

ABA Toolkit for a Right to Counsel in Civil Proceedings

**American Bar Association
Model Access Act &
Basic Principles for a Right to Counsel in Civil Proceedings
2010**



Working Group on Civil Right to Counsel

AMERICAN BAR ASSOCIATION
Toolkit for a Right to Counsel in Civil Proceedings:

**ABA Model Access Act &
ABA Basic Principles for a Right to
Counsel in Civil Proceedings**

Approved by ABA House of Delegates, August 2010

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ACKNOWLEDGMENTS

The members of an informal ABA Working Group on a Civil Right to Counsel deserve tremendous recognition for dedicating their valuable time and thoughtful efforts for over a year toward conceptualizing, developing, and finalizing the *ABA Model Access Act* and *ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings*. These individuals represented a wide variety of ABA sections, standing committees, commissions, divisions, and other entities with an interest in civil right to counsel issues. The ABA Working Group on a Civil Right to Counsel is chaired by Michael S. Greco, who served as ABA President in 2006 and was instrumental in the historic adoption of first-time ABA policy calling for a right to counsel in civil matters involving basic human needs. Other members of the 2009-2010 ABA Working Group on a Civil Right to Counsel (with affiliated ABA entities indicated for identification purposes and current as of time of service on the working group) include: Peter H. Carson (Section of Business Law); Margaret Drew (Commission on Domestic Violence); Justice Earl Johnston, Jr. (Standing Committee on Legal Aid and Indigent Defendants); Wiley E. Mayne, Jr. (Section of Litigation); Neil McBride (Standing Committee on Legal Aid and Indigent Defendants); JoNel Newman (Commission on Immigration); Robert L. Rothman (Section of Litigation/Standing Committee on Legal Aid and Indigent Defendants); Hon. Edward J. Schoenbaum (Judicial Division/Coalition for Justice); Robert Stein (Standing Committee on Legal Aid and Indigent Defendants); Michelle Tilton (Section of Tort Trial and Insurance Practice); Robert Weeks (Standing Committee on Legal Aid and Indigent Defendants); and Lisa C. Wood (Section of Litigation). In addition, the ABA Working Group on Civil Right to Counsel is staffed by Terrence J. Brooks, Counsel for the Standing Committee on Legal Aid and Indigent Defendants (SCLAID), and Shubhangi Deoras, Consultant to SCLAID on Civil Right to Counsel Activities.

PREFACE

The American Bar Association at its Annual Meeting in August 2010 adopted as policy two important documents: the *ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings* and the *ABA Model Access Act*. These documents provide jurisdictions that are willing and able to implement a civil right to counsel (referred to by some as a “Civil Gideon” right) with two important tools for doing so.

It is undeniable that an acute justice gap between the civil legal needs of low-income persons and the legal assistance they receive continues unabated in the United States. In recent years this imbalance has been and continues to be exacerbated by a devastating economic recession. State and local governments with serious budget shortfalls struggle to provide even the lowest level of funding for civil legal aid, while the demand for such aid continues to increase dramatically as countless individuals facing high unemployment and widespread home foreclosures are plunged into poverty for the first time. In addition, natural and man-made disasters such as Hurricanes Katrina, Ike, and Gustav, and the Deepwater Horizon oil spill, have intensified the recession’s effect on low-income communities in and around the Gulf Coast region. Moreover, IOLTA funding has become less available due to declining interest rates and the recession.

The U.S. Census Bureau has determined that the number of individuals living below 125 percent of the federal poverty level increased from 49.6 million in 2005 to 56.8 million in 2009. In 2011 that number increased to more than 63 million. National and state studies conducted since 2000 have consistently demonstrated that less than twenty percent of the legal needs of low-income individuals are being addressed. And although the private bar’s provision of pro bono legal services is admirable, and the ABA, the Legal Services Corporation, state bar associations, and other interested groups have worked diligently to increase federal funding for the provision of civil legal services, congressional appropriations continue to be below the amount necessary to meet the heightened need existing today, and the justice gap continues to grow.

In an effort to help close the justice gap, on August 7, 2006, the ABA’s House of Delegates adopted the following policy, known as Recommendation 112A:

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.

In 2010, the ABA reaffirmed its commitment to equal justice for all by adopting the two resolutions contained within this publication: the *ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings* and the *ABA Model Access Act*. These two documents represent the culmination of a year-long drafting process that drew on input from and the expertise of individuals from within and outside of the Association. Taken together, the *Model Access Act* and the *Basic Principles of a Right to Counsel in Civil Legal Proceedings* are intended as useful tools for civil legal services leaders, access to justice advocates, and jurisdictions wishing to advance a right to counsel in civil proceedings. The ABA recognizes that, because budgetary and other considerations differ widely among the states and localities, the decision of whether a right to counsel in civil matters is an appropriate response to local unmet legal needs should be made by leaders and individuals with requisite knowledge and experience in each jurisdiction.

As the civil right to counsel movement continues to take hold in jurisdictions throughout the country, it is important that local legal services and access to justice organizations participate in the discussions within their jurisdictions in order to ensure that, however a right to counsel in civil proceedings may be implemented, the growing civil legal needs of the poor in their communities will be met and served in the most efficient and effective manner possible. It is the hope of the ABA Working Group on a Civil Right to Counsel that the *Basic Principles of a Right to Counsel in Civil Legal Proceedings* and the *Model Access Act* will assist advocates in their continuing efforts to provide access to civil legal services for the poor in their respective jurisdictions.

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January 1, 2012

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COMMISSION ON IMMIGRATION

SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION

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NEW YORK COUNTY LAWYERS ASSOCIATION

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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.

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

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.

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.

.....

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

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...”

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 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,

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*.

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 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

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

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:

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

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http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/legal_services/2009apr14_lsconepager.auth_checkdam.pdf

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 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:

"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,

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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)

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.

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.

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

¹ See American Bar Association, Mission and Goals, Goal IV, Objective 4 (August 2008), available at http://www.americanbar.org/utility/about_the_aba/association_goals.html; AMERICAN BAR ASSOCIATION, RECOMMENDATION 112A (Aug. 7, 2006), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.aut_hcheckdam.pdf.

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 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

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,

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.

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

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.

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 Defendants³

August 2010

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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.”¹

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**

¹ AMERICAN BAR ASSOCIATION, RECOMMENDATION 112A (Aug. 7, 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.aut_hcheckdam.pdf.

aid delivery system is willing and able to provide representation, or where the person can otherwise receive such representation at no cost.

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.² The resolution specifies the following five examples of categories involving interests so fundamental and critical as to trigger the right to counsel:³

- “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

² AMERICAN BAR ASSOCIATION, RECOMMENDATION 112A (Aug. 7, 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.aut_hcheckdam.pdf.

³ American Bar Association’s Task Force on Access to Civil Justice, *Report to the House of Delegates* 13 (Aug. 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.aut_hcheckdam.pdf.

by the state, or in which the state intervened, for the purposes of child protective intervention.⁴

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 hearing.⁵ 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.⁶ 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).⁷

The right to counsel described in Principle 1 applies in adversarial proceedings occurring in both judicial and “quasi-judicial” tribunals, including administrative agencies.⁸ 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.⁹ “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

⁴ 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.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.authcheckdam.pdf.

⁵ American Bar Association's Task Force on Access to Civil Justice, *Report to the House of Delegates*, *supra* note 3, at 12-13.

⁶ CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT §§ 401-404 (Feb. 8, 2008) *available at*

http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_ca_state_basic_access_act_feb_08.authcheckdam.pdf; American Bar Association's Task Force on Access to Civil Justice,

Report to the House of Delegates, *supra* note 3, at 14.

⁷ 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.

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

⁹ 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.

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 factors other than case category and financial eligibility, for example, the merits of the case and the significance of the relief sought.¹⁰

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.¹¹

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,

¹⁰ 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)).

¹¹ 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).

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-board standard that may be widely acknowledged to be under-inclusive (such as, for example, current national LSC eligibility guidelines).¹² 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).¹³ 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.¹⁴ Specifically, the

¹² 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.

¹³ CALIFORNIA ACCESS TO JUSTICE COMMISSION’S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT, *supra* note 5, §§ 402(2).

¹⁴ 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.americanbar.org/groups/child_law/projects_initiatives/parentrepresentation.html; AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, Standard H-1 (1996), *available at*

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.”¹⁵ Similarly, according to the *NCSC Guidelines for Involuntary Civil Commitment*, “(t)o protect the interests of persons who are subject to commitment proceedings and permit sufficient time for respondents’ attorneys to prepare their cases, attorneys should be appointed when commitment proceedings are first initiated.”¹⁶ 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.¹⁷

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.¹⁸ In particular,

http://www.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.authcheckdam.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>.

¹⁵ AMERICAN BAR ASSOCIATION, STANDARDS FOR PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, *supra* note 14, Role of the Court 4.

¹⁶ NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E4(a).

¹⁷ 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”).

¹⁸ 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.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards_of_Practice_for_Lawyers_Representing_Children.authcheckdam.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.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.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

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.¹⁹ 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.”²⁰

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).²¹

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.²² 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.”²³

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

http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf (recommending independence of public defense function for effective implementation of right to counsel in criminal cases).

¹⁹ AMERICAN BAR ASSOCIATION (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES *supra* note 18, § VI.A.5.

²⁰ NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E4(b).

²¹ NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E4(b).

²² 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.

²³ 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.

Commentary

In accordance with applicable *ABA Model Rules of Professional Conduct*²⁴ and commentary to the proposed “ABA Model Access Act,”²⁵ 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*.

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.²⁶ 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.²⁷ 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.”²⁸ The *ABA Standards of Practice for*

²⁴ See AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, 1.7, 1.8, 1.10 (2009), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

²⁵ 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).

²⁶ 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/>.

²⁷ 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.

²⁸ AMERICAN BAR ASSOCIATION, STANDARDS FOR PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, *supra* note 14, Role of the Court 8.

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 represent children; and (6) seek additional funding.²⁹

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.³⁰ 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.³¹

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

²⁹ ABA (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES, *supra* note 18, § VI.D.

³⁰ 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”).

³¹ 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).

attorneys should decline new appointments whenever their workloads become so excessive as to prevent them from providing competent and diligent representation to existing clients.³²

- 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 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 7.³³ In addition, with respect

³² 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.

³³ *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

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.³⁴

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.³⁵ 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

[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.

³⁴ 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 http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_tencivilprinciples.authcheckdam.pdf; ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLE 10.

³⁵ 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.

cases.³⁶ 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.³⁷

- 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 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.³⁸ 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.”³⁹

- 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.⁴⁰

³⁶ ABA (SECTION OF FAMILY LAW), STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES, *supra* note 18, § VI.C.

³⁷ 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.

³⁸ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

³⁹ NATIONAL CENTER FOR STATE COURTS, GUIDELINES FOR INVOLUNTARY CIVIL COMMITMENT, *supra* note 14, Guideline E4(a).

⁴⁰ 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*

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.⁴¹ 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.

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.

⁴¹ *See generally* AMERICAN BAR ASSOCIATION, PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID, *supra* note 34.