

## ALASKA BAR ASSOCIATION PRO BONO COMMITTEE

### RESOLUTION IN SUPPORT OF RECOGNIZING A RIGHT TO COUNSEL FOR INDIGENT INDIVIDUALS IN CERTAIN CIVIL CASES

WHEREAS, the Alaska Bar Association (AkBA) has made the commitment to access to justice for underserved populations a key priority, as set forth in its bylaws, which define one of its purposes as facilitating “the administration of justice,” and as exemplified by the Alaska Bar Association Board of Governor’s endorsement of Alaska Rule of Professional Conduct 6.1 which encourages each member of the Bar to commit to 50 hours of pro bono service each year and its endorsement of the creation of a full-time staff person to coordinate pro bono services;

WHEREAS, the Alaska Supreme Court’s 1999 Civil Access to Justice Task Force Report concluded that approximately 50% of Alaska’s poor citizens were likely to face a legal need in any given year, as of the date of its publication<sup>1</sup>;

WHEREAS, the Alaska Supreme Court’s 2000 Civil Access to Justice Task Force Report used a poverty population of 66,000 because the 2000 census figures had not come out, but the number of Alaskans living below Alaska’s poverty level<sup>2</sup> as released by the Census Bureau in 2002, was actually 80,405 and today it is even greater;

WHEREAS, the Alaska’s legal services providers estimate that at least 50% of the poor people across the State who make it to a legal services office are turned away because of the limited resources, both public and pro bono, available to serve the neediest among us and that this number is particularly high amongst clients seeking help with family law cases, which are amongst the hardest to place with volunteer attorneys;

WHEREAS, nationally, the extent of the unmet need for legal services is staggering. In a recent report, the Legal Services Corporation found "a very serious shortage of civil legal assistance - an urgent justice gap - in the United States," and the report concludes that at least 80% of those who require legal assistance do not receive the help they need<sup>3</sup>;

WHEREAS, most European and Commonwealth countries have had a right counsel in civil cases for decades or even centuries, entitling poor people to legal assistance when needed,<sup>4</sup> and several Canadian provinces, New Zealand and some Australian states have provided attorneys to the poor as a matter of statutory right for decades, although the scope of the right has changed in response to legislative funding and priorities<sup>5</sup>;

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<sup>1</sup> Civil Justice Report, 11.

<sup>2</sup> Alaska’s poverty ceiling is set at 125% of the federal poverty ceiling due to cost of living factors.

<sup>3</sup> See Legal Services Corporation, Documenting the Justice Gap in America, at 18-19 (Sept. 2005) <http://www.lsc.gov/JusticeGap.pdf> (last visited 12/21/06).

<sup>4</sup> ABA Task Force on Access to Civil Justice, 2006 Report to the House of Delegates at 3-4 (Available at <http://abanet.org/legalservices/sclaid/downloads/06A112A.pdf>) (last visited 12/19/06); see also R. Lidman, Civil Gideon: A Human Right Elsewhere in the World, Clearinghouse Review, Vol. 40, No. 3-4 at 290 (July-August 2006).

<sup>5</sup> *Id.* at 7.

WHEREAS, the Alaska Bar Association recognizes that the overwhelming unmet legal needs of low income persons often result in a lack of access to justice where the most basic human needs are at stake, such as legal matters involving shelter, sustenance, safety, health or child custody and that the loss of this access results in Alaskans losing basic needs such as shelter, food, safety, and the right to the care and control of their family;

WHEREAS, the Alaska Bar Association recognizes that the unmet legal needs of Alaskans is a basic issue of fairness and access to the court since children, women, African Americans, Latinos and other minorities disproportionately bear the burden of poverty<sup>6</sup>; and

WHEREAS, the Alaska Bar Association recognizes that the overwhelming unmet legal needs of low income persons and the lack of resources to meet those needs ultimately leads to a loss of confidence by the public in the legal system which the Alaska Bar Association's members are bound to uphold;

NOW, THEREFORE, the Alaska Bar Association Pro Bono Committee proposes that the Alaska Bar Association endorse the following:

RESOLVED, That the Alaska Bar Association 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.

### **I. The Alaska Bar Association is Committed to Improving Access to Justice for the Poor**

The Alaska Bar Association has a long history of promoting the access to justice for the neediest among us. In 2003, the Board of Governors took a strong stand on the need for volunteer work by the legal community by approving Alaska Rule of Professional Conduct 6.1, which urges each member of the Bar to commit to at least 50 hours of pro bono work each year. In 2004, the Board of Governors again took a leadership role in furthering volunteer legal services by creating a position at the Bar Association dedicated specifically to pro bono services. The creation of this position was strongly advocated by members of the legal services and pro bono community, the bar, and the judiciary including the Alaska Supreme Court. This past year, under the stewardship of Board President Claman, the Board of Governors has continued to press for expanded ways to provide legal services to the poor by approving the emeritus rule which would facilitate the ability of inactive and retired attorneys to volunteer their time for pro bono work.

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<sup>6</sup> W. Henderson and Jonathon M. Smith, The Right to Counsel and Civil Rights: An Opportunity to Broaden the Debate, Vol. 40 Nos. 3-4 at 211 (July-August 2006).

## II. Proposed Resolution Echoes American Bar Association (ABA) Resolution

The ABA Resolution echoes an earlier resolution of the ABA. The American Bar Association, in recognition of the overwhelming unmet legal needs of low income persons and the resulting lack of access to justice where the most basic human needs are at stake, has already passed the following resolution:

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.

## III. Discussion

This resolution allows the leadership of the ABA to advocate for an expansion of the types of cases in which legal representation, as a matter of right, is provided to indigent individuals in civil cases. The means of implementing this resolution will be studied further by the Alaska Bar Association Pro Bono Committee, who will then make recommendations to the Alaska Board of Governors.

Notably, the Alaska Supreme Court has been at the forefront of this movement, finding a right to counsel for indigent persons in civil contempt proceedings for nonsupport,<sup>7</sup> certain custody proceedings,<sup>8</sup> termination of parental rights proceedings<sup>9</sup> (including private termination proceedings),<sup>10</sup> and paternity proceedings.<sup>11</sup> Counsel is also provided by statute to minors in domestic violence cases,<sup>12</sup> respondents in involuntary commitment proceedings<sup>13</sup> and to minors in judicial bypass of abortion cases.<sup>14</sup> There are many other categories in which this concept could be expanded.

This resolution does not define which cases would be included. It also does not address many other questions of implementation, such as how the right would be established, who would provide the representation and how it would be funded. The Pro Bono Committee recognizes that these are vitally important questions that will need resolution. It anticipates that the right to counsel would not be granted immediately in all cases in which basic human needs are at stake, as this would raise extensive obstacles in funding and administration. The Pro Bono Committee expects that the right to counsel would be expanded in an incremental fashion, prioritizing the most basic human needs where the need is greatest. Alaska residents already benefit from an existing system of legal services and voluntary pro bono programs that delivers legal services to the indigent. Expansions of the right to counsel would incorporate this foundation and build upon it. The resolution expresses an endorsement of the concept in principle, with the details to be developed following further study and reporting by the Committee.

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<sup>7</sup> *Otten v. Zaborac*, 525 P.2d 537 (Alaska 1974).

<sup>8</sup> *Flores v. Flores*, 598 P.2d 893 (Alaska 1979).

<sup>9</sup> *V.F. v. State*, 666 P.2d 42 (Alaska 1983).

<sup>10</sup> *In Re K.L.J.*, 813 P.2d 276 (Alaska 1991).

<sup>11</sup> *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977).

<sup>12</sup> AS 18.66.100.

<sup>13</sup> AS 18.85.100.

<sup>14</sup> AS 18.16.030(d).

## A. Other States' Efforts

The effort to expand a right to counsel on the state level is not unique to Alaska. Alaska would be joining a growing group of states that is endorsing such a right in a true model of federalism. The following information lists the states and the most common substantive areas where some level of a right to counsel has been identified by statute:

Custody (AK, AZ, CA, LA, MD, MA, MI, NY, OR, TX, VT, WA, WV, DC); neglect and abuse (IN, IA, KS, KY, MD, MS, NE, NV, NM, OK, PA, SC, SD, UT, VA, WV, WY);

Domestic Violence (AK, CA, NY);

Adoption (IL, KS, MD, MA, MO, NY, PA, SC);

Dependency and Termination of Parental Rights (AL, AK, AZ, AR, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KN, KY, LA, ME, MD, MA, MI, MN, MO, MS, MT, NC, NE, NV, NH, NM, ND, OH, OK, OR, PA, SC, TN, TX, UT, VT, WA, WV, WI, WY);

Visitation (AZ, CA, LA, MD, and MA);

Divorce (DE, OR, VT, and DC);

Involuntary Commitment for Mental Illness, Drug, or Alcohol Abuse (AL, AK, AZ, AR, CO, CT, DE, HI, IL, IA, KS, LA, MD, MA, MS, MO, MT, NV, NC, ND, OH, OR, PA, RI, SC, SD, VT, and WI);

Involuntary Quarantine (CT, DE, MD, NC, SC, and WV);

Involuntary Protective Services (AL, CO, DE, IN, MA, SC, and TN);

Involuntary Sterilization (CO, VT, and WV);

Judicial Bypass of Abortion (AK, DE, FL, IN, MS, MO, NC, SC, and WI);

Civil Arrest or Imprisonment (NC and ND);

Individuals under Disability to Sue (MD);

Petition for Special Immigrant Juvenile Status (FL);

Release of Mental Health Records (IN);

Military Personnel (CO, WV, and by Federal Statute);

Civil Rights Claims (IL);

Housing Discrimination (AZ, AR, CO, DE, and by Federal Statute); and

School Attendance (CO).

A report from the Brennan Center on Civil Gideon supports this background section.

## B. Status of "Civil Gideon" Activities in Selected States (as reported by the Brennan Center)

- 1) **California:** In fall 2006, the California Conference of Delegates of California Bar Associations (a separate entity from the California State Bar Association) passed a civil right to counsel resolution, which reads: 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. California Chief Justice Ronald George has endorsed the resolution.

Also, the California Access to Justice Commission has developed several pieces of model civil right to counsel legislation, and it recommended that the state develop pilot civil right to counsel projects in three counties. Chief Justice George and Governor Schwarzenegger supported the pilot project concept, but I believe it has not been funded.

The Los Angeles County Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.

- 2) **Colorado:** The Colorado Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.
- 3) **Connecticut:** The Connecticut Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.
- 4) **District of Columbia:** The Bar Association of the District of Columbia co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.
- 5) **Georgia:** As part of this year's State Bar Convention, there will be a moot court on the civil right to counsel which will be argued before the Georgia Supreme Court by law professors.
- 6) **Hawaii:** The Hawaii Justice Foundation and State Bar are engaged in an extensive civil justice needs study which will be released in October 2007. My understanding is that establishing a right to counsel in civil cases will be one of the recommendations.
- 7) **Illinois:** The Chicago Bar Association and Chicago Bar Foundation supported the ABA resolution, with the following caveats:
  - (1) The principal way to fulfill the goals of this resolution is to build on the existing comprehensive and multi-tiered pro bono/legal aid delivery system in our State; and
  - (2) while an appointed counsel element should be a part of this system, there needs to be a mechanism to screen cases for merit before extended representation is provided.
- 8) **Maine:** The Maine State Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006. On July 5, 2007, the Justice Action Group – the legal services state planning entity for Maine –issued a draft state legal services planning report, which recommends that the Justice Action Group create a commission to study the adoption “of a civil right to counsel in adversarial proceedings in which basic human needs are at stake.” Among the issues the commission would address would be “costs and evaluation of funding mechanisms; the scope of the right and when it attaches; eligibility criteria; types of representation and/or the scope of services; the types of providers; screening/process; right to counsel on appeal; phasing in of implementation; monitoring and evaluation of a pilot project.” The draft report is available online at <http://www.mbf.org/JAGPLANNINGRPT-7-5-07.pdf>. The final report will be issued in October, 2007. The membership of the Justice Action Group includes individuals from the state and federal judiciary, the Maine Legislature, the Executive Branch, the Maine State Bar Association, the Maine Bar Foundation, the Maine Civil Legal Services Fund Commission, and the boards of legal service providers.

9) **Maryland:** The IOLTA program submitted a brief in *Frase v. Barnhart*, a case in which the state supreme court was considering whether the right to counsel should exist in custody cases. The court did not decide the issue.

10) **Massachusetts:** On May 23, 2007, the Massachusetts Bar Association unanimously passed a resolution endorsing the principles behind the ABA civil right to counsel resolution. It states:

RESOLVED, That the Massachusetts Bar Association urges the Commonwealth of Massachusetts 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.

The Boston Bar Association, under the leadership of bar president-elect Anthony Doniger (who will become president September 1, 2007), is in the process of forming a task force on the civil right to counsel, to be chaired by Mary Ryan. The Boston Bar also co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.

11) **Minnesota:** A committee of the Minnesota State Bar Association will be creating a civil right to counsel task force to begin work in 2008. The Minnesota State Bar Association also co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.

12) **New Hampshire:** There is an Access to Justice Commission that has been in operation for a few months and is examining the civil right to counsel issue. In the past, the New Hampshire Bar Foundation provided the funding for a Citizens Commission on Access to Justice which produced research and a final report containing a recommendation for a civil right to counsel.

13) **New York:** The NY State Bar Association (NYSBA), the Association of the Bar of the City of New York (ABCNY), and the NY County Lawyers Association (NYCLA) all co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006. NYSBA, under the leadership of bar President Kate Madigan, has established a subcommittee on the civil right to counsel. NYCLA has passed a resolution supporting the right to counsel for tenants in eviction cases in New York City. NYSBA, ABCNY and NYCLA were all active in supporting the civil right to counsel in state court litigation in the 1980's.

14) **Pennsylvania:** The Philadelphia Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006. On November 30, 2007, the Pennsylvania House of Delegates approved a resolution submitted by the Legal Services to the Public Committee, providing that Pennsylvania Bar Association urge the Commonwealth of Pennsylvania 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.

- 15) **Washington State:** The Washington State Bar Association and the King County Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006. The Access to Justice Board created the Committee for Indigent Representation and Civil Legal Equality (CIRCLE) in 2003 which is actively seeking out legislative and litigation strategies to expand Washington's right to counsel.

Respectfully submitted,

The Alaska Bar Association Pro Bono Service  
Committee, September 2008