup> A quasi-public agency, the LSC distributes federal legal-services funds to local affiliates, which provide legal assistance to eligible citizens in civil matters such as divorce, child custody, landlord/tenant disputes, allegations of discrimination, income maintenance, and similar matters.<sup>5</sup> In 1998, 37% of all closed cases were family-law matters; 23% landlord/tenant and public-housing matters; and 14% income-maintenance cases such as food-stamp revocation, social security and disputes over government benefits.<sup>6</sup>

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In 1999, the LSC received a total of \$300 million from Congress, up 6% from 1998. For FY 2000, the LSC requested and received another 13% increase.<sup>7</sup> In addition to federal appropriations, LSC grantees receive funds from an array of sources, including grants from other federal entities, states and localities, income from interest on lawyers' trust accounts (IOLTA), and private charitable contributions. Under IOLTA, attorneys place their clients' funds in special accounts, on which interest earnings are passed along to the MLAC for distribution to its grantees.

The MLAC funds its grantees with state money and with IOLTA. Figure 1 shows how federal and nonfederal funds are channeled through the LSC and the MLAC to local grantees, which, in turn, provide legal services to eligible clients. MLAC grantees also receive assistance

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<sup>3</sup> Massachusetts Constitution, Preamble, Art. XI.

<sup>4</sup> Public Law 93-355, 93<sup>rd</sup> Cong., (25 July 1974).

<sup>5</sup> To be eligible for free legal assistance, a recipient must show that he or she earns no more than 125% of the poverty rate as determined by the Department of Health and Human Services and published in the Federal Poverty Guidelines each year.

<sup>6</sup> Legal Services Corporation, *1997 Cases Closed by LSC-Funded Programs*, <http://www.lsc.gov/97csrts.html> (1997).

<sup>7</sup> On November 19, 1999, the United States Senate approved an omnibus appropriations bill that included \$305 million for the Legal Services Corporation for FY 2000. The amount is just \$5 million more than its FY 1999 budget. President Clinton had requested a \$40 million increase.

from state and federal grants, IOLTA distributions, contributions from private charities and *pro bono* services provided by private attorneys. The data are for 1999.

Figure 1 - Legal Services Providers In Massachusetts (Flow Chart)

(please see <http://www.beaconhill.org/BHISudies/ls52000.html> for flow chart)

The MLAC received \$6.94 million from the Massachusetts Legislature in FY 1998 and \$7.25 million in FY 1999. For FY 2000, funding is at \$7.53 million.

In February 2000, the MLAC asked the Massachusetts Legislature for FY 2001 funding in the amount of \$26.1 million.<sup>8</sup> In its budget forwarded to the Senate, the House of Representatives approved \$9.08 million in funding for FY 2001; this represents an increase in funding of \$1.55 million.

Now the MLAC is offering a proposal to the Senate under which funding would increase by \$6 million each year for the next three years, bringing total state funding to \$25.53 million by FY 2003, or more than triple the FY 2000 level. Legal-services advocates defend this request not only on the basis of “unmet legal needs” but also on the argument that the Commonwealth can well afford to provide additional funds for legal services to deserving citizens.<sup>9</sup>

### *The Assertion of Unmet Legal Needs in Massachusetts*

The assertion of unmet legal needs in Massachusetts is based on a 1996 report by the Commission on Equal Justice entitled, *Equal Access to Justice, Renewing the Commitment*.<sup>10</sup> This report cited a national study conducted by the Institute for Survey Research at Temple University in 1994 entitled, *The Report on the Legal Needs Among Low-Income and Moderate-Income Households: A Summary of the Findings of the Comprehensive Legal Needs Study (CLNS)*. Another study cited in the report, *Legal Needs Among Low-Income Households in Massachusetts: Findings from the Comprehensive Legal Needs Study (MLNS)*, used the same methodology. The *MLNS* was conducted in 1994 by the Institute for Survey Research for the Commonwealth of Massachusetts.<sup>11</sup>

Both the *CLNS* and the *MLNS* estimated the number of unmet legal needs of eligible Massachusetts citizens by conducting telephone interviews designed to gather information on the respondents’ backgrounds, income, and potential and actual legal problems. The two studies documented ongoing legal needs as well as potential legal needs in various areas. Each study used a similar methodology, with the *MLNS* adopting that used by the national *CLNS*.

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<sup>8</sup> <http://www.lweekly.com>, Feb. 7, 2000.

<sup>9</sup> *Ibid.*

<sup>10</sup> The Massachusetts Commission on Equal Justice, *Equal Access to Justice: Renewing the Commitment* (Boston: Massachusetts Legal Assistance Corporation, 1996).

<sup>11</sup> Roy W. Reese and Carolyn Eldred, *Findings of the Comprehensive Legal Needs Study* (Philadelphia: Institute for Survey Research at Temple University, 1994); and Karl Landis, Roy W. Reese, and Carolyn Eldred *Legal Needs Among Low-Income Households in Massachusetts: Findings from the Comprehensive Legal Needs Study* (Philadelphia: Institute for Survey Research at Temple University, 1994).

Citing the *CLNS* and the *MLNS*, *Equal Access* reported 336,871 income-eligible households in Massachusetts in 1990. *Equal Access* determined that these households met 112,000 of their legal needs through recourse to the legal system in 1995. Of these legal needs, 43,000 were met through LSC- and MLAC-funded programs, 5,000 through other public-service programs and 64,000 by private attorneys. Subtracting and rounding, *Equal Access* thus concluded that “225,000 individual legal needs would have remained unmet.”<sup>12</sup>

In March 2000, the MLAC issued a one-page release reporting that it had turned away 54,000 low-income individuals in Massachusetts in 1998.<sup>13</sup> The MLAC apparently had counted and categorized the number of individuals who telephoned to request assistance but who could not be helped because of financial constraints faced by legal-services providers. Since the MLAC offered no details concerning the methodology with which it obtained this estimate, we can place no confidence in its validity.

### *Questioning the Claim of Unmet Legal Needs*

An examination of the *CLNS* and the *MLNS* studies raises questions about the methodology used in arriving at their respective conclusions:

- *The CLNS and MLNS used too broad a definition of “legal needs.”* The *MLNS* defined legal needs indirectly as “problems that people encounter that are susceptible to a remedy through the system of justice.”<sup>14</sup> The *MLNS* also said that an unmet legal need “touched on virtually every aspect of life and was not restricted just to those situations commonly assumed to have legal implications.”<sup>15</sup> *Equal Access* ultimately declared that any “legal need” that did not result in a case for the LSC, the MLAC, any other public program, or for a private attorney is an unmet legal need. Reported legal needs could thus include a tenant’s problems with insects, credit denials or lack of telephone service – issues seldom addressed through the legal system. Such an interpretation constitutes so broad a definition of unmet legal needs as to be meaningless.
- *Equal Access ignored extra-judicial remedies in its calculation of unmet legal needs.* Many of the responses of those surveyed were interpreted as indicating a legal need when, in fact,

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<sup>12</sup> This assumes an average of one legal need per household per year.

<sup>13</sup> Mitchell Zuckoff, “Uneven Justice: Limited Funds for Legal Aid Can Lead to Mismatches in Civil Cases,” *The Boston Globe*, 12 March 2000, A1.

<sup>14</sup> *MLNS*, 1.

<sup>15</sup> *MLNS*, v.

there were remedies available from outside the legal system. These remedies include mediation, third-party negotiation, government-provided resources and assistance by nonprofit organizations.

- *The CLNS and MLNS exaggerated the number of unmet legal needs by failing to account for respondents' possible unwillingness to devote sufficient time and effort to securing a legal remedy.* Respondents were not queried with respect to their willingness to incur the personal costs commonly associated with the pursuit of legal remedies. Meeting with lawyers, doing paperwork, providing testimony and fulfilling other legal obligations are necessary elements in obtaining a legal remedy. There is no unmet legal need unless the respondent is willing to incur the personal costs associated with such activities. Merely phoning a legal-services provider and indicating a legal need does not constitute evidence that such a need exists.
- *The studies failed to ask respondents whether they would have pursued a legal remedy if they had had sufficient resources to hire a private attorney.* A legal need can be unmet not only because of financial considerations but also because the person registering the need does not consider it worth meeting. Middle and high-income people allow all manner of legal needs to go unmet because they prefer to use their financial and personal resources to meet other, more pressing, nonlegal needs. There was no determination in the *CLNS* or *MLNS* of whether respondents, if given the opportunity, would have preferred to meet other needs. In the *MLNS*, only 12% of respondents identified cost as the reason they did not pursue a legal remedy to their problems. This suggests that the remaining 88% would have left their reported legal needs unmet even if they had had the resources to meet them.
- *Equal Access exaggerated the number of legal needs by relying on data relating to the prevalence – as opposed to the incidence – of such needs.* The study implicitly used data relating to the “prevalence” of legal needs, rather than data relating to the “incidence” of legal needs. Prevalence measures all the legal needs in existence, including unresolved legal needs from previous years. Incidence measures new legal needs arising during the course of a year. Thus *Equal Access* counted as legal needs problems left over from previous years. These problems may have remained unresolved because they lacked merit in the first place.

## *Assessing the Real Number of Unmet Legal Needs*

These questions cast doubt on the validity of the assertion in *Equal Access* that there are 225,000 unmet legal needs in Massachusetts. There is however, an even more fundamental problem. *Equal Access* appears to have greatly exaggerated the number of unmet legal needs even in terms of its own methodology. Indeed, *MLNS* and *Equal Access* themselves imply a much lower estimate.

According to *Equal Access*, there were 336,871 Massachusetts households eligible for legal services in 1990, averaging 1.0 legal needs per household, for a total of 336,871 legal needs.<sup>16</sup> *Equal Access* declared that of these needs, 225,000 went unmet. This implies that approximately 112,000 needs were met through the legal system.<sup>17</sup> Two out of three needs went "unmet."

We interpret the *MLNS* and *Equal Access* data to imply a significantly smaller number of unmet legal needs. Our interpretation rests on the *MLNS*'s own arguments that (a) a legal need can be considered "met" even if it is resolved satisfactorily outside the legal system; and (b) only a small fraction of all households surveyed attributed their inability to meet their legal needs to inadequate financial resources.

*The current number of unmet legal needs is less than 21,000 – far less than the estimate of 225,000 supporting the argument of "woefully inadequate" legal services*

Consider the 112,000 legal needs reported by *Equal Access* as having been met by the legal system. Then add the 15% (50,531) that *MLNS* reports were resolved outside the legal system through third party interventions and the 19% (64,006) that they report were resolved through individual efforts.<sup>18</sup> That brings the total number of legal needs that were met, through the legal system or otherwise, to 226,537. Subtracting from 336,871, we are left with 110,334 unmet legal needs. Using *MLNS*'s finding that 12% of respondents found costs to be an impediment to resolving their legal problems leaves just 13,240 legal needs that went unmet for financial reasons. Given that the number of income-eligible households has increased by 15.5% since 1990, there are 15,290 unmet legal needs in 2000.<sup>19</sup>

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<sup>16</sup> *MLNS*, 15.

<sup>17</sup> *Equal Access*, 13.

<sup>18</sup> *MLNS*, 34.

<sup>19</sup> According to the Massachusetts Institute for Social and Economic Research (MISER), the current population of Massachusetts is 6,340,843. Using the *Equal Access* estimate of 2.07 persons per household,

This estimate is arguably also misrepresentative insofar as it is based on the "prevalence," rather than the "incidence" of legal needs. That is, it counts as needs, not only those incurred during the current year, but also those left over from earlier years. *MLNS* reports 0.8 legal needs per household when needs are measured in terms of incidence, rather than prevalence.<sup>20</sup> Adjusting for this difference, we determine that the number of unmet legal needs in 2000 is 12,326.<sup>21</sup>

### *The Beacon Hill Institute Survey*

During the fall of 1999, the Beacon Hill Institute (BHI) conducted a survey of low-income households to obtain our own independent assessment of the extent of unmet legal needs in the Commonwealth. Our sample, consisting of 100 respondents, was drawn from four Massachusetts subsidized housing developments. The housing developments we selected were similar to the surveys described above with respect to ethnic composition, annual income of residents and other explanatory variables.

Seventy-two of the respondents identified at least one legal problem. Twelve of these respondents reported, as "legal," problems that were not, in fact, legal in nature.<sup>22</sup> Respondents from the 60 remaining households reported a total of 79 legal problems, yielding 0.79 problems per household. Multiplying by 389,028 (the estimated number of income-eligible households in 2000), we find the number of legal needs to be 307,332. Given that 205,912 of all legal needs will be met through the legal system or in some other way in 2000, we find 101,420 unmet legal

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the number of households is 3,063,209. The fraction of Massachusetts households below the poverty level was 10.7% in 1990 and 12.2% in 1997 (U.S. Census Bureau, *Statistical Abstract of the United States*, 1999, p. 485). Given that 11.1% (1/9) of households were below 125% of the poverty level in 1990, 12.7% were below 125% of the poverty level in 1997. Thus there were 389,028 households below 125% of the poverty level in 1997. We then estimate the number of unmet needs in 2000 to be  $\frac{389,028}{336,871} \cdot 13,240 = 15,290$ , where

$$\frac{389,028}{336,871} - 1 \cdot 100\% = 15.5\%.$$

<sup>20</sup> *MLNS*, 45.

<sup>21</sup> Given 0.8 legal needs per household for 336,871 eligible households, Massachusetts households incurred 269,497 new legal needs in 1990. Based on the data presented in the text, eligible households accommodated 67% of these needs by through legal, extra-judicial and individual efforts. (The fraction of legal needs met through legal system was  $112,000/336,871 = 0.33$ . The fraction met outside the legal system through third party interventions was 0.15, and the fraction met through individual efforts was 0.19, for a total of 0.67.) That leaves 88,934 unmet needs. Multiplying by 12%, we find that 10,672 legal needs were unmet for reasons of cost. Given that the number of income-eligible households has risen since 1990 by 15.5%, we determine that there are 12,326 unmet needs in 2000.

<sup>22</sup> For example, we determined that a reported problem of "not enough money to pay bills" was not a "legal" problem.

needs.<sup>23</sup> Multiplying by 0.20 (the fraction of surveyed households that did not seek legal help for reasons of costs), we find the number of legal needs that cannot be met for reasons of cost to be 20,284.

The best available evidence therefore suggests that fewer than 21,000 Massachusetts households are currently unable to meet their legal needs because they are poor and because of cost considerations. This is far fewer than the estimate of 225,000 supporting the argument of “woefully inadequate” legal services funding and still substantially fewer than 54,000 estimated by MLAC.

*Equal Access* implies that 67% of the legal needs of the poor are going unmet. MLAC claims 60% (three out of five). The foregoing analysis suggests that the correct number is no greater than 7%. Considering this discrepancy, the Commonwealth should conduct a new study before agreeing to any increases in legal services funding.

### *Should Massachusetts Provide the Requested Increase?*

In 1999, the MLAC distributed its funds to 18 legal-services programs providing general support, disability benefits, Medicare advocacy, battered-women services and family-law services.<sup>24</sup> Despite the unquestioned value of this assistance to a large number of recipients, a number of factors argue against increased funding of the MLAC at this time.

LSC funding of Massachusetts legal services has been almost unchanged in recent years. Yet, as mentioned above, total funding, which includes state appropriations and IOLTA, has grown rapidly. Since 1990, state appropriations to MLAC have increased at a 16.2% annual compound rate. From 1995-1999, IOLTA income increased at an 18.0% annual compound rate. Legal services have by no means been the poor stepchild of state policy.

There is a long history of concern over legal-services operations and whether or not legal-services providers are adhering to their mission. Critics have charged that the LSC and its grantees have deviated from their mission of helping indigent clients in civil legal matters, becoming instead a taxpayer-funded political advocacy group for social reform.<sup>25</sup> The agenda has not been to serve the needs of the poor, say critics, but to expand the welfare state through litigated increases in transfer payments.<sup>26</sup> This has had the incidental effect of abusing defendants

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<sup>23</sup> Multiplying 307,332 by 0.67, we get 205,912 legal needs that were met in 2000.

<sup>24</sup> Massachusetts Legal Assistance Corporation, *Annual Report FY 1998* (Boston), 32.

<sup>25</sup> Orrin G. Hatch et al, *Legal Services Corporation: The Robber Barons of the Poor?* (Washington: The Washington Legal Foundation, 1985), 10.

<sup>26</sup> Kenneth Boehm and Peter T. Flaherty, “Legal Disservices Corp.: There are Better Ways to Provide Legal Aid to the Poor,” *Policy Review* 74 (Fall, 1995), 18.

who are forced, at a great expense and often unsuccessfully, to prevail over the determined efforts of the legal-services bar.

In one instance, two tenants, assisted by a Boston-based legal-services office, remained in a Waltham woman's two-family home for almost two years without paying rent. The tenants bankrupted the woman leaving only after a judge evicted them. Another episode involved a \$400-a-week hospital worker who was left destitute after her tenant made unsubstantiated complaints resulting in continuous delays in the tenant's eviction hearing. Aided by a legal-services lawyer, the tenant eventually skipped the eviction hearing altogether.<sup>27</sup>

In fact, state legal-services funds often end up being spent on lobbying efforts of questionable value to the taxpayers who are paying for them. Greater Boston Legal Services has lobbied for paid parental leave. The Massachusetts Law Reform Institute has lobbied for relaxing workfare requirements for welfare recipients. Western Massachusetts Legal Services distributed a pamphlet advising welfare recipients to spend any lottery windfalls as quickly as possible in order to retain their benefits. It is therefore disingenuous, at best, for legal-services advocates to speak of unmet legal needs of the poor when they use state funds and the court system to implement a political agenda that is often inimical to the interests of the taxpayers and, indeed, of the poor themselves.

It was exactly that concern that led Congress, in 1996, to restrict sharply the use of LSC grant money. Federal law now prohibits the use of LSC funds for redistricting efforts, for efforts to alter or revise policies arrived at by executive order, the judicial process and legislation, and for class-action and issue-advocacy suits.

Finally, there is the question of what regular audits of state legal-services providers might reveal. The federal Office of the Inspector General (OIG) performed six field audits in 1997 to ensure grantee compliance with the federal restrictions. The OIG found that all six grantees overstated their caseload on average by 32%. In 1998, an additional six grantees were audited who, on average, overstated their caseload by 30%.

According to the OIG, some local grantee organizations refused to cooperate with the audit staff, and other organizations greeted the audits with hostility.<sup>28</sup> Sadly, our efforts to get information from the LSC and other legal-services entities met with a similar reaction. We never

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<sup>27</sup> Small Property Owners Association, *Small Property Owners News* (Cambridge), April 1998 and June 1998.

<sup>28</sup> Statement of the Office of Inspector General, Legal Services Corporation before the House of Judiciary Subcommittee on Commercial and Administrative Law, presented September 29, 1999 by Edouard Quatrevaux, Inspector General, Statement of Inspector General Edouard Quatrevaux before the House Judiciary Subcommittee on Commercial and Administrative Law, presented September 29, 1999.

received performance and financial data that we requested in writing and through numerous phone messages. See Appendix B.

### *Beacon Hill Institute's Recommendations*

Considering the doubtful legitimacy of the MLAC's request for expanded funding, the Beacon Hill Institute recommends that the state legislature freeze its appropriation of MLAC funds until it adopts the following measures:

1. Commission a new survey to reassess the incidence of unmet legal needs among the poor in Massachusetts.
2. Impose conditions on the receipt of MLAC funds similar to the 1996 federal guidelines imposed by Congress on LSC distributions.
3. Direct a nonpartisan office – perhaps the Inspector General – to perform frequent, irregularly-scheduled audits of MLAC grantees to ensure that caseloads are not overstated.
4. Conduct an information program aimed at alerting citizens to the existence of alternative services, such as *pro bono* attorney services, local, state and federal agencies and law-school clinics.
5. Impose enhanced disclosure requirements holding the MLAC and its grantees to the standards codified in the Freedom of Information Act.