

104 (Revised)

AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

COMMISSION ON IMMIGRATION

SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION

COMMISSION ON HOMELESSNESS AND POVERTY

COALITION FOR JUSTICE

JUDICIAL DIVISION

SENIOR LAWYERS DIVISION

SECTION OF TORT TRIAL AND INSURANCE PRACTICE

STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS

COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS

PHILADELPHIA BAR ASSOCIATION

SANTA CLARA COUNTY BAR ASSOCIATION

NEW YORK STATE BAR ASSOCIATION

KING COUNTY BAR ASSOCIATION

MASSACHUSETTS BAR ASSOCIATION

PENNSYLVANIA BAR ASSOCIATION

STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE

COMMISSION ON DOMESTIC VIOLENCE

NEW YORK COUNTY LAWYERS ASSOCIATION

ATLANTA BAR ASSOCIATION

BAR ASSOCIATION OF SAN FRANCISCO

WASHINGTON STATE BAR ASSOCIATION

LOS ANGELES COUNTY BAR ASSOCIATION

SECTION OF FAMILY LAW

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

SECTION OF BUSINESS LAW

SECTION OF ADMINISTRATIVE LAW

YOUNG LAWYERS DIVISION

COMMISSION ON YOUTH AT RISK

REPORT TO THE HOUSE OF DELEGATES

Recommendation

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

104 (Revised)

REPORT

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

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

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

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

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

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

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

104 (Revised)

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

104 (Revised)

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

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

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

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

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

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

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...”

104 (Revised)

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

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

The 2009 update from LSC noted:

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

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

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

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*.

104 (Revised)

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

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

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

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

- In Utah, a 2006 report found that in divorce cases, 49 percent of petitioners and 81 percent of respondents were self represented. Eighty percent of self-represented people coming to the district court clerk's office seek additional help before coming to the courthouse.
- A January 2004 report in New Hampshire found that, in the district court, one party is *pro se* in 85 percent of all civil cases and 97 percent of domestic abuse cases. In the superior court, one party is *pro se* in 48 percent of all civil cases and almost 70 percent in domestic relations cases.
- In California, a 2004 report found more than 4.3 million court users are self-represented. In family law cases, 67 percent of petitioners are self-represented at the time of filing and 80 percent are self-represented at disposition for dissolution cases. In unlawful detainer cases, 34 percent of petitioners are self-represented at filing and 90 percent of defendants are self-represented.

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

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

104 (Revised)

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

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

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

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

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

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

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

104 (Revised)

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*

104 (Revised)

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

104 (Revised)

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.

104 (Revised)

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)
Shubhangi Deoras (Consultant, Standing Committee on Legal Aid and Indigent Defendants)
Margaret Bell Drew (Commission on Domestic Violence)
Justice Earl Johnson, Jr. (Ret.) (Standing Committee on Legal Aid and Indigent Defendants)
Wiley E. Mayne, Jr. (Section of Litigation)
Neil G. McBride (Standing Committee on Legal Aid and Indigent Defendants)
JoNel Newman (Commission on Immigration)
Robert L. Rothman (Section of Litigation)
Judge Edward Schoenbaum (Judicial Division; Coalition for Justice)
Robert E. Stein (Standing Committee on Legal Aid and Indigent Defendants)
Michelle Tilton (Section of Tort Trial and Insurance Practice)
Robert A. Weeks (Standing Committee on Legal Aid and Indigent Defendants)
Lisa C. Wood (Section of Litigation)

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.

104 (Revised)

44 G. Funding provided pursuant to this Act shall not reduce either the amount or sources of
45 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.
48

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.
74
- 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, whether in a private action or as a result of proceedings

104 (Revised)

87 initiated or intervened in by the state for the purposes of child protective intervention,
88 (ii) a parent’s right to residential custody of a child or the parent’s visitation rights are
89 at risk of being terminated, severely limited, or subject to a supervision requirement,
90 or (iii) a party seeks sole legal authority to make major decisions affecting the child.
91 This definition includes the right to representation for children only in proceedings
92 initiated or intervened in by the state for the purposes of child protective intervention.
93

- 94 C. "Full legal representation" is the performance by a licensed legal professional of all legal
95 services that may be involved in representing a party in a court, an administrative
96 proceeding, or in an arbitration hearing, in which by law or uniform practice parties may
97 not be represented by anyone other than licensed members of the legal profession.
98
- 99 D. "Licensed legal professional" is a member of the State Bar or other entity authorized by
100 the State to license lawyers, a law student participating in a State authorized,
101 attorney-supervised clinical program through an accredited law school, or a member of
102 the Bar of another jurisdiction who is legally permitted to appear and represent the
103 specific client in the particular proceeding in the court or other forum in which the matter
104 is pending.
105
- 106 E. "Limited scope representation" is the performance by a licensed legal professional of one
107 or more of the tasks involved in a party's dispute before a court, an administrative
108 proceeding, or an arbitration body, only to the extent permitted by Rule 1.2(c) of the
109 ABA Model Rules of Professional Conduct or the jurisdiction’s equivalent, and when
110 such limited representation is sufficient to afford the applicant fair and equal access to
111 justice consistent with criteria set forth in Section 3 hereof. Depending on circumstances,
112 this form of assistance may or may not be coupled with self-help assistance.
113
- 114 F. "Public legal services" includes full legal representation or limited scope representation,
115 through any delivery system authorized under this Act, and funded by the State Access
116 Fund provided in Section 5 hereof.
117
- 118 G. The "State Access Board" (the "Board") is established as a statewide body, independent
119 of the judiciary, the attorney general, and other agencies of state government, responsible
120 for administering the public legal services program defined by and funded pursuant to
121 this Act.
122

123 **Commentary:**

124
125 Adopting jurisdictions may wish to make modifications, based on the unique circumstances
126 applicable in their communities, to the list of "basic human needs" set forth in this section. The
127 list set forth in this section is considered the most basic of needs that a civil right to counsel
128 should address; some jurisdictions may wish to expand the list as appropriate to their situation.
129 For example, some jurisdictions may wish to consider expanding the definition of "child

104 (Revised)

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

132
133 In proceedings in which a parent who meets the eligibility requirements set forth herein is
134 threatened with loss of child custody as defined in Section 2.B.v, representation should be
135 provided by the State as set forth in the Act. Recognizing that needs, priorities and resources
136 may differ from jurisdiction to jurisdiction, implementing jurisdictions may wish to consider
137 some or all of the following factors: (i) the number of private child custody disputes likely to
138 meet these standards, (ii) the impact of providing legal services in private child custody cases on
139 the ability of the state to serve other basic needs as set forth herein; (iii) the relative impact on
140 the state courts of a lack of representation in private child custody cases as compared to other
141 basic needs cases; and (iv) the availability of alternative financial resources to pay for
142 representation for the applicant, such as cases in which the parent seeking to terminate or to
143 severely limit the other parent’s child custody rights has the ability to pay for the applicant’s
144 representation. Additionally, implementing jurisdictions are referred to the ABA Standards on
145 the Representation of Children in Child Custody Cases (2003) for suggested criteria to decide
146 when counsel should be appointed for children in custody cases. All children subject to
147 proceedings in which the state is involved due to allegations of child abuse or neglect should
148 have legal representation as long as jurisdiction continues.

149
150 In light of the extraordinary level of unmet need, and the limited resources likely to be available
151 to support additional positions for state-funded legal services or other sources of legal
152 representation for the poor, to the extent the jurisdiction permits their use, jurisdictions may
153 consider authorizing paralegals, or other lay individuals who have completed appropriate training
154 programs, to provide certain types of limited, carefully-defined legal services in administrative
155 proceedings to persons qualifying under this Act for representation. If permitted, such services
156 should always be provided under the direct supervision of a licensed lawyer. Moreover, limited
157 scope representation should not be considered a substitute for full legal representation when full
158 legal representation is necessary to provide the litigant fair and equal access to justice, but rather
159 should be employed only when consistent with Section 3 below, and when limited scope
160 representation is determined to be sufficient to meet that high standard.

161 162 **SECTION 3. RIGHT TO PUBLIC LEGAL SERVICES.**

163
164 A. Subject to the exceptions and conditions set forth below, public legal services shall be
165 available at State expense, upon application by a financially-eligible person, in any
166 adversarial proceeding in a state trial or appellate court, a state administrative proceeding,
167 or an arbitration hearing, in which basic human needs as defined in Section 2.B hereof
168 are at stake. Depending on the circumstances described in the following Sections,
169 appropriate public legal services may include full legal representation or limited scope
170 representation as necessary for the person to obtain fair and equal access to justice for the
171 particular dispute or problem that person confronts, including, where necessary,
172 translation or other incidental services essential to achieving this goal.

104 (Revised)

173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215

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

104 (Revised)

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

221
222 b. if legal representation is otherwise being provided to the applicant
223 in the particular case, such as through existing civil legal aid programs, the
224 services of a lawyer who provides such representation on a contingent fee
225 basis, as the result of the provisions of an insurance policy, as part of a class
226 action that will reasonably serve the legal interests of the applicant and that
227 he or she is able to join, or if the applicant's interests are being protected by
228 counsel in some other way;

229
230 c. if the matter is not contested, unless the Board determines the
231 interests of justice require the assistance of counsel;

232
233 d. if under standards established by the Board, and under the
234 circumstances of the particular matter, the Board deems a certain type and
235 level of limited scope representation is sufficient to afford fair and equal
236 access to justice and is sufficient to ensure that the basic human needs at
237 stake in the proceeding are not jeopardized due to the absence of full
238 representation by counsel (however, limited scope representation shall be
239 presumed to be insufficient when the opposing party has full
240 representation);

241
242 e. for matters in designated courts or other forums when the Board
243 evaluates and certifies, after public hearings and in compliance with the
244 State's [statutory code governing administrative procedures], that:

245
246 1. the designated court or forum: (1) operates in such a manner that
247 the judge or other dispute resolver plays an active role in
248 identifying the applicable legal principles and in developing the
249 relevant facts rather than depending primarily on the parties to
250 perform these essential functions; (2) follows relaxed rules of
251 evidence; and (3) follows procedural rules and adjudicates legal
252 issues so simple that non-lawyers can represent themselves before
253 the court or other forum and still enjoy fair and equal access to
254 justice; and

255
256 2. within such designated court or forum, the specific matter satisfies
257 the following criteria: (1) the opposing party is not represented by
258 a licensed legal professional; (2) the particular applicant possesses

104 (Revised)

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

265
266 iv. Limited scope representation as defined herein shall be available to financially
267 eligible individuals where the limited service provided is required because self-help
268 assistance alone would prove inadequate or is not available and where such limited
269 scope representation is sufficient in itself or in combination with self-help assistance
270 to provide the applicant with effective access to justice in the particular case in the
271 specific forum. In matters before those courts or other forums in which
272 representation can be provided only by licensed legal professionals, however, limited
273 scope representation can only be substituted for full representation when permitted by
274 Section 3.B.iii above.

275
276 C. In addition, any state trial or appellate court judge, any state administrative judge or
277 hearing officer, or any arbitrator may notify the Board in writing that, in his or her
278 opinion, public legal representation is necessary to ensure a fair hearing to an
279 unrepresented litigant in a case believed to involve a basic human need as defined in
280 Section 2.B. Upon receiving such notice, the Board shall timely determine both the
281 financial eligibility of the litigant and whether the subject matter of the case indeed
282 involves a basic human need. If those two criteria are satisfied, the Board shall provide
283 counsel as required by this Act.

284
285 D. In order to ensure that the scarce funds available for the program are used to serve the
286 most critical cases and the parties least able to access the courts without representation,
287 eligibility for representation shall be limited to clients who are unable to afford adequate
288 legal assistance as defined by the Board, including those whose household income falls at
289 or below [125 percent] of the federal poverty level.

290
291 E. Nothing in this Act should be read to abrogate any statutory or constitutional rights in this
292 state that are at least as protective as the rights provided under this Act.

293
294 **Commentary:** With regard to Section 3.B.ii, in determining whether there is “a reasonable
295 probability of success on appeal” for appellants or equivalents, or “no reasonable possibility the
296 appellate court will affirm the decision of the trial court or other forum” for respondents or
297 equivalents, the Board or its designee shall give consideration to existing law or the existence of
298 a non-frivolous argument for extending, modifying, or reversing existing law or for establishing
299 new law.

104 (Revised)

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

309
310 The 125 percent income cap in Section 3.D suggests the minimum economic strata the Model
311 Act seeks to target. Implementing jurisdictions may consider alternative financial eligibility
312 standards that target a larger percentage of the population unable to afford legal services in cases
313 of basic needs, such as 150 percent of the federal poverty level, or a formula that also takes into
314 account other factors relevant to the financial ability of the applicant to pay for legal services.
315 For example, the determination of a particular applicant's financial eligibility ordinarily should
316 take account of the applicant's assets and medical or other extraordinary ongoing expenditures
317 for basic needs. Some of those factors, such as substantial net assets, might make a person
318 ineligible despite a current income that is below 125 percent of the federal poverty level. Other
319 factors might justify providing a person with legal services as a matter of right, even though
320 gross income exceeds 125 percent of the federal poverty level.

321
322 The Model Act assumes that services will be provided only in the context of adversarial
323 proceedings. Many legal matters impacting the poor may be resolved without adversarial
324 proceedings (e.g. transactional matters, issues relating to applications for benefits), and advice of
325 counsel may be important to a fair resolution of such matters. While this Model Act does not
326 address services in non-adversarial settings, adopting jurisdictions may wish to consider whether
327 services in such settings would provide a useful preventive approach and might conserve
328 resources that otherwise would need to be expended in the course of supporting adversarial
329 proceedings. If so, such an adopting jurisdiction may wish to adjust the Model Act to provide
330 some services outside of adversarial settings.

331

SECTION 4. STATE ACCESS BOARD.

332

333
334 A. There is established within the State judicial system an independent State Access Board
335 ("Board") that shall have responsibility for policy-making and overall administration of
336 the program defined in this Act, consistent with the provisions of this Act.

337

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

104 (Revised)

344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384

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.

104 (Revised)

385 vi. Establish and administer a system of evaluation of the quality of
386 representation delivered by the institutional providers and private attorneys
387 receiving funding for representation through the State Access Fund.
388

389 vii. If reliable, relevant data is not otherwise available, conduct, or contract
390 with others to conduct, studies which assess, among other things, the need and
391 demand for public legal services, the sufficiency of different levels of public legal
392 services to provide fair and equal access to justice in various circumstances, the
393 effectiveness of those services in positively impacting people's lives and legal
394 situations, the quality and cost-effectiveness of different providers of public legal
395 services, and other relevant issues.
396

397 viii. Prepare and submit an annual report to the Governor, the Legislature, and
398 the Judiciary on the extent of its activities, including any data utilized or
399 generated relating to its duties and both quantitative and qualitative data about the
400 costs, quantity, quality, and other relevant performance measures regarding public
401 legal services provided during the year. The Board also may make
402 recommendations for changes in the Model Access Act and other State statutes,
403 court rules, or other policies that would improve the quality or reduce the cost of
404 public legal services under the Model Access Act.
405

406 **Commentary:** While the size and composition of the Board are matters to be determined based
407 on local circumstances and need, it is suggested that an appropriate number of members to
408 consider is seven, with appointments being made by the Governor, the Chief Justice of the state
409 Supreme Court, and either a representative of the state Legislature or President of a state or
410 metropolitan bar association. Appointments should be allocated to ensure that a majority of
411 members are lawyers. For example, on a seven-person board, the Governor, Chief Justice,
412 Legislative representative and Bar President could each appoint one lawyer and the government
413 representatives could have a second appointment that could be a non-lawyer. It is suggested that
414 terms be for three years, with one renewal possible, and that terms be staggered.
415

416 Broad diversity on the Board is of critical importance, particularly in light of the eligible client
417 population. Other diversity factors may be taken into account as well. For example, it may
418 make sense in a particular state to have business and civic leaders on the Board as well as
419 persons representing the eligible population or others.
420

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

104 (Revised)

428
429 The emphasis in Section 4.E.i is on effective, cost-efficient services that provide the applicant
430 with fair and equal access to justice. How that is accomplished may vary from state to state
431 depending on the resources available in the community. Thus, the Board may choose to contract
432 with local non-profit legal aid organizations or with private attorneys, or both, as it deems
433 appropriate, to provide the services authorized under the Model Access Act. If the Board chooses
434 to contract with a local non-profit legal aid organization, it nonetheless may choose to contract as
435 well with private attorneys under circumstances it deems appropriate, such as when non-profit
436 legal aid organizations are unable to provide representation to an eligible client because of an
437 ethical conflict, legal prohibition or because there are not enough salaried attorneys properly to
438 represent the number of clients requiring representation in a given court or geographic area at the
439 time representation is required, or in cases when, because of special expertise or experience, or
440 other exceptional factors, a private attorney can provide representation that better serves the
441 goals of effectiveness, cost-efficiency, and fair and equal access to justice.

442
443 Assuming it is lawful to do so under the law of the enacting State, Section 4.E.ii may include
444 authority for the Board to delegate eligibility and scope of public legal services determinations to
445 local legal aid organizations, such as legal services organizations funded by the federal Legal
446 Services Corporation, those funded under the State IOLTA program, and any self-help centers
447 the State court system certifies as qualified, all of which would automatically be considered
448 certified to perform these functions. In assessing eligibility, the organization making the
449 determination should be authorized to evaluate both the applicant's financial eligibility and
450 whether the applicable standard defined in Section 3.B is satisfied.

451 452 **SECTION 5. STATE ACCESS FUND.**

453
454 A. The State Access Fund supplies all the financial support needed for the services
455 guaranteed by the provisions of this Act as well as the costs of administering the program
456 established under this Act.

457
458 B. In conjunction with preparation of the state judicial budget, the Board shall submit an
459 estimate of anticipated costs and revenues for the forthcoming fiscal year and a request
460 for an appropriation adequate to provide sufficient revenues to match the estimated costs.
461 Annually thereafter, the Board shall provide the Governor, the Legislature, and the
462 Judiciary with a status report of revenues and expenditures during the prior year. Within
463 three months after the end of the state's fiscal year the Board shall submit to the
464 Governor, the Legislature, and the Judiciary a request for the funds required from general
465 revenues to make up the difference, if any, between revenues received and appropriated
466 pursuant to the initial budget estimate and the obligations incurred in order to support the
467 right defined in this law.

468
469 **Commentary:** Because of varying financial conditions in implementing jurisdictions, no
470 attempt is made in this Section to identify possible revenue sources. Implementing jurisdictions

104 (Revised)

471 may consider using any available source of revenues, but shall ensure that current financial
472 support to existing legal aid providers is not reduced, as set forth in Section 1 G. of this Model
473 Access Act.
474