

# THE ACCESS TO JUSTICE PROBLEM AND WHAT CAN BE DONE ABOUT IT

By: Bruce Wiener, Michelle Crozier Haynes, and Jacqueline Neumann

It is no secret among lawyers and judges that there is an access to justice problem in Colorado and nationwide. Approximately three out of four litigants are unrepresented, or *pro se*, in civil and domestic relations cases where there is no constitutional right to counsel. The increasing cost of legal services coupled with the recent recession have made hiring a lawyer unaffordable not just for the poor but also for many moderate-income individuals. *Pro se* litigants are generally unfamiliar with court procedures and the complexities of the law and pose significant challenges to the efficient operation of the courts.

This article examines the access to justice problem here in Boulder County and Colorado, recent efforts in Colorado and in other states to address the problem, and what more can be done by lawyers to increase the availability of civil legal services to low- and moderate-income individuals.

## Legal Aid

The Legal Services Corporation (LSC) establishes the framework by which the indigent receive free civil legal services. LSC funds 134 independent nonprofit legal aid programs with more than 800 offices, including Colorado Legal Services, which has fourteen offices throughout Colorado.<sup>1</sup> LSC-funded programs help people who live in households with annual incomes at or below 125% of the federal poverty guidelines – in 2013, \$14,363 for an individual, \$29,438 for a family of four – in cases involving family law, housing and foreclosure, public benefits, and other civil legal issues.<sup>2</sup>

The demand for free civil legal services far outstrips the resources available, forcing LSC to turn away more than half of all eligible applicants seeking assistance.<sup>3</sup> As a result, legal aid providers must decline certain types of cases even if a prospective client qual-

ifies based on income. For example, Boulder County Legal Services (BCLS) does not assist in post-decree domestic relations matters, such as parenting time disputes and modifications of child support and maintenance.

## Access to Justice in Boulder County and Colorado

The number of *pro se* litigants in Colorado has increased dramatically in the last few years. Two-thirds of all domestic relations cases filed in Colorado in fiscal year 2013 had no attorney on the case, representing a 57% increase from 2001.<sup>4</sup> Of the 69,435 parties involved in these cases, 76% did not have representation.<sup>5</sup> 59% of the parties in county civil cases filed in Colorado in fiscal year 2013 did not have representation, but this figure is significantly higher – 98% – when limited to the responding party, which includes debtors, tenants, and other parties who generally have limited means.<sup>6</sup>

The percentage of *pro se* litigants filing in Boulder County is slightly lower than the state average, but the data

suggests a justice gap: 63% of domestic relations cases filed in the 20th Judicial District (JD) in fiscal year 2013 had no attorney on the case (70% of the parties involved did not have representation), and 58% of the parties in county civil cases filed in the 20th JD did not have representation.<sup>7</sup>

Interestingly, Colorado fares well compared to other states in several indices measuring the resources available to litigants who are *pro se*, disabled, and non-English speaking, but ranks in the bottom seven states in terms of the number of civil legal aid attorneys as a percentage of the total population.<sup>8</sup>

## Bridging the Justice Gap

Various measures have been taken in response to the growing number of *pro se* litigants in Colorado and nationwide, including: providing self-help resources at courthouses; rule changes designed to encourage *pro bono* attorney participation through “unbundled” legal services, or limited

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representation; lawyers increasingly utilizing reduced fee (“low bono”) and sliding scale fee arrangements; and the use of law students and other non-lawyers to provide legal services in limited circumstances.

### *Technology and Legal Information*

All fifty states have online sources of legal information to help individuals in civil legal cases.<sup>9</sup> In Colorado, courts have published many judicial forms online for use by *pro se* litigants.<sup>10</sup> In addition, each trial court in Colorado has a *pro se* litigant coordinator, family court facilitator, and other staff available to provide general information to *pro se* litigants. However, court staff are not permitted to provide legal advice.<sup>11</sup>

### *Pro Bono Assistance and Limited Scope Representation*

*Pro bono* assistance from the private bar has long been and remains a key part of providing civil legal services to the poor. The Boulder County Bar Association (BCBA) is known for its spirit of volunteerism in this regard, with attorneys providing a total value of \$1,079,000 in *pro bono* hours through BCLS in 2013.<sup>12</sup>

C.R.C.P. 11(b), C.R.C.P. 311(b), and Colo. RPC 1.2(c) authorize an attorney to enter a limited appearance on behalf of a client. In 2011, the Colorado Supreme Court amended C.R.C.P. 121, Section 1-1 to clarify the process by which an attorney provides notice of a limited appearance and notice of completion at the conclusion of the proceeding without leave of the court.<sup>13</sup> The rule change was designed to encourage more attorneys to provide assistance in *pro bono* and *pro se* matters.<sup>14</sup> However, limited representation is not appropriate in all cases and remains impermissible in federal court.<sup>15</sup>

### *“Low Bono” Assistance*

In recent years, lawyers have increasingly utilized “low bono” and sliding scale fee arrangements to make their services more affordable for modest

means clients. In Boulder County, some lawyers (including the authors) have taken a unique approach to assist clients who cannot afford the services of a market-rate attorney by charging significantly discounted rates and providing a range of legal services tailored to the financial and legal needs of the client under the auspices of a nonprofit organization. Other nonprofit organizations around the country are addressing the justice gap in different ways, including establishing a referral network for private attorneys charging reduced rates and by funding fellowships for recent law school graduates interested in pursuing public interest careers. In Boulder County, the BCBA maintains a list of reduced-rate legal service providers and refers clients to participating lawyers.

### *Other Proposals*

Various courts and legal commentators

have proposed allowing law students and other non-lawyers to provide legal services in limited circumstances.<sup>17</sup> The two law schools in Colorado now require or encourage their students to complete a certain number of *pro bono* hours prior to graduation.<sup>18</sup> With proper training and supervision, non-lawyers have the potential to help *pro se* litigants in simple legal matters.<sup>19</sup> However, it is well documented that parties represented by a lawyer in civil and domestic relations proceedings achieve more favorable outcomes in court than those without a lawyer.<sup>20</sup>

### **Conclusion**

The rise in *pro se* litigants in Boulder County and Colorado is consistent with national trends and significantly impacts the ability of many low- and moderate-income individuals to access the

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legal system, affecting where they live, work, and how much time they spend with their children. Efforts by the courts to increase self-help resources for pro se litigants are a good start, but significant gaps remain in the delivery of civil legal services. New models are emerging to provide “low bono” or reduced-rate civil legal services to clients who cannot afford a market-rate attorney but do not qualify for free legal aid because of income, matter type, or a conflict of interest.

The recent rule change in Colorado facilitating limited representation provides an opportunity for lawyers to assist clients of modest means for a specific proceeding or discrete legal task. Boulder lawyers can help bridge the justice gap by offering *pro bono* or “low bono” services and, when appropriate, by unbundling and consulting in their areas of expertise.

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1. *Fact Sheet on the Legal Services Corporation*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/what-is-lsc> (last visited Aug. 6, 2014); CLS Offices, COLORADOLEGALSERVICES.ORG.

2. *Fact Sheet on the Legal Services Corporation*, *supra* note 1.

3. Rhonda McMillion, *ABA Steps Up Calls for Increased Legal Service Corp. Funding*, ABA JOURNAL (May 1, 2014, 2:20 AM), [http://www.abajournal.com/magazine/article/aba\\_steps\\_up\\_calls\\_for\\_increased\\_legal\\_service\\_corp\\_funding/](http://www.abajournal.com/magazine/article/aba_steps_up_calls_for_increased_legal_service_corp_funding/).

4. Office of the State Court Administrator, Court Services Division (Dec. 2013), *Cases and Parties without Attorney Representation in Civil Cases FY 2013*. Information provided by Jessica Zender ([Jessica.zender@judicial.state.courts.us](mailto:Jessica.zender@judicial.state.courts.us)); see also Ric N. Morgan, *The Virtual Pro Se Clinic Concept*, 43 COLO. LAW. 5 (2014), available at [http://www.cobar.org/tcl/tcl\\_articles.cfm?articleid=8527](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=8527).

5. Office of the State Court Administrator, *supra* note 4.

6. *Id.*

7. *Id.*

8. Nat'l Ctr. for Access to Justice, *Composite Index, JUSTICE INDEX*, [www.justiceindex.org/findings/](http://www.justiceindex.org/findings/) (last visited Aug. 11, 2014).

9. Lonnie A. Powers, *As Demand Rises, Civil Legal Aid Innovates to Expand Access to Resources*, HUFFINGTON POST (July 11, 2014, 12:13 PM), [http://www.huffingtonpost.com/lonnie-a-powers/as-demand-rises-civil-leg\\_b\\_5534207.html](http://www.huffingtonpost.com/lonnie-a-powers/as-demand-rises-civil-leg_b_5534207.html).

10. *Forms and Instructions by Category*, COLO. JUD. BRANCH, <http://www.courts.state.co.us/Forms/Index.cfm> (last visited Aug. 6, 2014).

11. See CJD 13-01.

12. E-mail from Erika Martinez, Pro Bono Coordinator, Boulder Cnty. Legal Servs., to author; Michelle Crozier Haynes (Aug. 4, 2014, 2:17 PM MST) (on file with author).

13. C.R.C.P. 121, § 1-1(5) states that: In accordance with C.R.C.P. 11(b) and C.R.C.P. Rule 311(b), an attorney may undertake to provide limited representation to a *pro se* party involved in a court proceeding. Upon the request and with the consent of a *pro se* party, an attorney may make a limited appearance for the *pro se* party in one or more specified proceedings, if the attorney files and serves with the court and the other parties and attorneys (if any) a notice of the limited appearance prior to or simultaneous with the proceeding(s) for which the attorney appears. At the conclusion of such proceeding(s), the attorney's appearance terminates without the necessity of leave of court, upon the attorney filing a notice of completion of limited appearance. Service on an attorney who makes a limited appearance for a party shall be valid only in connection with the specific proceeding(s) for which the attorney appears.

14. Adam J. Espinosa & Daniel M. Taubman, *Limited Scope Representation Under the Proposed Amendment to C.R.C.P. 121, §1-1*, 40 COLO. LAW. 89 (2011), available at [http://www.cobar.org/tcl/tcl\\_articles.cfm?articleid=7300](http://www.cobar.org/tcl/tcl_articles.cfm?articleid=7300).

15. See *Johnson v. Bd. Of Cnty. Comm'rs for the Cnty. of Fremont*, 868 F.Supp. 1226, 1232 (D.Colo. 1994) (Senior District Judge John Kane putting attorneys on notice that engaging in ghostwriting in federal court may subject the attorney to contempt of court).

16. See, e.g., Access Justice, available at <http://accessjustice.net/>; Civic Legal Corps, available at <http://www.civiclegalcorps.org/>; Open Legal Services, available at <http://openlegalservices.org/>.

17. See, e.g., Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2629-33 (2014), [http://fordhamlawreview.org/assets/pdfs/Vol\\_82/No\\_6/Levin\\_May.pdf](http://fordhamlawreview.org/assets/pdfs/Vol_82/No_6/Levin_May.pdf) (discussing the history and effectiveness of non-lawyer legal service providers, including a proposal by the Washington State Supreme Court to permit non-lawyer limited license legal technicians to advise clients in certain family law matters); Justicem, *ABA Takes Step Toward Adopting 50 Hour Aspirational Goal for Pro Bono Services by Law Students*, Nat'l Cent. for Access to Justice Blog (Mar. 18, 2014), <http://ncforaj.org/2014/03/18/abatakes-step-toward-adopting-50-hour-aspirational-goal-for-pro-bono-service-by-law-students/> (discussing recent efforts by the ABA to adopt a 50-hour aspirational goal for *pro bono* service by law students).

18. See Public Service Pledge, University of Colorado Law School, [http://www.law.du.edu/index.php/about](http://www.colorado.edu/law/academics/pledge>AboutDULaw,UniversityofDenverSturmCollegeofLaw,http://www.law.du.edu/index.php/about).

19. See Levin, *supra* note 17, at 2617-21.

20. See, e.g., Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339, 367-68 (1976); John Montague Steadman & Richard S. Rosenstein, *"Small Claims" Consumer Plaintiffs in the Philadelphia Municipal Court: An Empirical Study*, 121 U. PA. L. REV. 1309, 1333 (1973); Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553 (1993).

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