IN THE SUPREME COURT FOR THE STATE OF ALASKA

DENNIS OLSON, *Appellant*,	)	Supreme Court No. S-15802
v.	)	
STEPHANIE OLSON, *Appellee.*	)	Superior Court No. 3PA-09-01278 CI

ON APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT PALMER
THE HON. GREGORY HEATH, JUDGE

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT DENNIS OLSON

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INTEREST OF THE AMICUS CURIAE

The American Bar Association ("ABA"), respectfully submits this brief as *amicus curiae* at this Court's invitation and in support of Appellant, Dennis Olson, with respect to the following question:

> Whether the Alaska Constitution's due process or equal protection clause requires the appointment of counsel to represent an indigent parent in a child custody matter when the other parent has private counsel?

Although it takes no position on the factual issues presented in this case, the ABA submits that recognition of a right to counsel under the circumstances presented in this case is necessary to protect fundamental rights, to promote fundamental fairness, to maximize judicial economy, and to preserve the neutrality that is central to the judicial role.

The ABA is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States. It has over 400,000 members, who come from all 50 states (including nearly 700 attorney members in Alaska) and a number of other jurisdictions, and who include attorneys in private law firms, corporations, nonprofit organizations, federal, state and local government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, law students and associate members.[1]

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[1] Neither this brief nor the decision to file it should be perceived as reflecting the views of any member of the judiciary who belongs to the ABA. No inference should be drawn that any member of ABA's Judicial Division Council has participated in the preparation, adoption of or endorsement of the positions set forth

Since its inception more than 100 years ago, the ABA has consistently worked to improve the administration of justice and the judicial process. Its history reflects an unwavering commitment to the principle that society must provide its citizens with equal access to justice, including meaningful access to legal representation for low-income individuals, in adversarial proceedings.

The ABA's Standing Committee on Legal Aid and Indigent Defendants ("SCLAID"), its first standing committee, was created in 1920 with Charles Evans Hughes, later the Chief Justice of the Supreme Court of the United States, as its first chair.[2] Within the Standing Committee's charge is the investigation, study and critical analysis of the administration of justice as it affects the poor and the promotion of remedial measures intended to help indigent individuals realize and protect their legal rights. ABA Const. Art. 31.7. The ABA's Goal IV, which is to "Advance the Rule of Law," includes Objective 3: "Work for just laws, including human rights, and a fair legal process," and Objective 4: "Assure meaningful access to justice for all persons."[3]

In the course of its on-going efforts to develop standards and policies for the legal profession, the ABA has frequently addressed the core question presented by

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in this brief. This brief was not circulated to any member of the Judicial Division Council prior to its filing.

[2] ABA Standing Committees are entities charged with investigating and analyzing "continuing or recurring matters related to the purposes or business" of the ABA. ABA Const. Art. 31.3.

[3] *See* ABA Missions and Goals, *available at* http://www.abanet.org/about/goals.html.

this and analogous cases: *When is a right to appointed counsel necessary in order to ensure meaningful access to our justice system*? In 2006, a Presidential Task Force on Access to Civil Justice, chaired by Maine Supreme Judicial Court Associate Justice Howard Dana, was appointed and charged to study and make recommendations regarding whether appointed counsel for low-income persons is necessary to ensure the protection of basic human needs, such as (among others) child custody. When this Task Force presented its Recommendation with Report to the ABA House of Delegates in August 2006, it was supported by a broad array of ABA committees (including SCLAID), ABA sections and other entities, and several state and local bar associations.[4]

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[4] Supporters of the Task Force on Access to Civil Justice's Recommendation with Report, besides SCLAID, included the following: ABA Section of Business Law; ABA Commission on Interest on Lawyers' Trust Accounts; ABA Commission on Law and Aging; ABA Section of Litigation; ABA Steering Committee on the Unmet Legal Needs of Children; ABA Standing Committee on Death Penalty Representation; ABA Commission on Immigration; ABA Section of Administrative Law and Regulatory Practice; ABA Section of Labor and Employment Law; ABA Section of Individual Rights and Responsibilities; National Legal Aid and Defender Association; Colorado Bar Association; Connecticut Bar Association; Maine State Bar Association; Minnesota State Bar Association; New York State Bar Association; Washington State Bar Association; Boston Bar Association; Association of the Bar of the City of New York; Bar Association of the District of Columbia; King County Bar Association (Washington); Los Angeles County Bar Association; New York Lawyers' Association; and The Philadelphia Bar Association. *See* ABA Policy #112A, Report at 1. The Recommendation and Report are reproduced as Appendix A to this Brief.

The Recommendation of the Task Force, which was unanimously adopted in August 2006 by the House of Delegates as ABA Policy #112A ("ABA Policy #112A"),[5] provides as follows:

> **RESOLVED**, that the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.

ABA Policy #112A, Report at 1. The categories of cases identified in Policy #112A are those "considered to involve interests so fundamental and important as to require governments to supply low income persons with effective access to justice as a matter of right." Report at 13. The category of "child custody" encompasses *all* "proceedings where the custody of a child is determined or the termination of parental rights is threatened." *Id.*[6]

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[5] Recommendations, but not their reports, become ABA policy only after approval by vote of the ABA House of Delegates, the organization's policy-making body. The House of Delegates is composed of 560 delegates from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. For information regarding the House of Delegates, *see generally* http://www.americanbar.org/groups/Leadership/house_of_delegates.html.

[6] In harmony with ABA Policy #112A, the Board of Governors of the Alaska Bar Association, in September 2008, similarly resolved "[t]hat the Alaska Bar Association urges the State of Alaska to provide legal counsel as a matter of right to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody." *See* Alaska Bar Ass'n Pro Bono Committee, Resolution in Support of Recognizing a Right to Counsel for Indigent Individuals in Certain Civil Cases (2008).

As the foundation for the principle advanced by Policy #112A, the Task Force identified the following "undeniable truths":

> The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the primary and costly responsibilities of finding the controlling legal principles and uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in a cogent fashion to the judge or jury. Discharging these responsibilities ordinarily requires the expertise lawyers spend three years of graduate education and more years of training and practice acquiring. With rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position may be, especially if opposed by a lawyer.

ABA Policy #112A, Report at 9. These critical considerations inform the ABA's consensus belief that in adversarial proceedings in which basic human needs are at stake, counsel should be appointed as a matter of right for parties unable to afford the cost of retaining an attorney. In furtherance of this objective, the ABA adopted the Model Access Act in 2010, which is model legislation designed for consideration and possible enactment by the States in furtherance of the proposition that "[f]air and equal access to justice is a fundamental right in a democratic society. It is especially critical when an individual who is unable to afford legal representation is at risk of being deprived of certain basic human needs." ABA Model Access Act, § 1.C., ABA Policy #104 (Revised) (adopted August 2010) (copy attached as Appendix B); *see also* ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings, ¶ 1, ABA Policy #105 (Revised) (adopted August 2010) (copy attached as Appendix C) (setting out fundamental requirements for providing effective representation as a guide for policymakers, including: "1. Legal representation is

provided as a matter of right at public expense to low-income persons in adversarial proceedings where basic human needs—such as shelter, sustenance, safety, health, or child custody—are at stake.").

These and other policies adopted by the ABA demonstrate its firm commitment to the ideal of a civil right to counsel on the part of indigent litigants under the circumstances confronted by Appellant, Mr. Olson, in the case at bar. It is in that context that the ABA respectfully submits this brief, offering its views for such assistance as they may provide the Court in deciding the important question presented.

SUMMARY OF ARGUMENT

As a matter of settled Alaska law, an indigent litigant is categorically entitled to the appointment of counsel in a child custody proceeding in which the adversary party is represented by an attorney provided by a public entity. *Flores v. Flores*, 589 P.2d 893 (Alaska 1979); Alaska Stat. 44.21.410(a)(4). In *Flores*, this Court determined that the due process guarantees afforded by the Alaska Constitution required the appointment of counsel under those circumstances to avoid disadvantages to the unrepresented party in the adjudication of fundamental parental rights that it held were "constitutionally impermissible." *Id.* at 896.

The ABA submits that the result reached in *Flores* is equally applicable to the circumstances in the case at bar, wherein the Appellant, an indigent litigant, was confronted in the child custody proceedings below by an adversary represented by a private attorney. The pure happenstance that the opposing party has a private,

rather than a public sector, attorney does not alter any of the disadvantageous consequences for an unrepresented parent in a child custody dispute that led this Court to determine that a right to appointed counsel is mandated by the Alaska Constitution in that context. The ABA respectfully suggests that both due process and equal protection principles of Alaska constitutional law compel recognition of a right to counsel in this case, no less than in *Flores*.

The ABA also submits that implementation of a right to appointment of counsel for unrepresented indigent parties in all child custody proceedings in which the opposing party is represented by counsel will inevitably enhance the quality and reliability of the outcomes reached in such cases, will foster the objectives of judicial economy and efficiency, and will diminish the extent to which members of the judiciary are confronted with situations in which their obligation to remain neutral and impartial is placed in conflict.

For all these salutary reasons, as elaborated more fully below, a right to counsel should be recognized in this case, and the judgment of the lower court to the contrary should be reversed.

ARGUMENT

THE APPOINTMENT OF COUNSEL FOR AN INDIGENT LITIGANT IN A CHILD CUSTODY PROCEEDING IN WHICH THE OPPOSING PARTY IS REPRESENTED BY COUNSEL PROTECTS FUNDAMENTAL RIGHTS, PROMOTES FUNDAMENTAL FAIRNESS, MAXIMIZES JUDICIAL ECONOMY AND EFFICIENCY, AND PRESERVES THE INTEGRITY OF THE JUDICAL ROLE

I. IMPORTANT PRINCIPLES OF ALASKA CONSTITUTIONAL LAW SUPPORT A CONCLUSION THAT COUNSEL SHOULD BE APPOINTED FOR AN INDIGENT LITIGANT OPPOSING A PARTY REPRESENTED BY COUNSEL IN AN ACTION CONCERNING CHILD CUSTODY

In *Flores v. Flores*, 598 P.2d 893 (1979), this Court addressed the question "whether an indigent party has the right to court-appointed counsel in a private child custody proceeding in which her spouse is represented by Alaska Legal Services Corporation (ALSC)." *Id.* at 894. The Court answered this question in the affirmative, holding "that the due process clause of the Alaska Constitution guarantees such a right." *Id.* (footnote omitted).

In reaching the conclusion that the "flexible" concept of due process required recognition of this right,[7] the Court focused principally upon two critical factors: (i) the nature of the indigent party's interest at issue; and (ii) the nature of the proceeding in which the interest at stake was to be adjudicated.

Regarding the first factor, this Court observed that "[t]he interest at stake is one of the most basic of all civil liberties, the right to direct the upbringing of one's child." *Id.* at 895. Elaborating on this point, the Court cited with approval several

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[7] *Id.* at 895 n.7, *quoting Otton v. Zaborac*, 525 P.2d 537, 539 (Alaska 1974) ("Due process is flexible, and the concept should be applied in a manner which is appropriate in the terms of the nature of the proceeding." (Citation omitted.)).

decisions of the Supreme Court of the United States, each supporting the proposition that parental rights "ha[ve] consistently been recognized . . . as being among the 'liberties' protected by the due process clause of the Federal Constitution." *Id.*[8]

The Court then turned to the nature of the proceedings implicating that liberty interest. Although the child custody action was between two private parties, the Court determined that the interests of the State warranted due process scrutiny, noting that "there is a strong state interest in divorce-child custody proceedings. . . . [L]egally binding marriages and divorces are wholly creations of the state [and] [a]ny provision for child custody in a divorce order is fully enforceable by the state." *Id.* at 895-96 (footnotes omitted). The Court concluded, "[i]n this case, Christine Flores stands to lose a basic 'liberty' just as surely as if she were being prosecuted for a criminal offense." *Id.* at 896.

Then, addressing whether, in light of the nature of the interest involved, the proceedings were of a character that should dictate appointment of counsel, this Court first noted that "[c]hild custody determinations are among the most difficult in the law," in that deciding what will be best for the child "requires a delicate process of balancing many complex and competing considerations that are unique to every case." *Id.* The Court continued:

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[8] *Citing Stanley v. Illinois*, 405 U.S. 645 (1972); *May v. Anderson*, 345 U.S. 528 (1953); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parallel citations omitted).

> A parent who is without the aid of counsel in marshaling and presenting the arguments in her favor will be at a decided and frequently decisive disadvantage which becomes even more apparent when one considers the emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught. This disadvantage is constitutionally impermissible where the other parent has an attorney supplied by a public agency.

Id. (footnote omitted).

Thus, this Court has already concluded, in *Flores*, that because of the fundamental nature of the right to parent and the extremely difficult, complex and emotionally-charged nature of child custody proceedings, due process requires the appointment of counsel to represent an indigent party if the other party was afforded counsel by a public agency. The only distinction between *Flores* and the present case is that the adversary party here had a private, rather than public, attorney—a difference the ABA respectfully submits should be immaterial for purposes of either due process or equal protection analysis under the Alaska Constitution.

A. Due Process

In the Matter of K.L.J., 813 P.2d 276 (Alaska 1991), this Court expanded its analysis in *Flores* and applied the three-part balancing test articulated by the Supreme Court of the United States in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for evaluating claims under the Due Process Clause of the Alaska Constitution. As set out in *In the Matter of K.L.J.*, this test considers: (i) the private interest involved and affected by official state action; (ii) the risk of an erroneous deprivation of or adverse impact on that interest based on the application of existing procedures and the value, if any, of additional or alternative procedures; and (iii) the

State's interests, including the financial and/or administrative burdens associated with the adoption of new or different procedures. 813 P.2d at 279, *citing Keyes v. Humana Hosp. Alaska, Inc.*, 750 P.2d 343, 353 (Alaska 1988). As the Court stated, "[t]he crux of due process is an opportunity to be heard and the right to adequately present one's interests." *Id.* (citations omitted). With respect to "the right to adequately present one's interests," an indigent litigant's need for counsel has great urgency, for, as this Court has noted, " 'the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' " *Reynolds v. Kimmons*, 569 P.2d 799, 801 (Alaska 1977), *quoting Otton v. Zaborac*, 525 P.2d at 539 (*citing Powell v. Alabama*, 297 U.S. 45, 68-69 (1932)).

As regards the first element of the three-part due process analysis, there can be no doubt after *Flores* that the parental rights implicated by child custody disputes involve an interest that is fundamental. *See* 598 P.2d at 895 ("one of the most basic of all civil liberties [is] the right to direct the upbringing of one's child"). Similarly, in *In the Matter of K.L.J.*, this Court recognized that "[t]he right to the care, custody, companionship and control of one's children 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" 813 P.2d at 279, *quoting Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *see also In re Adoption of A.F.M.*, 15 P.3d 258, 268 (Alaska 2001) (noting that a parent's loss of the custody of his or her child may constitute "punishment more severe than many criminal sanctions" (citations omitted)); *S.J. v. L.T.*, 737 P.2d 789, 796 (Alaska 1986) ("parents should not be deprived of the fundamental rights and duties inherent in the parent-child

relationship except for grave and weighty reasons" (citation omitted)); *Turner v. Pannick*, 540 P.2d 1051, 1055-56 (Alaska 1975) (Diamond, J., concurring) ("right of parents to nurture and direct the destiny of their children" is "fundamental").

Appellee nevertheless asserts that the parental rights at risk in a custody modification between divorced parents, in which "[a] parent's interest in having more or less custodial time and more or less custodial decision making than the other parent is not an interest of such weight so as to confer extraordinary due process protection." Brief of Appellee Stephanie Olson at 14. This position, that a determination of "the right to have your child with you for more time than she has with the other parent; and the right to have primary legal custody is not a fundamental right triggering a due process right to appointed counsel," *Id.*, seems completely inconsistent with the holding in *Flores, see* 598 P.2d at 895, and other similar rulings. Indeed, in an analogous situation, the Supreme Judicial Court of Massachusetts recognized in a private party guardianship proceeding:

> Even if the guardianship lasts for only a brief period of time, the displacement impacts the parent's liberty interests. While it is true that the parent's underlying parental rights are not forever terminated as a result of the guardianship, they are severely circumscribed, becoming subsidiary to those of the guardian, for as long as the guardianship remains in effect.

Guardianship of V.V., 24 N.E.3d 1022, 1024 (2015) (citation omitted). The ABA respectfully asserts that the issue here is not the application of due process principles to assess the degree to which a custody decision favors one parent or the other. Rather, the issue is whether an indigent parent is entitled to due process

protections of fundamental rights, as articulated in *Flores,* 598 P.2d at 896, when the opposing party is represented by a private, rather than a public, attorney.

Regarding the second element of the three-part balancing test, *Flores* has also established that there is a heightened risk of erroneous deprivation when an indigent party lacks legal representation in a contested custody dispute, where "all of the principals are likely to be distraught." 598 P.2d at 896; *accord In the Matter of K.L.J.*, 813 P.2d at 280 *(quoting Flores); see Jenkins v. Handel*, 10 P.3d 586, 590 n.12 (Alaska 2000) (child custody determinations are the most difficult in the law). The difficulties stem not only from the intense, emotionally-charged backdrop against which custody decisions are ordinarily made, but also from the amorphous nature of the governing legal standard. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens. J., concurring) (noting that the "best interests of the child" standard "provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores"); *see also In re Emilye A. v. Ebrahim A.*, 9 Cal. App. 4th 1695,1709 (1992) (observing that "[f]ew lay people are equipped to respond to the legal complexity of [custody] proceedings," especially when dealing with the "emotionally devastating potential loss of . . . their relationship with their children").

Even putting the potentially wrenching emotional aspects of a child custody proceeding to one side, few lay parents are capable of effectively performing the essential advocacy functions that a custody case requires, absent the assistance of an attorney. The critical responsibilities "of finding the controlling legal principles[,]

uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in a cogent fashion" that informed the ABA's deliberations in adopting Policy #112A (*see* ABA Report at 9-10 (Appendix A)), are integral features of all contested custody proceedings, which unrepresented parties have little, if any, chance of carrying out successfully.

King v. King, 174 P.3d 659 (Wash. 2007), illustrates the daunting challenges *pro se* parents can face in child custody disputes. Brenda King was "a housewife with a ninth-grade education and no money [who] was forced to act as her own attorney during a five-day divorce trial." Jonathan Martin, *Court Rules That Spouses Aren't Entitled To Public Divorce Lawyers*, Seattle Times, Dec. 7, 2007. Mrs. King's then-husband was represented by an attorney. In representing herself during the course of the bitter dispute over custody of the couple's three children, Mrs. King "gave speeches when she was supposed to ask questions," "didn't subpoena any witnesses," and "didn't know how to present evidence against her then-husband, including Child Protective Services reports about him." *Id.*; *see also* 174 P.3d at 673-76 (Madsen, J., dissenting) (Mrs. King "affirmatively did her own case harm" because she "was unable to prevent the admission of evidence that a lawyer would have been able to keep out," "could not separate her emotions from her conduct as her own legal representative," and "had exhausted the court's patience" by the end of the trial).

Having failed to bring to the attention of the court information favorable to her cause that an attorney would routinely present, Mrs. King, a stay-at-home mother

who had taken care of her children full-time for the previous 10 years, lost the custody fight. As a result, she was permitted to see her children only every other weekend. Like so many others, the *King* case demonstrates clearly "how much [is] at stake at trial" for parents in custody disputes "[a]nd how complicated it is for someone without a law degree to present [their] story in any meaningful way in a courtroom." David Bowermaster, *Should the Poor Be Appointed Attorneys in Civil Cases?*, Seattle Times, May 31, 2007 (internal quotation marks and citation omitted).

Frase v. Barnhart, 840 A.2d 114 (Md. 2003), also highlights the significant need for appointed attorneys who can assist indigent parents seeking to preserve rights to custody of their children. When Deborah Frase, mother of three, was incarcerated on a misdemeanor drug possession charge, her mother placed her youngest son in the care of the Barnharts, a family from the mother's church. Ms. Frase reclaimed her three-year old son six weeks after he went to live with the Barnharts, but the Barnharts then sued for custody of the boy. Unable to obtain free legal assistance, Ms. Frase was forced to represent herself in seeking to retain custody of her child.

Although Ms. Frase spent hours attempting to prepare her case, she did not depose the Barnharts or otherwise seek discovery regarding their claims, failed to identify salient points of law, could not question witnesses effectively, missed critical objections, and had little understanding of the rules of evidence or procedure. *See* Brief of Appellant, *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003) (No. 6), at 29-31

(explaining that because Ms. Frase had only a "rudimentary grasp of Maryland's family law" gleaned from her research in the courthouse library, she "was unable to challenge or limit [the Barnhart's] testimony" about disputed facts and "th[e] case was tried before the master and argued to the circuit court without a word of advocacy about the defining constitutional and family law issues"). The magistrate judge who heard the case ultimately found Ms. Frase to be a fit parent entitled to custody of her own child, but also attached several conditions to the custody award, including the requirement that the Barnharts' son be permitted to have regular visitation with Ms. Frase's child.[9]

The strategic and substantive difficulties experienced by the *pro se* litigants in the illustrative *King v. King* and *Frase v. Barnhart* cases are also seen in the considerations that led this Court to conclude that due process principles under the Alaska Constitution required the appointment of counsel to represent an indigent litigant seeking to oppose the adoption of his child by his ex-wife's new husband in *In the Matter of K.L.J.* There, in overturning the lower court's refusal to appoint counsel, this Court catalogued the unrepresented father's missteps in the proceedings below, including that he:

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[9] Ms. Frase was able to obtain counsel on appeal, and the Maryland Court of Appeals vacated the custody determination on the grounds that the conditions imposed by the lower court impermissibly infringed upon Ms. Frase's fundamental right as a parent "to make child rearing decisions." *Frase*, 840 A.2d at 128 (*quoting Troxel v. Granville*, 530 U.S. 57, 72-73 (2000)).

- failed to show the lower court that garnishment of his income by the State was the functional equivalent of voluntary payments for the purpose of satisfying his child support obligation (813 P.2d at 281);

- failed to seek correction of the trial court's erroneous determination that his indigency was not a justifiable cause for his failure to pay child support, although the applicable Alaska statute—AS 25.23.050(a)(2)—expressly provides otherwise (*Id.*);

- failed to effectively advance the argument that his indigency and lack of legal sophistication, rather than a lack of care or concern, explained the apparent "half-heartedness" that characterized his attempts to maintain contact with his child (*Id.*);

- failed in his attempt to introduce documentary evidence that would have demonstrated his continuing efforts to locate his daughter, because the evidence was not properly authenticated (*Id.*);

- failed to object to the introduction of prejudicial evidence by his former spouse because he did not know how to do so properly (*Id.*); and

- prejudiced his own case by his inability to articulate his interests or explain his actions in a coherent and contextually appropriate manner (*Id.* at 281-82).

These are all matters that this Court recognized would have been dramatically different if the unrepresented father had been provided an attorney, leading the Court to conclude that "[o]verall, this case clearly demonstrates the need for appointed counsel." *Id.* at 282.

The foregoing authorities demonstrate that the parental rights implicated by child custody determinations are fundamental—even when they involve "[a] parent's interest in having more or less custodial time and more or less custodial decision making than the other parent," Brief of Appellee Stephanie Olson at 14—and that the risks posed to those rights when an unrepresented indigent parent must litigate a contested custody proceeding against a party who is represented are severe.

As to the final factor, the State's interest, this Court noted in *In the Matter of K.L.J., supra*, wherein a father opposed the adoption of his child by his ex-wife's new husband, that "[f]irst and foremost, the state has an interest in the children" and "[t]o this end, the state shares the parent's interest in an accurate and just decision; the interests of both the state and the parent in the availability of appointed counsel coincide here." 813 P.2d at 279-80 (citation omitted). Accordingly, "[t]he state's interest in its citizens receiving a just determination on such a fundamental issue cannot be open to question." *Id.* at 280. In child custody matters like the case at bar, the interests of the State and the parent in an accurate and just determination similarly coincide.

While the State also maintains a valid countervailing concern for the costs associated with appointing counsel for indigent litigants in this context, the ABA submits that, as this Court stated in *In the Matter of K.L.J.*, "'though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here[.]'" *Id.* at 280 (citations omitted).

Because the three factors of the balancing test support a conclusion that due process requires the appointment of counsel in cases such as this one, the ABA respectfully suggests that the distinction between *Flores* and the case at bar—*i.e.*, that Mr. Olson's former spouse was represented by a *private* attorney in the proceeding below—should not prevent a conclusion that the critical strategic and

substantive disadvantages for the unrepresented indigent parent are precisely the same in each situation.[10]

B. Equal Protection

Article I, Section 1 of the Alaska Constitution provides, in pertinent part, "that all persons are equal and entitled to equal rights, opportunities, and protection under the law[.]" Under *Flores* and the statute codifying its result, Alaska Stat. 44.21.410(a)(4), an unrepresented indigent litigant who is party to a child custody proceeding in which the adversary party is represented by counsel provided by a public agency is *categorically* entitled to have counsel appointed to represent his/her interests. From an equal protection perspective, the ABA submits, an unrepresented indigent litigant under the same circumstances as those in *Flores*, except for the fact that here the adversary party was represented by private counsel, should not be denied the appointment of counsel.

The analytical framework that governs the determination of whether a provision of Alaska law survives scrutiny under the equal protection clause was

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[10] While, in their respective submissions of information per this Court's request, both the Office of Public Advocacy and the Alaska Court System have raised concerns regarding the cost implications of recognition of a categorical right to appointment of counsel sought in this case, such considerations should not impede this Court's exercise of its obligation to vindicate constitutional rights. *See Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913-15 (2001) ("Legislative exercise of the appropriations power has not in the past, and may not now, bar courts from upholding citizens' constitutional rights. Indeed, constitutional legal rulings commonly affect State programs and funding."); *see generally Bounds v. Smith*, 430 U.S. 817, 825 (1977) ("[T]he cost of protecting a constitutional right cannot justify its total denial.").

articulated by this Court in *Alaska Pacific Assur. Co. v. Brown*, 687 P.2d 264 (Alaska 1984). *Brown* states, in pertinent part:

> First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of the interest is the most important variable in fixing the appropriate level of review. Thus, the initial inquiry under Article I, Section 1 . . . goes to the level of scrutiny. . . . Depending on the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be undertaken of the purposes served by the challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.

Id. at 269; *accord State v. Schmidt*, 323 P.3d 647, 662 (Alaska 2014); *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 789 (Alaska 2005). Consideration of these two factors, the ABA submits, is sufficient to resolve the equal protection issue in the case at bar.[11]

As discussed above, the fundamental nature of a parent's interest in exerting control over the upbringing of his or her child has been repeatedly acknowledged by this Court. *E.g., In re Adoption of A.F.M.*, 15 P.3d at 268; *In the Matter of K.L.J.*, 813 P.2d at 279, 283; *S.J. v. L.T.*, 737 P.2d at 796; *Flores*, 598 P.3d at 895 (*citing* authorities). A law failing to accord that fundamental interest equal weight as

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[11] Although there is a third element to the equal protection analysis set forth in *Brown* and its progeny, which is concerned with whether "the particular means employed to further [the State's] goals" are appropriately tailored to the objective intended to be accomplished (*see* 687 P.2d. at 269-20), the ABA submits that this third stage of the analysis need not be reached here, because consideration of the first two factors is sufficient to establish that an equal protection violation patently exists.

between similarly-situated parents must be justified by a compelling state interest. *Brown, supra*; *see generally Herrick's Aero-Auto-Aqua Repair Serv. v. Department of Transp. & Pub. Facilities*, 754 P.2d 1111, 1114 (Alaska 1988) ("The burden on the State increases in proportion to the primacy of the interest involved. Eventually this burden reaches the equivalent of the federal compelling state interest test in those cases where fundamental rights ... are at issue." (Citation omitted.)). Here, there is no compelling state interest that might justify denying one indigent parent a right to counsel where the adversary parent is represented by a private attorney, while granting that right to another indigent parent whose adversary is represented by a public sector attorney.

AS 44.21.410(a)(4) codified the ruling in *Flores* that an indigent party is entitled to counsel in a child custody proceeding if the other party is represented by counsel from a public agency.[12] That legislative action, however, should not constitute a justification or provide a rationale for refusing a similarly-situated indigent parent appointed counsel based solely on the happenstance that the adversary party's counsel is private rather than public. This is especially true given this Court's reasons for finding a right to counsel in *Flores*. As discussed above, this Court identified the inherently difficult nature of child custody determinations and the complex, emotionally-charged character of child custody proceedings as among the

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[12] *See In re Alaska Network on Domestic Violence & Sexual Assault*, 264 P.3d 835, 838 (Alaska 2011) (language of AS 44.21.410(a)(4) "appears to have been drawn directly from *Flores*" (citation omitted)).

grounds for its conclusion that the disadvantage for an unrepresented parent, when the other parent is appointed a public attorney, is "constitutionally impermissible." 598 P.2d at 896. Those same daunting obstacles are faced by an unrepresented parent regardless of whether the lawyer representing the parent's adversary is public or private. Under AS 44.21.410, however, parents in the former group have a categorical right to appointed counsel, while parents in the latter group have no right to appointed counsel. That is not equal treatment under the law, and because there is no compelling state interest that validates the inequality, the lower court's denial of counsel to the Appellant, Mr. Olson, should be deemed a violation of his right to equal protection under this State's Constitution.

The ABA submits that support for this conclusion can be found in cases from the highest tribunals of various states that have analyzed whether an indigent parent should have a right to appointed counsel under state law in privately initiated adoption proceedings to terminate his or her parental rights when there is a right to appointed counsel in state-initiated termination of parental rights proceedings, for example, for alleged abuse or neglect. *See, e.g., In re Adoption of A.W.S. and K.R.S.*, 339 P.3d 414 (Mont. 2014); *Adoption of Meaghan*, 961 N.E.2d 110 (Mass. 2012); *In re Adoption of L.T.M.*, 824 N.E.2d 221 (Ill. 2005); *In the Interest of S.A.J.B.*, 679 N.W.2d 645 (Iowa 2004); *Matter of Adoption of KAS*, 499 N.W.2d 558 (N.D. 1993); *Zockert v. Fanning*, 800 P.2d 773 (Or. 1990). These cases uniformly hold, under a strict scrutiny analysis, that the seriously-adverse impact upon an

unrepresented indigent parent, for all practical purposes, is the same in both state- and privately-initiated proceedings.

In these adoption cases, the state courts concluded that, where a statutory right to appointment of counsel for indigent parents was provided in state-initiated involuntary termination actions but none was provided when they were defending against involuntary adoption actions, an impermissible inequality under the law was created as between similarly-situated citizens. For example, in *Matter of Adoption of KAS*, where involuntary termination of parental rights under North Dakota law could result from actions under three different statutory provisions, only two of which provide for a right to counsel, the Court found an equal protection violation, stating:

> [The privilege of appointed counsel to protect parental rights] is not clearly granted under NDCC § 14-15-19(6) "upon the same terms" to indigent parents who face Adoption Act proceedings to terminate their parental rights. It makes no difference to parents whether their parental rights are challenged in a proceeding under the Juvenile Court Act, the Parentage Act, or the Adoption Act. Each challenge threatens presently existing parental rights; each seeks the termination of the parent-child relationship.

499 N.W.2d at 563; *see also Adoption of Meaghan*, 961 N.E.2d at 113 (irrespective of whether the litigant seeking to terminate the indigent parent's parental rights is the State or a private party, "the same, fundamental, constitutionally protected interests are at stake, and the cost of erroneously terminating the parent's rights remains too high to require an indigent parent to risk it without counsel."); *Zockert*, 800 P.2d at 778 ("The legislative grant of the opportunity for a parent to benefit from the privilege of assistance by counsel in one mode of termination of parental rights requires that the opportunity to exercise that privilege be extended to all similarly

situated parents directly threatened with permanent loss of parental rights.[¶] It is inescapable that the denial of [the indigent] father's request for appointed counsel . . . denied him the equality of the privilege of counsel which is granted, upon the same terms, to other parents." (Citation omitted.)).

The ABA submits that there should be a similar result here, where there is only one category of proceedings—private child custody cases—and where the distinction as regards the right to counsel rests wholly on the vagaries of whether Mr. Olson, as an indigent parent, faces an adversary who is also impoverished but happens to have a public-sector attorney (in which event, both parties will have counsel) or one who has the economic wherewithal to afford a lawyer (in which event, Mr. Olson will not). Equal protection should not depend on the whether an indigent parent's adversary has public or privately retained counsel.

II. THE APPOINTMENT OF COUNSEL FOR AN INDIGENT LITIGANT IN A CONTESTED CUSTODY PROCEEDING IN WHICH THE ADVERSARY IS REPRESENTED BY COUNSEL WILL FOSTER FAIRER, MORE RELIABLE OUTCOMES, ENHANCE JUDICIAL ECONOMY AND EFFICIENCY, AND PRESERVE THE NEUTRALITY OF THE JUDICIAL ROLE

A recurring theme in the Report of the Presidential Task Force on Access to Civil Justice that resulted in adoption of ABA Policy #112A in 2006 is the problem of unequal justice under law, as routinely encountered by those who lack the economic means to secure legal representation when their rights or interests are placed at risk through the initiatives of other private parties or the State. As the Task Force observed:

> On a regular basis, the judiciary witnesses the helplessness of unrepresented parties appearing in their courtrooms and the unequal contest when those litigants confront well-counseled opponents. Judges deeply committed to reaching just decisions too often must worry about whether they delivered injustice instead of justice in such cases because what they heard in court was a one-sided version of the law and facts.

ABA Policy #112A, Report at 7.

The serious, real-world implications of this phenomenon have been specifically, and repeatedly, acknowledged within the context of child custody cases, in which fundamental parental rights may hang in the balance. Thus, although declining to find a categorical federal due process right to counsel in a termination-of-parental-rights case in *Lassiter v. Department of Social Services of Durham County,* 452 U.S. 18 (1981), Justice Stewart, in his opinion for the majority, observed:

> If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.

Id. at 28. In a similar vein, in *Frase v. Barnhart*, *supra*, in concurring in the majority's decision favorable to the unrepresented mother on the merits of the custody dispute but criticizing the majority's refusal to resolve the right-to-counsel issue, Judge Cathell of the Maryland Court of Appeals candidly acknowledged that an unrepresented parent, "when opposed by competent counsel for the opposing party (sometimes opposed by an organ of the State with its legions of lawyers), is normally not afforded the equal protection of the laws, *i.e.*, an equal access to justice

to which all citizens are entitled—in spite of the efforts of this Court to afford that equality." 840 A.2d at 134-35 (Cathell, J., with whom Bell, Ch.J. and Eldridge, J., joined, concurring in the result).[13]

Social science research has demonstrated that unequal representation of the parties can have a significant impact on how a custody case is resolved. *See, e.g.,* Robert H. Mnookin, Eleanor Maccoby, Catherine Albiston & Charlene Depner, *What Custodial Arrangements are Parents Negotiating?*, Divorce Reform at the Crossroads (Stephen Sugarman & Herma Kay, eds., 1990). This study showed that in divorce proceedings including child custody concerns, outcomes with regard to both legal and physical custody were substantially affected by whether counsel was involved. Concerning physical custody, the authors' statistics showed that mothers received physical custody only 49% of the time in cases in which only the father was represented by counsel, as compared with 63% in cases in which both parents had counsel and 86% of the cases in which only the mother was represented by a

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[13] As sixteen retired Washington State Court Judges asserted in an amicus brief filed in the Washington State Supreme Court:

> [I]ndigent persons without counsel receive less favorable outcomes dramatically more often that those with counsel. This disparity in outcomes is so great that the conclusion is inescapable -- indigent *pro se* litigants are regularly losing cases that they should be winning if they had counsel.

Brief for Retired Washington Judges as *Amici Curiae* Supporting Appellant, *King v. King*, 174 P.3d 659 (2007) (No. 79978-4) ("Brief of Retired Washington Judges"), at 6.

lawyer. *Id.* at 64. This data provides a clear indication that the participation of counsel has a significant impact on the resolution of custody determinations.

The types of legal errors by the unrepresented party that infected the proceedings in the trial court in *In the Matter of K.L.J.*, *supra*, could have been avoided had the appellant had the benefit of appointed counsel, as this Court expressly acknowledged. 813 P.2d at 281-82; *see also Lassiter*, 452 U.S. at 44 (Blackmun, J., with whom Brennan and Marshall, JJ., joined, dissenting) ("The provision of counsel for the parent would not alter the character of the proceeding, which is already adversarial, formal, and quintessentially legal. It, however, would diminish the prospect of an erroneous termination, a prospect that is inherently substantial, given the gross disparity in power and resources between the State and an uncounseled indigent parent." (Footnote omitted.)).

While the clear legal errors in *In the Matter of K.L.J.* made the trial court's refusal to appoint counsel ripe for reversal—*see* 813 P.2d at 282 & n.6 ("Even if we were not to establish a bright line right to counsel, we would conclude that the facts here are compelling enough by themselves to indicate a violation of Ronald's procedural due process rights.")—prejudicial error may not always be obvious when reviewed in hindsight. Thus, as Justice Blackmun observed in dissenting in *Lassiter* from the majority's holding that case-by-case appellate review of parental neglect actions involving an unrepresented defendant should suffice to vindicate due process concerns:

> The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant

> parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard-pressed to discern the significance of failures to challenge the State's evidence or to develop a satisfactory defense. Such failures, however, often cut to the essence of the fairness of the trial[.]"

452 U.S. at 51. This Court expressly relied upon this reasoning in rejecting a case-by-case approach to the determination of the right to appointed counsel in *In the Matter of K.L.J.*, 813 P.2d at 282 n.6, and instead ruled in favor of a categorical right for indigent litigants in the circumstances of that case. In order to enhance fairness and reliability, and to increase the public's awareness of such enhanced fairness and reliability,[14] the right to appointment of counsel on behalf of an indigent party in *all* child custody proceedings in which the adversary party has an attorney should similarly be recognized.

This would benefit not only the unrepresented litigant, but the judicial process as a whole. While the prejudice suffered by an indigent parent whose request for appointed counsel is denied cannot be overstated, the unsatisfactory experiences of the judges who must preside over the ensuing proceedings also should be considered. No voices have been more outspoken with respect to the difficulties presented for the judiciary in those instances than those of jurists themselves.

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[14] *See, e.g., Indiana v. Edwards*, 554 U.S. 164, 177 (2008) ("[P]roceedings must not only be fair, they must 'appear fair to all who observe them.'" (*quoting Wheat v. United States*, 486 U.S. 153, 160 (1988)).

Thus, for example, in urging the Supreme Court of Wisconsin to exercise original jurisdiction over an action presenting a civil right to counsel issue, eleven then-current and retired judges of the Circuit Courts for Milwaukee and Dane Counties, as *amici curiae*, stated:

> Due to a fundamental lack of understanding of the process, in combination with a deficiency of access to resources and guidance in the face of their complicated legal issues, self-represented litigants produce time-consuming frictions at every level of the state court organization.
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> * * *
>
> One self-represented party causes problems for all litigants in the action. It goes without saying that even the most determined self-represented individual finds herself significantly disadvantaged in the litigation by a typical inability to understand and clearly and properly assert her cause (or lack thereof). However, *represented* litigants also experience problems arranging for depositions and other discovery, giving notice and being properly notified, and responding to poorly articulated but often colorable claims and defenses. These problems significantly increase the expense for the represented party.

Brief *Amicus Curiae* of Eleven County Judges in Support of Petition Requesting Supreme Court Take Jurisdiction Of Original Action, *Kelly v. Warpinski* (No. 04-2999-OA) ("Brief of Eleven Wisconsin County Judges"), at 4-7 (Wis. 2004) (emphasis in original; citations omitted);[15] *see also* Brief of Retired Washington Judges at 3-4 ("[T]he significant costs to the judicial system and society that result where litigants lack counsel cannot be ignored. These costs include, for example, the burden faced by judges to make correct rulings when the record is incomplete or

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[15] Available at http://www.povertylaw.org/poverty-law-library/case/55800/55816/55816C1.pdf.

contains material that would have been excluded if an unrepresented party had been represented, the extra time required of judges and judicial staff to guide *pro se* litigants through court proceedings, and the burden of litigating cases that both parties represented by counsel would likely have settled."); *Lassiter*, 452 U.S. at 29 n.5, *citing* Note, *Representation in Child Neglect Cases: Are Parents Neglected?*, 4 Colum J.L. & Soc. Prob. 230, 250 (1968) (referencing findings that 72.2% of surveyed New York Family Court Judges agreed that it was more difficult to conduct a fair hearing in cases in which one parent was unrepresented, while only 11.1% disagreed).

Based on the same array of considerations, retired judges of this State's courts, in *Office of Public Advocacy v. Alaska Court System, et al.*, No. 5-12999 (Alaska 2009), as *amici curiae*, stated:

> In cases involving *pro se* litigants, Amici have at times taken pains to explain how a trial works, offering details about deadlines, trial schedules, rules, burdens of proof, and motions practice. But even with such efforts to help clarify requirements, unnecessarily protracted litigation may result. Further, ". . . attorneys representing a client against a *pro se* litigant find themselves returning over and over to court due to the *pro se* litigant's lack of understanding of the legal process. . . . [T]he community as a whole is impacted by the backlog created by the spillover from *pro se* cases, particularly in the area of domestic relations."

Brief of Retired Alaska Judges *Amicus Curiae* In Support of Appellee Jonsson ("Brief of Retired Alaska Judges"), filed November 19, 2008, at 21 (citations omitted).[16]

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[16] Similarly, Federal District Judge Robert Sweet concluded that "[a]s every trial judge knows, the task of determining the correct legal outcome is rendered almost

Each of these groups of retired and then-current jurists thus concur that numerous impediments result when *pro se* litigants must fend for themselves. As the retired Alaska jurists stated: "Under *Matthews v. Eldridge*, the importance of the interests at stake, the inherent complexity and fraught nature of contested custody cases, the substantial threat to correct determinations, and the administrative burden on the courts, all point to the same conclusion: counsel must be provided at public expense to an indigent parent facing a represented party in a contested custody case." Brief of Retired Alaska Judges at 27. *See also,* ABA Model Access Act § 1.F ("[p]roviding legal representation to low-income persons at public expense will result in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or underprepared litigants, will produce fairer outcomes, and will promote public confidence in the systems of justice.") (*see* Appendix B hereto).

An interrelated, though critically independent aspect of a court's dealings with unrepresented litigants is the ethical quandary for judges who must balance their natural inclination to assist *pro se* litigants and the requirements of judicial impartiality. As this State's retired judges stated:

> Judges are forced to walk a fine line when presiding over a case in which an unrepresented party is pitted against a lawyer. Amici are well acquainted with the conflict: on one hand, the judge must remain impartial. Even if fairness is maintained, the appearance of fairness and neutrality may fall. Judges polled in Alaska explained the conflict:

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impossible without effective counsel." Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 505 (1998).

> ". . . . a judge frequently must assume either the role of mediator, or at other times attorney, for each of the unrepresented individuals, thereby putting the judge in an inappropriate position."

Brief of Retired Alaska Judges at 18 (citation omitted); *see also* Brief of Retired Washington Judges at 13 ("Judges also face a difficult ethical quandary in *pro se* cases. Without assistance from attorneys, *pro se* litigants frequently expect judges to assist them in navigating complex procedural rules, as well as completing and filing proper forms."); Brief of Eleven Wisconsin County Judges at 6 ("Judges likewise endanger violation of the judicial code by providing help to [unrepresented] litigants." (Citations omitted.)); ABA Policy #112A, Report at 10 ("In seeking to insure that justice is done in cases involving *pro se* litigants, courts must struggle with issues of preserving judicial neutrality (where one side is represented and the other is not)").[17]

A determination that indigent litigants are entitled to the appointment of counsel in the circumstances presented by this case, thus, will also yield significant collateral benefits in fostering greater judicial economy and efficiency, and in avoiding the ethical Hobson's Choice for the judges presiding in these cases.

* * *

[17] *See also Bauman v. State Div. of Family & Youth Servs.*, 768 P.2d 1097, 1097-98 (Alaska 1989) ("To 'require a judge to instruct a *pro se* litigant as to each step in litigating a claim would compromise the court's impartiality in deciding the case by forcing the judge to act as an advocate for one side.'" (Citations omitted in original.)).

The ABA notes, in closing, that the Supreme Judicial Court of Massachusetts, in finding a constitutional violation where counsel was provided by law to an indigent party in a state-initiated guardianship but not in a private guardianship, concluded:

> There is no reason why an indigent parent whose child is the subject of a guardianship proceeding should receive the benefit of counsel only if the State is involved. To the contrary, there is every reason, given the fundamental rights that are at stake, why an indigent parent is entitled to the benefit of counsel when someone other than the parent, whether it be the State or a private entity or individual, seeks to displace the parent and assume the primary rights and responsibilities for the child, whether it be in a care and protection proceeding, a termination proceeding, an adoption case, or a guardianship proceeding.

Guardianship of V.V., 24 N.E.3d at 1025.

The ABA respectfully submits that this reasoning is equally applicable to child custody proceedings. The ABA accordingly urges this Court to rule that, under Alaska's Constitution, an indigent parent has a right to appointment of counsel when the other parent has private counsel.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* the American Bar Association respectfully requests that this Court reverse the decision below.

DATED: October 2, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE AND TYPEFACE

I, Breanne Jones, state that I am employed by the law firm of Perkins Coie LLP, and that on October 2, 2015, I caused to be served a true and correct copy of BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT DENNIS OLSON via U.S. Mail on the following:

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I further certify, pursuant to Appellate Rule 513.5, that the font used in the documents is Arial 12.5 point typeface.

Breanne Jones

APPENDIX A

Unanimously Approved by ABA House of Delegates August 7, 2006

AMERICAN BAR ASSOCIATION

TASK FORCE ON ACCESS TO CIVIL JUSTICE
SECTION OF BUSINESS LAW
COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS
COMMISSION ON LAW AND AGING
SECTION OF LITIGATION
STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
COMMISSION ON IMMIGRATION
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
KING COUNTY BAR ASSOCIATION (WASHINGTON)
MAINE STATE BAR ASSOCIATION
NEW YORK COUNTY LAWYERS' ASSOCIATION
THE PHILADELPHIA BAR ASSOCIATION
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
WASHINGTON STATE BAR ASSOCIATION
BOSTON BAR ASSOCIATION
COLORADO BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION
CONNECTICUT BAR ASSOCIATION
MINNESOTA STATE BAR ASSOCIATION
LOS ANGELES COUNTY BAR ASSOCIATION
THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
SECTION OF LABOR AND EMPLOYMENT LAW
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.

REPORT

This Resolution is the Logical Next Step in the ABA's Long History of Support for Achieving Equal Justice in the United States

The ABA has long held as a core value the principle that society must provide equal access to justice, to give meaning to the words inscribed above the entrance to the United States Supreme Court – "Equal Justice Under Law." As one of the Association's most distinguished former Presidents, Justice Lewis Powell, once observed:

> "Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status."

The ABA also has long recognized that the nation's legal profession has a special obligation to advance the national commitment to provide equal justice. The Association's efforts to promote civil legal aid and access to appointed counsel for indigent litigants are quintessential expressions of these principles.

In 1920, the Association created its first standing committee, "The Standing Committee on Legal Aid and Indigent Defendants," with Charles Evans Hughes as its first chair. With this action, the ABA pledged itself to foster the expansion of legal aid throughout the country. Then, in 1965, under the leadership of Lewis Powell, the ABA House of Delegates endorsed federal funding of legal services for the poor because it was clear that charitable funding would never begin to meet the need. In the early 1970s, the ABA played a prominent role in the creation of the federal Legal Services Corporation to assume responsibility for the legal services program created by the federal Office of Economic Opportunity. Beginning in the 1980s and continuing to the present, the ABA has been a powerful and persuasive voice in the fight to maintain federal funding for civil legal services.

These actions are consistent with and further several of the ABA's key goals including:

GOAL II To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.

When the ABA adopted this Goal, the following objectives for achieving it were listed:

1. Increase funding for legal services to the poor in civil and criminal cases.
2. Communicate the availability of affordable legal services and information to moderate-income persons.
3. Provide effective representation for the full range of legal needs of low and middle income persons.
4. Encourage the development of systems and procedures that make the justice system easier for all persons to understand and use.

The ABA Has Adopted Policy Positions Favoring a Right to Counsel

The ABA has on several occasions articulated its support for appointing counsel when necessary to ensure meaningful access to the justice system. In its amicus brief in *Lassiter v. Dept of Social*

Services of Durham County, 425 U.S. 18 (1981), the ABA urged the U.S. Supreme Court to rule that counsel must be appointed for indigent parents in civil proceedings that could terminate their parental rights, "[I]n order to minimize [the risk of error] and ensure a fair hearing, procedural due process demands that counsel be made available to parents, and that if the parents are indigent, it be at public expense. *Id.* at 3-4. The ABA noted that "skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. . . . Pro se litigants cannot adequately perform any of these tasks."

In 1979 the House of Delegates adopted Standards Relating to Counsel for Private Parties, as part of the Juvenile Justice Standards. The Standards state "the participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings." These standards were quoted in the *Lassiter* amicus brief. Also, in 1987, the House of Delegates adopted policy calling for appointment of counsel in guardianship/conservatorship cases.[1]

The ABA stated these positions some years ago, but its continuing commitment to the principles behind the positions was recently restated when it championed the right to meaningful access to the courts by the disabled in its amicus brief in *Tennessee v. Lane,* 541 U.S. 509 (2004). The case concerned a litigant who could not physically access the courthouse in order to defend himself. In terms that could also apply to appointment of counsel, the brief states, "the right of equal and effective access to the courts is a core aspect of constitutional guarantees and is essential to ensuring the proper administration of justice." ABA Amicus Brief in *Tennessee v. Lane* at 16.

Echoing the Association's stance in *Lassiter*, the brief continued "the right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights . . . [W]hen important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires *meaningful* access. . . To ensure meaningful access, particularly when an individual faces the prospect of coercive State deprivation through the judicial process of life, liberty, or property, due process often requires the State to give a litigant affirmative assistance so that he may participate in the proceedings if he effectively would be unable to participate otherwise." *Id.* at 17-18 (internal citations omitted).

Despite 130 Years of Legal Aid in the United States, Existing Resources Have Proven Inadequate to Fulfill the Promise of Equal Justice for All.

The right to representation for indigents in civil proceedings goes back to the earliest days of the common law when indigent litigants had a right to appointment of counsel so they could have access to the civil courts. Most European and Commonwealth countries have had a right to counsel in civil cases for decades or even centuries, entitling all poor people to legal assistance

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[1] *See* House of Delegates Resolution adopted in August, 1987 offered by the Special Committee on Legal Problems of the Elderly: "BE IT RESOLVED, That the American Bar Association supports efforts to improve judicial practices concerning guardianship, and adopts the following Recommended Judicial Practices and urges their implementation for the elderly at the state level: ... I. Procedure: Ensuring Due Process Protections ... C. Representation of the Alleged Incompetent ... 1. Counsel as advocate for the respondent should be appointed in every case..."

when needed. The United States, in contrast, has relied principally on supplying a fixed number of lawyers and providing representation only to however many poor people this limited resource is able to serve. As of today, the level of resource does not approach the level of need[2] and only a fortunate few of those unable to afford counsel enjoy effective access to justice when facing serious legal problems

For the first 90 years of legal aid in this country, the only financial support for civil legal aid came from private charity. It started in 1876 with a single legal aid society serving German-American immigrants in New York City. Bar associations and social service organizations later established legal aid programs in a few cities elsewhere in the country. Starting in 1920, prompted by the publication of Reginald Heber Smith's landmark expose of injustice in America, JUSTICE AND THE POOR, and under the leadership of Charles Evans Hughes, the ABA, as noted above, sought to nurture development of such programs and managed to foster legal aid societies in most major cities and many smaller communities around the nation. But those societies were grossly underfunded and understaffed.

It was not until 1965 that government funding first became available for civil legal aid as part of the War on Poverty. In 1974, the federal Legal Services Corporation was established as the central funding entity for legal aid programs nationwide. During the early years the federal government expanded legal aid funding considerably. But the expansion of federal appropriations soon stalled, when LSC proved vulnerable to political attack. Thus, local legal aid agencies began to more aggressively seek diversified funding from other sources including Interest on Lawyers Trust Accounts (IOLTA), state and local governments and private sources.[3] Despite these innovative and often heroic efforts, however, taking account of inflation and the growth in numbers of poor people civil legal aid funding is no higher today in real terms than it was a quarter century ago.[4]

Given this persistent shortage of legal aid resources, it is not surprising to find a vast and continuing unmet need for the services of lawyers among those unable to afford counsel. While the nationwide Legal Services Corporation-funded system for providing legal services assists as many as one million poor people with critical legal problems each year, a recent survey shows that the legal aid programs within that system have to turn away another million people who come to their offices[5]. Millions more are discouraged and don't bother seeking legal aid because

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[2] *See Documenting the Justice Gap in America, A Report of the Legal Services Corporation* (2005) documenting the percentage of eligible persons that LSC funded-programs are unable to serve due to lack of sufficient resources.

[3] Some of these funding sources also have come under attack. *See, e.g., Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Wieland v. Lawyers Trust Fund of Illinois*, Docket # 5-03-0419, App. Ct. of Ill, 5th Jud Dist. (2003).

[4] Expenditures of public resources to address the legal needs of the poor in the United States compare poorly with funding in many other industrialized nations. At the lower end, Germany and Finland invest over three times as much of their gross domestic product as the United States in serving the civil legal needs of lower income populations. At the upper end, England spends 12 times as much of its GDP as the U.S. does to provide civil legal aid to its citizens. In between, New Zealand spends five times more than the U.S and the Netherlands over seven times as much. Even Hong Kong, now a part of the People's Republic of China, invests more than six times as much as the U.S.

[5] *See* n. 1, *Documenting t he Justice Gap* at p. 5. It also should be noted that many of the cases in which local programs reported they provided services were ones where limited resources meant they only were able to supply

they know help is not available. Despite all the efforts of legal aid programs and pro bono lawyers, an ABA nationwide legal needs study in 1993 showed that legal help was not obtained for over 70% of the serious legal problems encountered by poor people.

More than ten years have passed since that ABA research, and matters have only gotten worse. Poverty has not significantly abated and indeed has increased since the 2000 census. Similarly, the civil legal needs of the poor remain substantially unfulfilled. For example, a September 2003 report by the District of Columbia Bar Foundation estimates that less than 10% of the need for civil legal assistance is being met in that jurisdiction. A similar study in Washington State, also released in September 2003, found that 87% of the state's low-income households encounter a civil legal problem each year, and that only 12% of these households are able to obtain assistance from a lawyer. In Massachusetts - a state with significant legal services resources - the occurrence of civil legal problems among the poor increased significantly in the period 1993-2002. By 2002 at least 53% of the poor households in the state had at least one unmet civil legal need and only 13% of those households were able to resolve all the problems they experienced.[6]

Both Constitutional Principles and Public Policy Support A Legally Enforceable Right to Counsel to Achieve Effective Access to Justice in Many Civil Cases

In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) the U.S. Supreme Court held:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries....From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

It appears just as difficult to argue a civil litigant can stand "equal before the law . . . without a lawyer to assist him." Indeed just a year after *Gideon*, the Supreme Court made a similar observation about civil litigants. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries...." *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). Yet, in 1981, the Supreme Court, in a civil matter, said that there is no absolute right to court appointed counsel for an indigent litigant in a case brought by the state to terminate parental rights. *Lassiter v. Department of Social Services*, 425

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self-help assistance, but believed full representation would have led to a better outcome for the clients. (*Id.* at p. 6, fn 8.)

[6] Seven additional states have recently examined the kinds of legal problems experienced by low-income residents of the state and what they do about them: Oregon (2000), Vermont (2001), New Jersey (2002), Connecticut (2003), Tennessee (2004), Illinois (2005) and Montana (2005). These studies, too, demonstrate that only a very small percentage of the legal problems experienced by low-income people (typically one in five or less) is addressed with the assistance of a private or legal aid lawyer.

U.S. 18 (1981). While the Court recognized that the complexity of a termination of parental rights proceeding might "overwhelm an uncounseled parent," the Court found--by a 5-4 vote--that the appointment of counsel was not required in every case. *Id.* at 30. Instead, trial courts were instructed to balance three factors to determine whether due process requires that a parent be given a lawyer: "the private interest at stake, the government's interest and the risk that the procedures used will lead to erroneous decisions." *Id.* at 27. The court went on to apply the standard in such a way that it virtually excluded the appointment of counsel except in the most extraordinary circumstances, in particular by overlaying on the three-part due process test an additional presumption against appointed counsel where there is no risk of loss of physical liberty.

It is to be hoped that the U.S. Supreme Court will eventually reconsider the cumbersome *Lassiter* balancing test and the unreasonable presumption that renders that test irrelevant for almost all civil litigants. There would be precedent for such a reversal, as seen in the evolution of the criminal right to counsel from *Betts v Brady,* 316 U.S. 455 (1942) to *Gideon* in 1963. In *Betts,* the Court said the appointment of counsel was required in criminal cases only where, after a case-by-case analysis, the trial court determined that counsel is necessary to ensure that trial is not "offensive to the common and fundamental ideas of fairness and right." *Id.* at 473. But by 1963, the Court realized that the *Betts* approach was unworkable, and overturned it in *Gideon.*

Powerful common law, constitutional, and policy arguments support a governmental obligation to ensure low income people are provided the means, including lawyers, to have effective access to the civil courts. These arguments have equal and sometimes greater application at the state level than they do at the federal level.

Common Law Antecedents Support a Right to Counsel in Civil Matters

The common law has a long history of granting indigent litigants a right to counsel in civil cases. As early as the 13th and 14th centuries English courts were appointing attorneys for such litigants, a right that Parliament codified in 1495.[7] Several American colonies imported this statute and its right to counsel as part of the common law they adopted from the mother country and, it has been argued, this nascent right continues to the current day.[8] But at a minimum the venerable age and persistence of this right[9] in the common law tradition suggests the fundamental importance

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[7] The critical language from the Statute of Henry VII, which also relieved indigent civil litigants from the obligation to pay fees and costs, reads as follows: "[T]he Justices...shall assign to the same poor person or persons counsel,...which shall give their counsel, nothing taking for the same;...and likewise the Justices shall appoint attorney and attorneys for the same poor person or persons...." II Hen VII, c. 12 (1495), An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, reprinted in 2 Statutes of the Realm 578 (1993). .

[8] See, e.g., Brief for Appellant, *Frase v. Barnhart*, 379 Md. 1000 (2003) at pp. 33-42, arguing the Statute of Henry VII is part of the English common law the colony and later the state of Maryland adopted as its own and this right to counsel remains part of Maryland law in the current day. Nor is this common law argument limited to the original 13 states. Many if not most other states expressly incorporated the English common law as it existed at the moment of their statehood as the common law of those states. See Johnson, *Beyond Payne: The Case for A Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOYOLA OF LOS ANGELES L. REV. 249, 251-259 (1978) for an explanation why the Statute of Henry VII the California Supreme Court used as the basis for finding a common law right to waiver of fees and costs also appears to justify the provision of free counsel to those same indigent litigants.

[9] The Statute of Henry VII was not replaced until 1883, when it was succeeded by a law designed to make the right more effective. In 1914 the English Parliament passed another reform of legal aid. Then in 1950 it enacted a

that tradition, which is the basis of American law, accords guaranteeing poor people equality before the law and furnishing them the lawyers required to make that guarantee a reality.

Other European and commonwealth countries also have come to recognize a statutory right to counsel in civil cases. France created such a statutory right in 1852, Italy did so when Garibaldi unified the country in 1865, and Germany followed suit when it became a nation in 1877. Most of the remaining European countries enacted right to counsel provisions in the late 19th and early 20th century. Several Canadian provinces, New Zealand and some Australian states have provided attorneys to the poor as a matter of statutory right for decades, although the scope of the right has changed in response to legislative funding and priorities.[10]

As of this time, no American jurisdiction has enacted a statutory right to counsel at public expense nearly as broad as these other countries. But many states have passed laws conferring a right to counsel in certain narrow areas of the law. The most common are those guaranteeing counsel to parents – and sometimes children -- in dependency (often called neglect) proceedings, and to prospective wards in guardianship and similar proceedings in which interference with personal liberties are at stake. A handful of states also have extended a statutory right to counsel in other situations. It is encouraging that state legislatures have recognized the truth that poor people cannot have a fair hearing in these particular adversarial proceedings. Yet many other proceedings that threaten loss of basic human needs are equally adversarial and often more complex. In those cases, just like dependency proceedings, no civil litigant can be "equal before the law...without a lawyer."

Courts perhaps more than legislatures are familiar with the truth of this principle embodied in the common law right to counsel and implemented, to a limited degree in many state statutes in the U.S., and to a broader extent, in the laws of many other countries. On a regular basis, the judiciary witnesses the helplessness of unrepresented parties appearing in their courtrooms and the unequal contest when those litigants confront well-counseled opponents. Judges deeply committed to reaching just decisions too often must worry whether they delivered injustice instead of justice in such cases because what they heard in court was a one-sided version of the law and facts. Nearly a decade ago, one trial judge, U.S. District Court Judge Robert Sweet, gave voice to this concern in a speech to the Association of the Bar of New York, and also tendered a solution. "What then needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society under a rule of law? . . . To shorthand it, we need a civil *Gideon,* that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system."[11]

State and Federal Constitutional Principles Support a Civil Right to Counsel

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sophisticated civil legal aid program that remains the most comprehensive and generously funded legal aid system in the world.

[10] These developments in other countries are surveyed in Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 Loyola of Los Angeles Law Review 341 (1985). Several of the foreign statutes are translated in Cappelletti, Gordley and Johnson, TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (Milan/Dobbs Ferry: Giuffre/Oceana, 1975, 1981).

[11] Sweet, *Civil "Gideon" and Justice in the Trial Court (The Rabbi's Beard)*, 42 THE RECORD 915, 924 (Dec. 1997).

In the years between *Gideon* and *Lassiter*, a few state supreme courts took some promising steps toward a constitutional right to counsel in civil cases. The Maine and Oregon Supreme Courts declared the constitutional right to due process required that their state governments provide free counsel to parents in dependency/neglect cases.[12] The Alaska Supreme Court ruled that counsel must be appointed at public expense to an indigent party in a child custody proceeding if the other party was provided free representation.[13] The California Supreme Court found a due process right to counsel for defendants in paternity cases[14] and an equal protection right for prisoners involved in civil litigation.[15] The New York Court of Appeal fell only one vote short of declaring a constitutional right to free counsel for poor people in divorce cases.[16]

During that era, between *Gideon* and *Lassiter*, academic articles also frequently appeared discussing the many legal theories which would support a constitutional right to counsel in civil cases.[17] In common with the state supreme court decisions mentioned above, these articles usually articulated arguments based on the due process clauses found in the federal and state constitutions and their implicit guarantees of a fair hearing in civil proceedings. But they carried the argument beyond the narrow categories of cases covered by the then existing state court decisions to embrace a far broader range of civil litigation. They emphasized the serious consequences losing litigants face in many other civil cases poor people commonly experience – and the empirical and other evidence suggesting the lack of counsel virtually guarantees these people in fact would lose those cases.

Some of these articles likewise found strong support for a right to counsel in the equal protection clauses common to the federal and most state constitutions. Some pointed to the fundamental interest all citizens have in enjoying "like access to the courts" for the protection of their rights – as the essential handmaiden of the right to vote without which laws enacted to give them substantive rights cannot be enforced. As a fundamental interest, it warrants the "close scrutiny" to which the courts are to subject any policies denying that access. It also was observed that some states have made "poverty" a "suspect class." This again would mandate close scrutiny of a state's denial of counsel to poor people in judicial proceedings structured in a way that requires a lawyer if one is to have effective access to those courts.

Over the years after *Gideon,* lawyers continued to pursue litigation seeking to establish the right to counsel in civil cases, with considerable success, initially on traditional notions of due

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[12] *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794 (Me. 1973); *State v. Jamison*, 444 P.2d 15 (Ore. 1968).

[13] *Flores v. Flores*, 598 P. 2d 893 (Ak, 1979).

[14] *Salas v. Cortez*, 24 Cal.3d 22, 593 P.2d 226 *cert. den.* 444 U.S. 900 (1979).

[15] *Payne v. Superior Court*, 17 Cal.3d 908 (1976).

[16] *In re Smiley*, 369 N.Y.S.2d 87, 90 (N.Y. 1975).

[17] See, e.g., Note, *The Right to Counsel in Civil Litigation*, 66 Colum.L.Rev. 1322 (1966); O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 5 (1967); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L.J. 545 (1967); Note, *The Indigent's Right ot Counsel in Civil Cases*, 43 Fordham L. Rev. 989 (1975), Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U.Mich.J.L. Ref. 554 (1976), Comment, *Current Prospects for an Indigent's Right to Appointed Counsel and Free Transcript in Civil Litigation*, 7 Pac. L.J. 149 (1976), Johnson, *Beyond Payne: The Case for a Legally Enforceable Right to Representation for Indigent California Litigants*, 11 Loyola of Los Angeles L..Rev. 249 (1978).

process. In Michigan and other states, a detailed blueprint was developed to take a series of cases through the appellate courts to establish the right to counsel in various circumstances. After several victories, the initiative was set aside in part because of the *Lassiter* decision.

After *Lassiter* and its narrow construction of due process, most of the possible constitutional theories remain untested in either the federal or state courts. But they have been reinforced by constitutional decisions abroad. As early as 1937, a quarter century before *Gideon* and over four decades before *Lassiter*, the Swiss Supreme Court found the analog of our constitution's equal protection clause, the "equality before the law" provision of that nation's Constitution, mandated appointment of free counsel for indigent civil litigants.[18] Then in 1979 the European Court of Human Rights issued a historic decision, *Airey v. Ireland*[19], based on an analog of due process--a provision in the European Convention on Human Rights and Fundamental Freedoms which guarantees civil litigants a "fair hearing."[20] In a decision that now applies to 41 nations and over 400 million people, the court held indigents cannot have a "fair hearing" unless represented by lawyers[21] and required member states to provide counsel at public expense to indigents in cases heard in the regular civil courts.[22] As a direct result of this decision, the Irish legislature created that nation's first legal aid program which is now funded at three times the level of America's. The *Airey* decision and its progeny also have influenced the scope of legal aid legislation in several other European countries.[23]

Policy Considerations Support Recognition of a Civil Right to Counsel

Underlying all the constitutional theories are several undeniable truths. The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the primary and costly responsibilities of finding the controlling legal principles and uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in a cogent fashion to the judge or jury. Discharging these responsibilities ordinarily requires the expertise lawyers spend three years of graduate education and more years of training and practice acquiring. With rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position

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[18] *Judgment of Oct. 8, 1937*, Arrets du Tribunal Federal (ATF) 63, I, 209 (1937), discussed in O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 5 (1967).

[19] *Airey v Ireland*, 2 Eur. Ct. H.R. (ser.A) 305 (1979).

[20] "In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, para.1, 213 U.N.T.S. 222.

[21] As the court explained: "The Convention was intended to guarantee rights that were *practical and effective*, particularly in respect of the right of access to the courts, in view of its prominent place in a democratic society....The possibility of appearing in person before the [trial court] did not provide an *effective* right of access... [I]t is not realistic,...to suppose that,...the applicant could effectively conduct her own case, despite the assistance which,...the judge affords to parties acting in person...." (*Id.* at p. 315, emphasis supplied.).

[22] A constitutional "fair hearing" guarantee likewise formed the basis for the Canadian Supreme Court's recent declaration of a right to counsel at public expense for indigent litigants, in this instance parents involved in dependency/neglect cases. *New Brunswick v J.G.* 177 D.L.R. (4th) 124 (1999).

[23] See, e.g., *Steel and Morris v. The United Kingdom*, Eur.Ct.H.R. (Judgment of Feb. 15, 2005) which found England's legal aid statute denying counsel to indigent defendants in defamation cases violated the right to counsel required to satisfy the European Convention's guarantee of a "fair hearing.".

may be, especially if opposed by a lawyer. Not surprisingly, studies consistently show that legal representation makes a major difference in whether a party wins in cases decided in the courts.[24]

There are other problems, too, when parties lack counsel in civil proceedings. In seeking to insure that justice is done in cases involving pro se litigants, courts must struggle with issues of preserving judicial neutrality (where one side is represented and the other is not), balancing competing demands for court time, and achieving an outcome that is understood by pro se participants and does not lead to further proceedings before finality is reached. Meantime large numbers of pro se litigants lose their families, their housing, their livelihood, and like fundamental interests, losses many of them would not have sustained if represented by counsel. Furthermore, the perception the courts do not treat poor people fairly has consequences for the system itself. As California Chief Justice Ronald George recently observed, "[E]very day the administration of justice is threatened...by the erosion of public confidence caused by lack of access."[25]

Whether cast as a constitutional imperative or a policy finding compelling a legislative remedy, when litigants cannot effectively navigate the legal system, they are denied access to fair and impartial dispute resolution, the adversarial process itself breaks down and the courts cannot properly perform their role of delivering a just result. Absent a systemic response, access to the courts will continue to be denied to many solely because they are unable to afford counsel. Considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a right of meaningful access to the courts.

Current Efforts to Establish a Civil Right to Counsel

For over two decades, the *Lassiter* decision appeared to paralyze serious consideration of a right to counsel in civil cases. But in the last few years advocates around the country have taken up the challenge with renewed vigor and strategic thinking.[26] Some are exploring state law common law

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[24] *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 Hofstra L.Rev. 533 (1992); Seron et al, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of A Randomized Experiment*, 35 Law & Soc'y Rev. 419 (2001).

[25] Chief Justice Ronald George, State of Judiciary Speech to California Legislature, 2001.

[26] This renewed interest also is reflected in the academic literature. Marvy, Paul and Gardner, Debra, *A Civil Right To Counsel For the Poor*, 32 Human Rights 8 (Summer 2005); Boyer, Bruce, Justice, *Access to the Courts, and the Right to Free Counsel For Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 Loy. U. Chi. L.J. 363 (2005); Nethercut, John, *'This Issue Will Not Go Away...': Continuing to Seek the Right to Counsel in Civil Cases*, 38 Clearinghouse Review 481 (2004); Smith, Jonathan, *Civil Gideon*, 18 MIE Journal 4:3 (2004); Perluss, Deborah, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 Seattle J. for Soc. Just. 571 (2004); Klienman, Rachel, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 Fordham Urb. L.J. 1507 (2004); Johnson, Earl, *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 Seattle J. for Soc. Just. 201 (2003); Johnson, Earl, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 Fordham Int'l L.J. 83 (2000); Sweet, Robert, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503 (1998); Sweet, Robert, *Civil Gideon and Justice in the Trial Court (the Rabbi's Beard)*, 52 The Record of the Ass'n of the Bar of the City of N.Y. 915 (1997); Young, Rosalie, *The Right to Appointed Counsel In Termination Of Parental Rights: The States' Response to Lassiter*, 14 Touro L. Rev. 247 (1997); Scherer, Andrew, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv. C.R.-C.L. L. Rev. 557 (1988); Werner, F. *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, 17 Housing L. Bull. 65 (1987). Estrelle, Mark, *Gideon's Trumpet Revisited: Providing Rights of Indigent Defendants in Paternity Actions*, 29 J. Fam. L. 1, 9 (1985);

rights and constitutional guarantees of open courts and access to the courts as well as due process and equal protection, through appellate advocacy and litigation. Others are pursuing a range of legislative approaches. In each of what is already a significant number of states, a local broad-based team of advocates has determined the route they believe is most likely to achieve success.

Many of those advocates have come together as the National Coalition for a Civil Right to Counsel (NCCRC). The coalition provides information-sharing, training, networking, coordination, research assistance, and other support to advocates pursuing, or considering pursuing, a civil right to counsel. It includes well over a hundred advocates from legal services programs, private law firms, state bar associations, law schools, national strategic centers and state access to justice commissions, representing over 30 states. At present, there are active civil right to counsel projects underway in at least eight jurisdictions and discussions are taking place in a number of others.

Courts are also now being asked to revisit the issue. For example, a nonprofit poverty and civil rights program and two major private firms in Maryland are actively pursuing recognition of the civil right to counsel through an appellate strategy raising claims under the state's constitution as well as the common law this state imported from the mother country. In 2003, in the case of *Frase v. Barnhart*, 379 Md. 1000 (2003), they brought the question whether a poor person has the right to appointed counsel in a civil case before Maryland's highest appellate court. As part of a coordinated effort, the state bar association and legal services programs filed amicus briefs in support of the appellant's right to counsel. The court avoided ruling on the issue by a 4-to-3 vote, finding in favor of the unrepresented litigant without reaching the issue. But an impassioned 3-judge concurrence would have declared a civil right to counsel for the indigent mother who faced a contested custody dispute without the assistance of counsel.

In Washington, advocates from the private bar, legal services, the state's three law schools, and others have joined together to pursue judicial recognition of the civil right to counsel under the state's constitution. To date, the group has litigated two cases. One involved a local city seeking to remove a 77-year old disabled man from the home he built nearly 50 years earlier for alleged building code violations. The other case involved an abusive husband asserting false allegations through his attorney in order to obtain sole custody of his children. Both cases were ultimately resolved in the appellate courts in ways that did not result in rulings on the right to counsel issue.

In Wisconsin advocates have filed appeals on behalf of indigent mothers seeking to retain custody of their children from their abusive estranged husbands, contending the Wisconsin state constitution guarantees them the right to counsel to defend their custodial rights. In Georgia, the federal District Court, relying in part on the Georgia state constitution's due process clause, recently held that foster children have a right to counsel in all deprivation cases (elsewhere known as dependency cases, abuse and neglect proceedings, etc.).[27] And, in a recently filed test case the Canadian Bar Association is seeking to establish a national right under their Constitution to obtain civil legal aid in certain types of cases and challenging British Columbia's current legal aid plan as inconsistent with required standards for legal aid delivery for low-income Canadians.

Besharov, Douglas, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After Lassiter v. North Carolina*, 15 Fam. L. W. 205, 219, 221 (1981).

[27] *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (D. Ga. 2005).

In other states, new focus on legislative recognition of a right to counsel has emerged. In California an effort is underway to draft a "model" statute, with alternative provisions regarding certain key issues, which creates and defines the scope of a statutory entitlement to equal justice including a right to counsel in appropriate circumstances. Recently, the State Bar of Texas sought legislation providing a civil right to counsel for low income tenants in certain eviction appeals cases. In New York this past June, the City Council appropriated $86,000 for a study of the need for counsel in eviction proceedings and the costs and benefits of providing counsel to tenants facing eviction. In addition, the New York State Equal Justice Commission has made advocacy for a civil right to counsel a prominent part of its agenda.

The effort to establish a right to court appointed counsel is a part of the struggle to make justice a matter of substance over form. More than 50 million people have incomes so low that they are eligible for legal services from Legal Services Corporation-funded programs[28] and millions more survive on incomes so low they cannot afford lawyers when in serious legal jeopardy. Many also have physical or mental disabilities or experience other barriers to navigating the legal system without a lawyer. Yet over the past quarter century the federal government has reduced its commitment to legal services by over 50%.

There is a crisis in equal justice, as documented above, and advocates are pursuing litigation and legislative strategies that might force a change in prevailing practices. The resolution voices the ABA's support for these primarily state-law-based approaches. While it remains important to look for the right in federal due process and equal protection law as the ultimate objective, the resolution seeks to foster the evolution of a civil right to counsel on a state-by-state basis, rooted in the unique provisions of each state's constitution and laws. This approach is likely to achieve significant results and provide doctrinal support for a future reconsideration of the right to civil counsel under the federal constitution.

The Proposed Resolution Offers a Careful, Incremental Approach to Making Effective Access to Justice a Matter of Right, Starting with Representation by Counsel in those Categories of Matters in which Basic Human Needs Are at Stake.

The right proposed in this resolution is long overdue and deeply embedded in the nation's promise of justice for all. But it also represents an incremental approach, limited to those cases where the most basic of human needs are at stake. The categories contained in this resolution are considered to involve interests so fundamental and critical as to require governments to supply lawyers to low income persons who otherwise cannot obtain counsel.

The resolution does not suggest that jurisdictions should limit their provision of counsel and other law-related services to these high-priority categories. Rather it indicates that in these categories they should *guarantee* no low income person is ever denied a fair hearing because of their economic status. In other categories of legal matters, it is expected that each jurisdiction will continue to supply legal services on the same basis as they have in the past. This includes jurisdictions where courts have the constitutional, statutory, or inherent power to appoint counsel in other categories of cases or for individuals who suffer impairments or unique barriers which

[28] "CPS Annual Demographic Survey, March Supplement," http://pubdb3.census.gov/macro/032005/pov/new01_125_01.htm

make it impossible for them to obtain a fair hearing in any cases unless they are represented by lawyers.

The right defined in this resolution focuses on representation in adversarial proceedings; it does not propose a generalized right to legal advice or to legal assistance unrelated to litigation in such forums. "Adversarial proceedings" as defined in the resolution are intended to include both judicial and some quasi-judicial tribunals, because many of the disputes involving the basic human needs described below are, in one jurisdiction or another, allocated to administrative agencies or tribunals. Indeed the label is often arbitrary. Cases a forum labeled a court would hear in one jurisdiction will be heard by a tribunal labeled an administrative agency or hearing officer or something else in other jurisdictions. The emphasis of the right articulated here is on the adversarial nature of the process, not what the tribunal is called. Some courts as well as some tribunals bearing another name function in an inquisitorial manner and without legal counsel. (In many states, for instance, parties in the small claims court are not allowed to be represented by lawyers and judges are expected to take an active role in developing the relevant facts. Similarly, some states have created pro se processes through which litigants can quickly and effectively access legal rights and protections without the need for representation by an attorney, for example in simple uncontested divorces.)

The basic human needs identified in this resolution as most critical for low income persons and families include at least the following: shelter, sustenance, safety, health and child custody.

- "Shelter" includes a person or family's access to or ability to remain in an apartment or house, and the habitability of that shelter.
- "Sustenance" includes a person or family's sources of income whether derived from employment, government monetary payments or "in kind" benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers' wage or employment disputes where counsel is not realistically available through market forces.
- "Safety" includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise.
- "Health" includes access to appropriate health care for treatment of significant health problems whether that health care is financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an employee benefit, through private insurance, or otherwise.
- "Child custody" embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.[29]

The above categories are considered to involve interests so fundamental and important as to require governments to supply low income persons with effective access to justice as a matter of right. There is a strong presumption this mandates provision of lawyers in all such cases. Trivial threats, however, even to a basic human need would not warrant such an investment of legal

[29] See generally, ABA Standards of Practice for Lawyers Representing Children in Custody Cases (2003) which includes suggested criteria to decide when counsel should be appointed for children in custody cases.

resources. Nor need counsel be supplied at public expense in cases where a lawyer is available to the litigant on a contingent fee basis. Furthermore, in some instances, there are informal proceedings, such as welfare fair hearings, in which government expressly permits trained and supervised non-lawyer advocates to represent both sides and where providing such representation is often sufficient. In still other instances, jurisdictions have redesigned a few select proceedings so they are not adversarial and also furnish self-help assistance sufficient to permit a litigant to have a fair hearing without any form of representation before the court. In such proceedings, the test is whether it can be honestly said the litigant can obtain a fair hearing without being represented by a lawyer. With rare exceptions, this will be true only when certain conditions are met: the substantive law and procedures are simple; both parties are unrepresented; both parties are individuals and neither is an institutional party; both parties have the intellectual, English language, and other skills required to participate effectively; and, the proceedings are not adversarial, but rather the judge assumes responsibility for and takes an active role in identifying the applicable legal standards and developing the facts.

This resolution focuses the right on "low income persons," but leaves to each individual jurisdiction the flexibility to determine who should be considered to fit within that category. Rather than being bound by the current national LSC eligibility guidelines (which are widely considered to be under-inclusive), it is anticipated jurisdictions will create their own criteria taking account of the applicant's income, net assets (if any), the cost of living and cost of legal services in the state or locality, and other relevant factors in defining the population to which this right attaches.

Because a civil right to counsel is likely to evolve in different ways in different jurisdictions, and also because states presently invest at very different levels, it is difficult to estimate how much a given jurisdiction will have to spend in additional public resources in order to implement such a right. It is possible to estimate the maximum possible exposure at the national level, however, from two sources – legal needs studies in the U.S. and the experience in other countries which have implemented a right to counsel in civil cases. Although there are major disparities among states, the United States is estimated to provide on average less than $20 of civil legal aid per eligible poor person. Most needs studies conclude the U.S. is already meeting roughly 20 percent of the need. This suggests the full need could be met if the U.S. raised the average to $100 per eligible person. But the right advocated in this resolution is substantially narrower and thus could be funded for substantially less than that. This conclusion is reinforced by the experience in England which has a much broader right to counsel than proposed in this resolution and the most generously funded legal aid program in the world, and furthermore uses a more costly delivery system than the U.S.[30] Yet it only spends in the neighborhood of $100 per eligible poor person. Thus, it is reasonable to anticipate the narrower right advocated in this resolution at the worst would result in a tripling of a jurisdiction's current investment in civil legal aid – although it might require somewhat more for states well below the national average and somewhat less for those presently above that average.

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[30] England provides partially-subsidized counsel to those above its poverty line. But completely free civil legal aid is available for the approximately 26 percent of the population below its poverty line, which amounts to approximately 13.5 million people. The English legal aid program currently spends about 1.36 billion dollars providing civil legal services to those in this lowest income stratum who are entitled to free legal services. That amounts to slightly more than $100 per eligible person in this income category.

In any event, put in perspective the increase would be a comparatively minor budgetary item in most states. Compared to Medicaid, for example, which nationally costs over $200 billion a year and spends nearly $4,200 per eligible person,[31] devoting even as much as $60 to $100 per eligible poor person in order to give them meaningful access to justice in their most urgent cases appears to be a minimal and justifiable investment. Funding this right also would only bring the total civil legal aid investment to about 1.5 percent of what American society currently spends on lawyers in this country, about the same share as they had in 1980.[32]

It is often difficult to obtain clear public understanding of the needs of the justice system. The third branch has historically struggled to obtain sufficient resources to fulfill its constitutional mandates.[33] Yet a peaceful and orderly society depends upon the effective functioning of the justice system. Within the sphere of justice system funding, there is a hierarchy of poor and poorer agencies. The courts are frequently under-funded. Even more resource starved are systems for providing constitutionally-mandated services to indigent persons accused of crimes. Last on the list are programs supplying civil legal aid. Implementation of a civil right to counsel as proposed herein is not intended to set up a struggle for the crumbs of finite resources between deserving, but oft-ignored constituencies. The result should not be a diminution of current or future funds allocated for public defense, which is an area that has all too often been inadequately supported by states and counties. Rather, it will be necessary for bar and judicial leaders to assist in educating the public and policy-makers about the critical functions of these parts of the justice system, and the need for our society to guarantee true access to justice for all.

Conclusion

In a speech at the 1941 meeting of the American Bar Association, U.S. Supreme Court Justice Wiley Rutledge observed:

> "Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion."

If Justice Rutledge's self-evident statement required proof, the past 130 years of legal aid history have demonstrated its truth. Not only has equality before the law remained merely a matter of charity in the United States, but that charity has proved woefully inadequate. The lesson from the past 130 years is that justice for the poor as a matter of charity or discretion has not delivered on

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[31] 2006 Statistical Abstract of the United States, Table 136, reflecting Medicaid alone provided $213 billion in health care to low income people. (This does not include the Medicare funds devoted to elderly poor in addition to their Medicaid benefits. Nor does it include other public funds used for health clinics and other special health care programs for low income patients. In 2003, a total of $279 billion was spent on the combination of Medicaid and other health care for the nation's low income residents. Table 122. This figure still did not include Medicare payments for the elderly poor, however.)

[32] According to the Statistical Abstract of the United States, Table 1263, individuals and institutions spent $194 billion on the services of lawyers in 2002. $3 billion would represent only 1.5 percent of that total societal expenditure on lawyers. This 1.5 percent would be about the same share of total legal resources as low income Americans had in FY 1980. That year the LSC budget was $321million with other public and private resources supplying several million more in civil legal aid, while the total societal investment in lawyer services was $23 billion. This gave civil legal aid roughly 1.5 percent of the nation's legal resources in that year.

[33] See *Funding the Justice System*, A Report by the American Bar Association Special Committee on Funding the Justice System (August, 1992).

the promises of "justice for all" and "equal justice under law" that form the foundation of America's social contract with all its citizens, whether rich, poor, or something in between. The Task Force and other proponents of this resolution are convinced it is time for this nation to guarantee its low income people equality before the law as a matter of right, including the legal resources required for such equality, beginning with those cases where basic human needs are at stake. We are likewise convinced this will not happen unless the bench and bar take a leadership role in educating the general public and policymakers about the critical importance of this step and the impossibility of delivering justice rather than injustice in many cases unless both sides, not just those who can afford it, are represented by lawyers.

Respectfully submitted,

Howard H. Dana, Jr., Chair
Task Force on Access to Civil Justice

August 2006

APPENDIX B

104 (Revised)

AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
COMMISSION ON IMMIGRATION
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
COMMISSION ON HOMELESSNESS AND POVERTY
COALITION FOR JUSTICE
JUDICIAL DIVISION
SENIOR LAWYERS DIVISION
SECTION OF TORT TRIAL AND INSURANCE PRACTICE
STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS
COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS
PHILADELPHIA BAR ASSOCIATION
SANTA CLARA COUNTY BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION
KING COUNTY BAR ASSOCIATION
MASSACHUSETTS BAR ASSOCIATION
PENNSYLVANIA BAR ASSOCIATION
STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE
COMMISSION ON DOMESTIC VIOLENCE
NEW YORK COUNTY LAWYERS ASSOCIATION
ATLANTA BAR ASSOCIATION
BAR ASSOCIATION OF SAN FRANCISCO
WASHINGTON STATE BAR ASSOCIATION
LOS ANGELES COUNTY BAR ASSOCIATION
SECTION OF FAMILY LAW
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF BUSINESS LAW
SECTION OF ADMINISTRATIVE LAW
YOUNG LAWYERS DIVISION
COMMISSION ON YOUTH AT RISK

REPORT TO THE HOUSE OF DELEGATES

Recommendation

RESOLVED, That the American Bar Association adopts the black letter and commentary of the ABA Model Access Act, dated August 2010.

104 (Revised)

REPORT

This Resolution Seeks to Create a Model Act for Implementation of the Policy Unanimously Adopted by the ABA in 2006 in Support of a Civil Right to Counsel in Certain Cases.[1]

In August 2006, under the leadership of then-ABA President Michael S. Greco and Maine Supreme Judicial Court Justice Howard H. Dana, Jr., Chair of the ABA Task Force on Access to Civil Justice, the House of Delegates unanimously adopted a landmark resolution calling on federal, state and territorial governments to provide low-income individuals with state-funded counsel when basic human needs are at stake. The policy adopted pursuant to Recommendation 112A provides as follows:

> "**RESOLVED,** That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction."

The Report supporting adoption of 2006 Resolution 112A set forth the long history of the ABA's unwavering and principled support for meaningful access to legal representation for low income individuals, as well as the history of the ABA's policy positions favoring a right to counsel. Because of their direct relevance to the present Recommendation and Report, portions of the 2006 Recommendation and Report are quoted here:

> The ABA has long held as a core value the principle that society must provide equal access to justice, to give meaning to the words inscribed above the entrance to the United States Supreme Court – "Equal Justice Under Law." As one of the Association's most distinguished former Presidents, Justice Lewis Powell, once observed:
>
> > 'Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.'

[1] This Recommendation and Report is the product of the ABA Working Group on Civil Right to Counsel comprised of representatives from a number of ABA Sections, Committees and other entities. ABA President Carolyn Lamm requested that the Working Group identify a means to advance the cause of establishing a civil right to counsel, as set forth in Recommendation and Report 112A adopted unanimously by the House of Delegates in August 2006, particularly in light of the impact on the lives of countless persons throughout the United States of the current, most severe economic recession in decades.

The ABA also has long recognized that the nation's legal profession has a special obligation to advance the national commitment to provide equal justice. The Association's efforts to promote civil legal aid and access to appointed counsel for indigent litigants are quintessential expressions of these principles.

In 1920, the Association created its first standing committee, "The Standing Committee on Legal Aid and Indigent Defendants," with Charles Evans Hughes as its first chair. With this action, the ABA pledged itself to foster the expansion of legal aid throughout the country. Then, in 1965, under the leadership of Lewis Powell, the ABA House of Delegates endorsed federal funding of legal services for the poor because it was clear that charitable funding would never begin to meet the need. In the early 1970s, the ABA played a prominent role in the creation of the federal Legal Services Corporation to assume responsibility for the legal services program created by the federal Office of Economic Opportunity. Beginning in the 1980s and continuing to the present, the ABA has been a powerful and persuasive voice in the fight to maintain federal funding for civil legal services.

. . . .

The ABA Has Adopted Policy Positions Favoring a Right to Counsel

The ABA has on several occasions articulated its support for appointing counsel when necessary to ensure meaningful access to the justice system. In its amicus brief in *Lassiter v. Dept of Social Services of Durham County*, 425 U.S. 18 (1981), the ABA urged the U.S. Supreme Court to rule that counsel must be appointed for indigent parents in civil proceedings that could terminate their parental rights, '[I]n order to minimize [the risk of error] and ensure a fair hearing, procedural due process demands that counsel be made available to parents, and that if the parents are indigent, it be at public expense. *Id.* at 3-4. The ABA noted that "skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. . . . Pro se litigants cannot adequately perform any of these tasks.'

In 1979 the House of Delegates adopted Standards Relating to Counsel for Private Parties, as part of the Juvenile Justice Standards. The Standards state 'the participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.' These standards were quoted

in the *Lassiter* amicus brief. Also, in 1987, the House of Delegates adopted policy calling for appointment of counsel in guardianship/conservatorship cases.[2]

> The ABA stated these positions some years ago, but its continuing commitment to the principles behind the positions was recently restated when it championed the right to meaningful access to the courts by the disabled in its amicus brief in *Tennessee v. Lane,* 541 U.S. 509 (2004). The case concerned a litigant who could not physically access the courthouse in order to defend himself. In terms that could also apply to appointment of counsel, the brief states, 'the right of equal and effective access to the courts is a core aspect of constitutional guarantees and is essential to ensuring the proper administration of justice.' ABA Amicus Brief in *Tennessee v. Lane* at 16.
>
> Echoing the Association's stance in *Lassiter*, the brief continued 'the right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights . . . [W]hen important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires *meaningful* access. . . To ensure meaningful access, particularly when an individual faces the prospect of coercive State deprivation through the judicial process of life, liberty, or property, due process often requires the State to give a litigant affirmative assistance so that he may participate in the proceedings if he effectively would be unable to participate otherwise.' *Id.* at 17-18 (internal citations omitted).

The proposed Model Access Act furthers the policy adopted by the House of Delegates in 2006 and directly serves the fundamental goals of the Association. Goal IV, which is to "Advance the Rule of Law," has as its fourth objective that the ABA "[a]ssure meaningful access to justice for all persons."

Since 2006, Progress In Meeting the Civil Need of Low-Income Individuals Has Been Slow While the Need Has Increased.

Since adoption of Recommendation 112A in 2006, a number of states have taken steps to implement a state-funded civil right to counsel in civil cases involving basic human needs. Perhaps the most significant progress to date has been in the State of California which, with enactment of the *Sargent Shriver Civil Counsel Act*, directed the development of one or more pilot projects in selected courts to "provide representation of counsel for low-income persons

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[2] *See* House of Delegates Resolution adopted in August, 1987 offered by the Special Committee on Legal Problems of the Elderly: "BE IT RESOLVED, That the American Bar Association supports efforts to improve judicial practices concerning guardianship, and adopts the following Recommended Judicial Practices and urges their implementation for the elderly at the state level: ... I. Procedure: Ensuring Due Process Protections ... C. Representation of the Alleged Incompetent ... 1. Counsel as advocate for the respondent should be appointed in every case..."

who require legal services in civil matters involving housing-related matters, domestic abuse and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child...." [3]

While other states have recognized through legislative enactment or judicial decision a right to counsel in limited circumstances – primarily involving termination of parental custody – and other pilot projects directed at specific basic needs, such as loss of housing, have been developed largely with private funding in New York City and Massachusetts, by and large the urgent need of low-income individuals for representation of counsel when their rights to health, safety, shelter and sustenance are threatened in adversarial proceedings, remains unmet. Indeed, the 2009 update by Legal Services Corporation of its 2005 Report, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, confirms that "there continues to be a major gap between the civil legal needs of low-income people and the legal help that they receive."

The 2009 update from LSC noted:

> *New data indicate that state courts, especially those courts that deal with issues affecting low income people, in particular lower state courts and such specialized courts as housing and family courts, are facing significantly increased numbers of unrepresented litigants. Studies show that the vast majority of people who appear without representation are unable to afford an attorney, and a large percentage of them are low-income people who qualify for legal aid. A growing body of research indicates that outcomes for unrepresented litigants are often less favorable than those for represented litigants.*

(Italics added). Not surprisingly, as the worst recession in decades continues to grip the nation, millions of individuals who can least afford it have lost their principal source of income -- their employment. The impact is being felt in state courts as more and more individuals without means of support or the ability to afford a lawyer appear without counsel, or *pro se*, for proceedings involving essential needs such as protection of shelter, protection from physical abuse, access to health care benefits, and deprivation of critical financial benefits.

The problems for state courts caused by the recession are exacerbated in at least two more ways. First, many state and local governments are facing severe revenue shortfalls. In some instances, those states are seeking to meet their budget challenges in part by reducing funding to the very courts now faced with a dramatic increase in self-represented litigants seeking to avoid loss of shelter as well as means of sustenance and safety. Second, the recession also has severely

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[3] Certain sections of the proposed ABA Model Access Act are based on provisions of the *California State Basic Access Act*, which itself sought to implement the "right to counsel and many of the policy choices reflected in the resolution passed by the ABA House of Delegates in August, 2006," as well as on provisions of the *Sargent Shriver Civil Counsel Act*.

impacted the availability of IOLTA funds, a critical source of revenue for many legal services programs, due to the sharp decline in short-term interest rates paid on deposits in those accounts.

Even prior to the recession, based on *pro se* statistics from state courts, a September 2006 memorandum of the National Center for State Courts reported that:

> *Courts are continuing to see an increase in the numbers of litigants who represent themselves. Self-represented litigants are most likely to appear without counsel in domestic-relations matters, such as divorce, custody and child support, small claims, landlord/tenant, probate, protective orders, and other civil matters. While national statistics on the numbers of self-represented litigants are not available, several states and many jurisdictions keep track of the numbers of self-represented litigants in their courts.*[4]

(Italics added). Among the pre-recession state court statistics set forth in the 2006 NCSC memorandum were these:

- In Utah, a 2006 report found that in divorce cases, 49 percent of petitioners and 81 percent of respondents were self represented. Eighty percent of self-represented people coming to the district court clerk's office seek additional help before coming to the courthouse.

- A January 2004 report in New Hampshire found that, in the district court, one party is *pro se* in 85 percent of all civil cases and 97 percent of domestic abuse cases. In the superior court, one party is *pro se* in 48 percent of all civil cases and almost 70 percent in domestic relations cases.

- In California, a 2004 report found more than 4.3 million court users are self-represented. In family law cases, 67 percent of petitioners are self-represented at the time of filing and 80 percent are self-represented at disposition for dissolution cases. In unlawful detainer cases, 34 percent of petitioners are self-represented at filing and 90 percent of defendants are self-represented.

The ABA, working together with Legal Services Corporation, State Bar Associations and other interested groups, has achieved some success in seeking increased Congressional funding to LSC. The increase in Congressional appropriations to LSC, however, remains far below the amount requested by the LSC Board to meet the need that existed even before the recession, let alone the greater level of need that exists today. The ABA Governmental Affairs Office reports that:

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[4] Madelynn Herman, Self Representation Pro Se Statistics Memorandum, September 25, 2006, http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm#other.

> For FY 2009, Congress provided a much-needed $40 million increase, raising LSC's funding level to $390 million. Yet, this is still significantly less than the amount appropriated in FY 1995, which would be about $578 million adjusted for inflation, and even further below the inflation-adjusted amount appropriated in FY 1981--$749 million. The President is requesting another $45 million increase, to $435 million; the bipartisan LSC Board recommends $485.1 million for FY 2010 in its attempt to close the justice gap over the next several years.[5]

When combined with the substantial reduction in IOLTA funds available to many legal services programs, financial resources available to existing legal services programs remain woefully short of the levels needed to adequately serve the unmet need of low-income individuals. Indeed, the LSC 2009 update reports that, "*Data collected in the spring of 2009 show that for every client served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources.*" Moreover, the referenced data only address individuals who seek assistance at LSC-funded entities. The update concludes, as did the original 2005 report, that "*state legal needs studies conducted from 2000 to 2009 generally indicate that less than one in five low-income persons get the legal assistance they need.*" (Italics added).

The Model Access Act is Needed to Provide a Mechanism for State and Territorial Governments to Address the Need for Civil Representation.

With this Recommendation, the ABA again will help to move the nation forward in meeting its commitment to the ideal of equal justice under law by providing a model act that implementing jurisdictions may use as a starting point to turn commitment into action. The Model Act complements the ABA's support of existing LSC-funded and other local legal aid programs by establishing a statutory right to counsel in those basic areas of human need identified in the 2006 Resolution and by providing a mechanism for implementing that right, with Commentary that acknowledges and identifies alternatives to meet local needs by jurisdictions considering implementation of the Model Act.

By providing a Model Access Act, the ABA will assist interested legislators with the means to introduce the concept and begin discussions within their jurisdictions that will lead to implementation of a statutory right to counsel. Although budget concerns might limit the ability of some jurisdictions to implement the Model Access Act, some states may choose to implement a pilot project to provide counsel and develop additional data on a limited range of cases, such as evictions or child custody proceedings as set forth in the proposed Model Access Act.

The Working Group has solicited comment from the legal services community and others throughout the nation. Many individuals and groups generously responded with suggestions and comments, all of which have been carefully considered by the Working Group, and many of which have been adopted in whole or in part in the proposed Model Access Act. The Working

[5] http://www.abanet.org/poladv/priorities/legal_services/2009apr14_lsconepager.pdf

Group benefitted as well from thoughtful comments by four individual members of the legal services community who counsel against adoption of the proposed Model Access Act out of genuine concern that it may be premature, and who suggest that further analysis and data are needed that can best be developed on a state-by-state basis rather than through a uniform national approach. After careful consideration of these comments, the Working Group concluded that (i) in light of existing data that demonstrate an extraordinary and growing number of low-income persons who today face civil adversary proceedings on matters of basic human need, and (ii) because the proposed Model Access Act, together with the Commentary thereto, explicitly contemplates and accommodates modification of its provisions to meet the local needs and circumstances of implementing jurisdictions, it is critical to move forward at this time. Indeed, adoption of the proposed Model Access Act may well spur the discussion, experimentation and data gathering on a state-by-state basis needed to effectively address the vast unmet need in this country.

Overview of The Model Access Act.

The Model Act is structured in five sections. *Section 1* sets forth legislative findings, *Section 2* provides definitions, *Section 3* defines the scope of the right to public legal services, *Section 4* establishes a State Access Board as the entity that will administer the program and *Section 5* creates a State Access Fund to provide funding mechanism while leaving to local officials the decision on the source of funding.

The legislative findings recognize in *Section 1.A* the "substantial, and increasingly dire, need for legal services...." *Section 1.C* makes the essential finding that, "*Fair and equal access to justice is a fundamental right in a democratic society. It is especially critical when an individual who is unable to afford legal representation is at risk of being deprived of certain basic human needs....*" (Italics added). Moreover, as the preliminary results of a survey of state court judges undertaken by the ABA Coalition for Justice plainly demonstrates, providing a right to counsel to low-income persons "will result in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants, will produce fairer outcomes, and will promote public confidence in the systems of justice." *Section 1.F.*

Importantly, *Section 1.G* makes it clear that funding provided under the Model Act "*shall not reduce either the amount or sources of funding for existing civil legal services programs below the level of funding in existence on the date that this Act is enacted*," and that "*[t]his Act shall not supersede the local or national priorities of legal services programs in existence on the date that this Act is enacted.*"

The definitions set forth in Section 2 explain, among other things, the scope of the "Basic human needs" for which the Act is intended to provide a right to counsel. These include the five areas identified in 2006 Report 112A: shelter, sustenance, safety, health, and child custody. Definitions are provided for each of those five categories of need and, as it does throughout the Act, the Commentary following Section 2 recognizes that, "*Adopting jurisdictions may wish to*

make modifications, based on the unique circumstances applicable in their communities," to the list of needs. Also of note is the definition of "Limited scope representation," may be provided "*only to the extent permitted by Rule 1.2(c) of the ABA Model Rules of Professional Conduct or the jurisdiction's equivalent, and when such limited representation is sufficient to afford the applicant fair and equal access to justice consistent with criteria set forth in Section 3 hereof.*" (Italics added).

Section 3 defines the scope of the right to public legal services and requires the applicant to meet both financial eligibility and minimal merits requirements. The financial eligibility requirement suggested in *Section 3.D* is 125 percent of the federal poverty level. However, the Commentary at the end of *Section 3* notes that implementing jurisdictions may set the standard to target a larger percentage of the population unable to afford legal services and also use a formula that "takes into account other factors relevant to the financial ability of the applicant to pay for legal services." Those factors may include the applicant's assets as well as medical or other extraordinary ongoing expenditures for basic needs.

The merits requirement represents an initial determination, to be made by the State Access Board, that plaintiffs or petitioners have "a reasonable possibility of achieving a successful outcome." Defendants or respondents must be found to have a "non-frivolous defense." A favorable initial merits determination is subject to further review once counsel is appointed and makes a thorough investigation of the claim or defense. However, where a judge, hearing officer or arbitrator initiates a request to the State Access Board that counsel be provided under the Model Act, the Board determines the financial eligibility of the applicant and whether the subject matter of the case involves a basic human need as defined therein, but there no further merits analysis is undertaken by the Board. It is assumed in such cases that the referring judge, hearing officer or arbitrator has made such a determination.

As for the availability of "limited scope representation," *Section 3.B.iv* spells out that such limited services may be provided where it "is required because self-help assistance alone would prove inadequate or is not available and where such limited scope representation is sufficient in itself or in combination with self-help assistance to provide the applicant with effective access to justice in the particular case in the specific forum." However, if the forum is one in which representation can only be provided by licensed legal professionals, limited scope representation is only permitted under the circumstances set forth in *Section 3.B.iii.*

Section 4 provides the mechanism for administration of the Model Act. It creates a State Access Board within the state judicial system, while again recognizing in the Commentary following *Section 4* that a different model may be appropriate based on local needs and resources. The Board's duties are set forth in *Section 4.E*, and include ensuring eligibility of applicants, establishing, certifying and retaining specific organizations to make eligibility determinations and scope of service determinations, and establishing a system for appeals of determinations of ineligibility. As detailed in the Commentary, the emphasis in providing such services is "on effective, cost-efficient services," which means the Board may contract with local non-profit

legal aid organizations, with private attorneys, or both. The determination will depend on local circumstances and will take into account limitations on the ability of local legal aid organizations to provide services either due to an ethical conflict, legal prohibitions, lack of sufficient salaried attorneys, or where it lacks particular expertise or experience.

Section 5 creates a funding mechanism, the State Access Fund, but in recognition of the very different and often challenging circumstances faced in many different areas of the nation, leaves entirely to implementing jurisdictions the responsibility to identify funding sources. The Commentary following *Section 5* cautions that while implementing jurisdictions may look to any available source of revenues, it "*should take care to maintain current financial support to existing legal aid providers.*" (Italics added).

Conclusion

We return to the eloquence of the Report submitted in support of Recommendation 112A in 2006, which continues to have great relevance today in light of the economic crisis that has left even more individuals with personal crises involving basic human needs, but without the resources to retain counsel or a source of publicly-funded counsel:

> In a speech at the 1941 meeting of the American Bar Association, U.S. Supreme Court Justice Wiley Rutledge observed:
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> > "Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion."
>
> If Justice Rutledge's self-evident statement required proof, the past 130 years of legal aid history have demonstrated its truth. Not only has equality before the law remained merely a matter of charity in the United States, but that charity has proved woefully inadequate. The lesson from the past 130 years is that justice for the poor as a matter of charity or discretion has not delivered on the promises of "justice for all" and "equal justice under law" that form the foundation of America's social contract with all its citizens, whether rich, poor, or something in between. The Task Force and other proponents of this resolution are convinced it is time for this nation to guarantee its low income people equality before the law as a matter of right, including the legal resources required for such equality, beginning with those cases where basic human needs are at stake. We are likewise convinced this will not happen unless the bench and bar take a leadership role in educating the general public and policymakers about the critical importance of this step and the impossibility of delivering justice rather than injustice in many cases unless both sides, not just those who can afford it, are represented by lawyers.

The members of the ABA Working Group on Civil Right to Counsel and the co-sponsors of this Recommendation and Report strongly urge the adoption of the proposed ABA Model Access Act in order to implement the ABA's unanimously-adopted 2006 policy and help to turn the legal profession's commitment to civil right to counsel into reality.

As it has done on countless occasions during the past 132 years, the ABA must again provide leadership at a time when its members and the people they care about in communities throughout the nation need an effective and meaningful method for providing legal representation to low-income persons in order to secure rights that are basic to human existence.

Respectfully submitted,

Lorna G. Schofield, Chair
Section of Litigation[6]

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[6] **Members of the ABA Working Group on Civil Right to Counsel (ABA Entities are indicated for identification purposes only):**

Michael S. Greco, Chair (Past President of the American Bar Association)
Terry Brooks (Counsel, Standing Committee on Legal Aid and Indigent Defendants)
Peter H. Carson (Section of Business Law)
Shubhangi Deoras (Consultant, Standing Committee on Legal Aid and Indigent Defendants)
Margaret Bell Drew (Commission on Domestic Violence)
Justice Earl Johnson, Jr. (Ret.) (Standing Committee on Legal Aid and Indigent Defendants)
Wiley E. Mayne, Jr. (Section of Litigation)
Neil G. McBride (Standing Committee on Legal Aid and Indigent Defendants)
JoNel Newman (Commission on Immigration)
Robert L. Rothman (Section of Litigation)
Judge Edward Schoenbaum (Judicial Division; Coalition for Justice)
Robert E. Stein (Standing Committee on Legal Aid and Indigent Defendants)
Michelle Tilton (Section of Tort Trial and Insurance Practice)
Robert A. Weeks (Standing Committee on Legal Aid and Indigent Defendants)
Lisa C. Wood (Section of Litigation)

104 (Revised)

ABA Model Access Act

SECTION 1. LEGISLATIVE FINDINGS

The Legislature finds and declares as follows:

A. There is a substantial, and increasingly dire, need for civil legal services for the poor in this State. Due to insufficient funding from all sources, existing program resources for providing free legal services in civil matters to indigent persons cannot meet the existing need.

B. A recent report from Legal Services Corporation, *Documenting the Justice Gap in America*, concludes that "only a fraction of the legal problems experienced by low-income individuals is addressed with the help of an attorney." It also concludes that, "Nationally, on average, only one legal aid attorney is available to serve 6,415 low-income individuals. In comparison, there is one private attorney providing personal legal services for every 429 individuals in the general population." The report further notes that the number of unrepresented litigants is increasing, particularly in family and housing courts.

C. Fair and equal access to justice is a fundamental right in a democratic society. It is especially critical when an individual who is unable to afford legal representation is at risk of being deprived of certain basic human needs, as defined in Section 2.B. Therefore, meaningful access to justice must be available to all persons, including those of limited means, when such basic needs are at stake.

D. The legal system [of this state] is an adversarial system of justice that inevitably allocates to the parties the primary responsibility for discovering the relevant evidence, identifying the relevant legal principles, and presenting the evidence and the law to a neutral decision-maker, judge or jury. Discharging these responsibilities generally requires the knowledge and skills of a licensed legal professional.

E. Many of those living in this State cannot afford to pay for the services of lawyers when needed for those residents to enjoy fair and equal access to justice. In order for them to enjoy this essential right of citizens when their basic human needs are at stake, the State government accepts its responsibility to provide them with lawyers at public expense.

F. Providing legal representation to low-income persons at public expense will result in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants, will produce fairer outcomes, and will promote public confidence in the systems of justice.

G. Funding provided pursuant to this Act shall not reduce either the amount or sources of funding for existing civil legal services programs below the level of funding in existence on the date that this Act is enacted. This Act shall not supersede the local or national priorities of legal services programs in existence on the date that this Act is enacted.

Commentary: States in which legal needs studies or analyses have been conducted may consider either adding appropriate language in Section 1.B regarding such studies or replacing the current language referring to the recent federal Legal Services Corporation Report with a reference to state-specific studies or analyses.

SECTION 2. DEFINITIONS.

In this Act:

A. "Adversarial proceedings" are proceedings presided over by a neutral fact-finder in which the adversaries may be represented by a licensed legal professional, as defined herein, and in which rules of evidence or other procedural rules apply to an established formal legal framework for the consideration of facts and application of legal rules to produce an outcome that creates, imposes, or otherwise ascribes legally enforceable rights and obligations as between the parties.

B. "Basic human needs" means shelter, sustenance, safety, health, and child custody.

i. "Shelter" means a person's or family's access to or ability to remain in a dwelling, and the habitability of that dwelling.

ii. "Sustenance" means a person's or family's ability to preserve and maintain assets, income or financial support, whether derived from employment, court-ordered payments based on support obligations, government assistance including monetary payments or "in kind" benefits (*e.g.*, food stamps) or from other sources.

iii. "Safety" means a person's ability to obtain legal remedies affording protection from the threat of serious bodily injury or harm, including proceedings to obtain or enforce protection orders because of alleged actual or threatened violence, and other proceedings to address threats to physical well being.

iv. "Health" means access to health care for treatment of significant health problems, whether the health care at issue would be financed by government programs (*e.g.*, Medicare, Medicaid, VA, etc.), financed through private insurance, provided as an employee benefit, or otherwise.

v. "Child custody" means proceedings in which: (i) the parental rights of a party are at risk of being terminated, whether in a private action or as a result of proceedings

initiated or intervened in by the state for the purposes of child protective intervention, (ii) a parent's right to residential custody of a child or the parent's visitation rights are at risk of being terminated, severely limited, or subject to a supervision requirement, or (iii) a party seeks sole legal authority to make major decisions affecting the child. This definition includes the right to representation for children only in proceedings initiated or intervened in by the state for the purposes of child protective intervention.

C. "Full legal representation" is the performance by a licensed legal professional of all legal services that may be involved in representing a party in a court, an administrative proceeding, or in an arbitration hearing, in which by law or uniform practice parties may not be represented by anyone other than licensed members of the legal profession.

D. "Licensed legal professional" is a member of the State Bar or other entity authorized by the State to license lawyers, a law student participating in a State authorized, attorney-supervised clinical program through an accredited law school, or a member of the Bar of another jurisdiction who is legally permitted to appear and represent the specific client in the particular proceeding in the court or other forum in which the matter is pending.

E. "Limited scope representation" is the performance by a licensed legal professional of one or more of the tasks involved in a party's dispute before a court, an administrative proceeding, or an arbitration body, only to the extent permitted by Rule 1.2(c) of the ABA Model Rules of Professional Conduct or the jurisdiction's equivalent, and when such limited representation is sufficient to afford the applicant fair and equal access to justice consistent with criteria set forth in Section 3 hereof. Depending on circumstances, this form of assistance may or may not be coupled with self-help assistance.

F. "Public legal services" includes full legal representation or limited scope representation, through any delivery system authorized under this Act, and funded by the State Access Fund provided in Section 5 hereof.

G. The "State Access Board" (the "Board") is established as a statewide body, independent of the judiciary, the attorney general, and other agencies of state government, responsible for administering the public legal services program defined by and funded pursuant to this Act.

Commentary:

Adopting jurisdictions may wish to make modifications, based on the unique circumstances applicable in their communities, to the list of "basic human needs" set forth in this section. The list set forth in this section is considered the most basic of needs that a civil right to counsel should address; some jurisdictions may wish to expand the list as appropriate to their situation. For example, some jurisdictions may wish to consider expanding the definition of "child

custody" to encompass proceedings involving the establishment of paternity and/or the complete denial of visitation rights.

In proceedings in which a parent who meets the eligibility requirements set forth herein is threatened with loss of child custody as defined in Section 2.B.v, representation should be provided by the State as set forth in the Act. Recognizing that needs, priorities and resources may differ from jurisdiction to jurisdiction, implementing jurisdictions may wish to consider some or all of the following factors: (i) the number of private child custody disputes likely to meet these standards, (ii) the impact of providing legal services in private child custody cases on the ability of the state to serve other basic needs as set forth herein; (iii) the relative impact on the state courts of a lack of representation in private child custody cases as compared to other basic needs cases; and (iv) the availability of alternative financial resources to pay for representation for the applicant, such as cases in which the parent seeking to terminate or to severely limit the other parent's child custody rights has the ability to pay for the applicant's representation. Additionally, implementing jurisdictions are referred to the ABA Standards on the Representation of Children in Child Custody Cases (2003) for suggested criteria to decide when counsel should be appointed for children in custody cases. All children subject to proceedings in which the state is involved due to allegations of child abuse or neglect should have legal representation as long as jurisdiction continues.

In light of the extraordinary level of unmet need, and the limited resources likely to be available to support additional positions for state-funded legal services or other sources of legal representation for the poor, to the extent the jurisdiction permits their use, jurisdictions may consider authorizing paralegals, or other lay individuals who have completed appropriate training programs, to provide certain types of limited, carefully-defined legal services in administrative proceedings to persons qualifying under this Act for representation. If permitted, such services should always be provided under the direct supervision of a licensed lawyer. Moreover, limited scope representation should not be considered a substitute for full legal representation when full legal representation is necessary to provide the litigant fair and equal access to justice, but rather should be employed only when consistent with Section 3 below, and when limited scope representation is determined to be sufficient to meet that high standard.

SECTION 3. RIGHT TO PUBLIC LEGAL SERVICES.

A. Subject to the exceptions and conditions set forth below, public legal services shall be available at State expense, upon application by a financially-eligible person, in any adversarial proceeding in a state trial or appellate court, a state administrative proceeding, or an arbitration hearing, in which basic human needs as defined in Section 2.B hereof are at stake. Depending on the circumstances described in the following Sections, appropriate public legal services may include full legal representation or limited scope representation as necessary for the person to obtain fair and equal access to justice for the particular dispute or problem that person confronts, including, where necessary, translation or other incidental services essential to achieving this goal.

B. In a State trial or appellate court, administrative tribunal, or arbitration proceeding, where by law or established practice parties may be represented only by a licensed legal professional, public legal services shall consist of full legal representation as defined herein, provided pursuant to the following conditions and with the following exceptions:

i. Full public legal representation services shall be available to a plaintiff or petitioner if a basic human need as defined herein is at stake and that person has a reasonable possibility of achieving a successful outcome. Full public legal representation services shall be available to a financially eligible defendant or respondent if a basic human need as defined herein is at stake, so long as the applicant has a non-frivolous defense. Initial determinations of eligibility for services may be based on facial review of the application for assistance or the pleadings. However, the applicant shall be informed that any initial finding of eligibility is subject to a further review after a full investigation of the case has been completed. In family matters, the person seeking a change in either the de facto or de jure status quo shall be deemed the plaintiff and the person defending the status quo shall be deemed the defendant for purposes of this Act, regardless of their formal procedural status. However, any order awarding temporary custody pending resolution on the merits shall not alter which party is deemed to be the plaintiff and defendant in the case. Furthermore, in any case originally initiated by the state, the persons against whom the state moved shall be considered the defendants for all stages of the proceedings.

ii. Eligibility for full public legal representation services in State appellate courts is a new and different determination after the proceedings in a trial court or other forum conclude. If the financially eligible applicant is an appellant or equivalent, full legal representation services shall be available when there is a reasonable probability of success on appeal under existing law or when there is a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law. If the financially eligible applicant is a respondent or equivalent, however, full legal representation services shall be available unless there is no reasonable possibility the appellate court will affirm the decision of the trial court or other forum that the opposing party is challenging in the appellate court. In determining the likely outcome of the case, the Board shall take into account whether the record was developed without the benefit of counsel for the applicant.

iii. Irrespective of the provisions of Sections 3.B.i and 3B.ii above, full public legal representation services shall not be available to an applicant in the following circumstances:

a. in proceedings in any forum where parties are not allowed to be represented by licensed legal professionals (however, this does not preclude

a financially-eligible person from receiving full legal representation if the opposing party in such a forum appeals a decision of that forum that was favorable to the applicant to a forum where licensed legal professionals are permitted to provide representation, and that opposing party is represented by a licensed legal professional in that appeal);

b. if legal representation is otherwise being provided to the applicant in the particular case, such as through existing civil legal aid programs, the services of a lawyer who provides such representation on a contingent fee basis, as the result of the provisions of an insurance policy, as part of a class action that will reasonably serve the legal interests of the applicant and that he or she is able to join, or if the applicant's interests are being protected by counsel in some other way;

c. if the matter is not contested, unless the Board determines the interests of justice require the assistance of counsel;

d. if under standards established by the Board, and under the circumstances of the particular matter, the Board deems a certain type and level of limited scope representation is sufficient to afford fair and equal access to justice and is sufficient to ensure that the basic human needs at stake in the proceeding are not jeopardized due to the absence of full representation by counsel (however, limited scope representation shall be presumed to be insufficient when the opposing party has full representation);

e. for matters in designated courts or other forums when the Board evaluates and certifies, after public hearings and in compliance with the State's [statutory code governing administrative procedures], that:

1. the designated court or forum: (1) operates in such a manner that the judge or other dispute resolver plays an active role in identifying the applicable legal principles and in developing the relevant facts rather than depending primarily on the parties to perform these essential functions; (2) follows relaxed rules of evidence; and (3) follows procedural rules and adjudicates legal issues so simple that non-lawyers can represent themselves before the court or other forum and still enjoy fair and equal access to justice; and

2. within such designated court or forum, the specific matter satisfies the following criteria: (1) the opposing party is not represented by a licensed legal professional; (2) the particular applicant possesses

the intelligence, knowledge, language skills (or appropriate language assistance), and other attributes ordinarily required to represent oneself and still enjoy fair and equal access to justice; and (3) if self-help assistance is needed by this party to enjoy fair and equal access to justice, such self-help assistance is made available.

iv. Limited scope representation as defined herein shall be available to financially eligible individuals where the limited service provided is required because self-help assistance alone would prove inadequate or is not available and where such limited scope representation is sufficient in itself or in combination with self-help assistance to provide the applicant with effective access to justice in the particular case in the specific forum. In matters before those courts or other forums in which representation can be provided only by licensed legal professionals, however, limited scope representation can only be substituted for full representation when permitted by Section 3.B.iii above.

C. In addition, any state trial or appellate court judge, any state administrative judge or hearing officer, or any arbitrator may notify the Board in writing that, in his or her opinion, public legal representation is necessary to ensure a fair hearing to an unrepresented litigant in a case believed to involve a basic human need as defined in Section 2.B. Upon receiving such notice, the Board shall timely determine both the financial eligibility of the litigant and whether the subject matter of the case indeed involves a basic human need. If those two criteria are satisfied, the Board shall provide counsel as required by this Act.

D. In order to ensure that the scarce funds available for the program are used to serve the most critical cases and the parties least able to access the courts without representation, eligibility for representation shall be limited to clients who are unable to afford adequate legal assistance as defined by the Board, including those whose household income falls at or below [125 percent] of the federal poverty level.

E. Nothing in this Act should be read to abrogate any statutory or constitutional rights in this state that are at least as protective as the rights provided under this Act.

Commentary: With regard to Section 3.B.ii, in determining whether there is "a reasonable probability of success on appeal" for appellants or equivalents, or "no reasonable possibility the appellate court will affirm the decision of the trial court or other forum" for respondents or equivalents, the Board or its designee shall give consideration to existing law or the existence of a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law.

In Section 3.C, the Model Act does not authorize the Board to apply a merits test or any other limitation, other than financial and subject matter eligibility, upon receipt of notice from a trial judge (or other type of fact-finder named therein) that an unrepresented litigant requires public legal representation. The rationale for this distinction is that, while it may be appropriate for the Board to review criteria relating to areas requiring detailed knowledge of the Model Act and any regulations that may have been promulgated (e.g., financial and subject matter eligibility), it is unseemly for the Board to second-guess the judge on the issue of whether a litigant's position has sufficient merit.

The 125 percent income cap in Section 3.D suggests the minimum economic strata the Model Act seeks to target. Implementing jurisdictions may consider alternative financial eligibility standards that target a larger percentage of the population unable to afford legal services in cases of basic needs, such as 150 percent of the federal poverty level, or a formula that also takes into account other factors relevant to the financial ability of the applicant to pay for legal services. For example, the determination of a particular applicant's financial eligibility ordinarily should take account of the applicant's assets and medical or other extraordinary ongoing expenditures for basic needs. Some of those factors, such as substantial net assets, might make a person ineligible despite a current income that is below 125 percent of the federal poverty level. Other factors might justify providing a person with legal services as a matter of right, even though gross income exceeds 125 percent of the federal poverty level.

The Model Act assumes that services will be provided only in the context of adversarial proceedings. Many legal matters impacting the poor may be resolved without adversarial proceedings (e.g. transactional matters, issues relating to applications for benefits), and advice of counsel may be important to a fair resolution of such matters. While this Model Act does not address services in non-adversarial settings, adopting jurisdictions may wish to consider whether services in such settings would provide a useful preventive approach and might conserve resources that otherwise would need to be expended in the course of supporting adversarial proceedings. If so, such an adopting jurisdiction may wish to adjust the Model Act to provide some services outside of adversarial settings.

SECTION 4. STATE ACCESS BOARD.

A. There is established within the State judicial system an independent State Access Board ("Board") that shall have responsibility for policy-making and overall administration of the program defined in this Act, consistent with the provisions of this Act.

B. The Board shall consist of ____ [an odd number of] members appointed by [such representatives of the different branches of government and/or bar associations to be set forth herein]. A majority of the members shall be persons licensed to practice law in the jurisdiction. The members should reflect the broadest possible diversity, taking into account the eligible client population, the lawyer population, and the population of the state generally.

Board members shall be compensated at the rate of [$___ a day] for their preparation and attendance at Board meetings and Board committee meetings, and shall be reimbursed for all reasonable expenses incurred attendant to discharging their responsibilities as Board members.

C. The Board shall select an Executive Director who shall serve at the pleasure of the Board, and who shall be responsible for implementing the policies and procedures determined by the Board, including recommendations as to staff and salaries, except for his or her own salary, which shall be determined by the Board.

D. The Board is empowered to promulgate regulations and policies consistent with the provisions of the Act and in accordance with the State's [statutory code governing administrative procedures].

E. The Board shall:

i. Ensure that all eligible persons receive appropriate public legal services when needed in matters in which basic human needs as defined in Section 2.B hereof are at stake. It is the purpose and intent of this Section that the Board manage these services in a manner that is effective and cost-efficient, and that ensures recipients fair and equal access to justice.

ii. Establish, certify, and retain specific organizations to make eligibility determinations (including both financial eligibility and the applicable standard defined in Section 3.B hereof) and scope of service determinations pursuant to Section 3 hereof.

iii. Establish and administer a system that timely considers and decides appeals by applicants found ineligible for legal representation at public expense, or from decisions to provide only limited scope representation.

iv. Administer the State Access Fund established and defined in Section 5, which provides the funding for all public legal service representation needs required by this Act.

v. Inform the general public, especially population groups and geographic areas with large numbers of financially eligible persons, about their legal rights and responsibilities, and the availability of public legal representation, should they experience a problem involving a basic human need.

vi. Establish and administer a system of evaluation of the quality of representation delivered by the institutional providers and private attorneys receiving funding for representation through the State Access Fund.

vii. If reliable, relevant data is not otherwise available, conduct, or contract with others to conduct, studies which assess, among other things, the need and demand for public legal services, the sufficiency of different levels of public legal services to provide fair and equal access to justice in various circumstances, the effectiveness of those services in positively impacting people's lives and legal situations, the quality and cost-effectiveness of different providers of public legal services, and other relevant issues.

viii. Prepare and submit an annual report to the Governor, the Legislature, and the Judiciary on the extent of its activities, including any data utilized or generated relating to its duties and both quantitative and qualitative data about the costs, quantity, quality, and other relevant performance measures regarding public legal services provided during the year. The Board also may make recommendations for changes in the Model Access Act and other State statutes, court rules, or other policies that would improve the quality or reduce the cost of public legal services under the Model Access Act.

Commentary: While the size and composition of the Board are matters to be determined based on local circumstances and need, it is suggested that an appropriate number of members to consider is seven, with appointments being made by the Governor, the Chief Justice of the state Supreme Court, and either a representative of the state Legislature or President of a state or metropolitan bar association. Appointments should be allocated to ensure that a majority of members are lawyers. For example, on a seven-person board, the Governor, Chief Justice, Legislative representative and Bar President could each appoint one lawyer and the government representatives could have a second appointment that could be a non-lawyer. It is suggested that terms be for three years, with one renewal possible, and that terms be staggered.

Broad diversity on the Board is of critical importance, particularly in light of the eligible client population. Other diversity factors may be taken into account as well. For example, it may make sense in a particular state to have business and civic leaders on the Board as well as persons representing the eligible population or others.

Also, as an alternative to creating an independent administrative body within the judicial system, a State may consider providing for administration of the program by an entirely independent entity, by the state bar association, the state court system, or the executive branch. Notably, most nations with advanced legal aid programs - including the United States - have chosen to establish some form of independent or semi-independent body to administer their public legal aid systems. Smaller states, however, may find it too cumbersome or expensive to set up a free-standing independent body to administer their public legal aid system.

The emphasis in Section 4.E.i is on effective, cost-efficient services that provide the applicant with fair and equal access to justice. How that is accomplished may vary from state to state depending on the resources available in the community. Thus, the Board may choose to contract with local non-profit legal aid organizations or with private attorneys, or both, as it deems appropriate, to provide the services authorized under the Model Access Act. If the Board chooses to contract with a local non-profit legal aid organization, it nonetheless may choose to contract as well with private attorneys under circumstances it deems appropriate, such as when non-profit legal aid organizations are unable to provide representation to an eligible client because of an ethical conflict, legal prohibition or because there are not enough salaried attorneys properly to represent the number of clients requiring representation in a given court or geographic area at the time representation is required, or in cases when, because of special expertise or experience, or other exceptional factors, a private attorney can provide representation that better serves the goals of effectiveness, cost-efficiency, and fair and equal access to justice.

Assuming it is lawful to do so under the law of the enacting State, Section 4.E.ii may include authority for the Board to delegate eligibility and scope of public legal services determinations to local legal aid organizations, such as legal services organizations funded by the federal Legal Services Corporation, those funded under the State IOLTA program, and any self-help centers the State court system certifies as qualified, all of which would automatically be considered certified to perform these functions. In assessing eligibility, the organization making the determination should be authorized to evaluate both the applicant's financial eligibility and whether the applicable standard defined in Section 3.B is satisfied.

SECTION 5. STATE ACCESS FUND.

A. The State Access Fund supplies all the financial support needed for the services guaranteed by the provisions of this Act as well as the costs of administering the program established under this Act.

B. In conjunction with preparation of the state judicial budget, the Board shall submit an estimate of anticipated costs and revenues for the forthcoming fiscal year and a request for an appropriation adequate to provide sufficient revenues to match the estimated costs. Annually thereafter, the Board shall provide the Governor, the Legislature, and the Judiciary with a status report of revenues and expenditures during the prior year. Within three months after the end of the state's fiscal year the Board shall submit to the Governor, the Legislature, and the Judiciary a request for the funds required from general revenues to make up the difference, if any, between revenues received and appropriated pursuant to the initial budget estimate and the obligations incurred in order to support the right defined in this law.

Commentary: Because of varying financial conditions in implementing jurisdictions, no attempt is made in this Section to identify possible revenue sources. Implementing jurisdictions

may consider using any available source of revenues, but shall ensure that current financial support to existing legal aid providers is not reduced, as set forth in Section 1 G. of this Model Access Act.

APPENDIX C

105 (Revised)

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
SECTION OF LITIGATION
COMMISSION ON IMMIGRATION
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
COMMISSION ON HOMELESSNESS AND POVERTY
COALITION FOR JUSTICE
JUDICIAL DIVISION
SENIOR LAWYERS DIVISION
SECTION OF TORT TRIAL AND INSURANCE PRACTICE
STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS
COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS
PHILADELPHIA BAR ASSOCIATION
SANTA CLARA COUNTY BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION
NEW YORK COUNTY LAWYERS ASSOCIATION
KING COUNTY BAR ASSOCIATION
MASSACHUSETTS BAR ASSOCIATION
PENNSYLVANIA BAR ASSOCIATION
STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE
COMMISSION ON DOMESTIC VIOLENCE
ATLANTA BAR ASSOCIATION
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
BAR ASSOCIATION OF SAN FRANCISCO
WASHINGTON STATE BAR ASSOCIATION
LOS ANGELES COUNTY BAR ASSOCIATION
SECTION OF FAMILY LAW
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF BUSINESS LAW
SECTION OF ADMINISTRATIVE LAW
YOUNG LAWYERS DIVISION
COMMISSION ON YOUTH AT RISK

REPORT TO THE HOUSE OF DELEGATES

Recommendation

RESOLVED, That the American Bar Association adopts the black letter and commentary **ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings**, dated August 2010.

105 (Revised)

REPORT

Introduction: The ABA's Policy on Civil Right to Counsel

In August 2006, the House of Delegates of the American Bar Association (ABA) took a historic step toward achieving the Association's objective to "[a]ssure meaningful access to justice for all persons" by adopting a resolution urging "federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction."[1] This action marked the first time the ABA officially recognized a governmental obligation to fund and supply effective legal representation to all poor persons involved in the type of high stakes proceedings within the civil justice system that place them at risk of losing their homes, custody of their children, protection from actual or threatened violence, access to basic health care, their sole source of financial support, or other fundamental necessities of life. The ABA resolution came on the heels of a growing consensus, following a decades-long, wide-ranging effort by a dedicated cadre of ABA members and other national advocates, that the time was ripe to bring to light the critical need for a civil right to counsel in this country.

Right to Counsel Efforts and Developments Following the ABA's Action in 2006

In the few short years since the ABA adopted its resolution, there has been significant interest and activity on the part of the courts, legislatures, local policymakers, bar associations, and others to examine civil right to counsel issues and establish a right as well as systems for implementation. Notable examples of such efforts that have occurred across the nation—some of which have achieved a measure of success—are discussed in more detail below:

- *Alaska:* On September 11, 2008, the Alaska Bar Association's Board of Governors adopted a resolution sponsored by the association's Pro Bono Committee that directly tracks the language of the ABA's civil right to counsel resolution adopted in 2006. Specifically, the Alaska resolution "urges the State of Alaska to provide legal counsel as a matter of right to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody." Following the resolution's adoption, the bar association formed an implementation committee to explore and define the method by which the Board of Governors will pursue the goals of the resolution. In addition, the ABA filed an amicus brief in November 2008 in a civil right to counsel case before the Alaska Supreme Court (*Office of Public Advocacy v. Alaska Court System, Randall Guy Gordanier, et al.*). The case involved an appeal by state

[1] *See* American Bar Association, Mission and Goals, Goal IV, Objective 4 (August 2008), available at http://www.abanet.org/about/goals.html; AMERICAN BAR ASSOCIATION, RECOMMENDATION 112A (Aug. 7, 2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

agencies of a lower court ruling requiring appointment of counsel for an indigent parent in a custody matter under both the equal protection and due process clauses of the state constitution. Oral argument in this case took place on May 21, 2009. One week later, in response to a perceived lack of argument in opposition to the civil right to counsel claim, the court issued an order for supplemental briefing from the parties and amici to address whether the case was moot and/or whether the due process claim was properly before the court. In August 2009, the Alaska Supreme Court issued an order dismissing the appeal as moot.

- *California:* In October 2006, the Conference of Delegates of California Bar Associations (now known as the Conference of California Bar Associations) adopted a resolution, endorsed by the state's chief justice, recommending sponsorship of legislation to amend the state constitution by adding the following language providing a right to counsel in certain civil cases: "All people shall have a right to the assistance of counsel in cases before forums in which lawyers are permitted. Those who cannot afford such representation shall be provided counsel when needed to protect their rights to basic human needs, including sustenance, shelter, safety, health, child custody, and other categories the Legislature may identify in subsequent legislation."

  In November 2006, the California Model Statute Task Force of the California Access to Justice Commission (an entity funded by the State Bar of California, with board members appointed by the state bar as well as other governmental and non-governmental entities) distributed a model statute, known as the State Equal Justice Act, implementing a broad "right to equal justice" in civil cases (including the provision of publicly-funded legal services) with very limited exceptions. The task force distributed a second model statute in March 2008, known as the State Basic Access Act, which provided a more narrow right to counsel in certain high-stakes matters involving basic needs such as shelter, sustenance, safety, health, and child custody. Both acts address a variety of issues that states may face while considering the implementation or expansion of a statutory right to counsel in civil cases, including the scope of the right, eligibility criteria, delivery of services, and administration issues. Additionally, the California Access to Justice Commission's Right to Legal Services Committee was involved in designing a pilot program to provide free representation to poor litigants in high-stakes civil cases that ultimately informed the content of Assembly Bill No. 590 (later enacted as the "Sargent Shriver Civil Counsel Act" in 2009).

  In October 2008, the Bar Association of San Francisco held a conference entitled "Bridging the Justice Gap: The Right to a Lawyer" that focused on the state movement to implement mandates and funding for a civil right to counsel. Moreover, reports indicate that both the Bar Association of San Francisco and the Alameda County Bar Association—the two largest bar associations in Northern California—focused a significant amount of their efforts during the 2009-2010 bar year on the right to counsel issue. Further, members of the Bar Association of San Francisco's Justice Gap Committee are exploring various strategies for promoting and establishing a civil right to counsel at the state level and holding focus groups with members of the general public to inform any possible future legislative efforts. The committee will convene a moot court in 2010 focusing on whether there is a right to

counsel in civil cases under the California Constitution. Attorneys from two prominent law firms in the state (Morrison & Foerster and Cooley-Goddard) will be arguing opposing sides of the issue, and some retired Court of Appeals justices will act as judges.

On October 11, 2009, California Governor Arnold Schwarzenegger signed into law Assembly Bill No. 590, the "Sargent Shriver Civil Counsel Act," which provides funding over six years for a pilot program (beginning in July 2011) to evaluate the effectiveness of providing counsel to poor litigants in certain high-stakes civil cases. The pilot program will be funded through a $10 increase in certain post-judgment court fees and is expected to raise $11 million per year. In response to the state's current budget crisis, initial revenue from these fees will be diverted to the court system budget until 2011, after which the revenue will be used to fund the pilot programs. Representation will be provided through a partnership between a court, a lead legal services agency, and other community legal services providers in housing, domestic abuse, conservatorship, guardianship, and elder abuse cases, as well as certain custody cases. The program will be evaluated according to several factors, including data on the allocation by case type of funding and the impact of the program on families and children, and a report is due to the legislature by January 2016. Currently, the Judicial Council is working to establish an implementation committee for the program.

- *Hawaii:* In December 2007, the Hawaii Access to Justice Hui—a group including the Hawaii State Bar Association, Hawaii Justice Foundation, the state judiciary, and various advocacy organizations—issued a report listing ten action steps necessary to increase access to justice in the state by 2010, one of which is the recognition of a right to counsel in civil cases involving basic human needs. Further, the Hawaii Access to Justice Commission, created by state supreme court rule in May 2008 and including three members appointed by the state bar association, established a Committee on the Right to Counsel in Certain Civil Proceedings, which is charged with: (a) studying developments in other jurisdictions regarding the establishment and implementation of a civil right to counsel; (b) recommending the types of civil matters in which counsel should be provided in Hawaii; (c) assessing the extent to which attorneys are available for such matters; and (d) recommending ways to ensure counsel is available in these matters. The committee met in August 2009 to consider next steps, including the possibility of drafting a resolution.

- *Maryland:* In 2008, the Maryland's chief judge appointed the Maryland Access to Justice Commission to develop, coordinate, and implement policy initiatives designed to expand access to the civil justice system. In its first year, the Commission has been gathering information from the public and will issue a report with recommendations at the conclusion of this process. In November 2009, the Commission issued an interim report that, among other things, details its discussion and examination of possible strategies for implementing a civil right to counsel in Maryland. The report includes a recommendation that closely tracks the language of the ABA's 2006 civil right to counsel resolution and states that "[t]he Maryland Access to Justice Commission supports the principle that low-income Marylanders should have a right to counsel at public expense in those categories of adversarial

proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody."

- ***Massachusetts:*** On May 23, 2007, the Massachusetts Bar Association adopted a resolution urging the state "to provide legal counsel as a matter of right at public expense to low income persons in those categories of judicial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as defined in Resolution 112A of the American Bar Association." Further, in October of that year, the bar association joined forces with the Massachusetts Access to Justice Commission to sponsor a "Civil *Gideon*" symposium.

  The Boston Bar Association and the Massachusetts Bar Association created a joint Task Force on the Civil Right to Counsel, which issued an extensive report on September 9, 2008 entitled "Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts." The report proposed establishing pilot programs in the state that would provide counsel in certain civil cases.

  In May 2009, following a recommendation of the joint Task Force on Civil Right to Counsel and with grant funding totaling $300,000, the Boston Bar Foundation and other advocates launched two pilot projects to provide counsel to low-income individuals in certain eviction defense cases in the Quincy District Court and the Northeast Housing Court in Massachusetts. The grants were awarded by the Massachusetts Bar Foundation and other local foundations and fund the provision of legal representation by attorneys from Greater Boston Legal Services and Neighborhood Legal Services in Lynn. The pilot projects will be evaluated by a legal expert/statistician who will conduct a randomized study. In addition, a more informal evaluation will be conducted involving court observation, interviews with litigants and court personnel, file reviews, and comparison of data gathered from the dockets.

- ***Michigan:*** In May 2009, the National Coalition for a Civil Right to Counsel (NCCRC) filed an amicus brief in *In re McBride*, No. 136988 (Mich. 2009), a case before the Michigan Supreme Court involving the denial of counsel to an incarcerated father in hearings that terminated his parental rights. NCCRC is a broad-based association formed in 2004 that includes more than 180 individuals and organizations from over 35 states and is committed to supporting efforts to expand recognition and implementation of a right to counsel for the poor in civil matters. The father appealed the unpublished decision of the Michigan Court of Appeals, in which the court held harmless the error of the lower court in neglecting to appoint counsel for the father under statutory law. NCCRC's brief argued that the parent had a right to counsel under the Michigan Constitution, and that the complete denial of counsel can never be harmless error. In June, the Michigan Supreme Court denied the father's request for review, but the order included a strongly worded dissent agreeing that the father's due process rights had been violated.

- ***Minnesota:*** In 2007, the Minnesota State Bar Association created a Civil Gideon Task Force to explore the feasibility of establishing a civil right to counsel in Minnesota and analyze

how such a right might affect the legal services delivery, public defense, county attorney, and judicial systems in the state. The task force consists of 60 members appointed by the state bar president with broad representation from all parts of the civil and criminal justice system, including judges, public defenders, private attorneys, and legal service providers. Since the goal of the task force involves fact-finding rather than implementation, the task force will consider all sides of the issue, weighing the pros and cons of a "Civil *Gideon.*" Additionally, the task force is considering whether to convene focus groups or hold hearings to gain the client perspective as well as educate the public on what a civil right to counsel might mean for the citizens of Minnesota. Further, the task force produced a white paper describing the scope of right to counsel currently in Minnesota and possible areas for expansion. Finally, the Judges' Committee of the task force sponsored a half-day conference on October 30, 2009 (during National Pro Bono Week) at St. Thomas Law School, at which Walter Mondale gave the keynote speech and Justice Earl Johnson, Jr. also spoke regarding civil right to counsel issues.

- *New Hampshire*: In 2006, the New Hampshire Citizens Commission on the State Courts, which was created via appointments by the Chief Justice of the New Hampshire Supreme Court, issued a report recommending that the state "examine the expansion of legal representation to civil litigants unable to afford counsel and study the implementation of a 'civil *Gideon.*'"

- *New York:* In November 2007, a bill was introduced in the New York City Council to establish a right to counsel for low-income seniors facing eviction or foreclosure. Although the matter has yet to come to a vote before the council, recent developments indicate that the bill likely will be reintroduced soon. In December 2008, the New York County Lawyers Association's president published a letter supporting the bill and urging the expansion of the right to counsel to include all low-income litigants facing eviction or foreclosure and unable to afford counsel. A bill was also introduced in the state legislature in 2009 to give courts discretionary power to appoint counsel for low-income seniors facing eviction and to stay the proceedings for up to three months to allow seniors to find counsel.

  Also in 2007, the president of the New York State Bar Association, Kate Madigan, published an article in the New York Law Journal on the need for expanding the right to counsel in civil cases within the state. In March 2008, the New York State Bar Association co-sponsored with Touro Law School a civil right to counsel conference, resulting in a symposium issue of the Touro Law Review devoted to civil right to counsel matters and a white paper describing the scope and possible expansion of the right to counsel in the state. Thereafter, the state bar association launched a radio campaign to promote the civil right to counsel concept and, in November 2008, adopted the conference white paper as its report. The same day, the bar association passed a resolution urging the legislature to expand the right to counsel to cover vulnerable low-income people facing eviction or foreclosure from their homes as well as certain unemployment insurance claimants.

- *North Carolina:* The Chief Justice of the North Carolina Supreme Court has convened a Civil Right to Counsel Committee of that state's Access to Justice Commission. In addition, the North Carolina Center on Poverty, Work, and Opportunity hosted a half-day conference on October 30, 2009 relating to access to justice and civil right to counsel issues.

- *Pennsylvania:* In November 2007, the Pennsylvania Bar Association passed a resolution consistent with the 2006 ABA resolution urging the state to provide counsel as a matter of right to low-income litigants in high-stakes civil proceedings, such as those involving "shelter, sustenance, safety, health or child custody." Thereafter, the bar association formed its Access to Justice Task Force to develop broad implementation strategies for the right to counsel endorsed by the association, including strategies for funding a right to counsel and for maximizing private bar involvement in efforts to improve access to the justice system.

  The Philadelphia Bar Association also has formed a "Civil *Gideon*" Task Force to consider expanding the civil right to counsel in the state. The task force co-sponsored a symposium on April 10, 2008 with the Pennsylvania Bar Association's task force. On April 30, 2009, the Philadelphia Bar Association adopted a resolution (tracking the language of the ABA 2006 resolution) calling for the establishment of a right to counsel in civil cases involving basic human needs and directing the bar association's Task Force on Civil Gideon to: (1) investigate all means for effectively providing for this right, including, for example, collaborative models, legislative initiatives, funding proposals, pilot projects, and other exploratory vehicles; and (2) upon completion of such investigation, prepare and submit a report with recommendations to the association's Board of Governors. The Task Force submitted this report to the Board of Governors in November 2009.

- *Texas:* On June 25, 2009, a petition for writ of certiorari was filed in the U.S. Supreme Court for *Rhine v. Deaton,* in which the petitioner, Tracy Rhine, asked the court to consider whether Texas Family Code Sec. 107.013 (which provides counsel to indigent parents facing termination of parental rights in state-initiated suits, but not privately initiated actions) violates the 14th Amendment's Equal Protection Clause. The petition also raised the issue of whether the cumulative denial of safeguards in Rhine's case violated her due process rights. Additionally, the cert petition argued that Rhine's case presented the U.S. Supreme Court with an opportunity to address the refusal on the part of state trial courts to adhere to the Court's 1981 ruling in *Lassiter v. Department of Social Services* that courts evaluate the need for court-appointed counsel using the factors articulated within the Supreme Court's 1976 decision in *Matthews v. Eldridge*. On October 5, 2009, the Court invited the Solicitor General of Texas to "express the views of the State" in *Rhine v. Deaton*. In December, the state filed its amicus brief in the case opposing a grant of the cert petition. On January 25, 2010, the Court denied the cert petition in *Rhine v. Deaton.*

- *Washington:* In January 2009, a Washington state appellate court ruled in *Bellevue School District v. E.S.* that students have a due process right to counsel in truancy proceedings that may lead to eventual detention. The case was appealed to the Supreme Court of Washington

and oral arguments were heard on January 19, 2010. On February 19, 2010, the Korematsu Center on Law and Equality at the Seattle University School of Law, University of Washington School of Law, and Gonzaga University School of Law co-sponsored a symposium entitled, "Civil Legal Representation and Access to Justice: Breaking Point or Opportunity for Change?" Panels addressed a discussion of the landscape of the civil right to counsel movement, the development of the right under state law, and appropriate standards for implementation. Additionally, a working session was held to explore principles upon which a civil right to counsel in Washington state could be based.

The Need for Further Guidance to Help Implement ABA Policy: The Proposed *ABA Basic Principles for a Right to Counsel in Civil Proceedings*

The ABA's 2006 civil right to counsel policy has played a key role in several of the efforts discussed above. However, national advocates and ABA leadership agree that, almost four years later, the ABA can and should be doing more to help support state efforts to advance the establishment and implementation of the right to counsel throughout this country. In 2009, ABA President Carolyn Lamm requested assistance from the ABA Working Group on Civil Right to Counsel (comprised of representatives from various ABA sections, committees, and other entities interested and involved in civil right to counsel issues) in identifying practical means for advancing the ABA's existing civil right to counsel policy. This Report with Recommendation, and the accompanying proposed ***ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings*** (Principles), represent a collaborative effort by members of the Working Group, with significant input from members of the legal services community as well as participants in the National Coalition for a Civil Right to Counsel (NCCRC), to provide much-needed, easily accessible guidance regarding the effective provision of civil legal representation as a matter of right.[2] Achieving the type of public policy change involved in creating and funding new civil right to counsel systems requires the support of a wide variety of potential allies, many of whom may not be lawyers (including, for example, community and business leaders, representatives of local government, members of chambers of commerce, media representatives, and representatives of social service or faith-based organizations). Accordingly, the black-letter Principles are written in clear and concise language and embody the minimum, basic requirements for providing a right to counsel that have been culled from the larger body of relevant caselaw, statutes, standards, rules, journal articles, and other sources of legal information that may be prove to be overwhelming for laypersons to assimilate.

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[2] The representative entities of the ABA Civil Right to Counsel Working Group include: the Standing Committee on Legal Aid and Indigent Defendants, the Section of Litigation, the Section of Business Law, the Judicial Division, the Section of Tort Trial and Insurance Practice, the Coalition for Justice, the Commission on Domestic Violence, and the Commission on Immigration. Concurrently with the proposed **ABA Basic Principles of a Right to Counsel in Civil Proceedings**, the Working Group developed a proposed model statute, known as the **ABA Model Access Act**, for implementation of a civil right to counsel; this model statute also has been submitted to, and recommended for adoption by, the ABA House of Delegates in August 2010. The Working Group solicited comment on both of these proposals from the legal services community at large and others throughout the nation.

Conclusion

The members of the ABA Working Group on Civil Right to Counsel and co-sponsors of this Report with Recommendation firmly believe that the proposed ***ABA Basic Principles of a Right to Counsel in Civil Proceedings*** will serve as a convenient educational tool for use by advocates working to implement the ABA's existing civil right to counsel policy. Moreover, experience has shown that this type of straightforward policy statement, when marked with the ABA's imprimatur, can be extremely effective in helping to garner the broad-based support necessary to implement systemic change. The "ABA Ten Principles for a Public Defense Delivery System," adopted by the House of Delegates in 2002, are widely acknowledged to have been helpful in educating and convincing policymakers and others involved in examining criminal indigent defense systems to undertake necessary reforms in several states. The proposed ***ABA Basic Principles of a Right to Counsel in Civil Proceedings*** follows this model and, hopefully, will prove to be as useful in campaigns to establish and implement a right to counsel for poor persons on the civil side.

Respectfully submitted,

Robert E. Stein, Chair
Standing Committee on Legal Aid and Indigent Defendants[3]

August 2010

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[3] **Members of the ABA Working Group on Civil Right to Counsel (ABA Entities are indicated for identification purposes only):**

Michael S. Greco, Chair (Past President of the American Bar Association)
Terry Brooks (Counsel, Standing Committee on Legal Aid and Indigent Defendants)
Peter H. Carson (Section of Business Law)
Shubhangi Deoras (Consultant, Standing Committee on Legal Aid and Indigent Defendants)
Margaret Bell Drew (Commission on Domestic Violence)
Justice Earl Johnson, Jr. (Ret.) (Standing Committee on Legal Aid and Indigent Defendants)
Wiley E. Mayne, Jr. (Section of Litigation)
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JoNel Newman (Commission on Immigration)
Robert L. Rothman (Section of Litigation)
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105 (Revised)

ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings

August 2010

The Objective

The goal of the *ABA Basic Principles for a Right to Counsel in Civil Legal Proceedings* (Principles) is to aid in implementing American Bar Association (ABA) policy, adopted by vote of the ABA House of Delegates in August 2006, that "urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction."[4]

These Principles set forth in clear terms the fundamental requirements for providing effective representation in certain civil proceedings to persons unable to pay for the services of a lawyer, in order to guide policymakers and others whose support is of importance to the implementation of civil right to counsel systems in the United States. Since the Principles embody minimum obligations, jurisdictions may wish to provide broader protection for the rights of civil litigants beyond the scope of these basic requirements.

The Principles

1. **Legal representation is provided as a matter of right at public expense to low-income persons in adversarial proceedings where basic human needs—such as shelter, sustenance, safety, health, or child custody—are at stake. A system is established whereby it can be readily ascertained whether a particular case falls within the categories of proceedings for which publicly-funded legal counsel is provided, and whether a person is otherwise eligible to receive such representation. The failure to designate a category of proceedings as one in which the right to counsel applies does not preclude the provision of legal representation from other sources. The jurisdiction ordinarily does not provide publicly-funded counsel in a case where the existing legal aid delivery system is willing and able to provide representation, or where the person can otherwise receive such representation at no cost.**

[4] AMERICAN BAR ASSOCIATION, RECOMMENDATION 112A (Aug. 7, 2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

Commentary

Principle 1 echoes the ABA resolution (adopted by its House of Delegates on August 7, 2006) advocating for governments to fund and supply counsel to indigent civil litigants as a matter of right in those categories of adversarial proceedings in which basic human needs are at stake.[5] The resolution specifies the following five examples of categories involving interests so fundamental and critical as to trigger the right to counsel:[6]

- "Shelter" includes a person's or family's access to or ability to remain in a dwelling, and the habitability of that dwelling.
- "Sustenance" includes a person's or family's ability to preserve and maintain assets, income, or financial support, whether derived from employment, court ordered payments based on support obligations, government assistance including monetary payments or "in-kind" benefits (e.g., food stamps), or from other sources.
- "Safety" includes a person's ability to obtain legal remedies affording protection from the threat of serious bodily injury or harm, including proceedings to obtain or enforce protection orders because of alleged actual or threatened violence, and other proceedings to address threats to physical well-being.
- "Health" includes access to health care for treatment of significant health problems, whether the health care at issue would be financed by government programs (e.g., Medicare, Medicaid, VA, etc.), financed through private insurance, provided as an employee benefit, or otherwise.
- "Child custody" includes proceedings in which: (i) the parental rights of a party are at risk of being terminated, whether in a private action or as a result of proceedings initiated or intervened in by the state for the purposes of child protective intervention, (ii) a parent's right to residential custody of a child or the parent's visitation rights are at risk of being terminated, severely limited, or subject to a supervision requirement or (iii) a party seeks sole legal authority to make major decisions affecting the child. The right to representation for children should be limited only to proceedings initiated by the state, or in which the state intervened, for the purposes of child protective intervention.[7]

The above list should not be considered all-inclusive, as jurisdictions may provide for a right to counsel in additional categories of proceedings or for especially vulnerable individuals with specific impairments or barriers requiring the assistance of counsel to guarantee a fair

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[5] AMERICAN BAR ASSOCIATION, RECOMMENDATION 112A (Aug. 7, 2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

[6] American Bar Association's Task Force on Access to Civil Justice, *Report to the House of Delegates* 13 (Aug. 2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

[7] This definition is consistent with the proposed American Bar Association Report with Recommendation, "ABA Model Access Act," § 2.B.v, at 3 (submitted for consideration by ABA House of Delegates in August 2010) and AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, Standard H-1 (1996), *available at* http://www.abanet.org/child/repstandwhole.pdf.

hearing.[8] On the other hand, the failure of jurisdictions to designate particular categories of proceedings as those in which the right to counsel applies should not discourage or prevent other sources (including legal services agencies, pro bono programs, law firms, or individual attorneys) from supplying legal representation at no cost in such areas.[9] Additionally, counsel need not be provided at state expense if a lawyer is available to a litigant on a contingent fee basis or via another arrangement by which the litigant's interests are protected by counsel at no cost (including, for example, as a result of insurance policy provisions or the existence of a class action lawsuit that the litigant realistically might be able to join).[10]

The right to counsel described in Principle 1 applies in adversarial proceedings occurring in both judicial and "quasi-judicial" tribunals, including administrative agencies.[11] Inherent in the Principle is the strong presumption that full representation is required in all such adversarial proceedings; nevertheless, in some situations, "limited scope representation" may provide an appropriate, cost-effective route to ensuring fair and equal access to justice.[12] "Limited scope representation" is reasonably defined as the performance by a licensed legal professional of one or more of the tasks involved in a party's dispute before a court, an administrative proceeding, or an arbitration body, to the extent permitted by Rule 1.2(c) of the ABA Model Rules of Professional Conduct or the jurisdiction's equivalent, and when such limited representation is sufficient to afford the applicant fair and equal access to justice.

Principle 1 also requires that jurisdictions establish a system to determine readily at the outset of the proceedings whether an individual is eligible to receive counsel as a matter of right. In making these eligibility determinations, the decision-maker should consider

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[8] American Bar Association's Task Force on Access to Civil Justice, *Report to the House of Delegates*, *supra* note 3, at 12-13.

[9] CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT §§ 401-404 (Feb. 8, 2008) *available at* http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/ca_state_basic_access_act_feb_08.pdf; American Bar Association's Task Force on Access to Civil Justice, *Report to the House of Delegates, supra* note 3, at 14.

[10] CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, § 301.3.2; American Bar Association's Task Force on Access to Civil Justice, *Report to the House of Delegates*, *supra* note 3, at 14.

[11] American Bar Association's Task Force on Access to Civil Justice, *Report to the House of Delegates, supra* note 3, at 13.

[12] American Bar Association's Task Force on Access to Civil Justice, *Report to the House of Delegates, supra* note 3, at 14. In light of the extraordinary level of unmet need, and the limited resources likely to be available to support additional positions for state-funded legal services or other sources of legal representation for the poor, some states may wish to consider authorizing paralegals or other lay individuals who complete appropriate training programs to provide certain types of limited, carefully-defined legal services in administrative proceedings to those eligible for representation. If permitted, such services should always be provided under the direct supervision of a lawyer.

factors other than case category and financial eligibility, for example, the merits of the case and the significance of the relief sought.[13]

Principle 1 does not comment on who should be responsible for making eligibility determinations, leaving this decision to the discretion of individual jurisdictions. However, a proposed model statute for civil right to counsel implementation (known as the "ABA Model Access Act,") has been submitted for consideration by the House of Delegates in August 2010, and addresses this issue. The proposed "ABA Model Access Act," consistent with the "State Basic Access Act" (created in 2008 by a task force of the California Access to Justice Commission), suggests one approach that may be suitable, depending upon the law of the enacting jurisdiction: the delegation of the authority to make eligibility and scope of services decisions to identified, certified local organizations (including legal services organizations funded by the federal Legal Services Corporation and the state IOLTA program) by an independent, statewide oversight board that is responsible for policy-making and the overall administration of the civil right to counsel program.[14]

In accordance with the ABA civil right to counsel resolution adopted in 2006, Principle 1 assumes that services will be provided only in the context of adversarial proceedings. Many legal matters impacting the poor may be resolved without adversarial proceedings (e.g. transactional matters, issues relating to applications for benefits), and counsel may be important to a fair resolution of such matters. While these Principles do not address services in non-adversarial settings, jurisdictions may wish to consider whether services in such settings provide a useful preventive approach and might conserve resources that otherwise would need to be expended in the course of supporting adversarial proceedings.

2. **Financial eligibility criteria for the appointment of counsel ordinarily take into account income, liquid assets (if any), family size and dependents, fixed debts, medical expenses, cost of living in the locality, cost of legal counsel, and other economic factors that affect the client's ability to pay attorney fees and other litigation expenses.**

Commentary

Consistent with the views expressed in the report accompanying the ABA's 2006 civil right to counsel resolution, as well as the commentary to the "ABA Model Access Act," Principle 2 leaves it to individual jurisdictions to establish financial eligibility criteria based in part on economic factors specific to each locality, as opposed to employing an across-the-

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[13] *See, e.g.,* CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, §301 (requiring that trial court eligibility determinations take into account applicant's possibility of achieving a successful outcome (if plaintiff) or lack of non-frivolous defense (if defendant).

[14] Proposed American Bar Association Report with Recommendation, "ABA Model Access Act," at 9 (submitted for consideration by ABA House of Delegates in August 2010); CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, §§ 501, 505(2).

board standard that may be widely acknowledged to be under-inclusive (such as, for example, current national LSC eligibility guidelines).[15] The calculation of net assets should exclude resources needed to fund necessities of life, assets essential to generate potential earning, and home ownership (longstanding asset exclusion in legal services eligibility determinations).[16] Individuals of limited means should not be forced to risk their homes to afford legal representation, especially considering the important role of homeownership in breaking the cycle of generational poverty.

3. **Eligibility screening and the provision of publicly-funded counsel occur early enough in an adversarial proceeding to enable effective representation and consultation during all critical stages of the proceeding. An applicant found ineligible for representation is entitled to appeal that decision through a process that guarantees a speedy and objective review by a person or persons independent of the individual who denied eligibility initially.**

Commentary

The requirement of early eligibility screening and appointment of counsel in Principle 3 is consistent with existing national standards established by the ABA, National Center for State Courts (NCSC), and other organizations regarding the provision of certain types of representation as a matter of right in certain categories of civil proceedings, including those involving representation of children in custody and child abuse matters, of parents in abuse and neglect cases, and of individuals subject to involuntary commitment.[17] Specifically, the *ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases* urge courts to "(e)nsure appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been dismissed from the court's jurisdiction."[18] Similarly, according to the *NCSC Guidelines for Involuntary Civil Commitment*, "(t)o protect the interests of persons who are subject to commitment

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[15] Proposed American Bar Association Report with Recommendation, "ABA Model Access Act," *supra* note 11, at 8; American Bar Association's Task Force on Access to Civil Justice, *Report to the House of Delegates, supra* note 3, at 14. *See also* CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, §§ 401-404.

[16] CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, §§ 402(2).

[17] Laura K. Abel and Judge Lora J. Livingston, *The Existing Civil Right to Counsel Infrastructure*, 47 Judges' J. 3 (Fall 2008); AMERICAN BAR ASSOCIATION, STANDARDS FOR PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, Role of the Court 4. (2006), *available at* http://www.abanet.org/child/parentrepresentation/home.html; AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, Standard H-1 (1996), *available at* http://www.abanet.org/child/repstandwhole.pdf; NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, Guideline E4(a) (1986), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=12.

[18] AMERICAN BAR ASSOCIATION, STANDARDS FOR PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, *supra* note 14, Role of the Court 4.

proceedings and permit sufficient time for respondents' attorneys to prepare their cases, attorneys should be appointed when commitment proceedings are first initiated."[19] In addition, statutes providing for a right to counsel in various categories of civil matters in Arkansas (involuntary commitment proceedings), Montana (child custody/termination of parental rights), and New Hampshire (guardianship of person or estate) all require the appointment of counsel immediately upon or after the filing of the original petition in the case.[20]

4. Counsel complies with all applicable rules of professional responsibility and functions independently of the appointing authority.

Commentary

In accordance with a number of national standards relating to the provision of publicly-funded legal representation in both the civil and criminal contexts, Principle 4 requires that counsel must function independently of the appointing authority.[21] In particular, the *ABA Standards of Practice for Lawyers Representing Children in Custody Cases* provide that the court must ensure that appointed counsel operates independently of the court, court services, the parties, and the state.[22] Further, the *NCSC Guidelines for Involuntary Civil Commitment* require that attorneys be appointed from a panel of lawyers eligible to represent civil commitment respondents and in a manner that safeguards "the autonomy of attorneys in representing their clients."[23]

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[19] NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E4(a).

[20] *See* MONT. CODE ANN. § 41-3-425 (requiring appointment of counsel for parent or guardian "immediately" after filing of petition seeking removal or placement of child or termination of parental rights); ARK. CODE ANN. § 20-47-212 (West) (requiring appointment of counsel in involuntary commitment proceedings immediately upon filing of the original petition); N.H. REV. STAT. ANN. § 464-A:6 (requiring appointment of counsel "immediately upon the filing of a petition for guardianship of the person and estate, or the person, or estate").

[21] AMERICAN BAR ASSOCIATION (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES § VI.A.5 (2003), *available at* http://www.abanet.org/family/reports/standards_childcustody.pdf; ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 14, Standard G-1; NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E4(b); AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, PRINCIPLE 1 (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf. *See also* Abel & Livingston, *supra* note 14, at 2-3; CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, §§ 501-505; AMERICAN BAR ASSOCIATION, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 42-44 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf (recommending independence of public defense function for effective implementation of right to counsel in criminal cases).

[22] AMERICAN BAR ASSOCIATION (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES *supra* note 18, § VI.A.5.

[23] NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E4(b).

To allow jurisdictions maximum flexibility in designing civil right to counsel systems, Principle 4 does not specify the appointing authority; nevertheless, various standards and other sources provide examples that jurisdictions may find appropriate for their purposes. For instance, the applicable NCSC involuntary civil commitment guideline vests responsibility for maintaining the panel of attorneys from which appointments must be made with "an objective, independent third party, such as the local bar association or a legal services organization," and requires courts to appoint attorneys serially from the panel (unless compelling reasons require otherwise).[24]

Additionally, both the proposed "ABA Model Access Act" and the model California State Basic Access Act include a significant amount of detail regarding the establishment and operation within the state's judicial system of an independent board responsible for policy-making and the overall administration of the type of civil right to counsel program detailed in the statute.[25] This approach is consistent with the recommendations of criminal indigent defense standards, encapsulated in the first of the *ABA Ten Principles of a Public Defense Delivery System*, which provides that "(t)he public defense function, including the selection, funding, and payment of defense counsel, is independent" and adds that "[t]o safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems."[26]

5. **To the extent required by applicable rules of professional conduct, replacement counsel must be provided in situations involving a conflict of interest.**

Commentary

In accordance with applicable *ABA Model Rules of Professional Conduct*[27] and commentary to the proposed "ABA Model Access Act,"[28] Principle 5 requires the appointment of alternate counsel in conflict of interest situations, except where a waiver is obtained as permitted by the *ABA Model Rules of Professional Conduct.*

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[24] NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E4(b).

[25] Proposed American Bar Association Report with Recommendation, "ABA Model Access Act," supra note 11, 8-11; CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, §§ 501-505.

[26] AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLE 1. *See also* AMERICAN BAR ASSOCIATION, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, *supra* note 18, 42-44.

[27] *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, 1.7, 1.8, 1.10 (2009), *available at* http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

[28] Proposed American Bar Association Report with Recommendation, "ABA Model Access Act, *supra* note 11, at 11. *See also* CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, § 505(1).

6. Caseload limits are established to ensure the provision of competent, ethical, and high quality representation.

Commentary

Principle 6 safeguards against the burden of excessive caseloads having a harmful impact on the quality of publicly-funded representation provided to low-income litigants.[29] National standards and ethical rules long have recognized the critical importance of controlling workload when providing representation to indigents in both the civil and criminal contexts.[30] Specifically, the *ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases* requires courts to "ensure that attorneys who are receiving appointments carry a reasonable caseload that would allow them to provide competent representation for each of their clients."[31] The *ABA Standards of Practice for Lawyers Representing Children in Custody Cases* imposes the following additional obligations on courts:

> Courts should control the size of court-appointed caseloads, so that lawyers do not have so many cases that they are unable to meet these Standards. If caseloads of individual lawyers approach or exceed acceptable limits, courts should take one or more of the following steps: (1) work with bar and children's advocacy groups to increase the availability of lawyers; (2) make formal arrangements for child representation with law firms or programs providing representation; (3) renegotiate existing court contracts for child representation; (4) alert agency administrators that their lawyers have excessive caseloads and order them to establish procedures or a plan to solve the problem; (5) alert state judicial, executive, and legislative branch leaders that excessive caseloads jeopardize the ability of lawyers to competently

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[29] For an in-depth discussion on the deleterious effects of excessive caseloads in the criminal indigent defense context, *see* AMERICAN BAR ASSOCIATION, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, *supra* note 18, at 43 (recommending establishment and enforcement of limits on defense counsel's workload for effective implementation of right to counsel in criminal cases). *See also* NATIONAL RIGHT TO COUNSEL COMMITTEE (THE CONSTITUTION PROJECT/NATIONAL LEGAL AID AND DEFENDER ASSOCIATION), JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 65-70 (2009), *available at* http://tcpjusticedenied.org/.

[30] AMERICAN BAR ASSOCIATION, STANDARDS FOR PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, *supra* note 14, Role of the Court 8; ABA (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES, *supra* note 18, § VI.D; ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 14, Standard L. *See also* Abel & Livingston, *supra* note 14, at 2; AMERICAN BAR ASSOCIATION, FORMAL OPINION 06-441, ETHICAL OBLIGATIONS OF LAWYERS WHO REPRESENT INDIGENT CRIMINAL DEFENDANTS WHEN EXCESSIVE CASELOADS INTERFERE WITH COMPETENT AND DILIGENT REPRESENTATION (May 13, 2006); ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLE 5.

[31] AMERICAN BAR ASSOCIATION, STANDARDS FOR PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, *supra* note 14, Role of the Court 8.

represent children; and (6) seek additional funding.[32]

On the criminal side, the fifth principle of the *ABA Ten Principles of a Public Defense Delivery System* obligates counsel to decline appointments when his or her workload has become "so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations," and under no circumstances should national caseload standards be exceeded.[33] In 2006, the ABA issued its first Formal Ethics Opinion detailing the affirmative obligations of lawyers who represent indigent criminal defendants with regard to managing excessive caseloads. The opinion stated unequivocally that, consistent with the *ABA Model Rules of Professional Conduct*, no lawyer may accept new clients if his or her workload prevents the provision of competent and diligent representation to existing clients; further, the opinion outlined the specific measures lawyers must take to ensure that they will not receive further appointments during this time.[34]

To implement this Principle 6 in accordance with existing national standards and ethics rules, a jurisdiction's appointing authority should set caseload standards and reasonable limits on the number of appointments a particular attorney should accept, and attorneys should decline new appointments whenever their workloads become so excessive as to prevent them from providing competent and diligent representation to existing clients.[35]

7. **Counsel has the relevant experience and ability, receives appropriate training, is required to attend continuing legal education, and is required to fulfill the basic duties appropriate for each type of assigned case. Counsel's performance is evaluated**

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[32] ABA (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES, *supra* note 18, § VI.D.

[33] ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLE 5. *See also* OR. REV. STAT., QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE, Standard II (court rule providing that "neither defender organizations nor assigned counsel should accept workloads that, by reason of their size or complexity, interfere with providing competent and adequate representation or lead to the breach of professional obligations").

[34] AMERICAN BAR ASSOCIATION, FORMAL OPINION 06-441, ETHICAL OBLIGATIONS OF LAWYERS WHO REPRESENT INDIGENT CRIMINAL DEFENDANTS WHEN EXCESSIVE CASELOADS INTERFERE WITH COMPETENT AND DILIGENT REPRESENTATION (May 13, 2006); ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1.1, 1.2(a), 1.3, 1.4 (2009).

[35] Abel & Livingston, *supra* note 14, at 2; CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, § 505(7); AMERICAN BAR ASSOCIATION, STANDARDS FOR PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, *supra* note 14, Role of the Court 8; ABA (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES, *supra* note 18, § VI.D; ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 14, Standard L. *See also* NATIONAL RIGHT TO COUNSEL COMMITTEE (THE CONSTITUTION PROJECT/NATIONAL LEGAL AID AND DEFENDER ASSOCIATION), JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, *supra* note 26, 192-194, 202-205; AMERICAN BAR ASSOCIATION, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, *supra* note 18, at 43 (recommending establishment and enforcement of limits on defense counsel's workload for effective implementation of right to counsel in criminal cases); ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLE 5.

systematically for quality, effectiveness and efficiency according to nationally and locally adopted standards.

Commentary

Numerous right to counsel statutes, court rules, and national standards impose the type of experience, training, and continuing education requirements, as well as the requirement to perform specific duties, found within Principle 7.[36] In addition, with respect to the evaluation of counsel's performance, this Principle reflects the approach taken by the proposed "ABA Model Access Act," which requires an independent board to establish and administer a system of evaluation of the quality of representation provided by institutions and private attorneys receiving public funding for this purpose through the Model Act.[37]

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[36] *See* Abel & Livingston, *supra* note 14, at 2; ABA STANDARDS FOR PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, *supra* note 14, Commentary to Basic Obligation 1, Basic Obligations 4, 19, 20; ABA (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES, *supra* note 18, § VI.A.7; ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 14, Standard H-4, I-2, I-3; NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 22-23 (1995), *available at* http://www/ncjfcj.org/images/stories/dept/ppcd/pdf/resguide.pdf; NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E1(a), E1(d), E2, E5; ARIZ. REV. STAT. ANN. § 36-537.B (requiring specific duties of attorneys involved in involuntary commitment cases); Ark. Sup. Ct. Admin. Order No. 15 (imposing experience, training, continuing legal education requirements, as well as the requirement to perform specific duties, for attorneys representing parents or children in dependency or neglect proceedings); ARK. CODE ANN. § 9-27-401(d)(2) (West); TEX. FAM. CODE ANN. § 107.003-107.004 (requiring the completion of certain basic and additional duties of attorney ad litem for child and amicus attorney); CAL. WELF. & INST. CODE § 317 (c), (e) (West) (providing caseload and training standards for attorneys for children and requiring the performance of specific duties by attorneys); *Florida Indigent Services Advisory Board, Final Report: Recommendations Regarding Qualifications, Compensation and Cost Containment Strategies for State-Funded Due Process Services, Including Court Reporters, Interpreters and Private Court-Appointed Counsel*, 5, 14 (2005) *available at* http://www.justiceadmin.org/art_V/1-6-2005%20Final%20Report.pdf (recommending experience and training standards that are met or exceeded by standards imposed on counsel in dependency cases in each judicial district in Florida); MD. R. CT., tit. 11 app. (GUIDELINES OF ADVOCACY FOR ATTORNEYS REPRESENTING CHILDREN IN CINA [CHILDREN IN NEED OF ASSISTANCE] AND RELATED TPR [TERMINATION OF PARENTAL RIGHTS] AND ADOPTION PROCEEDINGS); CAL. WELF. & INST. CODE § 317 (c), (e) (West) (providing caseload and training standards for attorneys for children and requiring the performance of specific duties by attorneys). *See also* AMERICAN BAR ASSOCIATION, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, *supra* note 18, at 14-15 (experienced and trained defense counsel necessary for effective implementation of right to counsel in criminal cases); ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLES 6, 9.

[37] Proposed American Bar Association Report with Recommendation, "ABA Model Access Act," supra note 11, at 10. *See also* CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, § 505(7) (providing for establishment of standards for all appointed attorneys (whether salaried staff from non-profit legal services organizations or private attorneys) supplying legal representation in accordance with the act, to ensure that "the quality and quantity of representation provided is sufficient to afford clients fair and equal access to justice in a cost-efficient manner."); ABA PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID, PRINCIPLE 3 (Aug. 2006), *available at*

8. **Counsel receives adequate compensation and is provided with the resources necessary to provide competent, ethical and high-quality representation.**

Commentary

Consistent with national standards, Principle 8 recognizes that successful implementation of a right to counsel in civil legal matters cannot be accomplished without a sufficient investment of resources to compensate attorneys adequately and to provide them with the requisite support services and practical tools necessary to deliver competent, ethical, and high-quality representation to their clients.[38] The *ABA Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases* provides that lawyers appointed to represent children "are entitled to and should receive adequate and predictable compensation that is based on legal standards generally used for determining the reasonableness..." of fees received by attorneys who are privately retained in family law cases.[39] The organized bar and judiciary should coordinate efforts with the state legislature, courts, local public defense/civil legal aid programs, and civil justice system funders/supporters, to avoid competition among the various sectors of the civil and criminal justice systems for finite resources and, instead, secure funding sufficient to ensure equal justice for all.[40]

9. **Litigants receive timely and adequate notice of their potential right to publicly-funded counsel and, once eligibility for such counsel has been established, any waivers of the right are accepted only if they have been made knowingly, intelligently, and voluntarily.**

Commentary

Principle 9 requires that individuals unable to afford counsel be notified of their right to publicly-funded counsel in a timely and adequate fashion. Moreover, this Principle

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http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/tencivilprinciples.pdf; ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLE 10.

[38] *See* Abel & Livingston, *supra* note 14, at 3; ABA (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES, *supra* note 18, § VI.C; ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 14, Standard J-1; NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES, *supra* note 33, at 22; NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E4(c). *See also* ABA *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, *supra* note 18, at 41(defense counsel requires adequate compensation and resources to provide quality representation necessary for effective implementation of right to counsel in criminal cases); ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLE 8.

[39] ABA (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES, *supra* note 18, § VI.C.

[40] American Bar Association's Task Force on Access to Civil Justice, *Report to the House of Delegates, supra* note 3 at 15; ABA PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID, *supra* note 34, PRINCIPLE 9; ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLE 8.

prohibits the acceptance of waivers of the civil right to counsel unless they meet the strict requirements established by the U.S. Supreme Court for proper waivers of the Sixth Amendment right to counsel in criminal cases; that is, the waiver must be made knowingly, intelligently, and voluntarily after the defendant has been advised of his or her right to counsel.[41] The *NCSC Guidelines for Involuntary Civil Commitment* contains similar language, requiring courts to determine that any waiver of appointed counsel in involuntary commitment proceedings is "clear, knowing, and intelligent."[42]

10. A system is established that ensures that publicly-funded counsel is provided throughout the implementing jurisdiction in a manner that adheres to the standards established by these basic Principles and is consistent with the "American Bar Association Principles of a State System for the Delivery of Civil Legal Aid."

Commentary

The goal of these Principles, in keeping with the recommendations of national standards, is at a minimum to establish a statewide system for providing counsel to individuals in certain high-priority civil proceedings who are not able to afford an attorney.[43] The state system should be operated in conjunction with the systems that are established to fund and provide civil legal aid throughout the state and to help achieve the ABA Principles of a State System for the Delivery of Civil Legal Aid.[44] Principle 10 also recognizes and supports the fact that local jurisdictions may wish to provide broader access to counsel within their borders than can be accomplished at the state level.

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[41] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[42] NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E4(a).

[43] Abel & Livingston, *supra* note 14, at 3; CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, §505; AMERICAN BAR ASSOCIATION, PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID, *supra* note 34, PRINCIPLE 6; ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 14, Standard G-2, J-4. *See also* AMERICAN BAR ASSOCIATION, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, *supra* note 18, at 42-43 (statewide structure for delivery of public defense services ensures uniformity in quality necessary for effective implementation of criminal right to counsel); ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLE 2.

[44] *See generally* AMERICAN BAR ASSOCIATION, PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID, *supra* note 34.