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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

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SECTION OF TORT TRIAL AND INSURANCE PRACTICE

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NEW YORK COUNTY LAWYERS ASSOCIATION

KING COUNTY BAR ASSOCIATION

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PENNSYLVANIA BAR ASSOCIATION

STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE

COMMISSION ON DOMESTIC VIOLENCE

ATLANTA BAR ASSOCIATION

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

BAR ASSOCIATION OF SAN FRANCISCO

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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 **ABA**
2 **Basic Principles of a Right to Counsel in Civil Legal Proceedings**, dated August 2010.

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REPORT

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

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

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

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

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

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

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

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

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

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

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

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

- **Hawaii:** In December 2007, the Hawaii Access to Justice Hui—a group including the Hawaii State Bar Association, Hawaii Justice Foundation, the state judiciary, and various advocacy organizations—issued a report listing ten action steps necessary to increase access to justice in the state by 2010, one of which is the recognition of a right to counsel in civil cases involving basic human needs. Further, the Hawaii Access to Justice Commission, created by state supreme court rule in May 2008 and including three members appointed by the state bar association, established a Committee on the Right to Counsel in Certain Civil Proceedings, which is charged with: (a) studying developments in other jurisdictions regarding the establishment and implementation of a civil right to counsel; (b) recommending the types of civil matters in which counsel should be provided in Hawaii; (c) assessing the extent to which attorneys are available for such matters; and (d) recommending ways to ensure counsel is available in these matters. The committee met in August 2009 to consider next steps, including the possibility of drafting a resolution.
- **Maryland:** In 2008, the Maryland’s chief judge appointed the Maryland Access to Justice Commission to develop, coordinate, and implement policy initiatives designed to expand access to the civil justice system. In its first year, the Commission has been gathering information from the public and will issue a report with recommendations at the conclusion of this process. In November 2009, the Commission issued an interim report that, among other things, details its discussion and examination of possible strategies for implementing a civil right to counsel in Maryland. The report includes a recommendation that closely tracks the language of the ABA’s 2006 civil right to counsel resolution and states that “[t]he Maryland Access to Justice Commission supports the principle that low-income Marylanders should have a right to counsel at public expense in those categories of adversarial

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

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

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

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

- **Michigan:** In May 2009, the National Coalition for a Civil Right to Counsel (NCCRC) filed an amicus brief in *In re McBride*, No. 136988 (Mich. 2009), a case before the Michigan Supreme Court involving the denial of counsel to an incarcerated father in hearings that terminated his parental rights. NCCRC is a broad-based association formed in 2004 that includes more than 180 individuals and organizations from over 35 states and is committed to supporting efforts to expand recognition and implementation of a right to counsel for the poor in civil matters. The father appealed the unpublished decision of the Michigan Court of Appeals, in which the court held harmless the error of the lower court in neglecting to appoint counsel for the father under statutory law. NCCRC’s brief argued that the parent had a right to counsel under the Michigan Constitution, and that the complete denial of counsel can never be harmless error. In June, the Michigan Supreme Court denied the father’s request for review, but the order included a strongly worded dissent agreeing that the father’s due process rights had been violated.
- **Minnesota:** In 2007, the Minnesota State Bar Association created a Civil Gideon Task Force to explore the feasibility of establishing a civil right to counsel in Minnesota and analyze

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

- ***New Hampshire:*** In 2006, the New Hampshire Citizens Commission on the State Courts, which was created via appointments by the Chief Justice of the New Hampshire Supreme Court, issued a report recommending that the state “examine the expansion of legal representation to civil litigants unable to afford counsel and study the implementation of a ‘civil *Gideon*.’”
- ***New York:*** In November 2007, a bill was introduced in the New York City Council to establish a right to counsel for low-income seniors facing eviction or foreclosure. Although the matter has yet to come to a vote before the council, recent developments indicate that the bill likely will be reintroduced soon. In December 2008, the New York County Lawyers Association’s president published a letter supporting the bill and urging the expansion of the right to counsel to include all low-income litigants facing eviction or foreclosure and unable to afford counsel. A bill was also introduced in the state legislature in 2009 to give courts discretionary power to appoint counsel for low-income seniors facing eviction and to stay the proceedings for up to three months to allow seniors to find counsel.

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

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- **North Carolina:** The Chief Justice of the North Carolina Supreme Court has convened a Civil Right to Counsel Committee of that state's Access to Justice Commission. In addition, the North Carolina Center on Poverty, Work, and Opportunity hosted a half-day conference on October 30, 2009 relating to access to justice and civil right to counsel issues.
- **Pennsylvania:** In November 2007, the Pennsylvania Bar Association passed a resolution consistent with the 2006 ABA resolution urging the state to provide counsel as a matter of right to low-income litigants in high-stakes civil proceedings, such as those involving "shelter, sustenance, safety, health or child custody." Thereafter, the bar association formed its Access to Justice Task Force to develop broad implementation strategies for the right to counsel endorsed by the association, including strategies for funding a right to counsel and for maximizing private bar involvement in efforts to improve access to the justice system.

The Philadelphia Bar Association also has formed a "Civil *Gideon*" Task Force to consider expanding the civil right to counsel in the state. The task force co-sponsored a symposium on April 10, 2008 with the Pennsylvania Bar Association's task force. On April 30, 2009, the Philadelphia Bar Association adopted a resolution (tracking the language of the ABA 2006 resolution) calling for the establishment of a right to counsel in civil cases involving basic human needs and directing the bar association's Task Force on Civil *Gideon* to: (1) investigate all means for effectively providing for this right, including, for example, collaborative models, legislative initiatives, funding proposals, pilot projects, and other exploratory vehicles; and (2) upon completion of such investigation, prepare and submit a report with recommendations to the association's Board of Governors. The Task Force submitted this report to the Board of Governors in November 2009.
- **Texas:** On June 25, 2009, a petition for writ of certiorari was filed in the U.S. Supreme Court for *Rhine v. Deaton*, in which the petitioner, Tracy Rhine, asked the court to consider whether Texas Family Code Sec. 107.013 (which provides counsel to indigent parents facing termination of parental rights in state-initiated suits, but not privately initiated actions) violates the 14th Amendment's Equal Protection Clause. The petition also raised the issue of whether the cumulative denial of safeguards in Rhine's case violated her due process rights. Additionally, the cert petition argued that Rhine's case presented the U.S. Supreme Court with an opportunity to address the refusal on the part of state trial courts to adhere to the Court's 1981 ruling in *Lassiter v. Department of Social Services* that courts evaluate the need for court-appointed counsel using the factors articulated within the Supreme Court's 1976 decision in *Matthews v. Eldridge*. On October 5, 2009, the Court invited the Solicitor General of Texas to "express the views of the State" in *Rhine v. Deaton*. In December, the state filed its amicus brief in the case opposing a grant of the cert petition. On January 25, 2010, the Court denied the cert petition in *Rhine v. Deaton*.
- **Washington:** In January 2009, a Washington state appellate court ruled in *Bellevue School District v. E.S.* that students have a due process right to counsel in truancy proceedings that may lead to eventual detention. The case was appealed to the Supreme Court of Washington

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

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

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

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

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Conclusion

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

Respectfully submitted,

Robert E. Stein, Chair
Standing Committee on Legal Aid and Indigent Defendants³

August 2010

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

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

August 2010

The Objective

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

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

The Principles

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

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

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Commentary

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

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

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

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

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

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

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

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

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

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

⁹ CALIFORNIA ACCESS TO JUSTICE COMMISSION'S MODEL STATUTE TASK FORCE, STATE BASIC ACCESS ACT §§ 401-404 (Feb. 8, 2008) *available at*

http://www.abanet.org/legal/services/sclaid/atjresourcecenter/downloads/ca_state_basic_access_act_feb_08.pdf; American Bar Association's Task Force on Access to Civil Justice, *Report to the House of Delegates*, *supra* note 3, at 14.

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

Numerous right to counsel statutes, court rules, and national standards impose the type of experience, training, and continuing education requirements, as well as the requirement to perform specific duties, found within Principle 7.³⁶ In addition, with respect to the evaluation of counsel's performance, this Principle reflects the approach taken by the proposed "ABA Model Access Act," which requires an independent board to establish and administer a system of evaluation of the quality of representation provided by institutions and private attorneys receiving public funding for this purpose through the Model Act.³⁷

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

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

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

Commentary

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

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

Commentary

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

<http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/tencivilprinciples.pdf>; ABA TEN

PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, *supra* note 18, PRINCIPLE 10.

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

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

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

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

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

Commentary

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

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

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

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

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