

February 8, 2008

STATE BASIC ACCESS ACT

[NOTE: This is a draft of a generic state statute guaranteeing a right to counsel in cases where certain high priority human needs are at stake except when less expensive forms of assistance are sufficient to provide fair and equal access to justice. The right also is limited to contested matters in the courts and other forums which use adversary proceedings and does not include legal advice, document preparation or other legal services outside the litigation context. Thus, this draft law differs from the STATE EQUAL JUSTICE ACT the drafting committee prepared and distributed earlier which sought to implement a *comprehensive* right to equal justice in all matters inside and outside the courts where some type and level of assistance or representation was needed. Not only is the right we seek to implement in this draft considerably narrower, but we deliberately chose to alter its design in other respects. It would have been possible to merely make some minor language changes and a few deletions in the State Equal Justice Act, leave the Act otherwise intact, and rename it the State Basic Access Act. But instead we chose to attempt a substantial overhaul – essentially striving to produce a draft that might implement the right and many of the policy choices reflected in the resolution passed by the ABA House of Delegates in August, 2006. We recognize there are many other statutory constructs that could accomplish that goal. But here is one.]

100. LEGISLATIVE FINDINGS

The Legislature finds and declares:

101. Fair and equal access to justice is a fundamental right in a democratic society. It is essential to the enforcement of many other rights and responsibilities in any society governed by the rule of law, but is especially critical when those rights and responsibilities involve certain basic human needs which are defined in Section 205. Therefore, meaningful access to justice must be available to all citizens, including those of limited means, when such needs are at stake.

102. The adversary system of justice used in this State and elsewhere in the United States inevitably allocates to the parties the primary responsibility for discovering the relevant evidence and finding the relevant legal principles and presenting them to a neutral judge or jury. Discharging these responsibilities generally requires the knowledge and skills of a legally-trained professional.

103. When a party is not represented, the judicial system suffers, too, in performing its function of arriving at the correct and just decision. The judge is placed in an untenable position because it is difficult or impossible to render a fair informed decision in a case in which one side is unable to adequately present its case.

104. Because in many civil cases involving basic human needs, lawyers are as essential as judges and courts for citizens to gain fair and equal access to justice, the State government has just as great a responsibility to ensure adequate counsel is available to all in such cases as it does to supply judges, courthouses, and other forums for the hearing of those cases.

105. Many of those living in this State cannot afford to pay for the services of lawyers when needed for those residents to enjoy fair and equal access to justice. In order for them to enjoy this essential right of citizens when their basic human needs are at stake, the State government accepts its responsibility to provide them with lawyers at public expense.

106. Both experience and empirical studies reveal several factors that can affect the determination of when representation by an attorney is needed for fair and equal access to justice and when self-representation will suffice. These factors include the complexity of the substantive law, the complexity of the forum's procedures and process, the individual's education, legal sophistication and English language ability, and the presence of counsel on the opposing side of the dispute.

107. The Legislature finds the protection of these basic human needs requires a legally enforceable right to counsel for those unable to afford a lawyer and thus provides funding under this statute sufficient to implement this right in such cases. But the Legislature also recognizes there are many other disputes and legal problems this state's lower income citizens face. By guaranteeing a right to counsel and funding that right in this statute when these basic human needs are at stake, it is by no means intended to reduce the other resources devoted to providing justice in other categories of disputes and problems nor to suggest fair and equal access to justice should not be afforded in such cases using resources provided by other governments or under other statutes of this State or through private sources of funding.

108. If those represented by publicly-funded lawyers are to have fair and equal access to justice, those lawyers must be as independent, ethical, competent, and loyal to their clients as those serving clients who can afford to pay for counsel. Thus, this Act shall be administered in such a way as to ensure the clients served by lawyers funded under the Act receive representation which measures up to this standard.

Drafting Committee's Commentary

The findings and declarations in section 100 et. seq. express the legislature's intent in enacting this remedial statute and are expected to guide the courts and the Basic Access Advocacy Board in their interpretation of the remaining provisions of the statute.

200. DEFINITIONS

201. For purposes of this Act, "public legal services" includes full legal representation, limited legal representation, and non-lawyer representation funded by the Basic Access Fund provided in section 600 et seq.

202. "Full legal representation" is the performance by a licensed legal professional of all phases (such as preparation of pleadings, investigation of facts, research of law, preparation of pleadings, negotiations, appearance at pre-trial, trial, and post-trial proceedings, preparation of appellate briefs and appearance at appellate oral arguments) that may be involved in representing a party in a court or other tribunal in which by law or uniform practice parties may not be represented by anyone other than licensed members of the legal profession.

203. “Limited legal representation” is the performance by a licensed legal professional of one or more of the tasks involved in a party’s dispute before a tribunal in which representation by members of the legal profession is required, according to established rules permitting the legal professional to so limit the legal representation provided, and when such limited representation is sufficient to afford the applicant fair and equal access to justice consistent with criteria set forth in section 302 below. Depending on circumstances, this form of assistance may or may not be coupled with self-help assistance.

204. “Non-lawyer representation” is representation by qualified non-lawyer advocates in tribunals in which representation by such advocates is permitted and in which, in the particular circumstances of the case, the Basic Access Advocacy Board or its delegated agent or designee considers such representation sufficient to afford the applicant fair and equal access to justice.

205. “Basic human needs” includes shelter, sustenance, safety, health, and child custody.

205.1. “Shelter” includes a person or family’s access to or ability to remain in an apartment or house, and the habitability of that shelter.

205.2. “Sustenance” includes a person or family’s sources of income whether derived from employment, court-ordered payments deriving from support obligations, government monetary payments or “in kind” benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers’ wage or employment disputes where counsel is not realistically available without government subsidy.

205.3. “Safety” includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise.

205.4. “Health” includes access to appropriate health care for treatment of significant health problems whether the health care at issue would be financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an employee benefit, through private insurance, or otherwise.

205.5. “Child custody” embraces proceedings where government seeks to take custody of a child or terminate parental rights and thereby threatens to deprive the child, parent or de facto parent of their relationship, and also the interests of the child, parent, or de facto parent in private custody disputes.

206. “Licensed legal professional” is a member of the State Bar, a law student participating in an attorney-supervised clinical program through an

accredited law school, or a member of the bar of another jurisdiction who is legally permitted to appear and represent the particular client in the particular proceeding in the court or other forum which is hearing that matter.

207. “Non-profit legal services organization” is a non-profit corporation that employs licensed legal professionals for the purpose of delivering appropriate public legal services to persons who cannot afford to pay for their own counsel.

208. The “Basic Access Advocacy Board” (BAAB) is established within the State judicial system and is the statewide body responsible for administering the public legal services program defined by and funded under this statute. The BAAB is authorized to implement the statute, to enact regulations (after public hearings) consistent with the statute, and to delegate eligibility decisions (among others) to designated public or non-profit bodies as described in Section 700 et seq.

300. RIGHT TO PUBLIC LEGAL SERVICES.

Subject to the exceptions and conditions specified in sections 301 - 306 below, appropriate public legal services shall be available to any financially eligible person in any case where basic human needs as defined in section 205 are at stake. Depending on circumstances described in these sections, appropriate public legal services may include full legal representation or limited legal representation or non-lawyer representation as needed for the person to enjoy fair and equal access to justice for the particular dispute or problem that person confronts. In addition, such public legal services shall be made available in any legal matter [not limited to basic human needs as defined herein] whenever a judge in the case makes a determination that the provision of such services to a party involved in that case is in the interests of justice, and the decisions of the judge shall not be subject to review by BAAB, except as to financial eligibility. The standards for “financial eligibility” are defined in section 400 et seq.

301. Eligibility Criteria for Full Public Legal Representation.

In a State trial court or any other State forum where by law or established practice parties can only be represented by licensed members of the legal profession, public legal services shall consist of full legal representation as defined in section 202 above, provided under the following conditions and with the following exceptions:

301.1 Full public legal representation services shall be available to a *plaintiff or petitioner* if a basic human need as defined in section 205 is

at stake and that person has a reasonable possibility of achieving a successful outcome. Except in exceptional circumstances, full public legal representation services shall be available to a financially eligible *defendant or respondent* if a basic human need as defined in section 205 is at stake unless the applicant lacks a non-frivolous defense. In family matters, the person seeking a change in the status quo shall be deemed the plaintiff and the person defending the status quo shall be deemed the defendant for purposes of this statute, regardless of their formal procedural status.

301.2 Eligibility for full public legal representation services in State appellate courts is a new and different determination after the proceedings in a trial court or other forum conclude. If the financially eligible applicant is an *appellant or petitioner* rather than a respondent or real-party-in interest, except in extraordinary circumstances full legal representation services shall be available only if there is a reasonable probability of success on appeal. If the financially eligible applicant is a *respondent or real-party-in interest*, however, except in extraordinary circumstances full legal representation services shall be available unless there is no reasonable possibility the appellate court will affirm the decision of the trial court or other forum which the opposing party is challenging in the appellate court.

301.3 Irrespective of the provisions of sections 301.1 and 301.2 above, full public legal representation services shall not be available to an applicant in the following circumstances:

301.3.1 In proceedings in any forum where parties are not allowed to be represented by licensed legal professionals. However, this does not preclude a financially eligible person from receiving full legal representation services if the opposing party in such a forum appeals a decision of that forum which was favorable to the applicant to a forum where licensed legal professionals are permitted to provide representation and that opposing party is represented by a licensed legal professional in that appeal.

301.3.2 If legal representation is available to the applicant in the particular case through the services of a lawyer who provides such representation on a contingent fee basis, or as the result of the provisions of an insurance policy, or if a class action exists or is impending and is realistically available for the applicant to join, or for some other reason a

lawyer is willing to provide such representation at no cost to the applicant, or if the parties' interests are being protected by counsel in some other way.

301.3.3 If the matter is not contested, unless the BAAB or its delegated designee or the judge in the case determines the interests of justice require the assistance of counsel.

301.3.4 If under standards established by the Basic Access Advocacy Board, and under the circumstances of the particular matter, the Board deems a certain type and level of limited legal representation is sufficient to provide fair and equal access to justice and such limited public legal representation is provided. It shall be presumed limited legal representation is insufficient in actions before courts or other forums in which representation can only be provided by licensed legal professionals and in which the opposing party has full legal representation provided by such a professional.

301.3.5 For matters in designated courts or other forums when the State Basic Access Advocacy Board evaluates and certifies after public hearings and in compliance with the Administrative Procedures Act that:

- (a) The designated court or forum: (1) operates in such a manner that the judge or other dispute resolver plays an active role in identifying the applicable legal principles and in developing the relevant facts, rather than depending primarily on the parties to perform these essential functions, and (2) follows relaxed rules of evidence, and (3) follows procedural rules and adjudicates legal issues so simple that non-lawyers can represent themselves before the court or other forum and still enjoy fair and equal access to justice, and
- (b) within such designated court or forum, the specific matter satisfies the following criteria: (1) the opposing party is not represented by a licensed legal professional, (2) the particular applicant possesses the intelligence, knowledge, language skills (or appropriate language assistance), and other attributes ordinarily required to represent oneself and still enjoy fair and equal access to justice, and (3) if self-help

assistance is needed by this party to enjoy fair and equal access to justice, that such self-help assistance is made available.

302. Limited Legal Representation

Limited legal representation as defined in 203 above shall be available to financially eligible individuals where the limited service provided is required because self-help assistance alone would prove inadequate or is not available and where such limited legal representation is sufficient in itself or in combination with self-help assistance to provide the applicant with effective access to justice in the specific case in the specific forum. In matters before those courts or other forums in which representation can only be provided by licensed legal professionals, however, limited legal representation can only be substituted for full representation when permitted by 301.3.4 above, and shall not be available in the matters excluded under 301.3.5.

303. Non-lawyer Representation

Non-lawyer representation as defined in Section 204 shall be available from qualified non-lawyer advocates to financially eligible individuals rather than from licensed legal professionals in proceedings in forums which permit non-lawyer representation of parties and in which (1) the eligibility factors set forth in 300 and 301 are satisfied, and (2) non-lawyer representation is more economical than full legal representation, and (3) the opposing party is not represented by a licensed legal professional, and (4) the non-lawyer advocate works under the supervision of attorneys in a non-profit legal services organization or has been certified by a non-profit legal services organization or by an official body BAAB designates to possess adequate training, knowledge, and skill to provide appropriate representation in that forum, and (5) the forum and the circumstances do not fit the exception defined in 301.3.5. This section is not intended to and does not supersede existing state law governing non-attorney representatives or paralegals.

304. Other Forms of Representation and Assistance and Other Sources of Support for Public Legal Services Not Prohibited or Discouraged by This Act.

Consistent with the intent declared in section 107, nothing in this Act prohibits or discourages the provision of full legal representation or other forms of representation (for instance, non-lawyer representation or self-help assistance) with public or private funds in those matters in which a person is not eligible for representation under the terms of Sections 301-303. Nor does this section or anything in this Act prohibit or discourage the voluntary provision of representation in matters eligible for such services under this Act by members of

the legal profession not paid out of funds appropriated under the Basic Access Act, but serving on a pro bono basis or paid out of other public or private funds.

[NOTE: There are several alternative ways of reconfiguring the right defined in sections 300 et. seq. One possibility would be to limit the right to court proceedings—and also remove references to other forums in 301 and 302. Another would be to reduce or expand the list of “basic human needs” in which a right to equal justice is guaranteed. As drafted, this State Basic Access Act, unlike the State Equal Justice Act the task force previously drafted, does not discuss or guarantee self-help assistance in those situations where that level of assistance is deemed sufficient and therefore neither legal representation nor non-lawyer representation is available under the terms of the Act. It is possible, of course, to modify this law to guarantee those levels of assistance, too. In any event, the current draft makes it clear nothing in the Basic Access Act prohibits or is intended to discourage the provision of these other forms of assistance either through public or private funding. Moreover, it furnishes a strong incentive to governments to finance such self-help assistance since the availability of such services presumably would reduce the number of cases requiring government-paid professional representation.]

400. FINANCIAL ELIGIBILITY

401. The Basic Access Advocacy Board (BAAB) shall establish financial eligibility standards which must be satisfied in order for an applicant to receive full public legal representation or limited legal representation.

402. The BAAB shall construct and publish matrices of financial eligibility levels. The BAAB shall establish different matrices for different regions of the state, taking into account significant differences in cost-of-living, the cost of legal services, and other economic circumstances. Each such matrix shall take account of the following factors regarding the financial circumstances of an applicant for services: (1) current income; (2) current assets, taking into account reasonable exemptions for necessities of life, assets essential to potential earning and homeownership; (3) family size and relationships with dependents, and (4) other economic factors relevant to the applicant’s ability to pay attorney fees and other litigation expenses.

403. The BAAB may establish and publish categorical eligibility rules for persons whose sole income is derived from public assistance.

404. The BAAB shall adjust financial eligibility standards annually to insure they fully account for changes in the cost of living and other inflationary factors. The

BAAB also may allow those making the eligibility determinations in individual cases to exercise some limited measure of flexibility in applying these standards in order to account for unusual circumstances, but BAAB shall review such cases retroactively to insure there are no abuses.

[NOTE: The financial eligibility section only contemplates supplying public-funded legal services for the low income population. However, since this is designed as a state not a federal statute, the right is expected to be tailored to the cost of living, cost of lawyers and other appropriate economic factors within different regions of the particular state. This recognizes that the uniform federal standard fails to take account of vast differences among and within states –income distribution, the cost of living generally, and the average legal fees lawyers charge--which affect who can afford to hire their own lawyers in the particular jurisdiction. On the other hand, another possible alternative would give the right only to those at and below the current federal eligibility level for legal services – that is, 125 percent of the federal poverty guideline. Such an approach would simplify the administration of the right considerably. On the other hand, some jurisdictions might want to experiment by extending the coverage to income strata somewhat above the poverty line – and require them to make co-payments on a sliding scale that rises with increasing levels of income. Studies show and many people constantly say that the “near poor” and even the middle classes are unable to afford lawyers for many or at least some of their legal problems. Indeed, many European and commonwealth countries extend the right well up into the middle classes – with half and sometimes more of the population eligible for some level of government-subsidized legal services.]

500. BASIC ACCESS ADVOCACY BOARD

501. There shall be established within the State judicial system an independent Basic Access Advocacy Board (BAAB) which shall have responsibility for policy-making and overall administration of the program defined in this chapter, consistent with the provisions of this chapter.

502. The State Basic Access Advocacy Board shall consist of three members, all of whom shall be members of the State Bar. One member shall be appointed by the Chief Justice, one by the State Bar Association, and one by the Governor, each serving a three-year term, renewable for one additional three-year term. These terms shall be staggered, with the initial board participating in a draw to determine which member shall serve an initial one-year term, which two years and

which three years. Board members shall be compensated at the rate of [\$__ a day] for their preparation for and attendance at board meetings and board committee meetings, and shall be reimbursed for all legitimate expenses attendant to discharging their responsibilities as board members.

503. The Board shall select an Executive Director who shall serve at the pleasure of the Board, and shall be responsible for implementing the policies and procedures determined by the Board. The Executive Director shall be compensated at the same salary level as a judge of the trial court. Based on recommendations from the Executive Director, the Board shall create and define other staff positions, but the Executive Director shall select the persons who occupy these positions. The Board shall establish the compensation and benefit levels for these other positions, but in doing so shall establish categories consistent with comparable positions in the judicial branch of the State government. Other than the Executive Director and [three/four/five] senior employees who serve at the pleasure of the Board, the employees of the Board shall have the same status and protections and benefits as other employees of the Judicial branch.

504. The Basic Access Advocacy Board (BAAB) is empowered to promulgate regulations consistent with the provisions of the Act and in accordance with the State Administrative Procedures Act [after obtaining input from affected persons and organizations, the general public, and holding public hearings on the proposed regulations]. The Board also is empowered to delegate eligibility determinations in individual cases and other applications of its regulations and basic policies to designated organizations.

505. The State Basic Access Advocacy Board shall:

(1) Ensure all eligible persons receive appropriate public legal services when needed in matters in which basic human needs as defined in section 205 are at stake. It is the purpose and intent of this section that the Basic Access Advocacy Board (BAAB) manage these services in a manner that is both cost-efficient and guarantees recipients fair and equal access to justice. To this end, professional legal services shall be provided by contracting with non-profit legal services organizations to use salaried staff attorneys in those courts and geographic areas and cases in which this is feasible. Private attorneys shall be utilized when salaried attorneys are unable to provide representation to an eligible client because of an ethical

conflict or legal prohibition or because there are not enough salaried attorneys to properly represent the number of clients requiring representation in a given court or geographic area at the time representation is required, or in cases when because of special expertise or experience or other exceptional factors a private attorney can provide representation that better serves the goal of cost-efficient and fair and equal access to justice.

(2) Identify and certify specific organizations to which it delegates the authority to make eligibility determinations pursuant to Sections 300 and 400. Legal services organizations funded by the federal Legal Services Corporation, those funded under the State IOLTA program, and any self-help centers the State court system certifies as qualified are automatically considered certified to perform this function.

(3) Establish and administer a system to timely and independently consider and decide any appeals that applicants found ineligible for legal representation might lodge challenging those decisions to deny representation.

(4) Administer the Basic Access Fund established and defined in section 600 which provides the funding for all public legal services required to implement the right defined in this law. The BAAB's administrative responsibilities for the Basic Access Fund are defined in sec 602.

(5) Through its own staff, contracts with media firms, and other means, BAAB shall inform the general public, especially population groups and geographic areas with large numbers of financially eligible persons, about their legal rights and responsibilities and the availability of public legal services should they experience a problem involving a basic human need as defined in section 205.

(6) Directly and through contracts with organizations and individuals possessing appropriate expertise in evaluation, social science, and empirical research, BAAB shall conduct studies which, among other subjects, assess the need and demand for public legal services, the sufficiency of different levels of public legal services to provide fair and equal access to justice in various circumstances, the effectiveness of those services in positively impacting people's lives and legal situations, the quality and cost-effectiveness of different providers of public legal services, and address other relevant issues.

(7) Ensure clients served by public legal services funded through the State Equal Justice Act receive the same independent, confidential, competent, and otherwise ethical representation as those persons who can afford to pay for legal representation and as is guaranteed to all clients by the code of ethics applicable to licensed legal professionals. To this end, the BAAB shall establish standards for both non-profit legal services organizations using primarily salaried staff attorneys and private attorneys that ensure the quality and quantity of representation provided is sufficient to afford clients fair and equal access to justice in a cost-efficient manner.

(8) Prepare and submit an annual report to the Governor, the Legislature, and the Judiciary. Among other subjects, this report shall include (1) a summary of BAAB's activities for the year and the results of any special studies or evaluations BAAB conducted or commissioned during the year, (2) quantitative and qualitative data about costs, the quantity and quality and other relevant performance measures regarding public legal services provided during the year in cases involving basic human needs, (3) the current status of the combined federal-state-local government efforts to provide State residents full and fair access to justice in cases involving basic human needs and in other non-criminal matters, (4) recommendations for changes in the BAAB legislation and other State statutes, court rules, or other policies which would improve the quality or reduce the cost of public legal services required to guarantee all residents of State their right to fair and equal access to justice in cases involving basic human needs.

[NOTE: This draft places administrative responsibility for public legal services within the judicial branch but as an independent body within that branch. The board of this independent body is selected by the judiciary, the executive branch, and the legal profession. It is entirely possible and justifiable to consider members of such a board being selected by other groups and entities, e.g., the state access to justice commission, the state legislative bodies, the state legal aid association (although that might raise conflict of interest issues), a client organization or client representative, or other constituencies.]

Alternative possible arrangements to this hybrid system include administration by the state bar association or by the court system itself or as a separate part of the executive branch [similar to public defender offices] or a completely independent body such as was used in

the companion draft statute the Task Force produced – the State Equal Justice Act. Notably, most nations with advanced legal aid programs – including the United States – have chosen to establish some form of independent or semi-independent board to administer their legal aid systems. Smaller states, however, may find it too cumbersome or expensive to set up a free-standing independent body to administer their legal aid system.]

600. BASIC ACCESS ADVOCACY FUND

601. Purpose

The Basic Access Fund supplies all the financial support needed for the services guaranteed by the provisions of the Basic Access Act.

602. Administration

Each year the BAAB shall submit a budget estimate of anticipated costs and revenues for the forthcoming annual period and a request for an appropriation adequate to provide sufficient revenues to match the estimated costs. Each quarter thereafter the BAAB shall supply the Governor, the legislature, and the judiciary with a status report of revenues and expenditures during the prior quarter. Within three months after the end of the state's fiscal year the BAAB shall submit to the Governor, the legislature, and the judiciary a request for the funds required from general revenues to make up the difference, if any, between revenues received and appropriated pursuant to the initial budget estimate and the obligations incurred in order to support the right defined in this law. To the extent the revenues received and appropriated exceed the required expenditures for a given fiscal year, the excess shall be maintained as a reserve to discharge obligations incurred in future fiscal years.

[NOTE: No attempt is made in this section to identify possible revenue sources in addition to appropriations from a state's general revenues, although such sources do exist and have been used or proposed in various jurisdictions to provide public financial support for civil legal services for the poor. Among these possibilities are a substantial percentage of civil filing fees, a percentage of punitive damage awards (or conceivably all damage awards), an appropriation from general revenues set as a fixed percentage of judicial appropriations, a dedicated sales or gross receipts tax imposed on legal fees, etc.]