

AMERICAN BAR ASSOCIATION

**SECTION OF LITIGATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
COMMISSION ON IMMIGRATION
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
COMMISSION ON HOMELESSNESS AND POVERTY
COALITION FOR JUSTICE
JUDICIAL DIVISION
SENIOR LAWYERS DIVISION
SECTION OF TORT TRIAL AND INSURANCE PRACTICE**

REPORT TO THE HOUSE OF DELEGATES

Recommendation

- 1 **RESOLVED**, That the American Bar Association adopts the black letter and commentary of the
- 2 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 fundamental that justice should be the same, in substance and availability, without regard to economic status.’

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

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

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

.....

The ABA Has Adopted Policy Positions Favoring a Right to Counsel

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

In 1979 the House of Delegates adopted Standards Relating to Counsel for Private Parties, as part of the Juvenile Justice Standards. The Standards state ‘the participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.’ These standards were quoted in the *Lassiter* amicus brief. Also, in 1987, the House of Delegates adopted policy calling for appointment of counsel in guardianship/conservatorship cases.²

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.

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

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

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

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

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

Representation of the Alleged Incompetent . . . 1. Counsel as advocate for the respondent should be appointed in every case...”

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*.

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

The 2009 update from LSC noted:

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

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

The problems for state courts caused by the recession are exacerbated in at least two more ways. First, many state and local governments are facing severe revenue shortfalls. In some instances, those states are seeking to meet their budget challenges in part by reducing funding to the very courts now faced with a dramatic increase in self-represented litigants seeking to avoid loss of shelter as well as means of sustenance and safety. Second, the recession also has severely 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 violence cases. In the superior court, one party is *pro se* in 48 percent of all civil cases and almost 70 percent in domestic relations cases.
- In California, a 2004 report found more than 4.3 million court users are self-represented. In family law cases, 67 percent of petitioners are self-represented at the time of filing and 80 percent are self-represented at disposition for dissolution cases. In unlawful detainer cases, 34 percent of petitioners are self-represented at filing and 90 percent of defendants are self-represented.

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

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*

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

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

served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources.” Moreover, the referenced data only address individuals who seek assistance at LSC-funded entities. The update concludes, as did the original 2005 report, that *“state legal needs studies conducted from 2000 to 2009 generally indicate that less than one in five low-income persons get the legal assistance they need.”* (Italics added).

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

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

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

The Working Group has solicited comment from the legal services community and others throughout the nation. Many individuals and groups generously responded with suggestions and comments, all of which have been carefully considered by the Working Group, and many of which have been adopted in whole or in part in the proposed Model Access Act. The Working 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 legal representation,” may be provided “*only to the extent permitted by Rule 1.2 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 legal 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 legal 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 legal 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,

Lorna G. Schofield, Chair
Section of Litigation⁶

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

Michael S. Greco, Chair (Past President of the American Bar Association)
Terry Brooks (Counsel, Standing Committee on Legal Aid and Indigent Defendants)

Peter H. Carson (Section of Business Law)
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Margaret Bell Drew (Commission on Domestic Violence)
Justice Earl Johnson, Jr. (Ret.) (Standing Committee on Legal Aid and Indigent Defendants)
Wiley E. Mayne, Jr. (Section of Litigation)
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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

46 on the date that this Act is enacted. This Act shall not supersede the local or national
47 priorities of legal services programs in existence on the date that this Act is enacted.
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49 **Commentary:** States in which legal needs studies or analyses have been conducted may
50 consider either adding appropriate language in Section 1.B regarding such studies or replacing
51 the current language referring to the recent federal Legal Services Corporation Report with a
52 reference to state-specific studies or analyses.
53

54 SECTION 2. DEFINITIONS.

55
56 In this Act:

- 57
- 58 A. "Adversarial proceedings" are proceedings presided over by a neutral fact-finder in
59 which the adversaries may be represented by a licensed legal professional, as defined
60 herein, and in which rules of evidence or other procedural rules apply to an established
61 formal legal framework for the consideration of facts and application of legal rules to
62 produce an outcome that creates, imposes, or otherwise ascribes legally enforceable
63 rights and obligations as between the parties.
64
- 65 B. "Basic human needs" means shelter, sustenance, safety, health, and child custody.
- 66
- 67 i. "Shelter" means a person's or family's access to or ability to remain in a dwelling,
68 and the habitability of that dwelling.
69
- 70 ii. "Sustenance" means a person's or family's ability to preserve and maintain assets,
71 income or financial support, whether derived from employment, court-ordered
72 payments based on support obligations, government assistance including monetary
73 payments or "in kind" benefits (*e.g.*, food stamps) or from other sources.
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- 75 iii. "Safety" means a person's ability to obtain legal remedies affording protection
76 from the threat of serious bodily injury or harm, including proceedings to obtain or
77 enforce protection orders because of alleged actual or threatened violence, and other
78 proceedings to address threats to physical well being.
79
- 80 iv. "Health" means access to health care for treatment of significant health problems,
81 whether the health care at issue would be financed by government programs (*e.g.*,
82 Medicare, Medicaid, VA, etc.), financed through private insurance, provided as an
83 employee benefit, or otherwise.
84
- 85 v. "Child custody" means proceedings in which: (i) the parental rights of a party are
86 at risk of being terminated, (ii) a parent's right to residential custody of a child or the
87 parent's visitation rights are at risk of being terminated, severely limited, or subject to
88 a supervision requirement, or (iii) a party seeks sole legal authority to make major
89 decisions affecting the child.
90

- 91 C. "Full legal representation" is the performance by a licensed legal professional of all legal
92 services that may be involved in representing a party in a court, an administrative
93 proceeding, or in an arbitration hearing, in which by law or uniform practice parties may
94 not be represented by anyone other than licensed members of the legal profession.
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- 96 D. "Licensed legal professional" is a member of the State Bar or other entity authorized by
97 the State to license lawyers, a law student participating in a State authorized,
98 attorney-supervised clinical program through an accredited law school, or a member of
99 the Bar of another jurisdiction who is legally permitted to appear and represent the
100 specific client in the particular proceeding in the court or other forum in which the matter
101 is pending.
102
- 103 E. "Limited legal representation" is the performance by a licensed legal professional of one
104 or more of the tasks involved in a party's dispute before a court, an administrative
105 proceeding, or an arbitration body, only to the extent permitted by Rule 1.2 of the ABA
106 Model Rules of Professional Conduct or the jurisdiction's equivalent, and when such
107 limited representation is sufficient to afford the applicant fair and equal access to justice
108 consistent with criteria set forth in Section 3 hereof. Depending on circumstances, this
109 form of assistance may or may not be coupled with self-help assistance.
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- 111 F. "Public legal services" includes full legal representation or limited legal representation,
112 through any delivery system authorized under this Act, and funded by the State Access
113 Fund provided in Section 5 hereof.
114
- 115 G. The "State Access Board" (the "Board") is established as a statewide body, independent
116 of the judiciary, the attorney general, and other agencies of state government, responsible
117 for administering the public legal services program defined by and funded pursuant to
118 this Act.
119

120 **Commentary:**

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122 Adopting jurisdictions may wish to make modifications, based on the unique circumstances
123 applicable in their communities, to the list of "basic human needs" set forth in this section. The
124 list set forth in this section is considered the most basic of needs that a civil right to counsel
125 should address; some jurisdictions may wish to expand the list as appropriate to their situation.
126 For example, some jurisdictions may wish to consider expanding the definition of "child
127 custody" to encompass proceedings involving the establishment of paternity and/or the complete
128 denial of visitation rights.
129

130 In light of the extraordinary level of unmet need, and the limited resources likely to be available
131 to support additional positions for state-funded legal services or other sources of legal
132 representation for the poor, to the extent the jurisdiction permits their use, jurisdictions may
133 consider authorizing paralegals, or other lay individuals who have completed appropriate training
134 programs, to provide certain types of limited, carefully-defined legal services in administrative
135 proceedings to persons qualifying under this Act for representation. If permitted, such services

136 should always be provided under the direct supervision of a licensed lawyer. Moreover, limited
137 legal representation should not be considered a substitute for full legal representation when full
138 legal representation is necessary to provide the litigant fair and equal access to justice, but rather
139 should be employed only when consistent with Section 3 below, and when limited legal
140 representation is determined to be sufficient to meet that high standard.

141
142 **SECTION 3. RIGHT TO PUBLIC LEGAL SERVICES.**
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144 A. Subject to the exceptions and conditions set forth below, public legal services shall be
145 available at State expense, upon application by a financially-eligible person, in any
146 adversarial proceeding in a state trial or appellate court, a state administrative proceeding,
147 or an arbitration hearing, in which basic human needs as defined in Section 2.B hereof
148 are at stake. Depending on the circumstances described in the following Sections,
149 appropriate public legal services may include full legal representation or limited legal
150 representation as necessary for the person to obtain fair and equal access to justice for the
151 particular dispute or problem that person confronts, including, where necessary,
152 translation or other incidental services essential to achieving this goal.

153
154 B. In a State trial or appellate court, administrative tribunal, or arbitration proceeding, where
155 by law or established practice parties may be represented only by a licensed legal
156 professional, public legal services shall consist of full legal representation as defined
157 herein, provided pursuant to the following conditions and with the following exceptions:
158

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

176
177 ii. Eligibility for full public legal representation services in State appellate courts is a
178 new and different determination after the proceedings in a trial court or other forum
179 conclude. If the financially eligible applicant is an appellant or equivalent, full legal
180 representation services shall be available when there is a reasonable probability of

181 success on appeal under existing law or when there is a non-frivolous argument for
182 extending, modifying, or reversing existing law or for establishing new law. If the
183 financially eligible applicant is a respondent or equivalent, however, full legal
184 representation services shall be available unless there is no reasonable possibility the
185 appellate court will affirm the decision of the trial court or other forum that the
186 opposing party is challenging in the appellate court. In determining the likely
187 outcome of the case, the Board shall take into account whether the record was
188 developed without the benefit of counsel for the applicant.

189
190 iii. Irrespective of the provisions of Sections 3.B.i and 3B.ii above, full public legal
191 representation services shall not be available to an applicant in the following
192 circumstances:

193
194 a. in proceedings in any forum where parties are not allowed to be
195 represented by licensed legal professionals (however, this does not preclude
196 a financially-eligible person from receiving full legal representation if the
197 opposing party in such a forum appeals a decision of that forum that was
198 favorable to the applicant to a forum where licensed legal professionals are
199 permitted to provide representation, and that opposing party is represented
200 by a licensed legal professional in that appeal);

201
202 b. if legal representation is otherwise being provided to the applicant
203 in the particular case, such as through existing civil legal aid programs, the
204 services of a lawyer who provides such representation on a contingent fee
205 basis, as the result of the provisions of an insurance policy, as part of a class
206 action that will reasonably serve the legal interests of the applicant and that
207 he or she is able to join, or if the applicant's interests are being protected by
208 counsel in some other way;

209
210 c. if the matter is not contested, unless the Board determines the
211 interests of justice require the assistance of counsel;

212
213 d. if under standards established by the Board, and under the
214 circumstances of the particular matter, the Board deems a certain type and
215 level of limited legal representation is sufficient to afford fair and equal
216 access to justice and is sufficient to ensure that the basic human needs at
217 stake in the proceeding are not jeopardized due to the absence of full
218 representation by counsel (however, limited legal representation shall be
219 presumed to be insufficient when the opposing party has full
220 representation);

221
222 e. for matters in designated courts or other forums when the Board
223 evaluates and certifies, after public hearings and in compliance with the
224 State's [statutory code governing administrative procedures], that:

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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 legal 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 legal 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 legal 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.

271 E. Nothing in this Act should be read to abrogate any statutory or constitutional rights in this
272 state that are at least as protective as the rights provided under this Act.
273

274 **Commentary:** With regard to Section 3.B.ii, in determining whether there is “a reasonable
275 probability of success on appeal” for appellants or equivalents, or “no reasonable possibility the
276 appellate court will affirm the decision of the trial court or other forum” for respondents or
277 equivalents, the Board or its designee shall give consideration to existing law or the existence of
278 a non-frivolous argument for extending, modifying, or reversing existing law or for establishing
279 new law.
280

281 In Section 3.C, the Model Act does not authorize the Board to apply a merits test or any other
282 limitation, other than financial and subject matter eligibility, upon receipt of notice from a trial
283 judge (or other type of fact-finder named therein) that an unrepresented litigant requires public
284 legal representation. The rationale for this distinction is that, while it may be appropriate for the
285 Board to review criteria relating to areas requiring detailed knowledge of the Model Act and any
286 regulations that may have been promulgated (e.g., financial and subject matter eligibility), it is
287 unseemly for the Board to second-guess the judge on the issue of whether a litigant’s position
288 has sufficient merit.
289

290 The 125 percent income cap in Section 3.D suggests the minimum economic strata the Model
291 Act seeks to target. Implementing jurisdictions may consider alternative financial eligibility
292 standards that target a larger percentage of the population unable to afford legal services in cases
293 of basic needs, such as 150 percent of the federal poverty level, or a formula that also takes into
294 account other factors relevant to the financial ability of the applicant to pay for legal services.
295 For example, the determination of a particular applicant’s financial eligibility ordinarily should
296 take account of the applicant’s assets and medical or other extraordinary ongoing expenditures
297 for basic needs. Some of those factors, such as substantial net assets, might make a person
298 ineligible despite a current income that is below 125 percent of the federal poverty level. Other
299 factors might justify providing a person with legal services as a matter of right, even though
300 gross income exceeds 125 percent of the federal poverty level.
301

302 The Model Act assumes that services will be provided only in the context of adversarial
303 proceedings. Many legal matters impacting the poor may be resolved without adversarial
304 proceedings (e.g. transactional matters, issues relating to applications for benefits), and advice of
305 counsel may be important to a fair resolution of such matters. While this Model Act does not
306 address services in non-adversarial settings, adopting jurisdictions may wish to consider whether
307 services in such settings would provide a useful preventive approach and might conserve
308 resources that otherwise would need to be expended in the course of supporting adversarial
309 proceedings. If so, such an adopting jurisdiction may wish to adjust the Model Act to provide
310 some services outside of adversarial settings.
311

312 **SECTION 4. STATE ACCESS BOARD.**
313

314 A. There is established within the State judicial system an independent State Access Board
315 ("Board") that shall have responsibility for policy-making and overall administration of
316 the program defined in this Act, consistent with the provisions of this Act.
317

318 B. The Board shall consist of ____ [an odd number of] members appointed by [such
319 representatives of the different branches of government and/or bar associations to be set
320 forth herein]. A majority of the members shall be persons licensed to practice law in the
321 jurisdiction. The members should reflect the broadest possible diversity, taking into
322 account the eligible client population, the lawyer population, and the population of the
323 state generally.
324

325 Board members shall be compensated at the rate of [\$__ a day] for their preparation and
326 attendance at Board meetings and Board committee meetings, and shall be reimbursed for
327 all reasonable expenses incurred attendant to discharging their responsibilities as Board
328 members.
329

330 C. The Board shall select an Executive Director who shall serve at the pleasure of the Board,
331 and who shall be responsible for implementing the policies and procedures determined by
332 the Board, including recommendations as to staff and salaries, except for his or her own
333 salary, which shall be determined by the Board.
334

335 D. The Board is empowered to promulgate regulations and policies consistent with the
336 provisions of the Act and in accordance with the State's [statutory code governing
337 administrative procedures].
338

339 E. The Board shall:
340

341 i. Ensure that all eligible persons receive appropriate public legal services
342 when needed in matters in which basic human needs as defined in Section 2.B
343 hereof are at stake. It is the purpose and intent of this Section that the Board
344 manage these services in a manner that is effective and cost-efficient, and that
345 ensures recipients fair and equal access to justice.
346

347 ii. Establish, certify, and retain specific organizations to make eligibility
348 determinations (including both financial eligibility and the applicable standard
349 defined in Section 3.B hereof) and scope of service determinations pursuant to
350 Section 3 hereof.
351

352 iii. Establish and administer a system that timely considers and decides
353 appeals by applicants found ineligible for legal representation at public expense,
354 or from decisions to provide only limited legal representation.
355

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

359
360 v. Inform the general public, especially population groups and geographic
361 areas with large numbers of financially eligible persons, about their legal rights
362 and responsibilities, and the availability of public legal representation, should they
363 experience a problem involving a basic human need.

364
365 vi. Establish and administer a system of evaluation of the quality of
366 representation delivered by the institutional providers and private attorneys
367 receiving funding for representation through the State Access Fund.

368
369 vii. If reliable, relevant data is not otherwise available, conduct, or contract
370 with others to conduct, studies which assess, among other things, the need and
371 demand for public legal services, the sufficiency of different levels of public legal
372 services to provide fair and equal access to justice in various circumstances, the
373 effectiveness of those services in positively impacting people's lives and legal
374 situations, the quality and cost-effectiveness of different providers of public legal
375 services, and other relevant issues.

376
377 viii. Prepare and submit an annual report to the Governor, the Legislature, and
378 the Judiciary on the extent of its activities, including any data utilized or
379 generated relating to its duties and both quantitative and qualitative data about the
380 costs, quantity, quality, and other relevant performance measures regarding public
381 legal services provided during the year. The Board also may make
382 recommendations for changes in the Model Access Act and other State statutes,
383 court rules, or other policies that would improve the quality or reduce the cost of
384 public legal services under the Model Access Act.

385
386 **Commentary:** While the size and composition of the Board are matters to be determined based
387 on local circumstances and need, it is suggested that an appropriate number of members to
388 consider is seven, with appointments being made by the Governor, the Chief Justice of the state
389 Supreme Court, and either a representative of the state Legislature or President of a state or
390 metropolitan bar association. Appointments should be allocated to ensure that a majority of
391 members are lawyers. For example, on a seven-person board, the Governor, Chief Justice,
392 Legislative representative and Bar President could each appoint one lawyer and the government
393 representatives could have a second appointment that could be a non-lawyer. It is suggested that
394 terms be for three years, with one renewal possible, and that terms be staggered.

395
396 Broad diversity on the Board is of critical importance, particularly in light of the eligible client
397 population. Other diversity factors may be taken into account as well. For example, it may
398 make sense in a particular state to have business and civic leaders on the Board as well as
399 persons representing the eligible population or others.

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

408
409 The emphasis in Section 4.E.i is on effective, cost-efficient services that provide the applicant
410 with fair and equal access to justice. How that is accomplished may vary from state to state
411 depending on the resources available in the community. Thus, the Board may choose to contract
412 with local non-profit legal aid organizations or with private attorneys, or both, as it deems
413 appropriate, to provide the services authorized under the Model Access Act. If the Board chooses
414 to contract with a local non-profit legal aid organization, it nonetheless may choose to contract as
415 well with private attorneys under circumstances it deems appropriate, such as when non-profit
416 legal aid organizations are unable to provide representation to an eligible client because of an
417 ethical conflict, legal prohibition or because there are not enough salaried attorneys properly to
418 represent the number of clients requiring representation in a given court or geographic area at the
419 time representation is required, or in cases when, because of special expertise or experience, or
420 other exceptional factors, a private attorney can provide representation that better serves the
421 goals of effectiveness, cost-efficiency, and fair and equal access to justice.

422
423 Assuming it is lawful to do so under the law of the enacting State, Section 4.E.ii may include
424 authority for the Board to delegate eligibility and scope of public legal services determinations to
425 local legal aid organizations, such as legal services organizations funded by the federal Legal
426 Services Corporation, those funded under the State IOLTA program, and any self-help centers
427 the State court system certifies as qualified, all of which would automatically be considered
428 certified to perform these functions. In assessing eligibility, the organization making the
429 determination should be authorized to evaluate both the applicant's financial eligibility and
430 whether the applicable standard defined in Section 3.B is satisfied.

431
432 **SECTION 5. STATE ACCESS FUND.**

- 433
434 **A.** The State Access Fund supplies all the financial support needed for the services
435 guaranteed by the provisions of this Act as well as the costs of administering the program
436 established under this Act.
437
438 **B.** In conjunction with preparation of the state judicial budget, the Board shall submit an
439 estimate of anticipated costs and revenues for the forthcoming fiscal year and a request
440 for an appropriation adequate to provide sufficient revenues to match the estimated costs.
441 Annually thereafter, the Board shall provide the Governor, the Legislature, and the
442 Judiciary with a status report of revenues and expenditures during the prior year. Within
443 three months after the end of the state's fiscal year the Board shall submit to the
444 Governor, the Legislature, and the Judiciary a request for the funds required from general
445 revenues to make up the difference, if any, between revenues received and appropriated

446 pursuant to the initial budget estimate and the obligations incurred in order to support the
447 right defined in this law.

448
449 **Commentary:** Because of varying financial conditions in implementing jurisdictions, no
450 attempt is made in this Section to identify possible revenue sources. Implementing jurisdictions
451 may consider using any available source of revenues, but shall ensure that current financial
452 support to existing legal aid providers is not reduced, as set forth in Section 1 G. of this Model
453 Access Act.
454