



**Testimony of Victor A. Kovner
Chair
The Committee for Modern Courts**

**Hearings on
IOLA and the
Future of Civil Legal Services in New York State**

Before the

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**Senate Standing Committee on Crime Victims, Crime and Corrections
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Senate Standing Committee on Insurance**

**New York City Hearings
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On behalf of Modern Courts, I want to thank the Committees for providing us with the opportunity to present testimony today on this critically important issue of funding for civil legal services. By holding these hearings you recognize that government bears some responsibility of providing access to justice for low income New Yorkers, and to support the tireless work of civil legal service providers across this state. Continuing that support will avoid enormous further burdens to our court system and the administration of justice.

In strong economic times, the Interest on Lawyer Accounts (“IOLA”) is a fine source of funding. But the recent economic downturn demonstrates the vulnerability of IOLA. Modern Courts believes that an emergency bailout of IOLA, although critical - and we thank you for your persuasive efforts to make that happen - may only be a “one shot deal.” It has become imperative to review alternative and additional ways to fund civil legal services. The goal of providing low income New Yorkers access to equal and fair justice can only be met when the state can offer secure and consistent funding.

Modern Courts recently commenced a study along with our Board member, Amelia T.R. Starr, a partner at the law firm of Davis Polk, which compares the civil access to justice funding initiatives of various states across the country. Modern Courts offers this information today, not

as a directive to what New York must do, but as a source of useful comparative information to consider for the future.

Many states have discovered that addressing the underfunding of civil legal services at the state level is the most effective way of ensuring that the problem does not worsen when federal funding diminishes and economic factors conspire to drain other sources of revenue. In addition to IOLA, which is employed by all 50 states, all of the states analyzed generate a significant portion of funding for civil legal services by directing a portion of court fees to civil legal services. While no state has completely solved the problem of funding, those who have taken aggressive measures to increase civil legal services funding have almost uniformly turned to increases in court fees or to court fee surcharges in order to generate additional revenue. Many states also use supplemental fees, such as a surcharge on attorney registration fees, to augment funding for civil legal services. And, many states have turned to additional fee increases to weather the funding crunch caused by increased demand for civil legal services and decreased funding sources.

There are public policy concerns, however, that have thus far kept New York from adopting fee increases or surcharges. The *Blue Ribbon Report*, an effort that was motivated in part by another sudden decrease in the availability of IOLA funds, was produced in 1998.¹ This report remains the most thorough inquiry to date into the question of identifying a dedicated

¹ See LEGAL SERVICES PROJECT, FUNDING CIVIL LEGAL SERVICES FOR THE POOR: REPORT TO THE CHIEF JUDGE 3 (1998), <http://www.courts.state.ny.us/reports/misc/legalservpoor.pdf> [(hereinafter, “BLUE RIBBON REPORT”]. See also IOLA Fund of the State of New York—About IOLA, <http://www.iola.org/about.html> (last accessed July 14, 2009).

revenue source for civil legal services in New York State. As stated in the *Blue Ribbon Report*, “an across-the-board increase might unduly restrict the access of the poor and near poor to the courts.”² In my view, consideration should be given to a court fee that would not adversely effect access to justice nor fall unequally on any particular party to litigation. A surcharge on the filing of a motion may meet those objectives. Such a fee would be broadly distributed between plaintiffs and defendants as both parties frequently file motions during the course of litigation. A minimal fee of twenty five (\$25.00) dollars would generate a significant revenue source. It is estimated that in fiscal year 2008 there were roughly 311,412 motions made across the state and, to the extent that the number of motions might be reduced even slightly, that would also be healthy for the courts.

An expanding number of states have found set asides of court fees, increases and surcharges are among the most achievable policy objectives for civil legal service advocates seeking out new funding sources. Our submitted written testimony provides an analysis and statutory references for Pennsylvania, Michigan, Ohio and California. And also gives a snapshot of Kentucky, Missouri, Maryland and Nebraska.

1. Pennsylvania

In 2002, Pennsylvania enacted the Access to Justice Act, which created a \$2 filing fee surcharge in state courts.³ The Act was renewed in 2006, and is now scheduled to sunset in

² *Id.*

³ See THE PENNSYLVANIA IOLTA BOARD, RESULTS OF THE PENNSYLVANIA ACCESS TO JUSTICE ACT: A REPORT ON THE FILING-FEE SURCHARGE LAW, FY 2004-2008 1 (2009) <http://www.paiolta.org/ajareport/Report.pdf> (hereinafter, “PAIOLTA REPORT”).

2012.⁴ While the surcharge is modest—especially as compared to Pennsylvania’s state court filing fees, which can be as high as \$550 to initiate a cause of action with a jury demand⁵—the revenue raised for Pennsylvania’s civil legal service providers has been substantial. In fiscal year 2008, the \$2 Access to Justice surcharge yielded \$9.7 million in revenues.⁶ The funds collected in FY 2008 made up 18% of the total funding for Legal Aid in the state.⁷

More recently, Pennsylvania reacted to the decrease in IOLA (IOLTA) funds by increasing attorney registration fees. The Supreme Court of Pennsylvania raised attorney registration fees from \$175 to \$200 in April 2009, and committed the entirety of the revenue that will be generated by this \$25 increase to the IOLTA fund.⁸ This fee increase is expected to generate about \$1.5 million annually.⁹

Like the increased attorney registration fee proceeds, revenue from the \$2 surcharge flows into the Pennsylvania IOLTA Fund, which also collects some voluntary attorney

⁴ *See id.*

⁵ *See* First Judicial District of Pennsylvania—2009 Prothonotary Fee Schedule, <http://fjd.phila.gov/pdf/prothyfees.pdf>. The fees listed on this schedule are for the city of Philadelphia; filing fees are lower in less-populated parts of the state, though the Access to Justice fee is \$2 statewide.

⁶ *See* PAIOLTA REPORT, *supra* note 43 at 1.

⁷ *See id.*

⁸ *See* Administrative Office of Pennsylvania Courts, *Annual Registration Fee for Lawyers to Increase*, Apr. 2, 2009, <http://www.aopc.org/NR/rdonlyres/7753FE41-9923-447A-82C8-2D8BFC282686/0/prrel09402.pdf>. The new rule requires that every attorney who is required to pay an annual registration fee “pay an additional annual fee of \$25 for use by the IOLTA Board.” Pennsylvania Supreme Court, Amended Rule 1.15—Safekeeping Property, <http://www.pacourts.us/OpPosting/Supreme/out/73drd.attach.pdf> (last viewed July 23, 2009).

⁹ *See* Annual Registration Fee for Lawyers to Increase, *supra* note 47.

contributions and other small interest-based funds.¹⁰ In addition to making its own grants based on bids from local civil legal service providers, PAIOLTA forwards the proceeds from the filing fee surcharge, a portion of the IOLTA revenues, and portions of other state funds to the Pennsylvania Legal Aid Network, Inc. (“PLAN, Inc.”).¹¹ PLAN, Inc. is an umbrella organization that receives funds from PAIOLTA and from state appropriations.

2. Michigan

Michigan’s mechanism for funding civil legal service providers is unique among the states compared here and, though not appropriate for New York, it is worth review. Rather than imposing an increased court fee or surcharge, the Michigan legislature passed a statute stipulating that 23% of the state court fee fund must be paid into an indigent civil legal assistance fund.¹² This system came into being in 1994, when the Michigan court system needed a one-time boost of revenue to overhaul its computer system. Civil legal service advocates were able to ally themselves with the court system, which used its political capital to push a court fee increase through the legislature. Once the court system had the needed revenue to update its computer system, civil legal service advocates reaped the windfall of the increased court fees by securing

¹⁰ Email Interview with Sam Milkes, Executive Director, Pennsylvania Legal Aid Network, Inc. (July 28, 2009).

¹¹ *Id.*

¹² *See* MICH. COMP. LAWS § 600.151a(d).

the 23% allocation of the state court fee fund.¹³ In 2008, this court fee setoff generated \$7.15 million, with another \$1.8 million coming from IOLTA proceeds.¹⁴

The Michigan State Bar Foundation, a nonprofit corporation that is primarily devoted to funding civil legal services, determines how that money is disbursed to local civil legal service providers by accepting bids from those local agencies.¹⁵ The officers and trustees of the Foundation are elected by the membership on an annual basis.¹⁶ The Foundation has discretion in awarding the contracts, though its decisions are subject to approval by the state court administrator.¹⁷

3. Ohio

In addition to using IOLTA proceeds to fund civil legal services, Ohio imposes a \$26 access to justice surcharge on filing fees in its Court of Common Pleas,¹⁸ Municipal Courts,¹⁹ and County Courts.²⁰ This surcharge was increased to \$26 from \$15 in 2005, and the increase

¹³ Telephone Interview between Davis Polk summer associates and Meredith McBurney, Resource Development Consultant, American Bar Association Resource Center for Access to Justice Initiatives (July 27, 2009).

¹⁴ MARGARET J. NICHOLS, MICHIGAN STATE BAR FOUNDATION, 2008 PRESIDENT'S REPORT TO THE MEMBERS 9 (2008), <http://www.msbf.org/presidentsreport.pdf>.

¹⁵ See About the Michigan State Bar Association, <http://www.msbf.org/aboutus.html> (last viewed July 30, 2009).

¹⁶ See *Foundation News: Michigan State Bar Foundation Elects 2008-09 Officers and Trustees*, Michigan State Bar Association, October 1, 2008, <http://www.msbf.org/news/msbfofficerspr100108.pdf>.

¹⁷ See MICH. COMP. LAWS § 600.151a(d). As of the date of this report, the authors were unable to obtain a copy of the Michigan State Bar Foundation's grant-making policies or bylaws.

¹⁸ OHIO REV. CODE. ANN. § 2303.201.

¹⁹ OHIO REV. CODE. ANN. § 1901.26.

²⁰ OHIO REV. CODE. ANN. § 1907.24.

has no sunset provision—it is permanent law.²¹ The Ohio courts charge an \$11 surcharge (\$7 prior to 2005) for filing in the small claims division, and assesses a \$15 surcharge when a case is transferred from the small claims division to one of the state courts of general jurisdiction (\$15 being the difference between the small claims surcharge paid and the \$26 surcharge that would have been paid had the action originally been filed in one of the general civil courts).²² The surcharge is applicable to nearly every civil action filed in the state, and it is not waived unless all other filing fee surcharges are also waived.²³ Under this surcharge fee structure, Ohio raised \$17.7 million in 2007, the highest amount of revenue that any state generated through court fees, both in absolute and per capita terms.²⁴ The filing fee surcharge has transformed the way in which civil legal services in Ohio are funded. In 1992, federal LSC grants made up over 50% of funding for civil legal services. By 2007, however, the proportion of LSC grants had fallen to 19%.²⁵

Much like Pennsylvania, Ohio has a state-level umbrella organization—the Ohio Legal Assistance Fund (“OLAF”)—that collects the revenues from both the filing fee surcharge and

²¹ See Ohio Legal Assistance Foundation, “Filing Fees,” available at <http://www.olaf.org/filingfees/index.shtml> (last viewed July 21, 2009).

²² See Ohio Legal Assistance Foundation, “Filing Fees: Statutes,” available at <http://www.olaf.org/filingfees/statutes.shtml#2303.201> (last viewed July 21, 2009).

²³ See *id.*

²⁴ The per capital revenue generated is approximately \$1.54 per person.

²⁵ See Ohio Legal Assistance Fund, “Historical Summary of Funding Allocations for Legal Services in Ohio,” April 2008, available at http://www.olaf.org/aboutolaf/fundinghistory/Data%20Source%20for%20Ohio%20Legal%20Aid%20Revenues%20Chart%20_Updated%20April%202008_.pdf (last viewed July 21, 2009).

from IOLTA, and then disburses them to regional civil legal service providers. OLAF is run by a 35-member board, with 12 members appointed by various political leaders: the Governor, the Attorney General, the Treasurer, the President of the Senate, the Speaker of the Assembly, and the Ohio Public Defender each nominate one member, while the Chief Justice of the State Supreme Court nominates six members.²⁶

4. California

In addition to distributing grants to civil legal service providers through an IOLTA fund, California diverts \$4.80 of each civil filing fee, usually between \$180 and \$300, to the Equal Access Fund (“EAF”),²⁷ which also receives \$10 million in appropriations each year from the state legislature.²⁸ California also passed legislation in October 2009 that diverted additional money from a list of fees to increase the Equal Access Fund in a pilot project in various counties.²⁹

In addition, the California Commission on Access to Justice has engaged the legal and lay community in addressing the legal needs of the poor. The 25-member commission of lawyers and judges, as well as academic, business, labor and community leaders, was established to

²⁶ See Ohio Legal Assistance Foundation—Rules, Rule 120.51-1-02(B) (2001), <http://www.olaf.org/ioltaiota/IOLTARules/FINAL%20VERSION%20OF%20OLAF%20RULES.pdf>.

²⁷ See JUDICIAL COUNCIL OF CALIFORNIA—ADMINISTRATIVE OFFICE OF THE COURTS, FACT SHEET: UNIFORM CIVIL FEE STRUCTURE, (2008), <http://www.courtinfo.ca.gov/reference/documents/factsheets/uniformcivilfee.pdf>.

²⁸ See JUDICIAL COUNCIL OF CALIFORNIA—ADMINISTRATIVE OFFICE OF THE COURTS, EQUAL ACCESS FUND: A REPORT TO THE CALIFORNIA LEGISLATURE 8 (2005), http://www.courtinfo.ca.gov/programs/equalaccess/documents/EAF_FullReport.pdf (hereinafter, “EAF REPORT”).

²⁹ 2009 Cal ALS 457; 2009 Cal AB 590; Stats 2009 ch 457. http://leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20091011_chaptered.pdf

explore ways to improve access to civil justice for Californians living on low and moderate incomes. This collaborative is dedicated to finding long term solutions to the chronic lack of resources for legal assistance.³⁰

Several other states not described above have also enacted surcharges to fund civil legal services: Kentucky and Missouri have Access to Justice filing fee surcharges of between \$10 and \$20; Maryland has a surcharge of between \$10 and \$25; and Nebraska imposes a \$3 surcharge on civil filings and a \$4 surcharge on criminal filings. Many have taxed all litigants who avail themselves of the civil court system so as to enable low-income parties to have that same access. The examples above also demonstrate that states are actively attempting to mitigate the harm caused by the current financial crisis.

The survey of state funding and distribution mechanisms is not exhaustive, but it clearly indicates certain common policy choices among states over the last two decades. Court fees are among the first revenue sources states rely on to redress the woefully inadequate funds available to civil legal services. Securing dedicated funds for civil legal services will require creating or diverting revenue streams from several different sources. While New York should be wary of any increase in court costs because of the negative impact on access to justice, it seems clear that revenue from filing fees—either generated by a surcharge, or partially diverted from existing fee revenue—should play a part in funding civil legal services. Not only is this a more palatable political proposal than a tax or fee in an unrelated area, it also makes sense conceptually—all

³⁰ <http://www.calbar.ca.gov/calbar/pdfs/comcom/CAAJ-Brochure.pdf>

civil parties who avail themselves of the judicial system should devote part of their court costs to ensuring that the less fortunate can have fair access to that system.

Our justice system cannot function efficiently and effectively when there is a lack of consistent and secure resources for civil legal service providers. By providing legal representation to low income New Yorkers, civil legal service providers benefit their clients, the justice system, and also help prevent costly “crisis” services.

Modern Courts will continue its analysis of the work of other states and will make more recommendations once the research is complete and submit them to you. Thank you for your leadership on these issues and for providing Modern Courts the opportunity to present testimony.

Respectfully submitted,

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