ADOPTED

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local, territorial and tribal governments to provide legal counsel as a matter of right at public expense to low-income persons in all proceedings that may result in a loss of physical liberty, regardless of whether the proceedings are: a) criminal or civil; or b) initiated or prosecuted by a government entity;

FURTHER RESOLVED, That no court should accept an in-court waiver of the right to appointed counsel in a case that may result in a loss of physical liberty unless the person has had the opportunity to confer with a lawyer; and

FURTHER RESOLVED, That a person who has waived appointed counsel should be offered appointed counsel at each subsequent stage of the proceedings at which the person appears without counsel.

REPORT

The ABA Has Long Supported a Right to Counsel in Cases Involving Basic Human Needs.

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."

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:
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> > 'Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.'
>
> The ABA also has long recognized that the nation's legal profession has a special obligation to advance the national commitment to provide equal justice. The Association's efforts to promote civil legal aid and access to appointed counsel for indigent litigants are quintessential expressions of these principles.
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> In 1920, the Association created its first standing committee, "The Standing Committee on Legal Aid and Indigent Defendants," with Charles Evans Hughes as its first chair. With this action, the ABA pledged itself to foster the expansion of legal aid throughout the country. Then, in 1965, under the leadership of Lewis Powell, the ABA House of Delegates endorsed federal funding of legal services for the poor because it was clear that charitable funding would never begin to meet the need. In the early 1970s, the ABA played a prominent role in the creation of the federal Legal Services Corporation to assume responsibility for the legal services program created by the federal Office of Economic Opportunity. Beginning in the 1980s and continuing to the present, the ABA has been a powerful and persuasive voice in the fight to maintain federal funding for civil legal services.

...

The ABA Has Adopted Policy Positions Favoring a Right to Counsel

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

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

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

Echoing the Association's stance in *Lassiter*, the brief continued 'the right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights . . . . [W]hen important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires meaningful access. . . . To ensure meaningful access, particularly

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

> when 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 Resolution Addresses a Perceived Gap in the ABA's Existing Policy on the Right to Counsel in Civil Cases.

While Resolution 112A called for a right to counsel generally in "those categories of adversarial proceedings where basic human needs are at stake," it proceeded to list five categories of cases: shelter, sustenance, safety, health, and child custody. These categories are sometimes perceived by the bar or the public to be a definitive list of what constitutes a "basic human need," rather than just examples. This misunderstanding is potentially furthered by the fact that some types of basic human needs civil cases not included in 112A's list are addressed by other ABA resolutions: for instance, Resolution 115 (2017) supports a right to counsel in immigration removal proceedings, while Resolution 109A (2010) calls for the provision of counsel in all juvenile status offense proceedings.

Civil proceedings involving physical liberty, such as child support contempt and incarceration for failure to pay court-imposed fees and fines, are not explicitly addressed by any ABA resolution. This omission is in part due to the U.S. Supreme Court taking a surprising direction on the issue. In 1981, the Court stated, "The preeminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."[2] At the time of Resolution 112A's adoption in 2006, it was believed that this statement essentially established a right to counsel in civil cases involving physical liberty. Then, in 2011 the Court considered whether an indigent parent facing incarceration due to child support contempt proceedings initiated by the other custodial parent has a categorical Fourteenth Amendment right to appointed counsel.[3] The ABA filed an amicus brief arguing that the right to counsel should not depend on the "criminal" or "civil" case label and that the provision of counsel where incarceration is at stake "promotes the fair and efficient administration of justice."[4] The Court held, however, that there was no categorical right to counsel, although it suggested the result might be different if the government was the plaintiff.

Since then, state courts have been split on whether a right to counsel exists for civil incarceration. For example, the Maryland Court of Appeals recognized a categorical right to counsel under the state constitution "in any proceeding that may result in the defendant's incarceration"[5] and the Tennessee Court of Appeals identified a right to counsel in the fees and fines contempt context,[6] while the Wyoming Supreme Court declined to recognize a right to counsel for any child support contempt cases even where the government is the plaintiff,[7] and the

[2] *Lassiter v. Dep't of Soc. Servs*, 452 U.S. 18, 25 (1981).
[3] *Turner v. Rogers*, 564 U.S. 431 (2011)
[4] Brief for American Bar Association as Amicus Curiae Supporting Petitioner, *Turner v. Rogers*, 564 U.S. 431 (2011).
[5] *DeWolfe v. Richmond*, 76 A.3d 1019, 1029 (Md. 2013).
[6] *Poole v. City of Chattanooga*, 2000 Tenn. App. LEXIS 181 at *19 n.4 (Tenn. Ct. App. 2000) (unpublished).
[7] *State, Dep't of Family Services v. Currier*, 295 P.3d 837, 843 (Wyo. 2013).

Maine Supreme Judicial Court held there was no right to counsel in a fees and fines case.[8] At the same time, the U.S. Commission on Civil Rights has said that "Courts and municipalities should establish a program to provide counsel at no cost at the imposition of a fine or fee and at an indigency determination as appropriate," based on the following findings:

> Lack of counsel in municipal court cases that involve only fines and fees can exacerbate problems that arise when courts fail to conduct ability to pay determinations and consider fee alternatives for indigent defendants. Counsel can assist in presenting evidence regarding a defendant's ability to pay fines and fees, negotiating lower fines and fees or alternate payment plans, and making sure the defendant understands the implications of any payment commitments made.[9]

The Right to Counsel Should Attach When Incarceration is Threatened, and Not Only When Actual Incarceration Occurs.

In *Scott v. Illinois*, the U.S. Supreme Court took the position that a defendant's Sixth Amendment right to counsel is not violated in a criminal case if the court imposes a sanction other than incarceration.[10] Consequently, a criminal defendant does not know whether he or she

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[8] *Colson v. State*, 498 A.2d 585 (Me. 1985).

[9] U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications* (Sept. 2017), *available at* http://www.usccr.gov/pubs/Statutory_Enforcement_Report2017.pdf.

[10] 440 U.S. 367 (1979). Notably, the Court in *Lassiter v. Dep't of Soc. Servs*, 452 U.S. 18 (1981) referred to the right to counsel in civil cases attaching where the litigant "*may* lose his personal freedom" (emphasis added), although the Court did also note the holding in *Scott*. In *Lake v. Speziale*, 580 F.Supp. 1318 (D. Conn. 1984), a federal court observed that:

> It is the latter phrase, "when, if he loses, he may be deprived of his physical liberty," ... to which the plaintiffs point as establishing the right to counsel on a "potential incarceration" basis. Certainly the cited language of *Lassiter* is prospective and concerns the potential for incarceration, rather than being retrospective by dealing only with whether actual incarceration resulted from the proceedings. It is unclear to this Court, however, whether the Supreme Court by its language in *Lassiter* intended to adopt a prospective 'potential incarceration' test to determine the indigent civil litigant's right to appointed counsel under the Due Process Clause of the Fourteenth Amendment ... It would appear anomalous for an indigent civil litigant to have a more extensive right to appointed counsel based on the "potential incarceration" test which *Lassiter* suggests is appropriate under the Due Process Clause of the Fourteenth Amendment, than would an indigent criminal defendant under the Sixth and Fourteenth Amendments, which right to counsel and appointed counsel is violated only in the event of actual incarceration under the rule of *Scott v. Illinois* ... Nevertheless, the language employed by the Supreme Court in *Lassiter* is prospective, and, on the strength of that language, several courts subsequent to the *Lassiter* decision have held that an indigent individual in a civil contempt proceeding has a right to appointed counsel based on the potential incarceration in which the proceeding may result."

Many state courts deciding the right to counsel in civil cases have also relied on the threat of incarceration, as opposed to actual incarceration. *See, e.g., Black v. Division of Child Support Enforcement*, 686 A.2d 164, 168 (Del. 1996) ("*Lassiter* presumes an entitlement to court appointed counsel only when a defendant is faced with the possible deprivation of his physical liberty"); *Carroll v. Moore*, 423 N.W.2d 757, 766-67 (Neb. 1988) (finding right to counsel in paternity cases in part because "[e]ven though a defendant's physical liberty is not immediately at risk if adjudged to be the father of a child in a paternity proceeding, he can lose his physical liberty in later proceedings which arise out of and are based on the initial paternity determination.")

has a right to counsel until *after* sentencing. And nothing in *Scott* prevents the prosecutor from *threatening* an unrepresented defendant with incarceration in order to obtain an unfavorable plea agreement. This is a significant problem given that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[11]

The Commentary to ABA Standards for Criminal Justice: Providing Defense Services 5-5.1 supports the principle of requiring the appointment of counsel when a litigant is threatened with incarceration, as it states:

> The presence of counsel in cases punishable by incarceration that do not result in the imposition of an actual sentence to jail will help to assure fair proceedings. The Supreme Court stressed in *Argersinger* the need for counsel in order to assure fair trials, and this objective obviously is served regardless of whether incarceration results .... A 'predetermination procedure', discussed in the *Argersinger* decision, by which the court confers with the prosecutor in advance of the proceeding to determine the likelihood of imprisonment being imposed, is also rejected. In addition to being time-consuming, there is substantial risk that the court will receive information about the defendant or the offense charged which will make it exceedingly difficult for the judge to sit as fair and impartial arbiter, regardless of whether it is determined that counsel should be provided. Many states have enacted statutes consistent with standard 5-5.1 requiring, at a minimum, that counsel be afforded wherever there is possibility of imprisonment.

The Right to Counsel for an Individual Threatened with Incarceration Should Not Depend on the Nature of the Proceeding.

The threat of incarceration may surface in many different types of civil proceedings, all of which have in common the possibility that, at some point during the litigation, a judge will order that the person be incarcerated. Such proceedings include parole revocation, probation revocation, criminal contempt, and civil contempt, and may arise where there is failure to pay fees/fines, failure to pay child support, and other contexts. Yet the right to counsel relies on meaningless distinctions between these types of cases. For instance, there is a Sixth Amendment right to counsel in parole/probation revocation and civil contempt proceedings where a deferred sentence is activated as part of the proceeding,[12] as well as for criminal contempt proceedings involving failure to pay a fee or fine,[13] but not for other parole/probation revocation proceedings,[14] and it is unclear whether a federal constitutional right to counsel exists for civil contempt proceedings.[15] Additionally, while there is no Sixth Amendment right to counsel when a fine-only criminal

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[11] *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citing Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, tbl. 5.22.2009, *available at* http://www.albany.edu/sourcebook/pdf/t5222009.pdf; Sean Rosenmerkel et al., U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables 1* (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf; *Padilla v. Kentucky*, 130 S. Ct. 1473 1485–86 (2010) (recognizing that pleas account for nearly 95% of all criminal convictions).

[12] *Mempa v. Rhay*, 389 U.S. 128, 135 (1967).
[13] *Turner v. Rogers*, 564 U.S. 431 (2011).
[14] *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).
[15] *Turner v. Rogers*, 564 U.S. 431 (2011).

sentence is imposed, some federal courts have said that the Sixth Amendment bars later incarceration for that un-counselled fine, even if the incarceration occurs within the context of a civil proceeding.[16] Yet all of these proceedings involve the same fundamental determination (whether the person has the ability to pay the court-imposed fee or fine) and the same consequence (incarceration).

Requiring the appointment of counsel without relying on the label of the case is consistent with the spirit of ABA Standards for Criminal Justice: Providing Defense Services, as several of the standards call for looking past the case label in determining what rights should attach. Standard 5-5.1 states:

> Counsel should be provided in all proceedings for offenses punishable by death or incarceration, regardless of their denomination as felonies, misdemeanors, or otherwise. An offense is also deemed to be punishable by incarceration if the fact of conviction may be established in a subsequent proceeding, thereby subjecting the defendant to incarceration.

Standard 5-5.2 states:

> Counsel should be provided in all proceedings arising from or connected with the initiation of a criminal action against the accused, including but not limited to extradition, mental competency, postconviction relief, and probation and parole revocation, regardless of the designation of the tribunal in which they occur or classification of the proceedings as civil in nature.

The Commentary to 5-5.2 further explains the applicability to civil proceedings:

> In recent years, the line between criminal and civil proceedings which give rise to a constitutional right to counsel has become increasingly blurred. Thus, protected liberty interests have extended due process concepts to justify the provision of counsel for indigent litigants in such "quasi-criminal" matters as contempt for failure to make child support payments, termination of parental rights, civil commitment, and civil contempt. The arguments for a right to counsel in these contexts seem to suggest a right to counsel in traditionally civil contexts as well, so long as critical liberty interests are involved. This standard stops at proceedings "arising from or connected with" the commencement of criminal proceedings, but should not be taken to disparage the right to counsel in broader contexts as an essential aspect of a fair trial and access to justice, so long as an effective administrative infrastructure – perhaps like that suggested in this chapter – is provided.

Moreover, the National Task Force on Fines, Fees, and Bail Practices has published a bench card observing that "Case law establishes that the U.S. Constitution affords indigent persons a right to court-appointed counsel in most post-conviction proceedings in which the individual faces actual

[16] S*hayesteh v. City of South Salt Lake*, 217 F.3d 1281 (10th Cir. 2000), *United States v. Foster*, 904 F.2d 20 (9th Cir. 1990), *United States v. Perez-Macias*, 335 F.3d 421 (5th Cir. 2003), *United States v. Pollard*, 389 F.3d 101 (4th Cir. 2004).

incarceration for nonpayment of a legal financial obligation, or a suspended sentence of incarceration that would be carried out in the event of future nonpayment, even if the original sanction was only for fines and fees."[17]

The Right to Counsel for an Individual Threatened with Incarceration Should Not Depend on the Nature of the Plaintiff.

Even in seemingly "private" civil contempt actions such as child support proceedings initiated by the custodial parent, the state can still play a sufficient role.[18] Furthermore, the threat of incarceration for the defendant is not diminished in cases where the plaintiff is an individual. The *Turner* Court reasoned that appointing counsel for a defendant would create an imbalance if the plaintiff is a pro se individual,[19] but did not acknowledge the asymmetry of interests at stake: while both parties have financial interests at stake, only the defendant can be incarcerated, sometimes for years at a time.[20] Incarceration results "in quite serious repercussions affecting [a defendant's] career and his reputation."[21] When one looks to the full extent of the burden worn by a defendant, it becomes readily apparent that all defendants merit appointed counsel regardless of the status of the plaintiff.[22] And in fact, prior to the Supreme Court's 2011 decision, the majority of states provided a right to counsel in all contempt proceedings regardless of the identity of the plaintiff.[23]

Waivers Should Not Be Accepted Unless the Person Has Had An Opportunity to Consult With Counsel, and Should Be Revocable for Further Proceedings.

The Supreme Court has said that "Waiver of the right to counsel ... must be a 'knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances.'"[24] As described

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[17] http://www.ncsc.org/~/media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx.

[18] *See, e.g., In re Marriage of Stariha*, 509 N.E.2d 1117, 1122 (Ind. App. 1987) (in privately-initiated child support contempt case, court states, "It is difficult to imagine how the present case does not involve state action. Admittedly, Rebecca initiated this action as a private individual. However, the trial court found John in contempt for failure to pay child support pursuant to Rebecca's motion and sentenced him to thirty days. Certainly, John's incarceration, depriving him of his physical liberty for thirty days, amounted to state action. The court enforced a contempt proceeding that was initiated privately.").

[19] *Turner*, 564 U.S. at 446-47.

[20] *See, e.g., Armstrong v. Grondolsky*, 341 Fed. App'x 828, 831 (3d Cir. 2009) (noting appellant's seven-year jail sentence for civil contempt).

[21] *Argersinger*, 407 U.S. at 37, 37 n.6 (noting also that when incarceration lasts thirty days or longer a defendant will generally lose employment to the detriment of the defendant and his family).

[22] *Dube v. Lopes*, 481 A.2d 1293, 1294 (Conn. Super. 1984) ("There is no logical reason why [*Lake v. Speziale*, 580 F.Supp. 1318 (D. Conn. 1984)] should not apply to contempt proceedings initiated by a private person. The result is the same and that is incarceration for failure to comply with a court order of support. Surely, the requisite state action which is necessary to trigger the due process clauses is present when a person is deprived of his physical liberty by the court. It is crystal clear that a person may not be incarcerated by the state without first being advised of his constitutional right to counsel, and, if indigent, without having counsel appointed to represent him, whether the contempt proceedings are initiated by a private person or the state.").

[23] *See, e.g., Russell v. Armitage*, 697 A.2d 630, 634 (Vt. 1997) ("[E]very federal circuit court of appeal that has addressed the issue has determined that due process prohibits incarceration of an indigent defendant in a civil contempt proceeding absent appointment of counsel ... And the vast majority of state courts have reached the same result"); Ala. Code § 15-12- 20; Ark. Code. Ann. § 16-87- 306; Ky. Rev. Stat. Ann. § 31.110; Okla. Stat. tit. 12, ch. 2, app., R. 29; Or. Rev. Stat. § 33.055(8); Tex. Fam. Code § 157.163(b); W. Va. Code § 29-21-2(2).

[24] *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)).

above, some persons may be pressured to waive their right to counsel in exchange for a plea agreement involving a reduced incarceration period or additional fees/fines in lieu of incarceration. Others may not understand what an attorney can actually do to help their situation. Ensuring that all defendants consult with an attorney before deciding whether to waive their right to appointed counsel can mitigate this concern. Moreover, a defendant who knowingly and intelligently waives the right to counsel at one proceeding may have a renewed need for counsel at a subsequent proceeding, owing to changed circumstances or the different nature of the subsequent proceeding. Absent being offered counsel again at the subsequent proceeding, the defendant may not understand that the prior waiver decision was not permanent and/or may not sufficiently consider whether his or her legal needs have changed.

This particular language in the resolution is consistent with Standard 5-8.2(b) of the Standards for Criminal Justice, Providing Defense Services, which states:

> If an accused in a proceeding involving the possibility of incarceration has not seen a lawyer and indicates an intention to waive the assistance of counsel, a lawyer should be provided before any in-court waiver is accepted. No waiver should be accepted unless the accused has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the accused appears without counsel.

Standard 5-8.2 (b) references in-court waiver of counsel to emphasize that the waiver must occur before a judicial officer, which is the only way in which an accused person can relinquish their right to legal representation. Waiver of defense representation conveyed to a prosecutor or other court personnel cannot constitute a valid waiver of the right to a lawyer. Similarly, waiver of counsel conveyed to an arresting officer or other police personnel is not a valid waiver of the right to a lawyer and representation during court proceedings.

Relevant Current Activities

Below is a summary of some of the significant steps taken nationwide on the right to counsel in civil cases implicating physical liberty.[25] The efforts that are still in progress or that will be renewed in 2018 would benefit significantly from the ABA's assertion of clear policy via this resolution.

Indiana: A case pending in a state trial court includes a claim that indigent defendants in child support contempt proceedings have a right to appointed counsel.

Louisiana: HB 249, enacted in 2017, provides a defendant with a right to counsel at a hearing regarding failure to comply with a criminal fine payment plan.

Mississippi: HB 672, HB 1033, and SB 2527 were introduced in 2017 but did not pass. They would have required counsel to be appointed prior to incarceration for failure to pay fees/fines.

[25] Litigation in the fees/fines context that is in in the early procedural stages (which is most such litigation) is not listed below.

Missouri: In *Fant v. Ferguson,* No. 4-15-CV-00253-AGF (E.D. Mo. 2015), a federal court in 2015 denied the City of Ferguson's motion to dismiss a claim that indigent persons facing incarceration for failure to pay fees and fines have a right to appointed counsel. The case is still being litigated.

Nebraska: LB 526 was introduced in 2017 but did not pass after receiving a hearing. It would have, among other things, required appointment of counsel for contempt proceedings related to debt collection.

Nevada: A case pending before the Nevada Supreme Court argues that indigent defendants in child support contempt proceedings have a right to appointed counsel.

New Hampshire: SB 200, enacted in 2017, requires appointment of counsel prior to incarcerating a person for failure to pay fines/fees or perform community service.

Pennsylvania: A case pending before the Superior Court (Appellate Division) raises the right to counsel prior to incarceration for failing to pay court-ordered fees and fines.

Utah: SB 71, enacted in 2017, requires counsel to be appointed for collection and enforcement of criminal debt (which is treated as a contempt matter) if the court is considering incarceration.

Conclusion

The threat of incarceration may surface in many types of proceedings, some of which are denominated as "civil," and some of which are labelled as "criminal." It is not clear under current law, nor under ABA policy, whether the loss of liberty pursuant to proceedings labelled as "civil" in nature can occur without the benefit of counsel. Moreover, criminal defendants may be deprived of counsel when they are threatened with incarceration, up to the point where actual incarceration is imposed. This resolution articulates a policy position that counsel should be provided in all proceedings where liberty is at risk, and that specific safeguards should be provided to avoid the unwitting or uncounseled waiver of counsel in such situations.

Respectfully submitted,

Lora J. Livingston
Chair, Standing Committee on Legal Aid and Indigent Defendants
February, 2018

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GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Legal Aid and Indigent Defendants

Submitted By: Lora J. Livingston, Chair

1. Summary of Resolution(s). Urges that legal counsel be provided at public expense to low-income persons in all proceedings that may result in a loss of physical liberty, regardless of whether the proceedings are: a) criminal or civil; or b) initiated and/or prosecuted by a government entity. Further, urges that waivers of the right to counsel at all stages of such proceedings should only be accepted after the person has had an opportunity to confer with counsel, and that a person who has waived appointed counsel should be offered appointed counsel at each subsequent stage of the proceedings at which the person appears without counsel.

2. Approval by Submitting Entity. The Standing Committee approved this resolution at its meeting on November 3, 2017.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This resolution is consistent with, and extends, policy previously adopted concerning a right to counsel in civil matters, and concerning the right to counsel in criminal proceedings.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. (If applicable) N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. This policy will principally be useful in the filing of briefs by litigants or amici in proceedings in state or federal courts, and in legislation at the state level.

8. Cost to the Association. (Both direct and indirect costs) No costs are anticipated.

9. Disclosure of Interest. (If applicable) No members of the committee have any direct or indirect interests that would be impacted by this proposed policy.

10. Referrals. This proposed policy resolution will be forwarded to:

    Section of Criminal Justice
    Section of Civil Rights and Social Justice
    Working Group on Building Public Trust in the American Justice System
    Judicial Division
    Section of Litigation

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

    Lora J. Livingston
    261st Judicial District Court
    PO Box 1748
    Austin, TX 78767-1748
    (512) 854-9481
    Lora.Livingston@traviscountytx.gov

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.) Same as above.

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EXECUTIVE SUMMARY

1. Summary of the Resolution

Urges that legal counsel be provided at public expense to low-income persons in all proceedings that may result in a loss of physical liberty, regardless of whether the proceedings are: a) criminal or civil; or b) initiated and/or prosecuted by a government entity. Further, urges that waivers of the right to counsel at all stages of such proceedings should only be accepted after the person has had an opportunity to confer with counsel, and that a person who has waived appointed counsel should be offered appointed counsel at each subsequent stage of the proceedings at which the person appears without counsel.

2. Summary of the Issue that the Resolution Addresses

Currently, in many proceedings denominated as "civil" in nature, counsel is not provided as a matter of right, resulting in the incarceration of numerous individuals who never have the opportunity to consult an attorney. Moreover, criminal defendants may be deprived of counsel when they are threatened with incarceration, up to the point where actual incarceration is imposed.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The policy will provide a foundation in ABA policy for advocacy in courts, legislatures and other fora to address the lack of counsel in proceedings that may result in incarceration for "civil" infractions, as well as in criminal proceedings where incarceration is threatened.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None known.