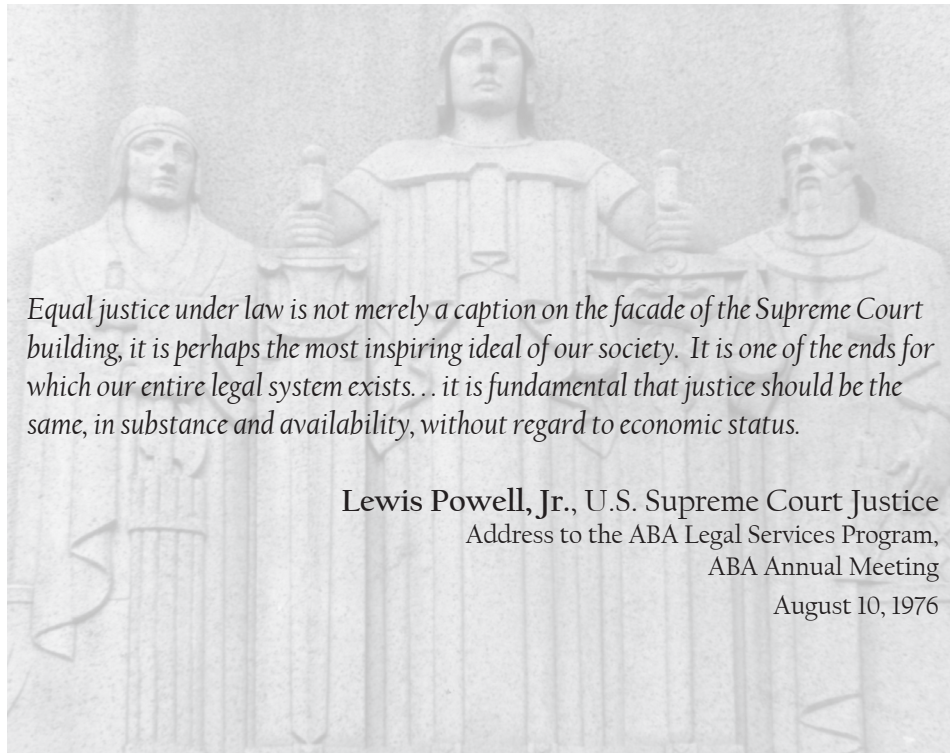


# GIDEON'S NEW TRUMPET:

## EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS



*Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists. . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status.*

Lewis Powell, Jr., U.S. Supreme Court Justice  
Address to the ABA Legal Services Program,  
ABA Annual Meeting  
August 10, 1976

**Boston Bar Association Task Force on  
Expanding the Civil Right to Counsel**

September 2008

## FOREWORD

The idea behind the creation of the Boston Bar Association Task Force on the Civil Right to Counsel came, quite simply, from the belief that it was time to move beyond the debate of whether it is a good and desirable thing for there to be a right to counsel for indigent parties in civil proceedings in which vital human interests are at stake. By the late summer of 2007, when the task force was formed, the Boston Bar Association had long embraced the Civil Gideon resolution of the ABA (indeed, the BBA Council had adopted this resolution before it was submitted to the ABA House of Delegates in 2006). The Massachusetts Bar Association and the Massachusetts Access to Justice Commission had also embraced the concept. The time had come to move to the next phase and ask, how should this important concept be implemented? Frankly, in appointing the task force, I hoped to encourage a debate about whether the answer lay in court challenges, model legislation, or model projects. Little did we anticipate that this task force would quickly move to a yet higher and more practical level, and to suggest specific ways to do it, to evaluate it, and thus to make it a reality. The success of the task force, as reflected in this Report and in the on-going planning to implement the carefully planned pilot projects in different substantive areas, is due in no small part to the remarkable, energetic and inspiring leadership of the task force's co-chairs, Mary K. Ryan and Jayne B. Tyrrell. These two great leaders brought direction and focus to the work of the task force, extracted great thought, debate and writing from its members, and have put this project now on a course that I believe will make a huge contribution, both in Massachusetts and nationally, to the efforts to make this concept a reality in our justice system. I am deeply thankful to them for their unstinting commitment and hard work on this endeavor.

This report is a remarkable achievement. I hope it serves as a document to inspire other bar associations and access to justice groups to move the civil right to counsel ideal closer to a reality. It would be foolish to think anything other than that this work is still only a beginning—pilot projects will have to be evaluated, the results measured not only in terms of costs and cost savings, but also in terms of access to justice ideals. But an important beginning it is, and for this we are all grateful.

*Anthony M. Doniger,*

*President Boston Bar Association, September 1, 2007 to August 31, 2008*

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## LIST OF ATTACHED APPENDICES

1. Roster of Task Force members and liaisons.
2. List of the committees and their members and advisors.
3. “Observations on the Right to Counsel in Civil Cases in Massachusetts” by Allan Rodgers, Massachusetts Law Reform Institute, April 5, 2004.
4. Memorandum by Mintz Levin (from Poonam Patidar to Susan M. Finegan) dated January 22, 2008, on the full list of known civil cases in which appointment and state payment of legal counsel is required, addendum to Allan Rodgers Memorandum on Observations on the Right to Counsel in Civil Cases, April 5, 2004.
5. Housing Committee Appendices
  - A. Survey of housing court judges, pro bono lawyers for the day, legal services lawyers and landlord attorneys.
  - B. Questionnaire and summary of results circulated by the Committee to a larger group after the initial proposals were developed.
  - C. Housing Committee Proposal.
6. Family Law Appendices
  - A. Family Law: Civil Contempt: The findings of the Litigation and Research Committee (legal precedent on right to counsel in civil contempt proceedings).
  - B. Proposal for Pilot Project regarding Civil Contempt.
  - C. Family Law Survey providing a list of various types of family law cases and requesting input as to where counsel is most needed to ensure a just outcome.
  - D. Proposal for Pilot Project regarding the Guardianship of Elders.
7. Listing of All Fee Shifting Statutes, Lia Marino, Suffolk Law Student, February 21, 2008.
8. Statistical Appendix to Report to Boston Bar Association Task Force on Expansion of the Civil Right to Counsel, on Legal Representation in Public Benefits Agency Hearings, by Allan Rodgers, Jul. 1, 2008 draft.
9. Costs of the Pilot Proposals by Gerry Singen.

## ACKNOWLEDGMENTS

On behalf of the Boston Bar Association, we want to thank the many people and organizations whose efforts have contributed so greatly to the work of the BBA Task Force on Expanding the Civil Right to Counsel (“Task Force”) and to this report. We begin with Tony Doniger, the BBA President whose vision led to the creation of the Task Force and gave it its mandate to formulate recommendations for expansion in specific areas, and with specific funding and enabling proposals. Without his leadership and commitment, the Task Force would not have accomplished all that it has.

We must express our gratitude for the unstinting support of the entire legal community concerned with expanding access to justice who contributed greatly to our work this past year - the Housing Courts, Probate and Family Courts and the District Courts, legal services organizations, the Access to Justice Commission, the Massachusetts Bar Association, the Women’s Bar Association, academia, the pro bono community, and many practitioners from large and small firms. We are grateful to Retired Chief Justice Herbert Wilkins, Chief Justice Paula Carey and Chief Justice Lynda Connolly for their constant input, cooperation and support in the design of the pilot programs.

Every member of the Task Force has made a significant personal contribution in terms of the time, experience, thoughtfulness and insight that each has contributed to the Task Force’s work. Particular acknowledgments must be made of the efforts of Kathy Jo Cook, Russell Engler, Jay McManus and Gerry Singsen, who served as members of the drafting committee with us. Allan Rodgers and Jessica Giglia, a summer intern at the IOLTA office, also drafted sections of the report. In large part, the Report is based on the individual reports drafted by the various committees, chaired by James Van Buren, Susan Cohen, Russell Engler, William Leahy, Joseph Kociubes, Jay McManus, Eva Nilsen, Michael Ricciuti and Richard Soden.

In addition to the Task Force, many others contributed to the work presented in this report. Committee members Jenny Chou, Joshua Dohan, Barbara Kaban, Joyce Kauffman, Megan Christopher and Jeff Wolf actively drafted sections of the Task Force report and/or Committee reports or made presentations to the Task Force but all of the Committee members, listed in Appendix 2, made a vital contribution. Others contributed in different ways by providing the Task Force with valuable information. For this, we thank Judge Jay Blitzman, Judge Michael Edgerton, Judge Wilbur Edwards, David Eppley, Fern Frolin, Judge David Kerman, Edward Leibensperger, Ilene Mitchell, Lonnie Powers, Robert Sable, Ellen Shapiro, Gayle Stone-Turesky, DYS Commissioner Jane Tewksbury and her staff, the Domestic and Sexual Violence Council and the Legal Services Family Law Task Force. Special mention should also be made of the numerous law students and lawyers who did research for the Task Force, including Timothy Blank, Joybell Chitbangonsyn, Joseph Kociubes, Lia Marino, Michelle Moor, Alicia Novak, Poonam Patidar, Michelle Peters, and Jennifer Stewart. Special thanks are also due to Brianne Miers, Donna Southwell and Kevin Decker for their production assistance.

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*Mary Ryan and Jayne Tyrrell, Co-Chairs*

## I. EXECUTIVE SUMMARY

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.”<sup>1</sup>

With these famous words, the United States Supreme Court capped its landmark decision in *Gideon v. Wainwright*, establishing the right to counsel for indigent defendants in criminal cases. Forty-five years later, no comparable right exists on the civil side of our legal system. As a result, indigent litigants are forced to navigate the legal system without legal representation even in cases where basic human needs are at stake.

A rigid delineation that presumes that counsel is important in criminal cases but not civil cases is untenable in the United States in the twenty-first century. Most parents would choose to serve thirty days in prison before giving up custody of their children, yet no right to counsel currently exists in private custody matters. Most parents would similarly choose a temporary loss of liberty to avoid eviction and homelessness, yet no right to counsel exists in eviction matters. Many people believe they have such rights, but they are sadly mistaken.

The absence of a right to counsel in certain civil matters has devastating consequences for the residents of the Commonwealth of Massachusetts. Consistent with reports across the country, large numbers of litigants appear without counsel in civil cases. The primary cause of self-representation is the high incidence of unmet legal needs among the poor, working poor and middle income litigants, combined with the shortage of lawyers available to represent those litigants.

Studies of courts and administrative agencies consistently show that indigent litigants without counsel routinely forfeit basic rights, not due to the facts of their case or the governing law, but due to the absence of counsel. On the other hand, the few who are fortunate enough to obtain representation stand a dramatically increased chance of obtaining a favorable outcome and preserving basic human needs. Such an unequal system of justice, that is available to some but not all, is untenable.

Massachusetts has been at the forefront in its efforts to achieve justice for the poor. Our legal services programs work tirelessly providing high quality representation and assistance to many who flood their offices, while forced to turn away even more. The Massachusetts Legal Assistance Corporation (“MLAC”) plays a unique and innovative role in supporting the legal aid community. The Committee for Public Counsel Services (“CPCS”) not only serves as a model for the nation in providing high quality criminal defense work, but also dedicates one-third of its budget to representation on the civil side where the right to counsel has already been recognized by statute or case law.

The Boston Bar Association’s 1998 Report of the Task Force on Unrepresented Litigants provided analysis and recommendations that have guided legal communities not only in Massachusetts but across the country. Innovative programs both inside and outside courthouses across the state provide various forms of assistance short of full representation that improve the plight of those without counsel. The Supreme Judicial



Court's ("SJC") Steering Committee on Self-Represented Litigants has developed wide-ranging proposals, including the landmark Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants and Limited Assistance Representation Pilot Programs. The SJC's Standing Committee on *Pro Bono* Legal Services fosters voluntary pro bono efforts to help close the justice gap for poor people in Massachusetts, consistent with SJC Rule 6.1. The Massachusetts Access to Justice Commission ("ATJ Commission") has held hearings around the state and produced its first report and recommendations calling for changes to increase access to justice for the poor in civil cases.

Despite these efforts and accomplishments, the crisis persists, and the basic human needs of those without counsel continue to be jeopardized in civil matters. The ATJ Commission's 2006-2007 hearings consistently confirmed the desperate call for enactment of a civil right to counsel to solve the crisis caused by the gap between the need for representation and the availability of lawyers for the poor. The Boston Bar Association ("BBA"), Massachusetts Bar Association ("MBA"), and the ATJ Commission have all supported and followed the landmark call of the American Bar Association ("ABA") for representation at public expense in adversarial proceedings where particular basic human needs are at stake.

The report that follows reflects the Task Force's recommendations to establish starting points for an expanded civil right to counsel. The report documents the history of the Task Force's work and the extensive research involved in producing the findings. The report explains the process of identifying basic needs that require the most immediate attention, crafting pilot projects designed to yield solutions to the challenges, and discussing steps to move the projects from the planning stages to reality. The stories told in each section about what a difference having a lawyer makes are true stories based on Massachusetts cases. The nine pilot projects, involving areas of housing, family, immigration and juvenile law, can be implemented for a total cost of approximately \$9 million, assuming each pilot runs for three years. In many instances, particularly those involving detention, incarceration or eviction, the expenditure for counsel will yield direct financial savings that exceed the cost of counsel. In other cases, such as custody and school exclusion, the financial costs may be harder to measure, but the financial, emotional and societal savings nonetheless will be significant. While the Task Force urges that all be fully implemented, the projects need not be launched all at once.

For too long, recognizing a Civil Gideon right has been resisted due to fears that do not comport with the reality of the concept. Civil Gideon, as understood by members of this Task Force, stands for the basic proposition that when a civil proceeding involves a basic need or right, and nothing short of representation by counsel will preserve that right, counsel must be provided. No one is calling for a lawyer for all litigants in all civil matters. No one is calling for representation by counsel when more limited forms of assistance will provide meaningful access to justice. No one is calling for representation when the rights at issue do not involve basic human needs.

The bar association resolutions, unmet legal needs surveys, ATJ Commission hearings, and experience of those familiar with courts confirm that an untenable gap exists in the provision of representation where basic human needs are at stake. Massachusetts has consistently led the nation in providing justice for the poor, and the plight of unrepresented litigants in civil cases begs for our leadership once more. It was a Massachusetts lawyer, Michael Greco, whose leadership as President of the ABA led to the landmark resolution; as he observed: "Above the doors to the Supreme Court Building are etched the words "equal

justice under law.” That eloquent statement, in this bountiful land full of hope and promise, today is hollow rhetoric to far too many in our society.”<sup>2</sup> In appointing the Task Force, BBA President Anthony Doniger observed: “I believe that we are now beyond the point of debating whether the civil right to counsel concept is a good idea.”<sup>3</sup>

Forty-five years after *Gideon*, the time for action is long overdue. The recommendations of the Task Force provide tangible starting points for achieving justice for all in our courts. While the details of particular pilot projects may be open to discussion or revision, the need for action that moves toward the expansion of a civil right to counsel is not negotiable. The desperate plight of far too many residents of the Commonwealth cries out for nothing less.

## II. THE JUSTICE GAP IN MASSACHUSETTS

The United States was founded upon the notion of equal justice. The founders of this nation established the Constitution in order to form a more perfect union and to establish a system of laws to guarantee justice to all. The Fifth and Fourteenth Amendments ensure equal protection of the law and due process from both the federal government and the state governments. Even the edifice of the Supreme Court re-enforces that aspiration as “Equal Justice Under Law” is proudly inscribed above the entrance through which each litigant passes on their way to the Court chamber. The Massachusetts Constitution, too, contains the assurance that all citizens should have equal access to justice.<sup>4</sup>

Unfortunately, however, for many in Massachusetts, the promise of equal justice remains a hollow one. Equal justice must mean equal access to the legal system, particularly the courts. The barriers to equal access to justice are real, and for poor persons and those historically disenfranchised, they are often insurmountable. Chief among them is the unavailability of counsel to assist those who cannot afford to pay a lawyer to handle a civil matter.

Approximately 15% of Massachusetts’ six million residents have incomes below 125% of the poverty line.<sup>5</sup> The poor and marginalized need access to the courts when they face the most serious possible losses involving basic human needs: tenants are threatened with eviction; parents are challenged for custody of their children; students face expulsion; immigrants face deportation; and the list goes on and on. The lack of counsel in these high stakes cases may mean that a family becomes homeless or a mother loses her children. The lack of counsel may mean that a child can no longer attend school, resulting in a downward spiral, refuge in criminal activity, and ultimately, prison. The lack of counsel may mean that a man or woman is forced to leave this country and return to a homeland where he or she will be beaten, tortured or killed due to political beliefs. In situations so dire, in cases so complex, those with the least resources and knowledge should not be turned away to fend for themselves. Despite a growing sensitivity by the bench to pro se litigants, the laws and rules are simply not designed to accommodate an untrained party.

Although more than 965,000 of Massachusetts’ residents are eligible for free legal services, most of them are turned away because legal aid programs do not have the resources to assist everyone needing counsel.<sup>6</sup> A total of 272 attorneys work for the twenty-one legal services organizations funded by MLAC and the federal Legal Services Corporation (“LSC”), or one lawyer for every 3550 poor persons in the state.<sup>7</sup> By contrast, there are 21,000 practicing lawyers in Massachusetts, one for every 252 people in Massachusetts.<sup>8</sup>



Despite studies showing that lawyers make an invaluable difference in the outcomes of these cases, pro se litigants dominate the dockets of many of the civil courts. MLAC reports that a majority of eligible applicants for legal services are turned away by its programs due to lack of resources. Legal needs studies find that over 80% of the needs of applicants are unmet.<sup>9</sup> In the Massachusetts Housing and Probate and Family Courts, often over 90% of the docket involves matters with unrepresented parties.<sup>10</sup> Again, many of the unmet legal needs concern issues of the utmost importance to people's lives, including housing, health, employment, and family and domestic issues.<sup>11</sup> Yet, because of the unavailability of counsel to aid those who need it most, these individuals have no choice but to represent themselves.

This is an unacceptable state of affairs. A society is not truly democratic, and its justice system not truly just, when its poorest citizens do not have access to the protection of its laws. When the result is that families are unable to protect their basic human rights, it can fairly be called an ongoing state of emergency. No person who can afford counsel would ever go into the courtroom unassisted if the outcome of the case could result in the loss of the family home or the removal of a child from the family. Poor persons should not be required to do so, either. Surely, as a society, we can do better than this. If the idea of equal justice under the law is to have genuine meaning, lawyers must be available to the broad masses of people, not just those with private means to pay for counsel.<sup>12</sup>

Currently, the pressing need to provide legal services to the poor in Massachusetts is addressed through legal services programs funded by the federal and state governments, other legal services programs created and funded by non-profits or charitable organization and pro bono efforts by the private bar, often in conjunction with these legal services programs. The legal services provided run the gamut from full representation to limited representation (telephone hot lines, for example, or lawyer for the day programs) to legal information made available at clinics or on web sites. The courts facing the greatest numbers of unrepresented litigants also now offer various forms of assistance and legal information to such persons.

The BBA Task Force set out to demonstrate how to move beyond the inadequacies of the current resources for providing legal aid for the poor through the creation and expansion of a legal right to counsel, not in every civil case, but in those in which critical human needs are at stake and only full representation by a lawyer will ensure equal access to justice. As described in the next section, dedicated advocates in states across the country are engaged in efforts to do the same: to create a civil right to counsel as another tool that can be used to narrow the gap between the promise of equal justice and the reality that it is denied to so many people today. The challenge for the Task Force was not to decide whether there should be a civil right to counsel, but rather, how to make it a reality in Massachusetts. The Task Force set out, therefore, to answer the important questions: In what types of cases do unrepresented litigants forfeit the most important rights? Does providing counsel in such cases preserve those rights and produce a more just outcome? What is the effect on the courts and the parties if low income parties have and exercise a right to counsel? What is the cost of counsel when certain tenants, landlords, immigrants, juveniles and parents in child custody cases are entitled to representation? What is the most effective use of counsel? What are the potential cost savings to the Commonwealth and to society if counsel is provided in key areas implicating basic human needs?

Expanding the right to counsel in civil cases is an essential way to ensure that, in truly vital cases, low income people have access to the justice system. A right to counsel in these cases will assure that low income people do not forfeit fundamental rights or lose

out on basic human needs without a fair hearing of their cases. Ironically, most Americans believe that a right to counsel already exists for these types of cases.<sup>13</sup> It is time to transform that optimistic belief from myth to fact.

### III. BACKGROUND AND CREATION OF TASK FORCE

#### A. HISTORY OF CIVIL GIDEON

In 2006, the ABA unanimously adopted Resolution 112A that reads, in its entirety:

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.<sup>14</sup>

The report accompanying the resolution traces the history of legal aid in the United States, as well as common law antecedents, state and federal constitutional principles and policy considerations that support a right to counsel in civil cases. The report discusses current efforts to establish a civil right to counsel and describes the resolution as offering a careful, incremental approach to making effective access to justice a matter of right.

The current efforts to establish a civil right to counsel reflect the surge of activity across the country, coinciding with the fortieth anniversary of the United States Supreme Court's 1963 decision in *Gideon v. Wainwright*, establishing a right to counsel in the criminal matters.<sup>15</sup> The activity has included conferences, websites and articles supporting the call for a Civil Gideon in various formulations, as well as the formation of a National Coalition for a Civil Right to Counsel. Advocates in some states, such as Maryland, Washington, Wisconsin and Alaska, filed litigation seeking decisions to create an expanded right to counsel in certain civil contexts. Others, including those in California, New York and Texas, have explored legislative responses to the issue. The adoption of the ABA Resolution has spurred discussions in many states about how to implement the resolution.<sup>16</sup>

In Massachusetts, the right to appointed counsel currently exists, by statute or case law, in a number of types of civil cases. Examples of these areas include care and protection cases, child guardianship cases, children in need of services ("CHINS"), mental health commitments and waiver of consent to adoption.<sup>17</sup> Roughly one-third of the budget for CPCS provides counsel in civil, as opposed to criminal, matters. The expansion of the right to counsel in Massachusetts has progressed steadily, and continues to do so, as evidenced by the 2008 decision of the Massachusetts SJC in *In Re Hilary*.<sup>18</sup>

Nonetheless and despite progress which ensures a right to counsel in some civil matters, the right has not been established in most cases in which basic needs are at stake, as envisioned by the ABA Resolution. The BBA, therefore, became an original sponsor of the resolution. The MBA and the ATJ Commission subsequently adopted similar resolutions.<sup>19</sup> In a report issued in June 2007, the ATJ Commission recommended the expansion of a civil right to counsel in several areas: evictions; civil contempt hearings where incarceration is a possibility; proceedings in which the Department of Youth Services ("DYS") seeks to revoke a juvenile's conditional release; civil actions involving the same issues as a criminal case in

which counsel was appointed; and guardianship proceedings including the custody of a youth.<sup>20</sup>

## B. CREATION AND MISSION OF THE BBA TASK FORCE

It was against this backdrop of activity that BBA President Tony Doniger created the Task Force on Expanding the Civil Right to Counsel<sup>21</sup> over the summer of 2007, which convened for the first time in September 2007.

### Formation of the Task Force

As constituted the Task Force was intended to represent stakeholders from all sectors of the legal community concerned with expanding access to justice – the judiciary, legal services, MLAC, the IOLTA Committee, CPCS, Massachusetts Law Reform Institute, the MBA, the Women's Bar Association of Massachusetts, academia, the pro bono community and practitioners from large and small firms – along with experts from each of the substantive law areas most likely to be affected by the work of the Task Force. The Task Force's work was enhanced by the substance of the Civil Gideon Symposium held in October 2007, which was jointly convened by the MBA and the BBA. In particular, former Chief Justice Herbert Wilkins, the Chair of the ATJ Commission, urged bar leaders to expand the Task Force to include the broadest possible input to ensure that its work would not have to be redone. The Task Force was subsequently expanded to include representatives from key statewide groups. James Van Buren, Vice Chair of the ATJ Commission, was appointed to the Task Force as its representative, and Gerry Singsen, consultant to the ATJ Commission, was asked to participate in Task Force efforts. A list of Task Force members and liaisons may be found in [Appendix I](#).

### Mission of the Task Force

The Task Force adopted the following mission statement:

The need for a civil right to counsel in matters of basic human need such as those involving shelter, sustenance, safety, health or child custody having been recognized by the BBA Council vote of June 20, 2006, as well as by the ABA, MBA and the Supreme Judicial Court's Access to Justice Commission, the mission of the task force will be to foster the expansion of a civil right to counsel by analysis of areas where the right will be most crucial and formulating recommendations for expansion in specific areas, and with specific funding and enabling proposals.

From the earliest discussions with President Doniger, the Task Force focused on expanding the areas in which Massachusetts, by judicial decision or legislation, already mandated a right to civil counsel in some civil matters. As a result, the Task Force established committees in substantive law areas of Family, Housing, Immigration and Juvenile Law. A Funding Committee was appointed to work on how to obtain funds for the proposals the substantive committees were expected to recommend. A Litigation/Research Committee was appointed to support the efforts of the Task Force and its committees. Individual members of the Task Force began looking at legal matters affecting rights to sustenance and the collateral consequences of criminal convictions. In order to broaden the input from stakeholders, the committees were encouraged to invite as members or advisors interested parties who were

not members of the Task Force. A full list of the committees and their members and advisors may be found in [Appendix 2](#).

The Task Force discovered that not enough was known about how to implement a right to counsel in most substantive law areas. Consequently, the Committees developed pilot project proposals that would allow it to learn more about the mechanisms for providing counsel, the effect of creating a right to counsel, the costs involved and the potential saving of some kinds of costs to the state. A pilot project could demonstrate the value of counsel to the parties and the courts and provide data for evaluation of alternatives such as the use of staff lawyers or private attorneys on assignments. The cost of pilot projects would be far less than full implementation of a right to counsel, and therefore more manageable.

#### IV. OVERVIEW OF COMMITTEE REPORTS

The following sections present the reports and recommendations of the Task Force committees in the substantive areas of housing, family, juvenile and immigration law. Although each committee followed its own path in tailoring its proposals to address the substantive issues identified by the committee, common themes emerged during the development and discussion of the proposals. This section briefly identifies those.

The committees determined that counsel is most essential when it is likely that counsel will be necessary to preserve basic human needs, and the proposals of the various committees broadly fit into two categories. In the first, the need for counsel arises because the civil case relates to a criminal matter in which the deprivation of liberty potentially is at stake. Proposals fitting this category include the Family Law Committee's proposal for representation in contempt proceedings, in which the defendant faces incarceration as a possible outcome, the Immigration Law Committee's proposal for representation of immigrants in detention, and the Juvenile Law Committee's proposal to represent juveniles in hearings in which the juvenile faces lock-up if his or her grant of conditional liberty is revoked. Closely related are cases in which the civil case is a collateral consequence of the criminal case, resulting in inefficiencies and unfairness in that counsel may be provided on the criminal side, but not on the civil side. Examples include the Housing Law Committee's proposal for counsel for evictions resulting from criminal conduct, and the Immigration Law Committee's proposal for increasing advice and support to non-citizens in the Massachusetts criminal courts.

With regard to the second category, the committees felt that counsel was also needed when a potential loss of basic human needs due to a dramatic power imbalance was at stake. Those imbalances often flow from the vulnerability of a family whose basic needs are in jeopardy and the comparative power of an adverse party. Examples of these scenarios include the Housing Law Committee's proposal for representation in eviction cases involving household members with mental disabilities, the Family Law Committee's proposals in the custody and adult guardianship areas, the Immigration Law Committee's proposal for representation for asylum seekers and the Juvenile Law Committee's proposal for counsel in school exclusion cases.

The process of identifying common threads affected not only the selection of certain areas of the law for the development of the proposals, but the details of the proposals themselves. For example, the common thread of power imbalances and unfairness in the legal

system caused the committee to place much of its focus on situations in which the adverse party is represented by counsel. At best, the result is a severe challenge to the adversary system and the judges, mediators, clerks and opposing counsel who must navigate the ethical quagmire which can result when one party is unrepresented. At worst, the situation reflects the ultimate breakdown of an adversary system that depends upon a rough equality between the parties. While that imbalance exists in all cases in which the government is the adverse party, the same is often true in civil cases in the areas of housing and family law. As a result, both the housing and family law proposals specifically include a right to counsel for a litigant when the opposing party is represented by counsel. The Task Force refrained from putting forward proposals that would create the imbalance, providing counsel for one side against an unrepresented party. Even in the contempt area, where counsel might be appointed for a defendant facing incarceration, the proposal includes the equivalent possibility that counsel be appointed for the victim of the contemnor's behavior as well.

To the extent possible, the proposals were developed and shaped with input from the courts, agencies and community groups that will be engaged with those working in the pilot projects. As described below, the housing proposals were developed after extensive input from judges and court personnel in the housing and district courts, as well as housing lawyers and other advocates. DYS' interest in the Juvenile Parole Revocation project enabled that proposal to move to the top of the Juvenile Law Committee's list of proposals. In contrast, resistance from the domestic violence community and some involved in the court system led the Family Law Committee to withdraw a proposal in the area of restraining orders. The active support of CPCS for the Immigration Law Committee's proposal regarding non-citizens in criminal court not only helped to shape the development of that proposal, but also to begin its implementation during the course of the Task Force's work. Moreover, and because the Task Force included a liaison to the Access to Justice Commission, who was fully aware of the Commission's work, hearings and report, four of the Task Force proposals were geared toward addressing problems identified by the Commission.

Finally, the Task Force sought to ensure that the proposals were balanced and complement one another. One form of balance was geographical. The Task Force shaped its proposals in such a way that the pilot projects would not be concentrated in one part of the state and exclude other parts. A second form of balance concerned the manner in which the proposal would be delivered. Some proposals use a staff model, similar to that which exists in legal services offices. Others utilize a mechanism similar to the fee-based system that exists with CPCS and involves the private bar. In addition, the proposals reflect the recognition of important roles for the private bar, including mechanisms that provide enhanced opportunities for pro bono work. All recognize that creating a right to counsel in a limited group of cases is but one aspect of a multi-tiered approach to fostering access to justice through various forms of assistance to low income people, including full representation, limited representation (attorneys for the day) and self-help (training for pro se litigants, self-help centers).

## V. HOUSING LAW COMMITTEE

### A. THE NEED FOR COUNSEL

Shelter is a basic human need. The loss of shelter may jeopardize a family's safety and health, may negatively affect a child's education and development and even lead to loss of



custody. The need for assistance in cases involving eviction is great. Almost 35,000 summary process eviction cases were filed in the housing and district courts in fiscal year 2007.<sup>22</sup> In Massachusetts, as elsewhere around the country, most tenants and some landlords appear without counsel.<sup>23</sup> With no right to counsel established in the eviction area, indigent tenants obtain full representation only when legal services offices or a pro bono attorney are able to take their case, a relatively rare occurrence because housing cases are high on the list of unmet legal needs. Tenants who are represented are much more likely to obtain a better result, whether it be maintaining possession of the premises, reaching a favorable settlement or winning at trial.<sup>24</sup> Two examples illustrate the critical role counsel can play in protecting these vital rights.

*Susan and her foster children were being evicted from her apartment of twenty years. Susan's subsidized rent went up when she got a new job after a period of disability. When later she got an eviction notice for nonpayment of rent, she went to housing court alone. Fortunately, she received assistance in court from an attorney who realized that the public housing authority had charged Susan \$4455 more than she owed. The housing authority dropped the eviction, eliminated Susan's debt, covered her next two month's rent and wrote her a check for the balance of \$1079.*

*Ray, a brain-injured, wheelchair-bound resident, faced eviction from his apartment for alleged threats. Without counsel in district court, Ray had signed a "move-out" agreement, giving up his fifteen-plus-year tenancy with no alternative housing. Although eligible for services through the Statewide Head Injury Program for almost a decade, Ray had fallen through the cracks. Ray was able to secure a lawyer who helped vacate the judgment. The eviction case was dismissed six months later, and services were put in place.*

Courts handling eviction cases in Massachusetts have been at the forefront in developing techniques and programs to ameliorate the impact of appearing without counsel. Nonetheless, many of the problems that exist across the country persist in Massachusetts. For example, a recent study of eviction proceedings in Cambridge District Court found that, while landlords were represented in 355 of the 365 cases studied, tenants were represented in only thirty-nine (8.5%). Most cases involved nonpayment of amounts less than \$1000 owed. After analyzing the case outcomes, the authors concluded: "[t]enants with representation have a better chance of retaining possession of their housing."<sup>25</sup>

Given the scope of the problems involved with unrepresented litigants in summary process eviction cases, the Task Force recommends this as an area wherein counsel should be provided as a matter of right.<sup>26</sup> The specific pilot proposal endorsed by the Task Force is presented below, although the Committee believes that at least two other types of cases merit future consideration: cases involving conditions in violation of the housing code which are serious enough to jeopardize health and safety; and cases linked to the foreclosure crisis which would not otherwise come within the ambit of this proposal.

## B. THE PROCESS

The development of a housing proposal was delegated to a committee of the Task Force. Members of the Committee consulted advocates and court personnel about existing programs to assist unrepresented litigants; they met with representatives of the district court, the Tenancy Preservation Program's Statewide Steering Committee,<sup>27</sup> and the housing court; they surveyed housing court judges, pro bono lawyers for the day, legal services lawyers and landlord attorneys and analyzed the responses;<sup>28</sup> they collected statistics and



relevant data regarding summary process eviction cases in housing and district courts; and they reviewed reports on the impact of counsel in housing courts, as well as reports regarding various limited assistance programs, including those currently in operation in the various housing courts in Massachusetts, New York and Connecticut. Members of the Committee also collected and reviewed reports and information related to cost savings in homelessness prevention and cost data in representation programs, such as data from CPCS, discussed below in connection with the Funding Committee.

As the Committee worked to identify discrete areas for representation around which a feasible pilot project could be constructed, several tensions emerged that shaped the structure of the final proposal. The first was whether one could actually identify the features of the most important cases for representation in advance, without leaving any role for judicial discretion to cover scenarios that cried out for counsel but did not fit the exact categories prescribed in a proposal. Some felt that there should be no role for judicial discretion while others felt that the appointment of counsel, in any instance, should be discretionary. The second tension was the dramatic difference between resources in the housing and district courts, which could make it difficult to implement a one-size-fits-all program. The third involved the potential imbalance in any representation proposal regarding assistance for landlords and tenants. Given that the “basic human need” is shelter, tenants would seem to be the ones more often at risk, but the Committee recognized that there are vulnerable, unrepresented landlords who need assistance to preserve their own shelter by pursuing eviction cases. The final tension involved the recognition that a pilot program could not provide representation to all unrepresented litigants. Thus, an important component of providing access to justice would be to ensure that there are sufficiently staffed assistance programs to reach litigants who desire assistance such as the Lawyer of the Day program and other limited assistance programs.<sup>29</sup>

Once the initial proposals were developed, the Committee circulated them, along with a short survey to a larger audience.<sup>30</sup> In view of the generally favorable reaction to the proposals, the Committee felt that there was no need to revise them further.

### C. THE PROPOSALS

#### Tenants

The proposals for representation of tenants focus on three areas. Subsection one of the tenant proposal focuses on those tenants who potentially are the most vulnerable, those with mental disabilities, and the proposal largely tracks language that guides the Tenancy Preservation Projects. Subsection two responds to the concerns about cases in which criminal behavior of an alleged household member puts the tenancy at risk, avoiding the anomalous and inefficient situation in which representation is available by right in the criminal context, but not the related eviction. Subsection three is crafted to guide the careful exercise of judicial discretion in selected cases, requiring consideration not only of the tenant’s vulnerability, but in cases in which the landlord is represented, focusing further on the affordability of the housing unit and whether the tenant has potentially meritorious claims and defenses.<sup>31</sup>

Specifically, the proposal would provide legal counsel for tenants in eviction cases where: (1) the case involves household members with mental disabilities where the disability is directly related to the reason for eviction; (2) the case involves criminal conduct (including cases brought pursuant to M.G.L. c. 139, sec. 19 and those brought as summary process cases); or (3) the judge concludes that the absence of representation for the tenant will lead to a

substantial denial of justice. In the exercise of judicial discretion, judges shall consider the following: a) factors relating to a tenant's vulnerability, such as disability, domestic violence, education, language, culture and age; b) factors relating to the landlord, such as whether the landlord controls a large or small number of units, whether the landlord is legally sophisticated, whether the landlord is represented by counsel, and whether the landlord lives in the building; c) the affordability of the unit for the tenant, including whether the unit is in public or subsidized housing; d) whether there appears to be cognizable defenses or counterclaims in the proceeding; e) whether the loss of shelter might jeopardize other basic needs of the tenant, such as safety, sustenance, health or child custody; and f) other indicia of power imbalances between the parties.

### Landlords

The proposal for representation of landlords focuses on parallel goals, providing representation for indigent litigants where shelter is at stake and the opposing party is represented.

The proposal would provide legal counsel for landlords where: (1) the landlord resides in the building that is the subject of the eviction proceeding; (2) the landlord owns no other interest in real property; (3) the tenant is represented by counsel; and (4) the landlord's shelter is at stake in the proceeding.

### D. IMPLEMENTATION AND EVALUATION

Because summary process eviction cases are heard in both housing courts and district courts, the Committee believes it is important to initiate pilot programs in at least one session of both the housing and district courts. After discussions with both courts, it appears feasible to do so. The pilot hopes to utilize available assistance and screening mechanisms, but if they are unavailable, a method for assistance and screening will also have to be provided. Further, the Task Force anticipates using two models of staffing, one involving legal services staff and one based on the model of appointed counsel utilized by CPCS. The Task Force expects that the small number of landlord cases will permit them to be handled by pro bono attorneys. The pilot in both courts is anticipated to cost approximately \$350,000 annually based on current estimates from advocates, judges and court personnel regarding the number of cases that are expected to fit the criteria of the project. It is anticipated to run for one to three years, depending on available funding. In terms of outcomes, the evaluation of the pilot will focus on retaining possession, whether temporarily or long term.

The Task Force also believes that the project may provide a cost savings as a result of reducing displacement and homelessness and associated costs. The state spends almost \$120 million on homeless shelters and related services.<sup>32</sup> A New York study found that nearly 30% of the homeless became homeless because of eviction.<sup>33</sup> If just 20% of the evictions could be averted, the state could save nearly \$6 million. Based on a similar rationale, New York City started funding lawyers to represent low income tenants in eviction proceedings. The city's social services department subsequently calculated that the city saves \$4 in shelter and other social services costs for every \$1 spent on legal representation.<sup>34</sup>

## VI. FAMILY LAW COMMITTEE

### A. THE NEED FOR COUNSEL

The probate and family courts in Massachusetts have been at the forefront in developing materials and programs to make it easier for litigants to navigate the legal system when they are forced to appear without counsel and to lessen the impact of the lack of counsel on the outcome of cases. There are Lawyer of the Day programs, family law facilitators in two courts, a pro se coordinator in one court, self-help centers and self-help materials. These programs, however, do not and cannot fully address the need. The unfortunate reality is that every day unrepresented litigants, often with a limited education, try to navigate a complex system to resolve important matters, such as their rights to see and to raise their children.<sup>35</sup> The Task Force has identified three types of case in which it believes that counsel should be appointed; they are cases involving child custody, guardianship and civil contempt.<sup>36</sup>

#### Child Custody

Recognizing the importance of custody proceedings, the Supreme Judicial Court has held that a parent has a right to counsel at the dispositional phase of a CHINS proceeding when a judge is considering an award of custody to the Department of Social Services.<sup>37</sup> There is, however, presently no right to counsel in custody disputes between private parties. The Task Force believes that there is a compelling need for a lawyer in contested child custody cases when one side has an attorney and the other party is unrepresented due to indigency, given the complexity of the issues and the important rights that may be at stake, including physical and legal custody and visitation. One brief example illustrates the critical role counsel can play in protecting these vital rights:

*Ms. A had been ordered to transport her four year old daughter to her husband's home for court-ordered visitation. When she did so, however, her husband beat her. The local police department was notified and referred Ms. A. to Greater Boston Legal Services ("GBLS"). A GBLS attorney represented her through multiple proceedings. Eventually Ms. A. was awarded full custody of her daughter, child support, and visitation arrangements that were safe. Ms. A. was then able to focus on finding a job, raising her daughter and rebuilding her life.*

This example is typical. Every day indigent parents are faced with the potential loss of the custody of their children. Studies show that counsel can make a difference and that parents represented by counsel are more likely to request and obtain joint custody arrangements,<sup>38</sup> shared decision making arrangements<sup>39</sup> and reasonable visitation arrangements,<sup>40</sup> results which are more satisfactory than the alternatives.<sup>41</sup> Counsel can dramatically increase the likelihood of a just outcome in these cases.

The challenges faced by a litigant who must represent herself in her custody case were described in great detail in the appellate brief filed on behalf of Brenda King in the case of *King v. King*.<sup>42</sup>

She had to wear multiple hats simultaneously: party, witness, lawyer, scrivener. . . . She had to do so during highly emotional testimony . . . and in the presence of Michael [her husband] who had been abusive toward her and the children. . . . She faced these challenges with a background of little formal education. . . . These difficulties

**“It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect. . . . If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”**

Learned Hand,  
Address at the  
75th anniversary  
celebration of the  
Legal Aid Society of  
New York, February  
16, 1951

were compounded by [her] lack of legal training. She could not master the difference between offering testimony, questioning witnesses, and making argument. . . . She did not know until the second day of trial that the judge would not consider as evidence pretrial reports, motions or other submissions, except the GAL's [guardian ad litem] interim reports. . . . She was unable to have some exhibits admitted, or introduce the evidence they contained through other means. . . . [She] struggled to handle issues that lawyers normally address through expert testimony, such as whether she has Attention Deficit Disorder and if so its impacts. . . . She had not obtained documents that a lawyer could have obtained through discovery. . . . The trial court gave explanations of how to admit exhibits . . . the hearsay rule, [and the like]. . . . But as a layperson, [she] was unable to follow the judge's instructions. . . . The court's efforts to accommodate for [her] lack of a lawyer had limits. . . . Some highly relevant evidence never came before the court because [she] lacked the skills that lawyers have. . . . [Her husband's] case included inadmissible evidence because [she] did not know to object, or how to impeach witnesses, or was unable to do so because she was simultaneously testifying.<sup>43</sup>

This description illustrates exactly why an unrepresented parent is at great risk of forfeiting the basic right to custody.

#### Guardianship of Elders<sup>44</sup>

Elders often become physically or mentally unable to care for themselves. But if they do not have living relatives or friends that they can trust and rely upon to make important decisions about living or medical arrangements or finances, they are at risk of losing their independence and control of their financial affairs, as well as significant personal and civil rights, to a court-appointed guardian. The elder population of the United States is expected to grow from an estimated 31.5 million in 2000 to a projected seventy million by 2030. Within this astronomical number, a significant proportion of these individuals are likely to be "unbefriended elders," those who have no living relatives or friends upon whom to rely or who could potentially be appointed as guardians if needed. In 2007, over 3500 petitions were filed in the probate and family courts statewide, seeking guardianship of persons who were allegedly mentally ill or incapacitated. Although the exact figure of unrepresented individuals is unknown, it is likely that a vast majority of these individuals do not have benefit of counsel.

In guardianship proceedings, often there is an initial hearing, during which a petitioner presents evidence to support his or her request for temporary guardianship. The question of whether guardianship is necessary is often complex and requires investigation of the potential ward as he or she may indeed have some incapacity. Determining whether the level of incapacity is such that he or she requires a court-appointed guardian may require a close evaluation of complex and voluminous medical evidence. Often, however, the court will have only the information provided by the petitioner, which may be biased. One brief example illustrates the critical role that counsel can play in protecting the rights of these potential wards.

*Seventy- four year old Grace was admitted to the hospital for a heart related condition. Hospital staff planned surgery, but Grace advised them that her primary care doctor had previously recommended against surgery, given other health problems. The hospital filed a petition asking the court to appoint a guardian to make a decision about the surgery, claiming that Grace was mentally ill. The judge granted the motion and appointed a guardian.*

*After the appointment of the guardian, Grace's clothing, purse and wallet were taken from her by the hospital staff, and she was transferred to a skilled nursing facility against her will. Ultimately GBLS intervened on Grace's behalf, filed an objection to the guardianship petition and a motion for an independent competency evaluation. Grace was found competent, and the guardianship was dismissed.*

Grace was fortunate to have GBLS's assistance, but there are thousands of elders just like Grace who do not have attorneys to represent them. Instead, they are left to rely on judges and guardians, most often strangers, to make important decisions for them. The drastic need for reform in this area has been broadly recognized<sup>45</sup> and is the subject of pending legislation in the proposed Uniform Probate Code, Article V, which is widely supported by the bar. The Probate and Family Court has adopted administrative reforms and has recently revised the required medical affidavit to provide more detailed and specific information from a treating physician to support the petition. Also, working together with Senior Partners for Justice,<sup>46</sup> the Court instituted a pilot project for volunteer lawyers to serve as *guardians ad litem* in guardianship cases involving mentally and physically disabled adults, including the elderly.<sup>47</sup>

### Civil Contempt

A defendant who does not comply with a court order, typically an order to pay support, may be brought into court and charged with civil contempt, and if found in contempt, incarcerated. Poor defendants are vulnerable to incarceration for civil contempt as they may not have the resources to satisfy the court order. Because of the potential loss of liberty at stake in civil contempt cases, the Task Force believes that this class of litigants should be entitled to appointed counsel.<sup>48</sup> Notably, this was also one of the recommendations of the ATJ Commission in its June 2007 report.<sup>49</sup>

At present, it is the practice of some judges to request an attorney who happens to be in the courthouse to serve as counsel for a defendant then present and facing incarceration. The current practice of appointing counsel on the day of likely incarceration does not allow an attorney time to meet with the client or to prepare, develop evidence or investigate the allegations. Though this is not adequate representation, there should be a continuing role for such pro bono volunteers in the future.

### B. THE PROCESS

In developing its three proposals, the Family Committee surveyed probate and family court judges, judicial case managers, probation officers, clerks, pro bono attorneys, family law advocates, BBA and MBA family law section members and legal services attorneys statewide. The initial survey provided a list of various types of family law cases and requested input as to where counsel is most needed to ensure a just outcome.<sup>50</sup> Respondents were asked to explain their reasons for selecting the types of cases that they chose and their estimates of the number of cases that would be involved. The Committee received hundreds of survey responses, which provided important insight that guided the Committee in narrowing the potential categories of cases to those ultimately chosen. The Committee then collected statistics and relevant data regarding custody, civil contempt and guardianship proceedings, researched law and practice in other jurisdictions, and met with advocates and court personnel to discuss existing programs to assist unrepresented litigants and their usefulness. It also reviewed recent relevant cases in Maryland, Wisconsin, Washington and Alaska and



determined that advocates in those jurisdictions have focused on custody, civil contempt and guardianship because of the compelling nature of the underlying rights at stake. Finally, once the proposal was developed, the Committee took the further step of circulating it widely to seek final input as to its feasibility. The revised proposal and questionnaire was sent not only to all judges and court personnel who had responded to the original survey, but to others as well. In addition, Committee members met with family law advocacy groups to discuss the proposal. None of the responses suggested a need for any changes to the proposal.

### C. THE PROPOSALS

#### Custody

The Task Force proposes a pilot project in two probate and family courts that will provide legal assistance and representation to low income parties in divorce actions pursuant to G.L. c. 208, §§ 1, 1B and paternity actions pursuant to G.L. c. 209C where custody is contested and (1) the other party is represented or (2) the party herself or himself has an abuse prevention order. The proposal rests on three basic principles: that parents risk forfeiting their basic rights to custody when, in cases involving custody, the other parent has an attorney and they do not; that the risk of forfeiting basic rights to custody increases in adversarial proceedings; and that parents risk forfeiting their basic rights to both safety and custody when they have an abuse prevention order but do not have an attorney to communicate with the opposing party and represent them.

#### Guardianship of Elders

Under this pilot project, referrals to counsel would be made at the request of the proposed ward, someone acting on behalf of the ward, or by the court if it determines that it is in the best interests of the ward. Various procedural safeguards would be provided, including a two week continuance to allow counsel to prepare for the hearing. This proposal substantially mirrors the proposed legislation with respect to guardianship proceedings, and it is hoped that the pilot project will provide further substantive support for enactment of the UPC.<sup>31</sup>

#### Civil Contempt

The Task Force proposes a pilot program in two counties, the goal of which will be to ensure that low income defendants at risk for incarceration will be appointed counsel to protect their procedural rights and to be their advocate. Further details of this proposal may be found in [Appendix 6B](#). Prior to appointment, there should be a determination of whether there is a risk of incarceration.<sup>32</sup> In order to address potential imbalances of power, counsel may also be appointed for plaintiffs as well as for defendants, taking into account: (1) whether the defendant is represented by counsel; (2) whether the Department of Revenue is representing the interests of the plaintiff;<sup>33</sup> (3) whether the plaintiff is capable of articulating a claim; (4) whether there is an imbalance of power arising from disability, domestic abuse, language barrier, or cultural difference; and (5) whether the claim is complex.

### D. IMPLEMENTATION AND EVALUATION

#### Custody

In terms of implementation, court clerks would screen cases scheduled for a hearing



to determine if custody was contested and if the case might be appropriate for the pilot project. Those cases would be referred to the Lawyer of the Day or Family Law Facilitator, who would further screen as need be and assist the litigants in securing counsel.

The court would hear the requests for counsel first, prior to any substantive court proceedings, including before meeting with a Probation Officer. The court would then rule on the request. If the request was allowed, counsel would be appointed and the case would proceed. Whether the appointment was allowed or denied, the court would issue a continuance to give the litigants sufficient time to prepare.

The Family Law Committee recommends that the Lawyer of the Day and Family Facilitator programs be expanded in order to meet the anticipated need.

The cost estimates for this proposal flow from the numbers of cases of the type described and would also be dependent upon the probate and family courts chosen to participate.

Locations for the custody pilot will be determined by the Chief Justice of the Probate and Family Courts, in consultation with the Task Force. The Committee estimated the likely number of cases in each county in order to determine overall costs.<sup>54</sup> Regarding funding, the Task Force has begun to approach funders to help develop the project in a manner which will identify the number of cases and focus on the most effective delivery system.

As stated previously, available studies confirm that counsel can dramatically increase the likelihood of a just outcome in custody cases. When a custodial parent is unrepresented in a contested custody dispute in which the other side has a lawyer, an important power imbalance results, raising basic fairness and due process concerns. As a result of the pilot, we expect to obtain valuable information on the number of contested custody cases in which one of the three types of situations involved in the pilot arise: paternity is involved; one side has an attorney and the other side does not; or an abuse order has been issued. The pilot project will look at how appointment of legal counsel in these types of cases impacts the outcome, the effect on clients' lives and well being, and any cost savings with regard to other government or social services costs.

### Guardianship of Elders

Before MassCourts<sup>55</sup> was implemented in the Probate and Family Court, the court knew how many cases guardianships cases were filed but not how many elders were placed under the control of guardians each year. Even with MassCourts, in most instances there is no means to track the whereabouts of these elders, monitor their treatment, determine whether they have recovered enough to reclaim their freedom and autonomy, or even learn whether they are dead or alive.<sup>56</sup>

The pilot program would appoint counsel in cases where the ward is indigent with the important goal of preventing people from being committed into nursing homes who might thrive in a less restrictive setting. If the proposed ward has adequate resources, counsel would be paid from the estate. The estimated cost of this proposal is \$120,000 annually.

Improving the rights of potential wards would go a long way towards making the process fairer. The evaluation would keep track of the number of people needing the

appointment of counsel and calculate the costs statewide when Article V is adopted by the legislature.

There is likely to be a savings to the taxpayer given the strong likelihood that the cost of counsel would be significantly less than the cost of placing the elder in some sort of facility outside of his or her home.

### Civil Contempt

The initial cost estimate for this pilot is \$620,000 per year, based on the estimated number of 1000 civil contempt cases that went to judgment in two of the larger counties. Evaluation data would include the impact on the class to be protected: contempt defendants. An important benchmark would be how many, or what percentage of, defendants were incarcerated. The goal is that the number would decrease significantly. Other important factors are the number of court appearances in a single case before incarceration or resolution; the amount of money owed and the purge amount; whether the plaintiff or his/her interests were represented by counsel; whether having a lawyer involved increases compliance with court orders by studying payment histories; and whether the defendant who had an attorney was more likely to pay regularly, to pay on time and to pay in full. If so, the pilot would evaluate whether there was a net gain to the taxpayer, i.e., whether the cost of counsel offsets an employed – not incarcerated – individual, current on his/her obligations.

## VII. JUVENILE LAW COMMITTEE

### A. THE NEED FOR COUNSEL

Providing lawyers for children in critical legal proceedings is both just and wise because children are categorically different from adults. In 2005, the Supreme Court of the United States acknowledged what every parent knows: youth is more than a mere chronological fact.<sup>57</sup> Children and adolescents differ from adults in their decision-making, risk assessment and ability to evaluate future consequences. They are more apt to be motivated by short term gain than a realistic appraisal of long term consequences and are more susceptible to outside pressure than are adults. Such deficits do not arise out of a specific disability, but rather reflect the average youth's immature neurological, cognitive, social and emotional development, which adversely impacts his ability to exercise the reasoning, judgment and decision-making exhibited by the average adult.<sup>58</sup> By the very fact of being young, children and youth are ill-equipped to protect or advocate effectively for themselves. As a result, they are more easily and profoundly injured by unfair practices and procedures that deprive them of their liberty or access to educational and other services critical to healthy youth development.

In 1967, the Supreme Court established a juvenile's affirmative right to appointed counsel in juvenile court proceedings, recognizing that juveniles "require the guiding hand of counsel . . . to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [he] has a defense and to prepare and submit it."<sup>59</sup> Subsequent federal decisions reiterated the developmental differences between juveniles and adults.<sup>60</sup> Yet in some instances children may not be entitled to representation, specifically, children in DYS custody facing revocation of their "parole" or grant of conditional liberty and those

**"Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion."**

Wiley Rutledge,  
U.S. Supreme  
Court Justice,  
Speech to American  
Bar Association,  
September 29, 1941

facing permanent exclusion from school. The Task Force recommends that these children have access to counsel.<sup>61</sup>

### Revocation of Grants of Conditional Liberty

Under Massachusetts law, a child between the ages of seven and seventeen found in violation of the criminal law may be adjudicated delinquent and committed to the custody of the juvenile correctional agency, DYS.<sup>62</sup> Once committed, regardless of age, the child remains in DYS custody until age eighteen or twenty-one.<sup>63</sup> Judicial oversight and legal representation ends with the decision to commit the juvenile.<sup>64</sup>

The committed population is overwhelmingly male, minority, poor and suffering from educational deficits, cognitive disabilities and mental health disorders.<sup>65</sup> Most juveniles are not confined for the entire period of their commitment; rather they are placed in the community where they reside under a "Grant of Conditional Liberty" which is supervised and can be revoked by DYS.<sup>66</sup>

DYS recognizes that revocation of a grant of conditional liberty triggers substantial due process rights. DYS regulations provide for a revocation hearing utilizing procedures that mirror adult parole revocation hearings. Absent counsel,<sup>67</sup> however, it is highly unlikely that a juvenile parolee facing revocation of his liberty will have the maturity and skills required to determine whether he has a defense, to prepare and submit it, to confront and cross examine adverse witnesses, to establish a record sufficient to support an appeal, or to indeed possess the knowledge necessary to decide whether there is a basis for an appeal. Nor will such youth be able to identify appropriate alternative sanctions or to develop and present information in mitigation of the alleged violation, as illustrated by the following example.

*Jonny, now fifteen years old, was committed to the DYS at age fourteen. Like many youth involved in the state's juvenile correctional system, Jonny has learning disabilities and struggles to read at a fourth grade literacy level. Raised in a low income family and community, Jonny is forced daily to contend with the effects of poverty: violence, drugs and the lure of gangs, among other threats. When released from DYS after his original commitment one of the conditions of his "grant of liberty" was that he avoid contact with gang members in his home city. Not surprisingly, Jonny found himself returned to lockup, his liberty revoked. Upon his return to DYS, Jonny was without representation. When asked whether he wanted to waive his rights to a hearing challenging the revocation of his parole, he turned to his DYS caseworker for advice, unaware that this individual was the same person who "charged" him with the violation leading to his parole being revoked, and who would "prosecute" the case against him. Jonny, confused and overwhelmed, waived his right to a hearing and was confined for thirty days in a secure facility.*

### School Exclusion

All children need education to succeed, and all communities need an educated citizenry to thrive. Yet in Massachusetts, once a child is permanently expelled from one public school, no other public school system is obligated to educate that child. Research documents that school exclusions lead to increased school dropout rates, lower test scores, poor academic achievement, social isolation and delinquency.<sup>68</sup> It also results in a lifetime of lower earnings and increased public assistance costs. The majority of children subject to punitive exclusionary proceedings are poor, minority and suffering from educational disabilities. Although it is difficult to measure, it is reasonable to assume that the social

costs of an inadequate education outweigh the costs of providing counsel for students facing school exclusion. Increasing high school completion 1% for all men ages twenty to sixty would save \$1.4 billion per year in crime-related costs. There is an estimated loss of \$50 billion per year in federal and state income tax revenues, or 5% of the individual income tax revenue collected in 2004, from 23 million high school dropouts between the ages of eighteen and sixty-seven.<sup>69</sup> Locally, in 2005, the average school dropout in Massachusetts earned \$456,000 less over a lifetime than the average high school graduate and \$1.5 million less than the average bachelor's degree holder. This translates into lower income and payroll taxes and higher Medicaid, Medicare and public assistance costs.<sup>70</sup>

Seemingly benign and informal school exclusion hearings are actually technical in nature, with statutes, regulations and rules that are complex, arcane and biased in favor of exclusion. Hearings are generally held on school property with school officials acting as fact witnesses, expert witnesses, judge and jury. Even the most well-informed adult has difficulty navigating these proceedings without the advice of counsel.

In many instances, the basis for combating disciplinary action is grounded in federal and state law. Attorneys have the knowledge and training to navigate and enforce the complex and interrelated laws and policies, to identify and preserve rights for future appeals, and to otherwise equalize the inherent and inevitable power imbalance students and their parents face when fighting to preserve a child's educational rights. Kevin's story illustrates the problem.

*Kevin is a well-liked, ten-year old student in a large public school system, a hard worker described by his teachers as a "good kid." Occasionally exhibiting behaviors that reflected what his teachers described as "emotional challenges," the rather diminutive Kevin was alleged to have pushed one of his teachers. Though the teacher later acknowledged that she had suffered no injury or bruising from the incident, the school moved to expel Kevin, relying on Ch. 71, § 37H. Kevin went the last months of the school year without any educational services. Not until his family received assistance from a legal aid program was there an effort made to secure those services and seek to overturn the expulsion. Left unchallenged, the school's course of action could have left this young boy without a legal right to ever gain admission to any other public school system in the state.*

## B. THE PROCESS

From among the Task Force members, two persons extensively familiar with juvenile law in Massachusetts were appointed to co-chair the Juvenile Committee. Other experts beyond the Task Force were invited to join the Committee. Two judges in the Juvenile Court volunteered to serve as advisors to the Committee. In addition, the Committee opened a dialogue with DYS concerning the pilot project for youth facing revocation of grants of conditional liberty. The Committee anticipates that it will approach the school districts in which the pilot project for counsel in school exclusion cases is expected to be implemented.

## C. THE PROPOSALS

### Revocation of Grants of Conditional Liberty

The Task Force, with the support of the CPCS and the stated commitment by DYS to engage in discussion, planning and training regarding this matter, proposes that a CPCS administrative position be created to identify lawyers to represent youths facing revocation

of grants of conditional liberty and to oversee their training.<sup>71</sup> CPCS will also recruit a fellowship attorney to do direct representation, training and creation of legal information materials for youth and DYS.

This model of representation recognizes and responds to the developmental vulnerabilities of committed youth and ensures the fundamental fairness of proceedings impacting their liberty interest. Without access to counsel, DYS committed youth who face revocation risk unwitting forfeiture of constitutional, appellate and administrative rights.

#### School Exclusion

The Task Force proposes a pilot project that will provide representation to students in school exclusion proceedings in school districts which have high numbers of school exclusions, high numbers of dropouts, low rate of MCAS proficiency, low numbers of graduates, high enrollment of low income students whose first language is not English, high rates of juvenile incarceration, and few existing advocacy resources.<sup>72</sup>

Because of the need for regionalized expertise, the pilot project would be based at the local offices of either the county bar advocate program or the CPCS in the selected geographical area. Information about the pilot project will be distributed through local Parent Information Centers, legal services agencies, CPCS and local bar associations.

After initial screening, parents and/or students requesting services would then be assigned counsel to represent the student at the disciplinary hearing as well as any other related meeting, negotiation or hearing to ensure that the student's educational rights are protected.

#### D. IMPLEMENTATION AND EVALUATION

Much of the information concerning implementation of the two pilot projects has been provided above. The anticipated costs for the DYS project is \$80,000 per year; the Task Force, CPCS, and DYS, along with other interested parties, will seek funding from the legislature for this expense in the first instance. The budget for the school exclusion project is \$160,000 per year; funding will be sought from foundations with particular interests in youth and education. Ideally, both projects would run for two to three years to allow the collection of sufficient information. Outcome measures will differ for each of the projects, as described below. For both projects, consideration will be given to comparing outcomes with cases in which no representation was available.

For the revocation of grants of conditional liberty project, outcome measures will consist of the following: (1) of all youth facing revocation in each year, the percentage of youth who waive their right to a hearing after consultation with counsel and (2) of those youth who elect to go to hearing, the percentage of favorable outcomes, as perceived by youth and as perceived by attorneys.

For the school exclusion project, outcome measures will consist of the following: (1) the number of requests for counsel per year as a percentage of total long term suspensions/expulsions from the designated school districts; (2) percentage of children returned to school after hearing; (3) favorable outcome achieved as perceived by student and family; (4) favorable outcome achieved as perceived by attorney; and (5) nature of the conduct at issue, including whether any violence is involved.



## VIII. IMMIGRATION LAW COMMITTEE

### A. THE NEED FOR COUNSEL

Each year, thousands of low income people appear in Immigration Court facing severe consequences, such as deportation or detention. Because of the complicated nature of immigration law, many of these individuals do not understand the proceedings or potential results. The Immigration & Nationality Act affords the right to counsel to these non-citizens, but they must exercise that right at their own expense.<sup>73</sup> The Task Force believes that representation should be provided in cases where individuals have the most at stake in terms of their liberty and their right to assert defenses to removal, that is, those who have been detained, those facing deportation as a result of a criminal offense (often minor) and those seeking asylum.

#### Non-Citizens in Immigration Detention

Immigration and Customs Enforcement (“ICE”) detains almost all immigrants with criminal convictions and is increasingly detaining other non-citizens, such as people who have overstayed their visas or entered without proper documents.<sup>74</sup> These detainees face complicated proceedings in Immigration Court, proceedings which will usually determine whether they will ever be able to live in the United States again. Because of the expense of detention, their cases are typically heard more quickly than those who are not in detention, leaving less time to prepare. Free and low-cost legal services are extremely limited for detained non-citizens. For those who cannot obtain free legal services, the likelihood of affording private counsel is diminished by their inability to work and raise funds to pay for counsel.

Currently resources to represent detainees without charge are extremely limited.<sup>75</sup> Thus, despite the dramatic effect that counsel has on the ultimate outcome of a case in Immigration Court, most non-citizens appear in Immigration Court without representation.<sup>76</sup> The example below illustrates the difference that having an attorney can make.

*Recently, the Political Asylum/Immigration Representation Project (“PAIR”) Detention Attorney kept the government from wrongfully deporting three different U.S. citizens and gained their release from detention -- men born in Trinidad, Argentina, and Dominica who had each become U.S. citizens through their U.S. citizen relatives. The PAIR Detention Attorney also stopped the deportation of a Haitian man whom Immigration had already sent to Louisiana to be deported immediately to Haiti. It was only through the legal expertise of the PAIR attorney that anyone even realized that he was not deportable. The government brought him back to Boston and terminated the deportation case against him.*

#### Non-Citizens in Criminal Courts

When Congress amended the Immigration & Nationality Act in 1996, many minor criminal convictions became automatic grounds for the deportation of immigrants, even immigrants *Orlando* married to U.S. citizens or whose children were U.S. citizens. This includes petty crimes, like theft or minor assaults for which the immigrant received a sentence of only probation. Deportation for these crimes is automatic without even the possibility of showing rehabilitation or other positive contributions to the community. Only those who face a probability of torture or persecution in their home country can apply for relief in Immigration Court if they have certain criminal convictions known as aggravated felonies, which include minor crimes that are misdemeanors.

“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

U.S. Supreme Court  
Justice Hugo Black,  
*Griffin v. Illinois*, 373  
U.S. 12, 19 (1964)



In some instances, deportation could have been avoided if the sentence had been structured differently or reduced by even one day. For example, the definition of “conviction” in the Immigration & Nationality Act includes cases that are continued without a finding (“CWOFF”) - essentially a dismissal - in state court. The consequences of criminal convictions to these non-citizens can be devastating, especially for long-term legal residents who have lived in the U.S. for many years with families who are U.S. citizens.<sup>77</sup> The following example is illustrative of the problem.

*Alphonse, a twenty-year-old from Jamaica, was arrested by the police for marijuana possession and possession of marijuana with intent to distribute. Alphonse has been a legal resident of the U.S. since he was nine years old, with family in the U.S.. Under Massachusetts law, these offenses are misdemeanors. The judge urged the defendant to plead guilty and accept a disposition that the case was “continued without a finding” (“CWOFF”). While under Massachusetts law a CWOFF is not considered a conviction, under federal immigration law it is, and the possession with intent to distribute charge is an “aggravated felony” subjecting the defendant to mandatory detention, automatic removal from the U.S. and denial of re-entry to the U.S. for the rest of his life. After consulting with an attorney in the CPCS Immigration Impact Unit, Alphonse’s defense attorney filed a successful motion to suppress; the possession with intent to distribute charge was then dismissed. Alphonse subsequently pled guilty to the remaining charge, which is not a deportable offense for a legal permanent resident such as Alphonse. Without the advice of the CPCS Immigration Impact Unit, Alphonse likely would have unknowingly pled guilty to an aggravated felony which would have caused his automatic and permanent removal from the U.S.<sup>78</sup>*

Federal immigration consequences of state criminal charges are an extremely complex area of law. Few attorneys in Massachusetts specialize in this area or have significant experience in both immigration and criminal law. CPCS currently provides limited support and advice in this area to its staff attorneys and bar advocates. Prior to May 2008, the only support offered by CPCS was through a part-time Immigration Law Specialist position. Recognizing the urgent need and skyrocketing number of immigrant defendants facing deportation for minor criminal offenses, CPCS recently hired an additional attorney. These two attorneys now comprise the CPCS Immigration Impact Unit, which provides advice and support on a limited number of individual cases and general support to 200 CPCS staff attorneys and the 2700 court-appointed bar advocates.<sup>79</sup> CPCS staff attorneys and bar advocates handle well over 200,000 cases a year.<sup>80</sup> A significant percentage of the clients are non-citizens. As the supervising agency for indigent representation in Massachusetts, CPCS should provide comprehensive training and support to all CPCS-affiliated attorneys representing non-citizen clients. Current staffing of the CPCS Immigration Impact Unit is insufficient to do this.

### Asylum Seekers

The Immigration & Nationality Act provides that individuals facing persecution or torture upon return to their home countries may seek asylum, withholding or removal, or relief under the Convention Against Torture as defenses to removal.<sup>81</sup> These claims often present complicated factual issues and require substantial documentation of conditions within the applicant’s country as well as the personal circumstances of the applicant. Despite the drastic consequences of deportation, which can include severe harm, torture and death, individuals seeking asylum and other forms of protection do not have a right to court-appointed counsel. Free and low-cost legal services are extremely limited and cannot meet

the need.<sup>82</sup> As a result, many individuals present asylum claims without representation by counsel. Because the law of asylum is complex and evolving, without legal assistance, many potential applicants remain unaware of their legal options and accept voluntary departure or are ordered to be removed without even exercising their right to apply for relief. Yet asylum applicants represented by counsel win asylum five times more often in Immigration Court than those who are unrepresented.<sup>83</sup> Marie's story provides an example of the seriousness of asylum cases and the need for representation.

*Marie fled Haiti after suffering persecution for her support of the deposed Haitian President, Jean Bertrand Aristide. Although Marie had very little education she was active politically. When a violent coup d'état forced Aristide from power, Marie was targeted on three occasions. The last time she was beaten and raped. Her domestic partner was kidnapped and has not been heard from since that time. Following this final act of violence, Marie fled to the Dominican Republic and then to St. Thomas, Virgin Islands and applied for asylum to the U.S. Severely traumatized, facing language and cultural barriers and knowing little about the legal system, she did not reveal the details of her past, including the fact that she was raped. She also did not present documentation of her own situation or of the political situation in Haiti. Fearing that she would be stigmatized in the community, she did not reveal the rape during her interview. By then Marie was in Boston, where the asylum officer found that she was not credible and referred her case to the Immigration Court to begin removal proceedings. Luckily, Marie was able to obtain legal representation and the Immigration Judge found her to be credible and granted her application for asylum. Marie was able to obtain employment authorization. She is currently working, attending school and will soon be eligible to apply for lawful permanent resident status. Without representation, she would almost certainly have been denied asylum and ordered deported. Because she was able to obtain representation in her removal hearing, she is safe, working in the U.S. and on a path to U.S. citizenship.*

## B. THE PROCESS

The Immigration Committee consulted with immigration practitioners with years of varied experience, including attorneys at PAIR, GBLS and CPCS. The Committee also reviewed data from a variety of sources, many of which are cited herein. Although the Committee sought input from judges in the Boston Immigration Court, the judges were not permitted to speak informally to the Committee.

## C. THE PROPOSALS

### Detainees

The pilot projects will provide legal assistance and representation in the Boston Immigration Court to low income non-citizens who are being detained by ICE at the Suffolk County House of Corrections.<sup>84</sup> Project staff will screen for income eligibility and conduct further intake as necessary to determine whether the Project will accept a case for full representation or for limited representation in bond proceedings for release from detention.

A client will be considered for limited representation in bond proceedings where: (1) the client is eligible for bond (numerous factors specified in the Immigration & Nationality Act prevent a person from being released on bond); (2) the client has children, family members or other significant ties to the community; (3) the client is eligible for relief from removal; or (4) the case presents a complex or innovative theory on bond eligibility factors.

A client will be considered for full representation where: (1) the client's case presents statutory or constitutional issues relating to the circumstances of his or her arrest by ICE, suppression of evidence, termination of proceedings due to lack of deportability, and related matters; (2) the client is potentially a United States citizen; (3) the client is seeking asylum, withholding of removal or relief under the Convention Against Torture, and the client presents a credible claim showing a likelihood of harm in the future if deported or the client has suffered harm in the past; (4) the client is eligible for other forms of relief from removal, such as a waiver of a ground of deportation or adjustment of status to lawful permanent resident, and representation in such cases would promote family unity or prevent removal to a country in which the client lacks current ties; or (5) the client is eligible for release from detention after remaining in immigration detention for more than ninety days after a final order of removal.

### Criminal Charges

The pilot project would provide assistance to immigrants who would potentially be deported because of relatively minor criminal convictions through the expansion of the Immigration Impact Unit within CPCS. The Unit would provide criminal defense attorneys throughout Massachusetts who represent indigent immigrants with the support, training and advice needed to fully and competently advise their clients in this area.

A fully funded Immigration Impact Unit within CPCS would be comprised of four staff attorneys and an administrative support person. The unit would provide support, advice and training regarding relevant immigration law to staff attorneys and bar advocates throughout Massachusetts. The majority of resources would be devoted to indigent criminal defense and delinquency attorneys; however, support would also be provided to children and family law attorneys, as well as mental health attorneys, who required assistance.

### Asylum Seekers

The pilot project will provide legal assistance and representation in Immigration Court to low income non-detained asylum seekers in Boston. Because the existing agencies are unable to meet the need for asylum representation and because many non-citizens who are eligible for asylum do not realize they are, the pilot would address both issues by: (1) placing one Attorney of the Day in the Boston Immigration Court and (2) adding two additional Asylum Staff Attorneys, one to be employed at GBLS and to directly represent asylum seekers, and the other to be employed at the PAIR to recruit, train and mentor pro bono attorneys to represent asylum seekers.

The agencies on the list of free legal services would conduct intake according to their current procedures. The Attorney of the Day would also assist in increased intake generated from these referrals.<sup>85</sup>

## D. IMPLEMENTATION AND EVALUATION

Anti-immigrant sentiment has been on the rise since September 11, 2001, and this potentially reduces public support for funding legal assistance programs for non-citizens.<sup>86</sup> Yet, in the context of an analysis of the civil right to counsel, the stakes are as high or even higher with immigration proceedings as these cases often result in loss of liberty (detention) and indeed for asylum seekers, often loss of life itself, if the applicant is deported.<sup>87</sup>

With assistance of counsel, many non-citizens are able to avoid detention. This can have a variety of positive effects, including individuals being able to work and contribute to the economy and the tax base; individuals being allowed to remain with their families, promoting family unity; and the government avoiding detention costs, which can average \$70 per day. Funding for the detainee and asylum projects<sup>88</sup> will be sought from private foundations and other funders who are focused on immigration issues as a priority. As to the second proposal (full funding for the CPCS Immigration Impact Unit), CPCS is a state-funded agency that provides representation of indigent defendants. Its budget includes funding for training and support of attorneys who provide such representation. Due to rapidly increasing deportation of immigrant defendants for minor criminal offenses, the training, advice and support provided by a fully funded Immigration Impact Unit is necessary for attorneys supervised by CPCS to represent their immigrant clients fully and effectively. The Task Force will seek to build support for CPCS's budget requests for a fully-staffed Unit.

Based on the estimated number of cases, the cost for each of the pilots in Immigration Court would be \$360,000 per year. Funding for one to three years of pilot operation will be sought. CPCS will seek additional funding in the amount of \$290,000 for full staffing of the Immigration Impact Unit.

For the proposals regarding detainees and asylum seekers, the funding agencies or providers will track, through their databases, the number of clients assisted and the scope of the assistance provided. They will track work authorizations and work history to the extent possible to show the benefits of regularizing status. After one year, they will report back on the increase in case load and the unmet need for counsel to represent both detained individuals (proposal one) and low income asylum seekers (proposal three) as well as estimates of the costs savings from removing clients from detention and the societal benefits from clients being in the work force. At that time staffing recommendations could be adjusted based on actual need. For the proposal regarding non-citizens facing criminal charges, CPCS will also track the number of clients and attorneys it has assisted throughout the year.

## IX. NEXT STEPS IN EXPANDING THE CIVIL RIGHT TO COUNSEL

### A. BEYOND THE PILOT PROJECTS

As discussed in the preceding sections, the Task Force's approach to implementing a Civil Gideon was to identify the most likely starting points for an expanded right to counsel. That assessment involved an analysis of competing basic needs, available data regarding the actual impact of counsel in various proceedings, and implementation concerns, specifically, which pilot projects could most effectively be established at this juncture. The pilot projects discussed in this report are not meant to be a complete list of types of cases in which a civil right to counsel is needed; rather, they are starting points.

In some instances, the need for counsel is so intertwined with potential changes in the substantive area of the law that those areas seemed to be problematic as starting points. Depending on the nature of changes not simply in the law, but in the practices and procedures of the relevant institutions, the need for counsel might become more or less urgent. For example, one basic need identified by the ABA and in the Task Force's Mission Statement is health. There are many health-related issues facing low income individuals,

ranging from access issues (e.g., discrimination, refusal of emergency services, denial of Medicaid or Medicare or veteran's benefits) to insurance claims to challenging a mental health commitment. With the Commonwealth's landmark health care initiative in its earlier stages, the need and appropriateness for legal representation on health issues will be greatly influenced by the experience with the system over time. Similarly, in the housing area, the foreclosure crisis compels widespread assistance for homeowners and tenants alike, which is currently under consideration and/or in the process of being implemented at the state and federal level. While it seems likely that counsel could make an impact on the outcome of many foreclosure cases, that impact will be affected by the nature of the substantive and procedural changes that are occurring and will likely continue to occur in the foreclosure process. Thus, crafting a specific pilot at this time seemed to be premature.

Not all changes, however, will necessarily lead to the expansion of the need for counsel. For example, in the housing area, many advocates and judges urged the Task Force to include eviction proceedings in all public housing cases, indicating that this is the type of eviction proceeding in which counsel is most needed. Recent data from the Cambridge District Court revealed that a large percentage of eviction cases in that court are brought by the Cambridge Housing Authority, often for small amounts of rent owed. To the extent housing authorities across the state can implement changes, either in their administrative processes or eviction practices that reduce the flow of cases to the courts, the need for counsel in turn might shrink. Similarly, changes in debt collection proceedings might reduce the need for counsel over time as well.

In other areas, the need for and effectiveness of representation is well established, so that there seemed little point in prioritizing those areas for pilot projects. Administrative hearings in public benefits matters provide one example that cuts across substantive areas. Cash benefits fit within the basic need of sustenance, while benefits tied to health care clearly implicate the basic need of health. The divisions in some instances are artificial, as the nature of the public benefit might well implicate more than one of the articulated needs of shelter, safety, sustenance, child custody and health.

Data available to the Task Force indicate both the importance of legal representation, and the limited benefit of new pilot projects, particularly where the goal of a pilot project is to learn more about the impact of counsel so as to develop the most effective statewide program. Data from across the country reveal that the addition of competent representation consistently increases the likelihood of success of a claimant by 15% to 30%.<sup>89</sup> Allan Rodgers of the Massachusetts Law Reform Institute analyzed recent data from Massachusetts agencies and confirmed a similar pattern for administrative hearings in Massachusetts.<sup>90</sup>

While the need for representation is acute, legal services programs have sufficient experience in these areas so that the design of an effective program is not a mystery. The problem instead is that the need for representation simply outweighs the current capacity. Expanding existing programs, rather than developing new pilot projects, seems to be a better step toward expanding access to counsel and increased representation. Moreover, with administrative proceedings at issue, the potential pool of candidates who could provide representation could easily include not only lawyers but lay advocates who currently are permitted to provide representation in those proceedings. Expansion of pro bono private bar representation might help meet the need as well. Only 10% of claimants have representation at hearings held by the Department of Transitional Assistance.<sup>91</sup> As with the example of housing authority evictions, the need for representation also could be reduced dramatically



with changes in agency practices that would improve the chances for unrepresented claimants to be successful.

Finally, the dynamic nature of our understanding of the basic needs in a civilized society will change over time. Changes in the law in the areas of the articulated basic needs, such as health and sustenance, may alter the need for counsel for the reasons explained above. This Task Force's work represents a confirmation of the principle that the division between criminal cases and civil cases as an automatic determinant of where counsel should be provided is an outmoded concept. Similarly, the articulated list of basic needs may not be exhaustive. The mission statement articulates the need for representation where basic needs, such as those involving shelter, safety, sustenance, health or child custody, are at stake. As it becomes clear that other basic needs are jeopardized in our legal proceedings, the need for representation in those areas may become clear as well.

## B. FINDING THE NECESSARY RESOURCES TO ADVANCE TO THE NEXT STAGE

One of the greatest challenges facing the Task Force is to ensure that the recommended pilot projects described in this report are funded and implemented, though as noted earlier, it is unrealistic to think that they will all happen right away or exactly as described. There is a major role for pro bono work in this effort, consistent with the strong pro bono tradition of the Massachusetts bar and the growing presence of law students handling pro bono work as well. Voluntary efforts alone cannot fill the gap; financial resources are also necessary. With the Task Force's recommendations in place, the Funding Committee has begun its work. In moving forward, the Task Force is guided by several principles.

First, whether considering permanent long term funding or short term funding for the pilots, the goal is to find new funds without taking away any of the current funds dedicated to legal services delivery and facilitating access to justice for the poor.

Second, the best way to stimulate new, permanent funding by the legislature is to demonstrate the economic and social benefits that flow from providing a lawyer to low income people to assist them in protecting basic human needs at jeopardy in adversarial proceedings, such as those involving shelter, sustenance, safety, health and child custody. Efforts by legal services providers and social scientists alike are underway to examine the cost savings benefits of such programs,<sup>92</sup> and the pilot programs themselves should provide additional data on this issue.

Third, short term funding for the pilot programs may come from a different source than long term funding. The Funding Committee considered a number of suggestions for ways to raise funds, such as civil filing fee surcharges or contribution of a percentage of punitive damage awards, but none seemed to be promising. Instead, the focus shifted to the fact that many of the goals underlying the civil right to counsel pilot projects are shared with other stakeholders – including state and local governments, civic institutions and private foundations. A focus group of bar leaders with broad and deep experience in the philanthropic community was assembled to assist the Task Force in brainstorming about possible funders. Initial discussions with several private funders have been encouraging, and private funding will be vigorously pursued. Given the broad range of interests served by private foundations, the goal will be to match the core interest fostered by each of the pilots, including safe housing, homelessness prevention, protection of the disabled, strong families, respect for elders and concern for the men, women and families who have immigrated to the

United States seeking a better life – with the particular goals of the foundation. While a private foundation may be unlikely to fund a full right to counsel in any of the key areas on a permanent basis, many typically fund two to three year efforts such as those proposed by the Task Force.

### C. ADDITIONAL RESEARCH PURSUED BY THE TASK FORCE

The Litigation/Research Committee of the Task Force has identified areas in which litigation might well be appropriate to establish a civil right to counsel, most notably, civil contempt, as discussed above in Section VI and below in [Appendix 6A](#). For now, however, the Task Force is focused on working with the courts, legal services providers, the private bar and stakeholders in the broader community who wish to approach these cases concerning critical human needs by implementing targeted pilot projects. Those projects will enable a better understanding and clearer analysis of the need for a civil right to counsel and what that right will mean, both in terms of cost and social benefit, and the non-monetary resources required to make it happen. Realizing, however, that litigation demonstrating the need for the civil right to counsel may be brought by others, the Task Force engaged in discussions with the staff of the Supreme Judicial Court to encourage the Court to notify the bar when cases involving the civil right to counsel in particular matters are pending so that the Task Force can evaluate whether assistance of some sort would be helpful.

The Litigation/Research Committee collected existing data about the cost of counsel in civil cases from CPCS. During FY06, approximately 20% or 46,667, of the total cases in which CPCS provided full legal representation to indigent or partially indigent clients were civil cases handled by staff attorneys in the Children and Family Legal Program of CPCS or by private bar appointments, an increase of 2010 over FY05. The ratio of civil to criminal case was similar to previous years.<sup>93</sup> The average cost of legal representation in all CPCS cases in the 2006 calendar year was \$493.13 (9.25 average hours billed), and the average cost in a civil case was \$799.53 (15.95 average hours billed).<sup>94</sup> For the 2007 calendar year, the average cost of representation in all cases was \$521.75 (9.72 average hours billed), and the average cost in a civil case was \$824.31 (16.43 average hours billed).<sup>95</sup> In FY06, civil cases saw an increase in new private counsel case assignments from the previous year (936 cases, or 4.4%), over the previous five-year period (FY00-FY05), while the number of civil cases overall increased by 1738 (8.9%). The CPCS Report notes that the overall FY06 increase occurred largely in the District and Juvenile Courts. The CPCS data, together with data from other sources, such as legal services offices, helped the Task Force to estimate costs for the pilots, though the estimates provided in this report will be refined as funding proposals become more specific.

The Committee also researched existing fee-shifting authorities, recognizing that fee-shifting mechanisms are important and provide a means for the private bar to represent low income clients as part of their regular practice and not just on a pro bono basis. The law firm of Heisler, Feldman, McCormick & Garrow, P.C., which received the Adams *Pro Bono* Award from the SJC's Standing Committee on *Pro Bono* Legal Services in 2006, has been recognized as visionary because their reliance on fee-shifting statutes enables them to represent low income clients who cannot afford the usual fees and costs.<sup>96</sup> While the Task Force is not making any recommendations to expand fee-shifting mechanisms, this is information that is clearly useful for interested practitioners and as such copies of the memoranda prepared for the Committee are attached in [Appendix 7](#).

D. CONTINUATION OF THE TASK FORCE

The mission of the BBA Task Force is not one that can be accomplished overnight or even in one year. But in the months since BBA President Doniger convened the Task Force, progress has already been made on expanding the civil right to counsel. Earlier this year, the SJC held that parents are entitled to counsel in certain proceedings if an award of custody to the state is under consideration.<sup>97</sup> In part due to the efforts of the Task Force, CPCS established an Immigration Impact Unit, and DYS is engaged in discussions with CPCS and legal services providers about a pilot project which would provide counsel to youth facing the revocation of a conditional grant of liberty. All concerned parties have agreed to seek funding from the legislature for the two projects. As outlined in this report, much more remains to be done to implement, evaluate and build on the recommended pilot projects. The BBA leadership strongly supports the mission of the Task Force and its continuation. The members of the Task Force look forward to the next stages of their work with energy and dedication to the mission of the Task Force as they prepare to work collaboratively with all those who share their commitment.

## APPENDICES

1. Roster of Task Force members and liaisons.
2. List of the committees and their members and advisors.
3. “Observations on the Right to Counsel in Civil Cases in Massachusetts” by Allan Rodgers, Massachusetts Law Reform Institute, April 5, 2004.
4. Memorandum by Mintz Levin (from Poonam Patidar to Susan M. Finegan) dated January 22, 2008, on the full list of known civil cases in which appointment and state payment of legal counsel is required, addendum to Allan Rodgers Memorandum on Observations on the Right to Counsel in Civil Cases, April 5, 2004.
5. Housing Committee Appendices
  - A. Survey of housing court judges, pro bono lawyers for the day, legal services lawyers and landlord attorneys.
  - B. Questionnaire and summary of results circulated by the Committee to a larger group after the initial proposals were developed.
  - C. Housing Committee Proposal.
6. Family Law Appendices
  - A. Family Law: Civil Contempt: The findings of the Litigation and Research Committee (legal precedent on right to counsel in civil contempt proceedings).
  - B. Proposal for Pilot Project regarding Civil Contempt.
  - C. Family Law Survey providing a list of various types of family law cases and requesting input as to where counsel is most needed to ensure a just outcome.
  - D. Proposal for Pilot Project regarding the Guardianship of Elders.
7. Listing of All Fee Shifting Statutes, Lia Marino, Suffolk Law Student, February 21, 2008.
8. Statistical Appendix to Report to Boston Bar Association Task Force on Expansion of the Civil Right to Counsel, on Legal Representation in Public Benefits Agency Hearings, by Allan Rodgers, Jul. 1, 2008 draft.
9. Costs of the Pilot Proposals by Gerry Singen.

## ENDNOTES

- <sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).
- <sup>2</sup> Michael Greco, *Court Access Should Not Be Rationed: Defined Right to Counsel in Civil Cases Is an Issue Whose Time has Come*, 91 A.B.A. J. 6 (2005).
- <sup>3</sup> Anthony Doniger, *A Civil Right to Counsel*, 51 BOSTON B.J., Sept.-Oct. 2007, at 2, 2.
- <sup>4</sup> MASS. CONST. art. XI.
- <sup>5</sup> U.S. Department of Commerce, Bureau of the Census (2006). *Current Population Survey: 2006 Annual Social & Economic Supplement*. URL: [http://pubdb3.census.gov/macro/032007/pov/new46\\_100125\\_01.htm](http://pubdb3.census.gov/macro/032007/pov/new46_100125_01.htm).
- <sup>6</sup> According to the U.S. Census Bureau, the population of Massachusetts in 2006 was 6,437,193. U.S. Department of Commerce, Bureau of the Census (2006). *State & County Quickfacts*. URL: <http://quickfacts.census.gov/qfd/states/25000.html>.
- <sup>7</sup> Massachusetts Legal Assistance Corporation, Program Revenue & Staffing Table, FY 2007. This number has been calculated using the number of citizens living with incomes below 125% of the poverty line; it is these individuals who are eligible for free legal services. URL: <http://www.mlac.org>.
- <sup>8</sup> The American Bar Association reports that in 2008, there are 42,501 active attorneys in Massachusetts. URL: [http://www.abanet.org/marketresearch/2008\\_NATL\\_LAWYER\\_by\\_State.pdf](http://www.abanet.org/marketresearch/2008_NATL_LAWYER_by_State.pdf). Approximately 50% of these are associated with IOLTA accounts, bringing the estimate to approximately 21,000 practicing attorneys in Massachusetts.
- <sup>9</sup> The November 1987 Massachusetts Legal Services Plan for Action by Massachusetts Legal Assistance Corporation states that five out of every six civil legal needs of low income persons are not being met by the legal services system.
- <sup>10</sup> Northeast Housing Court Survey by Rena Pike, Neighborhood Legal Services, June 2004 and Summary Process Survey Number 3, MLRI, September 1999, p. 14.
- <sup>11</sup> Of these critical issues, housing problems account for the highest rate of unmet needs, reported by 19% of low income households. Additionally, significant unmet legal needs relating to healthcare (13%), employment (9%), public benefits (8%), consumer issues (12%), and municipal services (20%) were reported. Policy Implications of the Massachusetts Legal Needs Survey presented by the Legal Needs Study Advisory Committee, May 2003.
- <sup>12</sup> Jonathan Smith, *Closing the Courthouse Door on Maryland's Poor*, 34 MD. B.J., Jul.-Aug. 2001, at 19, 20.
- <sup>13</sup> State Bar of California, State Bar Report: Bar Survey Reveals Widespread Legal Illiteracy, in Cal. Law., June 1991, at 68, 68-69 (noting more than two-thirds of Californians believe such a right already exists).
- <sup>14</sup> Resolution 112A, and the accompanying report appear online at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>. The Resolution was approved unanimously on August 7, 2006.
- <sup>15</sup> *Gideon v. Wainwright*, *supra* note 1.
- <sup>16</sup> For a more detailed explanation of recent activity, see Paul Marvy, *Advocacy for a Civil Right to Counsel: An Update*, 44 CLEARINGHOUSE REV. 644 (2008).
- <sup>17</sup> The full list of known civil cases in which appointment and state payment of legal counsel is required appears in a memorandum of Allan Rodgers of Massachusetts Law Reform, dated April 5, 2004, and updated by Mintz Levin Cohn Ferris Glovsky & Popeo, P.C., in a memorandum from Poonam Patidar to Susan M. Finegan, dated January 22, 2008. Both may be found in the Appendices, respectively as Appendix 3 and Appendix 4.
- <sup>18</sup> *In re Hilary*, 880 N.E.2d 343 (Mass. 2008). The case holds that, pursuant to G.L. c. 119, § 29, parents



are entitled to counsel at the dispositional phase of a CHINS proceeding if the judge is considering awarding custody to the Department of Social Services.

<sup>19</sup> The Massachusetts Bar Association (“MBA”) adopted the following language unanimously on May 23, 2007:

“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.” In its resolution, the AJC resolved to support “the concept of providing legal assistance, as a matter of right and at public expense, to low income person in those proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”

<sup>20</sup> Massachusetts Access to Justice Commission, *Barriers to Access to Justice in Massachusetts*, June 2007, Appendix C, p. 41 (“ATJ Report”).

<sup>21</sup> The Task Force generally uses the phrase “civil right to counsel” rather than Civil Gideon, in acknowledgement that the right to counsel on the civil side is likely to be far less universal than the right the criminal side.

<sup>22</sup> The Massachusetts Court System reports that 22,944 summary process cases were filed in the Housing Court Department in Fiscal Year 2007, and 11,880 in the District Court Department. See, <http://www.mass.gov/courts/courtsandjudges/courts/housingcourt/2007stats.html> and <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/allstats2007.pdf> (visited July 24, 2008).

<sup>23</sup> Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, FORDHAM URB. L. J. (forthcoming 2009)(manuscript at 11, on file with author). In Cambridge, MA, a recent examination of 365 cases found landlords represented in 355 of them (97.3%), compared to 39 for tenants (10.7%). Jennifer Greenwood, et al, *Tenancy at Risk: Leveling the Playing Field*, Northeastern University School of Law Legal Skills in Social Context Community Lawyering Program, 16 (May 2008).

<sup>24</sup> Engler, *supra* note 22, manuscript at 11-14. Professor Engler reports:

The courts are high volume courts, with few cases going to trial, and the vast majority resolved by default or settlement, typically the result of hallway negotiations. Tenants rarely are represented by counsel, while the representation rate of landlords varies from low rates in some courts, to highs of 85-90% in others; where landlord representation is high, the typical case pits a represented landlord against an unrepresented tenant. The demographics of the tenants reveal a vulnerable group of litigants, typically poor, often women, disproportionately racial and ethnic minorities.

While the details of eviction procedures vary, the common outcome measurements include possession, rent, abatement and repairs. Regardless of whether tenants appear or default, settle or go to trial, raise defenses or do not, the result invariably is a judgment for the landlord. The results typically are unaffected by whether the landlord is represented by counsel. The unrepresented tenant not only faces eviction, but does so swiftly, and with minimal judicial involvement.

One variable that often can halt the swift judgment for the landlord is representation for the tenant, with the likelihood of eviction dropping precipitously. Some reports discuss winning generally, showing tenants three, six, ten or even nineteen times as likely to win if they are represented by counsel, in comparison to unrepresented tenants. Others talk in terms of represented tenants faring better “by every measure”

or more generally in avoiding having judgments entered against them. Studies providing specific data show that represented tenants default less often, obtain better settlements, or win more often at trial.

<sup>25</sup> Jennifer Greenwood, et al, *Tenancy at Risk: Leveling the Playing Field*, Northeastern University School of Law Legal Skills in Social Context Community Lawyering Program, 5, 14, 16, 47 (May 2008).

<sup>26</sup> The ATJ Commission cited eviction proceedings as an area in which a right to counsel was needed. See ATJ Report 6-9.

<sup>27</sup> The Tenancy Preservation Project helps preserve the tenancies of persons with disabilities.

<sup>28</sup> The survey responses provided important insight that guided the proposal. The initial survey was framed in terms of an open-ended question inviting opinions on the types of eviction cases where counsel is most needed for a just outcome. Some judges and advocates expressed a preference for representation for all tenants, while acknowledging that result was unlikely to occur. Others focused on tenants in public and subsidized housing, but also recognized that those cases represent an enormous percentage of the docket. Some responders focused on particularly vulnerable litigants, such as those with disabilities. Others focused on scenarios in which the power lined up against the unrepresented litigant was overwhelming, such as those involving evictions related to criminal conduct or other scenarios in which governmental agencies were involved in the eviction. The survey is attached as Appendix 5A.

<sup>29</sup> Although not specifically a part of the proposed Pilot Projects, in order to reach all eligible litigants seeking assistance, the Committee recommended that implementation of its proposals be supplemented with the expansion of assistance programs for both tenants and landlords in all housing and district courts.

<sup>30</sup> See Appendix 5B.

<sup>31</sup> The exact language of the Committee's proposal may be found in Appendix 5C.

<sup>32</sup> Massachusetts FY08 budget allocates \$35.94 million to individual homelessness services (line item 4406-3000) and \$83.12 million to family services for a total of \$119.06 m. The FY08 budget is Ch 61 of the Acts of 2007.

<sup>33</sup> New York City Department of Social Services, *The Homelessness Prevention Program: Outcome and Effectiveness 2* (1990), at 14 (cited in Legal Services Project, *Funding Legal Services for the Poor: Report to the Chief Judge* (1998)).

<sup>34</sup> *Id.* at 23.

<sup>35</sup> Martinek, Paul J., *Family Law not for Amateurs*, BOSTON HERALD, Mar. 5, 2007, at 19.

<sup>36</sup> The Task Force does not believe that these are the only areas in which indigent pro se litigants would benefit from counsel, but given the limited resources at hand, these are critical areas in which we believe counsel would have the greatest impact. See generally, Section IX, Next Steps in Expanding the Civil Right to Counsel

<sup>37</sup> *In re Hilary*, *supra* note 17.

<sup>38</sup> ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 108-13, 300 (Harvard Univ. Press 1992). The authors studied approximately 1,100 California families as they made post-separation arrangements for their children in cases filed between September 1984 and April 1985. Where both parents were represented by counsel, the parties reached agreements for joint custody in 92% of the cases; when the mother alone was represented, joint custody agreements were reached in 73% of the cases; when the father alone was represented, joint custody agreements were reached in 88% of the cases; and when neither party was represented, joint custody agreements were reached in only 51% of the cases. While the authors found that mothers nearly always requested physical custody regardless of whether they were represented by counsel, the same was not true with fathers: only 21% of unrepresented father sought physical

custody, compared to 80% of represented fathers. *See also*, Robert Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?*, in *DIVORCE REFORM AT THE CROSSROADS* 61-65 (S. Sugarman & H. Kay eds., Yale Univ. Press, 1990).

<sup>39</sup> Jane Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 114, 132 (1990) (studying 1988 data from Washington State). Ellis found that in 91% of the cases, parents were more likely to elect some form of shared decision-making when both parties were represented by counsel as compared to 70% where one party was represented and 77% when neither party was represented.

<sup>40</sup> *Id.* at 132-33. The mean number of total visits was 120 per year where both parents had counsel, compared to 88 where only one side had counsel and 97 where neither party was represented.

<sup>41</sup> *See also Families in Transition: A Follow-up Study Exploring Family Law Issues in Maryland*, The Women's Law Center of Maryland, Inc. (December 2006) (available online at [www.wlcmd.org](http://www.wlcmd.org).) (Joint legal custody with physical custody to the mother was the most common result when both parties were represented, while joint legal custody with physical custody to the father rarely occurred unless the father alone was represented. Joint legal custody with physical custody to the mother resulted in 44.7% of the cases when both parties were represented, compared to 26.8% of the cases in which the mother alone was represented, 29.6% of the cases when the father alone was represented and 25.6% of the cases when neither party was represented; Regarding joint legal custody and physical custody to the father, that result occurred in 15.5% of the cases when only the father was represented, compared to 7.3% when both parties were represented, 5.7% when neither party was represented and 2% when only the mother was represented. Custody regression results correlating favorable outcomes for sole custody with representation. Sole custody was awarded to the mother in 54.8% of the cases in which only the mother was represented, compared to 13.4% of the cases in which only the father was represented; the father won sole custody in 16.2% of the cases in which only the father was represented, compared to 7.1% of the cases where neither party was represented. Sole custody was also awarded to the mother in 17.8% of the cases in which both parties were represented and 41% of the cases in which neither side was represented. Sole custody was also awarded to the father in 4.4% of the cases where both parties were represented and 0 cases in which only the mother was represented.)

<sup>42</sup> *In re the Marriage of King v. King*, 174 P.3d 659 (2007). This is the case in which the Washington State Supreme Court held that a parent in a marital dissolution custody case has no right to counsel.

<sup>43</sup> Brief of Appellant at 6-10, *In re the Marriage of King v. King*, 174 P.3d 659 (Wash. Ct. App. 2007) (No. 57831-6-1).

<sup>44</sup> While the Task Force acknowledges that guardianship of children is an important issue which needs addressing, the Task Force proposes that this issue be addressed at a later point in time.

<sup>45</sup> *See* Jeff Kelly et al., *Courts Strip Elders of Their Independence*, BOSTON GLOBE, Jan. 13, 2008, at A1; *see also* Jeff Kelly, *Chief Justice of Probate Presses for an Overhaul*, BOSTON GLOBE, Jan. 13, 2008, at B4.

<sup>46</sup> Founded by retired Probate and Family Court Judge Edward Ginsburg, Senior Partners for Justice is a group of senior lawyers who volunteer pro bono legal services.

<sup>47</sup> *See Pro bono GAL [guardian ad litem] program grows*, MASS. LAWYERS WEEKLY, Jul. 21, 2008.

<sup>48</sup> The Litigation and Research Committee researched legal precedent on right to counsel in civil contempt proceedings, and its findings can be found at Appendix 6A. While the issue invites litigation, the Task Force believes that a pilot project that answers questions such as how much it will cost if there is a right to counsel in civil contempt proceedings is important, is the best use of its resources, and will provide valuable information no matter how a right to counsel may be established in the future.

<sup>49</sup> *See* ATJ Report, 6-9.

<sup>50</sup> *See* Appendix 6C for a copy of the survey.

<sup>51</sup> A more detailed explanation of the Proposal for Pilot Project regarding the Guardianship of Adults may be found in Appendix 6D; this includes a copy of the Proposed Article V of the UPC, Section

5-106 of which deals with appointment of counsel.

<sup>52</sup> In some instances, there may be no risk of incarceration. For example, if the defendant shows documentation of disability benefits based on economic hardship (Emergency Aid to Elderly Disabled and Children, Supplemental Security Income), a judge may make an initial determination that he or she is prima facie unable to make previously assessed payments and not subject to incarceration. In such cases, an attorney need not be appointed. This may later be revisited, in light of new evidence. In such cases, the defendant in a contempt action does not face the loss of liberty and does not require counsel. The determination would be similar to the ones district court judges sometimes make at arraignments in smaller criminal matters.

<sup>53</sup> The Department of Revenue (DOR) helps custodial parents get child support. Anyone is entitled to DOR's child support services. In a memorandum to the Task Force from the Family Law Committee dated February 4, 2008, the number of civil contempt actions filed statewide in FY 06 is cited as more than 13,000. Less than a third, about 4,000 of the plaintiffs are unrepresented. It is estimated that the DOR was involved in approximately 5,000 of those cases.

<sup>54</sup> In FY 07, of the 11,814 divorce actions filed that were not joint petitions, the estimated outside number where counsel might be appointed would be 2,761. Of the 2,761 divorce complaints involving children where the plaintiff was pro se, not all involve a contested custody contest. Further, not all adversarial divorce cases involving children with pro se plaintiffs have pro se defendants. The outside number of cases where counsel will be appointed for the plaintiff will be reduced by those where the defendant is likewise unrepresented and by those where custody is not contested.

In FY 07, of the 20,147 paternity complaints filed, the estimated outside number of cases where counsel would be appointed is 7,411. All paternity complaints involve children, but they do not all involve custody contests. The outside number would be reduced by the number of cases where there is no custody contest. On the other hand, it is estimated that in 2,761 cases the plaintiff was represented; the number of unrepresented indigent defendants is not known; they would be entitled to counsel in the pilot.

<sup>55</sup> MassCourts is the computerized information system for the Massachusetts trial court.

<sup>56</sup> See Jeff Kelly et al., *Courts Strip Elders of Their Independence*, BOSTON GLOBE, Jan. 13, 2008, at A1.

<sup>57</sup> *Roper v. Simmons*, 543 U.S. 551, 569-71 (2005).

<sup>58</sup> Recent studies of the human brain using magnetic resonance imaging confirm that youths' behavioral immaturity mirrors the anatomical immaturity of their brains. Their judgment, thought patterns and emotions differ from adults because their brains are physiologically underdeveloped in the areas that control impulses, foresee consequences and temper emotions. For example, when processing information, children and adolescents rely on the amygdala, the area of the brain associated with primitive impulses such as aggression and fear. In contrast, adults process similar information through the pre-frontal cortex, an area of the brain associated with reasoned judgment and decision-making. Significantly, the pre-frontal cortex is the last area of the brain to develop, typically reaching mature functioning when an individual is in his or her mid-twenties.

<sup>59</sup> *In re Gault*, 387 U.S. 1, 36 (1967).

<sup>60</sup> See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them.”); *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (“There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults.”); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (“[E]ven the normal 16-year-old customarily lacks the maturity of an adult.”).

<sup>61</sup> Leading up to this final report, the Juvenile Committee had advanced a third proposal, Access to Counsel for Youth in the Custody of DYS (or “Conditions of Confinement”), to the Task Force for consideration. For various reasons the committee has decided to table that request at this time and will accordingly not include it in this report.

<sup>62</sup> G.L.c.119, §58.

<sup>63</sup> Juveniles adjudicated delinquent may be committed to age eighteen; juveniles indicted and adjudicated youthful offenders may be committed to the DYS to age 21. G.L. c. 119, §58.

<sup>64</sup> CPCS recently amended its standards of practice mandating that appointed counsel attend the initial staffing, that is the meeting in which the DYS invites input from the youth and his or her family regarding how much time the youth will spend in secure confinement.

<sup>65</sup> Whereas 26% of the Massachusetts youth population are minorities, the DYS committed population (1,995 youths as of Jan. 1, 2008, see DYS reports at [www.mass.gov](http://www.mass.gov)) is 58% minority youth. According to DYS' estimates, at least 45% of committed youth have been identified as special needs students by their local school systems and another 25% are most likely unidentified special needs students. A significant percentage suffers from substance abuse and has mental health disorders.

<sup>66</sup> This data, provided by the DYS, represents the number of revocations through November 2007. Twenty-seven percent were resolved through administrative review (i.e. no hearing – confinement for 1-7 days); 61% through revocation review (parolee stipulates to violation – review consists of disposition decision that may result in confinement up to four months); 11% resulted in a revocation hearing in which the parolee refused to stipulate to the violation. At this time, we have no data regarding the prevailing party in contested hearings or the number of appeals filed and their outcomes.

<sup>67</sup> Supreme Court precedent suggests there should be a constitutional right to counsel in these cases. In 1972, the Supreme Court held that a parolee's liberty falls within the ambit of the Fourteenth Amendment and termination of that liberty requires a due process hearing. *Morrissey v. Brewer*, 408 U.S. 471 (1972). One year later, in *Gagnon v. Scarpelli*, the Supreme Court acknowledged that the effectiveness of the rights guaranteed by *Morrissey* may depend on the use of skills which the [adult] parolee is unlikely to possess. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (“Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting complex documentary evidence.”). Although the Court did not require the appointment of counsel in all cases when an adult faced revocation of liberty, the Court noted “there will remain certain cases in which fundamental fairness - the touchstone of due process - will require that the state provide at its expense counsel for indigent probationers or parolees.” *Id.* at 790. California recently determined that all juvenile cases qualify under this standard. *L.H. v. Schwarzenegger*, No. Civ. S-06-2042 LKK/GGH (E.D. Cal. Jan. 29, 2008), 2008 WL 268983.

<sup>68</sup> *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*, THE CIVIL RIGHTS PROJECT (2000), Harvard Univ., 13-19.

<sup>69</sup> *The Social Costs of Inadequate Education*, National Access Network (2007). URL: <http://www.schoolfunding.info/issues/socialcosts.pdf>.

<sup>70</sup> Andrew Sum et al, *An assessment of the Labor Market, Income, Health, Social, Civic and Fiscal Consequences of Dropping Out of High School: Findings for Massachusetts Adults in the 21<sup>st</sup> Century*, NORTHEASTERN UNIV. CENTER FOR LABOR MARKET STUDIES, 31, 92, May 2007. For the full report, see [http://www.bostonpic.org/files/resources/dropout\\_social\\_cost\\_1-07.pdf](http://www.bostonpic.org/files/resources/dropout_social_cost_1-07.pdf).

<sup>71</sup> It should be noted that this is one of the areas in which the ATJ Commission also recommended that there be a civil right to counsel.

<sup>72</sup> Almost a quarter of the total suspensions statewide originated from just three districts: Boston, Springfield and Worcester. In Boston, the EdLaw Project, a collaboration of the Children's Law Center and the Youth Advocacy Program of the CPCS, was designed to provide low income students with counsel in education-related matters, including school exclusion. Neither Springfield nor Worcester has a similar program and as a result, the Task Force recommends that the pilot be implemented in those two districts.

<sup>73</sup> In 2003 the U.S. Congress authorized funding for the Department of Justice to provide Legal Orientation Programs (“LOPs”) to non-citizens detained by ICE, to improve the efficiency of the immigration court system and the access to legal services by the tens of thousands of immigration



detainees. This program is currently administered by the Vera Institute in New York, and funds programs at 15 sites throughout the country to provide workshops on immigration law and procedure, conduct individual orientations for detainees, distribute written self-help materials and refer cases to volunteer attorneys. There are no subcontractors in Massachusetts for this work. The LOP funding does not, however, fund legal representation.

<sup>74</sup> The numbers of detainees continues to grow. Nationally and in Boston, ICE is increasing the number of people it detains. The national daily detained population grew from 18,500 in FY 2005 to 27,500 in FY 2007. By FY 2008 ICE will be funded for 32,000 daily bed spaces – a 73% increase over FY 2005. DEPARTMENT OF HOMELAND SECURITY, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *Semi-Annual Report on compliance with ICE National Detention Standards*, at 5 (May 2008). Reflecting a similar trend, in 2007, the Boston District of ICE detained 1,211 people each day. *Summary of Meeting with ICE-Boston Office of Detention & Removal and NGO Representatives* (Sept. 2007). In 2006, it detained 759 each day. ICE/DHS, *Number of Detainees by Field Office-daily averages for week ending Sept. 30, 2006*. The 2007 numbers mark a 58% increase over the previous year. The Boston District of ICE relies primarily on the following jails to detain non-citizens: Bristol County House of Corrections, Plymouth County House of Corrections, Norfolk County House of Corrections and Suffolk County House of Corrections, and also uses facilities at Barnstable, Devens, and Franklin to a lesser degree.

<sup>75</sup> Only the Political Asylum/Immigration Representation Project (“PAIR”) and the Boston College Immigration and Asylum Project have detention staff attorneys dedicated to representing immigration detainees, and their combined staff time is the equivalent of 1.3 people (the PAIR Detention Attorney works 80% and the Boston College Detention Fellow works 50%). These two detention attorneys provide a regular presence in immigration detention centers, which are mostly county jails located throughout the state, give *Know Your Rights* presentations in detention, advise immigration detainees and represent some small percentage of those detained. PAIR has prepared a detailed Self-Help Manual for Immigration Detainees, as well as numerous other materials and screening forms. In addition, in 2007 PAIR began a collaborative project with the New England Chapter of the American Immigration Lawyers Association and the Boston Immigration Court to provide additional *Know Your Rights* presentations to immigration detainees at the Suffolk County House of Corrections, and to represent detainees pro bono in bond proceedings for those eligible for release on bond. This collaboration does not, however, provide pro bono representation for the case in chief.

<sup>76</sup> During FY 2007, only 42% of individuals nationwide who completed their immigration cases were represented by counsel. DEPT. OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR), *FY 2007 Statistical Year Book*, at G1 (April 2008) (115,900 out of 272,879).

<sup>77</sup> 8 USC 1101 (a)(48)(A); INA§101 (a)48(A).

<sup>78</sup> Query whether the deprivation of counsel constitutes ineffective assistance of counsel. A developing body of law and policy around the country suggests that failing to advise or misadvising a client about immigration consequences prior to resolution of a criminal case is ineffective assistance of counsel. “[T]he American Bar Association’s Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel ‘should fully advise the defendant of these consequences.’ ABA Standards for Criminal Justice, 14—3.2 Comment, 75 (2d ed. 1982).” *INS v. St. Cyr*, 533 U.S. 289, n.48 (2001). The Supreme Court stated in *Strickland v. Washington*, 466 U.S. 688, 688 (1984), that the ABA Standards are relevant factors in determining ineffective assistance of counsel. The Supreme Court of New Mexico held in 2004 that failure to advise a criminal defendant as to the immigration consequences of his plea constituted ineffective assistance of counsel. *State v. Paredes*, 136 N.M. 533 (2004). Similarly, in *U.S. v. Khalaf*, 166 F.Supp.2d 210 (D. Mass. 1999), the United States Court of Appeals for the First Circuit held that an attorney’s mistaken advice to a client regarding immigration consequences of his plea constituted ineffective assistance of counsel. See also *Utah v. Rojas-Martinez*, 73 P.3d 967, 969-70 (Utah Ct. App. 2003); *Ghanavati v. State*, 820 So. 2d 989 (Fla. Dist. Ct. App. 2002). Although the appellate courts in Massachusetts have traditionally found that failure to advise a criminal defendant about collateral consequences, such as immigration consequences, is not ineffective assistance of counsel, see *Commonwealth v. Montiero*, 56 Mass.App.Ct. 913 (2002), the Supreme Judicial Court suggested in *Commonwealth v. Villalobos*, 437

Mass. 797 (2002), that false or misleading information about immigration consequences could affect the voluntariness of a plea.

<sup>79</sup> The Unit runs training programs throughout Massachusetts and distributes written training materials, sample post-conviction motions and updates regarding developments in relevant immigration law. Attorneys within the Unit collaborate with immigration advocacy groups on amicus briefs in federal cases involving the impact of criminal cases on immigration status, on proposed state legislation and on state agency and court policies that impact indigent non-citizen criminal defendants. The Director of the Unit is also an *ex officio* member of the Governor's Advisory Council for Refugees and Immigrants.

<sup>80</sup> 2008 Report to the Legislature on the Committee for Public Counsel Services.

<sup>81</sup> Asylum, withholding of removal and relief under the Convention Against Torture are three forms of relief from removal based on an individuals' fear of persecution, harm, or torture in their native country.

<sup>82</sup> Historically, only six organizations in Massachusetts have had a limited number of staff available to provide representation in immigration matters on a pro bono basis. A portion of this time is dedicated to representation of asylum seekers, and a smaller portion available to those asylum seekers presenting their cases in removal proceedings. The need for representation far exceeds available resources, and individuals with asylum claims are turned away on a regular basis. The availability of free legal services in this area is crucial, as the consequences for denial are extremely grave, and asylum seekers, by statute, are ineligible for employment authorization based on their status until their claims have been pending for at least 180 days. This is compounded by the fact that, because the laws around asylum are complex, legal representation at an early stage of the proceeding is important to a determination of whether a potential asylum claim exists. Without legal representation, many meritorious claims are not even identified.

<sup>83</sup> The grant rate for unrepresented applicants nationwide was only 7%, compared to 36% if represented. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIVERSITY (2006) (study examining 297,240 asylum cases from 1994-2005, based on data from the Department of Justice).

<sup>84</sup> Suffolk County House of Corrections ("HOC") is one of the three largest immigration detention centers in this region. It was selected due to its proximity to the Boston Immigration Court and the ability to collaborate with another program advising immigration detainees at that location by the American Immigration Lawyers Association and PAIR, who could assist in identifying potential clients. To achieve manageable numbers, the pilot will provide representation to one-third of the estimated number of unrepresented detainees at the Suffolk County HOC.

<sup>85</sup> The Attorney of the Day will be responsible for one of the immigration judge's courtrooms and will attend all of that judge's master calendar hearings for non-detained clients over a one-year period. Each judge has two master calendar hearings/week, with approximately 35 people at each one, for a total of 70 people/week. About 50% of the litigants are represented, leaving approximately 35 people/week needing representation. The Attorney of the Day would make a brief presentation at the beginning of the master calendar hearings along with interpreters speaking Spanish, Portuguese and Haitian-Creole. The presentation would explain that people fearing return to their home countries could ask the Immigration Judge for a continuance to meet with a legal services agency to see if they have a basis for asylum, or withholding of removal or relief under the Convention Against Torture. The presentation would give examples of cases that qualify for asylum, which people might not normally know about, as well as examples of the more typical types of cases. The Immigration Judge will give each respondent the list of free legal services at the end of the master calendar hearing, and presumably will give each respondent a continuance of several weeks.

<sup>86</sup> For five years (from 1987 to 1991), the Commonwealth of Massachusetts funded asylum work through a disbursement to MLAC, in the range of \$250,000/year to \$300,000/year, which MLAC awarded to several non-profit organizations representing asylum-seekers.

<sup>87</sup> See Adam Liptak, *The Verge of Expulsion, The Fringe of Justice*, N.Y. TIMES, Apr. 15, 2008, at A12 (asylee fleeing persecution likely can't afford representation, much less competent representation); *Death by*

*Detention*, N.Y. TIMES, May 6, 2008, at A26 (editorial decrying the conditions of those in detention and the fact that many are unrepresented).

<sup>88</sup> While the Committee strongly supports the asylum proposal, it would rank it third in terms of prioritization, since existing legal services and pro bono panels are assisting many asylees with their cases. In addition, many of the clients in proposal one (the detention clients) are asylees, so that population would be covered through that proposal.

<sup>89</sup> See, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, FORDHAM URB. L.J. (forthcoming 2009).

<sup>90</sup> See data submitted by Allan Rodgers to the BBA Task Force, 7/1/08, at Appendix 8, Statistical Appendix to Report to Boston Bar Association Task Force on Expansion of the Civil Right to Counsel, on Legal Representation in Public Benefits Agency Hearings, Draft, 7/1/08.

<sup>91</sup> *Id.*, Appendix 8, at 2.

<sup>92</sup> See, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, FORDHAM URB. L.J. (forthcoming 2009).

<sup>93</sup> See “Statistics for Carryover and New Assignments and Services” (“NACS Spreadsheets”), 2006. The average costs for selected civil matters in the 2006 calendar year, along with average hours billed per case, was as follows: civil appeals, \$2,484.31 (49.78 hours); probate and housing contempt, \$395.00 (7.95 hours); Rogers hearings \$416.38 (8.34 hours), CHINS, \$392.20 (7.87 hours); and civil commitment, \$321.72 (6.47 hours).

<sup>94</sup> NACS Spreadsheets, 2007. The average costs for selected civil matters in the 2007 calendar year, along with average hours billed per case, was as follows: civil appeals, \$2,670.64 (53.47 hours), probate and housing contempt, \$612.75 (12.30 hours); Rogers hearings, \$401.88 (8.05 hours); CHINS, \$410.42 (8.25 hours); and civil commitment \$330.76 (6.65 hours). NACS Spreadsheets, 2007.

<sup>95</sup> *Id.*

<sup>96</sup> Mark D. Mason, *Re-thinking pro bono*, 14 MASS. B. ASS'N LAWYERS J., Dec. 2006. URL: <http://www.massbar.org/for-attorneys/publications/lawyers-journal/2006/december/re-thinking-pro-bono>.

<sup>97</sup> *In re Hillary*, *supra* note 17.

# **APPENDIX 1**

## ROSTER OF TASK FORCE MEMBERS AND LIAISONS



**Boston Bar**  
ASSOCIATION

**BOSTON BAR ASSOCIATION**  
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## **APPENDIX 2**

### LIST OF THE COMMITTEES AND THEIR MEMBERS AND ADVISORS

## Committee Members

### Collateral Consequences

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Boston University Law School

**William J. Leahy**

Committee for Public Counsel Services

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Law Office of James Van Buren

**Megan Christopher**

South Middlesex Legal Services

**Michael Dsida**

Committee for Public Counsel Services

**Joyce Kauffman**

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### **Russell Engler, Chair**

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Associate Justice

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### **Sarah Ignatius**

Political Asylum/Immigration Representation Project

### **Nancy J. Kelly**

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### **Robert Sable**

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### **Wendy Wayne**

Committee for Public Counsel Services

## **Juvenile**

### **William J. Leahy, Co-Chair**

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### **Jay T. McManus, Co-Chair**

Children's Law Center

### **Joshua M. Dohan**

Director of the Youth Advocacy Project

### **Barbara Kaban**

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### **Allan Rodgers**

Massachusetts Law Reform Institute

## **APPENDIX 3**

### **“OBSERVATIONS ON THE RIGHT TO COUNSEL IN CIVIL CASES IN MASSACHUSETTS”**

BY ALLAN RODGERS

MASSACHUSETTS LAW REFORM INSTITUTE

APRIL 5, 2004



# Massachusetts Law Reform Institute

99 Chauncy Street • Suite 500 • Boston MA 02111-1703

PHONE 617-357-0700 • FAX 617-357-0777

April 5, 2004

## Observations on the Right to Legal Counsel in Civil Cases in Massachusetts (prepared by Allan Rodgers)

I start with a catalogue of those civil cases in which legal counsel is required under current law, and then identify those categories of cases where litigants risk substantial loss of rights and where legal counsel is not now required.

### 1) Civil Cases In Which Appointment and State Payment of Legal Counsel is Required

a) Care and protection cases - c.119, §29 (both for a child and for a parent, guardian or custodian of the child).

b) Child guardianship cases - (c.119, §29 cross-references to c.201, §§5 and 14.)

c) Children in need of services - c.119, §39F - for the child.

d) Waiver of consent to adoption - c.210, §3(b) - for the child.

Department of Public Welfare v. J.K.B., 379 Mass. 1 (1979) - state constitutional right of counsel for the parents.

e) Mental health commitments - c.123, §5

f) Substitute judgment cases (Rogers) and other involuntary treatment, such as court-ordered anti-psychotic medication. c.123, §5; c.201, §6(c), §6A(c).

g) Adjudication as a sexually dangerous person. c.123A, §13(c).

h) Commitment by a court to a tuberculosis hospital. c.111, §94(1).

i) Petition by the Disabled Persons Protection Commission, DMH or DPH to order the provision of protective services to someone who lacks the capacity to consent to these services. c.19C, §7(a).

g) Civil debt collection cases which may involve serious sanctions against a defendant.

h) Obtaining relief from or sealing criminal records, unless CPCS is willing to provide representation.

i) Immigration law consequences such as detention and deportation. If a state chooses to provide and pay for legal counsel for immigration law cases, it is likely that the state could successfully do so in the face of the primary federal role in immigration law.

3) Other Resources to Substitute or Supplement Legal Representation by Counsel - Any discussion of the provision of legal counsel in civil cases should include viable alternatives that will either provide direct assistance in the resolution of civil matters without the necessity to resort to a court decision or will provide other representation or help which is adequate to protect a litigant's rights. Here are some of these alternatives.

a) Non-lawyer representation in court proceedings - Trained non-lawyers, supervised by lawyers, can provide competent representation in court hearings in a variety of cases. Examples are uncontested divorces and other uncontested family law matters; some housing cases; and appeals in public benefits termination cases. For many years we have had many examples of this kind of representation, but in agency administrative adjudicatory hearings. Examples are cash assistance, food stamps and health benefit appeals and unemployment hearings. Many of these hearings involve the termination or denial of essential benefits.

b) Screening, brief assistance and dispute resolution systems can, if adequate resources are available to assist needy unrepresented litigants, result in settlements or adjustments of disputes so that they need not go to court. We have the beginnings of these systems in the various Lawyers-for-the-Day programs in Probate and Family and Housing Courts and legal services programs provide clinics and back-up help in some categories of cases where the results have generally not been less favorable than if the litigants were provided with attorneys. Another example is the Tenancy Preservation Project, which provides pre-court hearing help in the Western Mass. and Boston Housing Courts to disabled tenants who are defendants in eviction cases. Some believe that this kind of program can be expanded to other eviction cases involving vulnerable tenants.

## **APPENDIX 4**

MEMORANDUM BY MINTZ LEVIN

(FROM POONAM PATIDAR TO SUSAN M. FINEGAN)

DATED 1/22/08 ON THE FULL LIST OF KNOWN CIVIL CASES IN WHICH APPOINTMENT AND STATE PAYMENT OF LEGAL COUNSEL IS REQUIRED, ADDENDUM TO ALLAN RODGERS MEMORANDUM ON OBSERVATIONS ON THE RIGHT TO COUNSEL IN CIVIL CASES

APRIL 5, 2004

January 22, 2008

## MEMORANDUM

TO: Susan M. Finegan  
FROM: Poonam Patidar  
DATE: May 22, 2008  
RE: BBA Task Force on Civil Right to Counsel

---

This memorandum serves as an addendum to the memorandum circulated on April 5, 2004 by Allan Rodgers. The two items that appear in bold are additions to the previous memorandum.

**In the Commonwealth of Massachusetts, courts are required to appoint legal counsel in the following civil cases:**

1. Care and protection cases. A right to counsel for the child and the parent, guardian or custodian of the child exists in all petitions, hearings and appeals regarding the commitment of such child to the custody of the Department of Social Services, foster care or a qualified person. MASS. GEN. LAWS ch.119, §29 (2007).
2. Child guardianship. Although it was asserted that no right to counsel exists for child guardianship cases, under section 29 of chapter 119 of the General Laws of Massachusetts, a parent, guardian or custodian has the right to counsel during any child custody proceeding in which the Department of Social Services or a licensed child placement agency is a party, including proceedings in which a guardian is appointed for the minor; a temporary guardian is appointed for emergency purposes; or there is court-ordered medical treatment. ch.119, §29; ch.201, §§5, 14. *See* Balboni v. Balboni, 39 Mass.App.Ct. 210 (1995). However, this right does not extend to custody proceedings in a divorce action, or proceedings not involving termination of parental rights. *See* In re Adoption of Estaban, 66 Mass.App.Ct. 1107 (2006).
3. Children in need of services. A child has a right to counsel during petitions and hearings in which a juvenile court is asked to determine whether the child is a child in need of services. A child in need of services is (i) a child under the age of seventeen who persistently runs away from the home of his or her parents or legal guardian or persistently refuses to obey the lawful and reasonable commands of his or her parent or legal guardian thereby resulting in the parent's or guardian's inability to care for and protect such child; or (ii) a child between the ages of six and sixteen who persistently and willfully fails to attend school or violates the lawful and reasonable regulations of his or her school. ch.119, §§ 21, 39F.

January 22, 2008

4. Waiver of consent to adoption. A child has a right to counsel in a petition for adoption if such petition is contested by any party. ch.210, §3. In addition, the Supreme Judicial Court in *Department of Public Welfare v. J.K.B.*, 379 Mass. 1 (1979), recognized a parent's constitutional right to counsel in cases involving the termination of parental rights.
5. Mental health commitments. An indigent person has the right to counsel in any hearing to commit or retain such person to a mental health facility or for medical treatment, including antipsychotic medication. ch.123, §5.
6. Substitute judgment cases and other involuntary treatment, such as court-ordered anti-psychotic medication. A person has the right to counsel at any hearing to admit or commit such person to mental health facility or a mental retardation facility; or to authorize treatment of such mentally ill or mentally retarded person with antipsychotic medication. Furthermore, a mentally retarded person has the right to counsel at an adjudicatory hearing regarding to the transfer of such person from one residential facility to another. ch.123, §5; ch.123B, §3; ch. 201, §§6, 6A, 14.
7. Adjudication and classification as a sexually dangerous person. In proceedings to declare a person a sexually dangerous person and to temporarily commit the person, such person has the right to counsel. This right to counsel extends to any subsequent hearings and trials. A person who is adjudicated a sexual offender is also entitled to counsel during a hearing to challenge such person's sex offender classification and duty to register prior to release or parole from custody. ch.6, §178L; ch.123a, §12-14. *See Commonwealth v. Nicholls*, 68 Mass.App.Ct. 1120 (2007).
8. Involuntary commitment to tuberculosis hospital. ch.111, §94C.
9. **Petition by the Department of Elderly Affairs to order the provision of protective services to someone who lacks the capacity to consent to these services. ch.19A, §20(a).**
10. Petition by the Disabled Persons Protection Commission, DMH or DPH to order the provision of protective services to someone who lacks the capacity to consent to these services. ch.19C, §7.
11. **Petition by a women of less than eighteen years of age to obtain an abortion without the consent of her parents. ch.112, §12S. *See In the Matter of Mary MOE*. 26 Mass.App.Ct. 915 (1988).**
12. Other Matters:
  - a. Criminal contempt for a violation of a civil court order in the Probate and Family Court or Housing Court. ch.211D, §6(b)(ii).
  - b. Any other matter in the Probate and Family Court or Housing Court in which the person is entitled to counsel. ch.211D, §6(b)(ii).

January 22, 2008

- c. Any other civil matter for which the Chief Counsel of CPCS determines that the appointment of a legal counsel is necessary. ch.211D, §6(b)(iii).

In Massachusetts, a civil right to counsel is provided to a person in circumstances where the state, a state agency, or a third party petitions the court to take some action involving or adverse to such person. Because the action is brought either against or relating to the person, there has been no discussion of the merits of the claim. The only exception is the case in which an unwed woman under the age of eighteen seeks judicial consent to an abortion in lieu of parental consent.



# **APPENDIX 5 A**

## HOUSING COMMITTEE APPENDICES

SURVEY OF HOUSING COURT JUDGES, PRO BONO LAWYERS  
FOR THE DAY, LEGAL SERVICES, LAWYERS AND LANDLORD  
ATTORNEYS

*The Boston Bar Association (BBA) Task Force on Expanding the  
Right to Counsel in Civil Cases*

**Survey for Housing Court Judges and Court Personnel**

The American Bar Association adopted a resolution calling for the appointment of counsel for persons of low income in civil matters *where basic human needs are at stake*, such as those involving *shelter, sustenance, safety, health, or child custody*. The Boston Bar Association President Tony Doniger has appointed a Task Force to find practical ways to explore expanding the right to counsel. The Task Force, which includes representatives from the Massachusetts Bar Association, the Access to Justice Commission, and the Women's Bar Association, among other organizations, is interested in your opinion on the types of cases where counsel are most needed for a just outcome.

As we assume parties generally would benefit from counsel, the challenge is to identify the greatest need in light of the ABA mission. Given your daily experiences, we want to benefit from your vantage point within the court system. Because the goal of this survey is to encourage brainstorming, we ask you not to focus at the moment on the resources that might be necessary to provide counsel for the types of cases you propose. We are at this stage simply trying to identify where counsel is most needed. The following is a partial list of categories for your consideration by which summary process cases could be targeted for counsel:

- 1) Features of the parties, e.g. mental/physical disability; cultural and/or language barriers; age (e.g. elderly, or cases involving minor children)
- 2) What is at stake, e.g. "for cause" evictions where subsidized housing is at risk; "for cause" evictions for criminal activity under G.L. c. 139 § 19 or c. 239 (fast-track and/or with implications for a related criminal process)
- 3) Forum, e.g. mediation; District Court v. Housing Court; jury claim
- 4) Features of the claim, e.g. non-payment of rent cases; "no fault" cases involving long-term tenancies; cases involving substantial counterclaims

**\*\* Your answers will remain CONFIDENTIAL. Thank you for your help. \*\***

BBA Task Force on Expanding the Right to Counsel in Civil Cases

SURVEY FOR HOUSING COURT JUDGES AND COURT PERSONNEL

Name: (Optional) \_\_\_\_\_

Date:

\_\_\_\_\_

Position: \_\_\_\_\_ Court: (Optional)

\_\_\_\_\_

I. Most important Scenarios for Availability of Counsel:

1. In light of the ABA mission statement, which types of cases are most compelling in your opinion for legal representation? List up to three:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. Why did you choose these particular cases?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

3. How might we identify the particular cases you propose [i.e. this might be relatively easy if, for example, the trigger is that a tenant is elderly, or living in certain types of housing, but more difficult to do in other situations].

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4. Do you have a rough estimate as to the volume of cases that would be involved (by # of cases or overall percentage), at least in your court, for the scenarios you propose?

\_\_\_\_\_

5. Do you have any additional comments? **Thank you**

\_\_\_\_\_

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Contact Information (Optional)

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## **APPENDIX 5 B**

### HOUSING COMMITTEE APPENDICES

QUESTIONNAIRE AND SUMMARY OF RESULTS CIRCULATED BY  
THE COMMITTEE TO A LARGER GROUP AFTER THE INITIAL  
PROPOSALS WERE DEVELOPED

*The Boston Bar Association (BBA) Task Force on Expanding the Right to Counsel in Civil Cases  
Housing Subcommittee*

**Draft Proposal: Pilot Project for A Right to Counsel in Certain Eviction Cases**

The American Bar Association (ABA), Boston Bar Association (BBA) and Massachusetts Bar Association (MBA) have adopted resolutions calling for the appointment of counsel for persons of low income in civil matters **where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody**. After obtaining input from judges and others working in the courts, lawyers, and advocates, the Housing Subcommittee of BBA Task Force on Expanding the Right to Counsel in Civil Cases has formulated the following draft proposal for pilot projects in eviction cases.

We have tried to balance the need to respond to the broad array of cases in which litigants would benefit from counsel, as identified in the survey responses, with the need to identify a narrow enough subset of cases to increase the chances of successful implementation. Because the initial focus is on identifying eligible clients or cases, we are not focusing here on implementation questions, such as delivery mechanisms, funding, or the initial settings for the pilot projects.

We welcome your feedback in general, with a particular emphasis on the following questions:

1. In the court(s) in which you practice or work, what is your best estimate of the number of cases (or percentage of the docket) that would fall into each category of the proposal?
2. Would you recommend eliminating any of the listed categories and, if so, which one(s) and why?
3. If there is a different, discrete subset of eviction cases that is more important than those listed in the draft proposal, please describe the type of case and explain why you feel it is more important?

Thank you. Please feel to your feedback for us by contacting me in whatever manner is easiest for you.

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*The Boston Bar Association (BBA) Task Force on Expanding the Right to Counsel in Civil Cases  
Housing Subcommittee*

**Draft Proposal: Pilot Project for A Right to Counsel in Certain Eviction Cases**

I. Representation Proposal

A. Legal counsel shall be provided for indigent tenants in the following eviction cases:

- 1) *Cases involving household members with mental disabilities where the disability is directly related to the reason for eviction; or*
- 2) *Cases involving criminal conduct (including cases brought pursuant to M.G.L. c. 139, sec. 19 and those brought as summary process cases); or*
- 3) *Cases in which, in the discretion of the judge, the absence of representation for the tenant will lead to a substantial denial of justice. In the exercise of judicial discretion, judges shall consider the following factors:*
  - a. *Factors relating to a tenant's vulnerability, such as disability, domestic violence, education, language, culture or age;*
  - b. *Factors relating to the landlord, such as whether the landlord controls a large or small number of units, whether the landlord is legally sophisticated, whether the landlord is represented by counsel, and whether the landlord lives in the building;*
  - c. *The affordability of the unit for the tenant, including whether the unit is in public or subsidized housing;*
  - d. *Whether there appear to be cognizable defenses or counterclaims in the proceeding;*
  - e. *Whether the loss of shelter might jeopardize other basic needs of the tenant, such as safety, sustenance, health or child custody;*
  - f. *Other indicia of power imbalances between the parties.*

B. Legal counsel shall be provided for indigent landlords where:

- 1) *The landlord resides in the building that is the subject of the eviction proceeding;*
- 2) *The landlord owns no other interest in real property;*
- 3) *The tenant is represented by counsel; and*
- 4) *The landlord's shelter is at stake in the proceeding.*

II. Proposals complementing the Representation Proposal

We will further recommend that the proposal above be supplemented with the expansion of assistance programs, such as lawyer of the day programs for both tenants and landlords in all Housing and District Courts, to reach all eligible litigants seeking assistance.

# **APPENDIX 5 C**

## HOUSING COMMITTEE APPENDICES

### HOUSING COMMITTEE PROPOSAL

**Draft Proposal: Pilot Project for A Right to Counsel in Certain Eviction Cases**

I. Representation Proposal

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- 1) *Cases involving household members with mental disabilities where the disability is directly related to the reason for eviction; or*
- 2) *Cases involving criminal conduct (including cases brought pursuant to M.G.L. c. 139, sec. 19 and those brought as summary process cases); or*
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  - a. *Factors relating to a tenant's vulnerability, such as disability, domestic violence, education, language, culture or age;*
  - b. *Factors relating to the landlord, such as whether the landlord controls a large or small number of units, whether the landlord is legally sophisticated, whether the landlord is represented by counsel, and whether the landlord lives in the building;*
  - c. *The affordability of the unit for the tenant, including whether the unit is in public or subsidized housing;*
  - d. *Whether there appear to be cognizable defenses or counterclaims in the proceeding;*
  - e. *Whether the loss of shelter might jeopardize other basic needs of the tenant, such as safety, sustenance, health or child custody;*
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- 1) *The landlord resides in the building that is the subject of the eviction proceeding;*
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- 4) *The landlord's shelter is at stake in the proceeding.*

II. Proposals complementing the Representation Proposal

We will further recommend that the proposal above be supplemented with the expansion of assistance programs, such as lawyer of the day programs for both tenants and landlords in all Housing and District Courts, to reach all eligible litigants seeking assistance.

## **APPENDIX 6 A**

### **FAMILY LAW COMMITTEE APPENDICES**

**FAMILY LAW: CIVIL CONTEMPT: THE FINDINGS OF THE  
LITIGATION AND RESEARCH COMMITTEE (LEGAL PRECEDENT  
ON RIGHT TO COUNSEL IN CIVIL CONTEMPT PROCEEDINGS)**

# memorandum

**to:** Civil Gideon Task Force  
**from:** Kathy Jo Cook, Litigation/Research Subcommittee  
**date:** 7/30/2008  
**re:** Contempt

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In Massachusetts, the right to counsel in contempt proceedings turns not on whether there may be a loss of liberty but rather on the nature of the punishment. “A remedy of imprisonment for refusing to do an act until the party performs the act is civil, while imprisonment for a definite term for doing the forbidden act is criminal.” Aroesty v. Cohen, 62 Mass. App Ct. 215 (2004) (emphasis added) (citations omitted).

Massachusetts courts have reasoned that counsel is not required in civil contempt proceedings because a defendant cannot be incarcerated unless the court makes an affirmative determination that the defendant has a “present ability to pay” the contempt judgment. Such a finding has been noted repeatedly to be a “prerequisite to a finding of civil” contempt. Id. at 220. Note that the definition of the “present ability to pay,” as recently expanded by the Appeals Court, does not mean that the defendant is able to “write a check” but rather that he can make ongoing payments toward the amount of the judgment. Poras v. Pauling, 70 Mass. App. Ct. 535, 542 (2007).

Massachusetts appears to be in the minority in permitting an indigent defendant to be incarcerated without having been afforded counsel. A recent court noted that at least in the context of non support, “every federal circuit court of appeals confronting the issue has concluded that the Due Process Clause of the Fourteenth Amendment...requires that an indigent defendant in a nonsupport proceeding may not be incarcerated if he has been denied the assistance of counsel.” Burton v. Hootman, 2007 WL 404359 (Ohio App. 5 Dist., February 5, 2007) citing Sevier v. Turner, 742 F.2d 262 (C.A.6) (1984), Walker v. McLain, 769 F.2d 1181 (C.A.10) (1985), Ridgway v. Baker, 720 F.2d 1409 (C.A.5) (1983), Henkel v. Bradshaw, 483 F.2d 1386 (C.A.9) (1973). Of note, in Wilson v. State of New Hampshire, 18 F.3<sup>rd</sup> 40, 41 (1994), the First Circuit, relying on Lassiter v. Department of Social Services, 452 U.S. 18, 26-26 (1981) wherein the Court said that “actual imprisonment” is the “line defining the constitutional right to appointment of counsel,” held that there was no right of counsel in civil contempt proceedings if the proceeding did not actually result in incarceration.

I have not reviewed the Briefs in the two most recent Massachusetts decisions discussing civil contempt, Poras v. Pauling, 70 Mass. App. Ct., 535 (2007) and Aroesty v. Cohen, 62 Mass. App. Ct. 215 (2004), but the decisions do not mention cases in any other state or federal jurisdiction, which may mean that Massachusetts courts have not yet considered the arguments raised in what appears to be the



majority of cases throughout the country. Indeed, there is no language in Poras or Aoresty to suggest that the parties raised the importance of counsel in determining if, in fact, the contemnor really has an ability to pay, an analysis that might require an advocate, rather than a simple determination by a judge.

The Supreme Judicial Court has not addressed the question of the right to counsel in contempt proceedings since 1980, when it wrote its decision in Furtado v. Furtado, 380 Mass. 137 (1980). In that case, the Court examined, among other things, whether the defendant was prejudiced by the presentation of a criminal complaint for contempt by a probation officer rather than an attorney. In a somewhat broad discussion on contempt, Justice Wilkins wrote: “There may be, of course, good practical reasons why an attorney should present contempt matters....The legal issues may be complicated, even though the presentation of the basic facts may be relatively simple....” Id. at 148. Although it cannot be said that Furtado stands for the proposition that there may be a right to counsel in civil contempt proceedings, the *dicta* does support the notion that while appearing to be simple, the question of the “ability to pay” may be complex, and as such, a defendant may not truly hold the keys to his own jail cell.

July 30, 2008

# **APPENDIX 6 B**

## FAMILY LAW COMMITTEE APPENDICES

### PROPOSAL FOR PILOT PROJECT REGARDING CIVIL CONTEMPT

To: Boston Bar Association Civil Right to Counsel Task Force  
From: Family Law Subcommittee  
Date: July 14, 2008  
Re: Preliminary proposal for Contempt Pilot Project

Introduction:

Since poor defendants in contempt actions are vulnerable to incarceration, this is a class of litigants most likely to be entitled to appointed counsel. The actions have a narrow scope: Whether the defendant deliberately failed to comply with a clear court order.

Need

The number is high, over 22,000 filed statewide in FY 06. In only 8,000 of these was a judgment entered. Approximately 8,000 of the plaintiffs were unrepresented. Online statistics do not indicate the number of unrepresented defendants. It is our understanding that DOR was involved in roughly 5,000, but this number needs to be verified. We expect that a significant proportion of contempts involve non-payment of support. Presumably many of these defendants will assert financial hardship as a defense in the action.

In some instances, there may be no risk of incarceration. For example, if the defendant shows documentation of disability benefits based on economic hardship (Emergency Aid to Elderly Disabled and Children, SSI), a judge may make an initial determination that s/he is prima facie unable to make previously assessed payments and not subject to incarceration. In such cases, an attorney need not be appointed. This may later be revisited, in light of new evidence. District Court judges sometimes make such an assessment at arraignment in smaller criminal matters. In such cases, the defendant in a contempt action does not face the loss of liberty and does not require counsel.

### Current Scope of Right to Counsel

At present, it is the practice of some judges to request an attorney who happens to be in the courthouse to serve as counsel for a defendant then present and facing incarceration. Generally the hearing has begun or some dispute intervention has occurred without counsel. In many instances, the attorney, who serves as a volunteer, has an hour or less to assess the case and marshal whatever resources may be available to the defendant. While this may be helpful in certain cases, generally it is poor practice not to communicate with the client before a court appearance, not to prepare the Financial Statement and not to be able to bring evidence to court. In addition, other judges may not often appoint counsel for contempt defendants,

### Potential for Expansion

The current practice relying on volunteers may be a useful adjunct to any established project. The current approach could not be fairly thought of as sufficiently systematic, however, to be valuable in designing a more comprehensive response to the problem.

### Proposed Solutions

A fairly straightforward approach might be to appoint counsel for every defendant. This appears to be unweildy and impractical. The project we are proposing will make an assessment of risk of incarceration and of financial eligibility for appointed counsel.

### Methodology

In order to determine whether the proposed intervention had an effect and to study that effect, it is necessary to compare the results with a sample of similarly situated persons who did not receive court appointed counsel. In this instance, it may be difficult to avoid the effect of counsel on the overall system. For example, if counsel is appointed for half the defendants in a certain session, it seems likely that the judge may be influenced by arguments

made that day on behalf of other defendants. Comparing the response to other judges, such as those in Courtroom 1 get lawyers and those in Courtroom 2 do not, will be skewed by the different philosophical approaches two judges may have.

Two models may have some value. One, study the results of the current system in a systematic fashion, perhaps focussing on certain courthouses where the project will be implemented. After the program is in effect, study these results as well. In the alternative, implement the project fully in two courthouses. Find two courthouses of similar sizes serving more or less the same demographic population.

Compare the results between the places where attorneys were appointed and those where they were not. I suggest some benchmarks for study are:

- The number of court appearances in a single case before incarceration;
- The amount of money owed and the purge amount;
- Whether the plaintiff or his/her interests were represented by counsel; and
- Whether incarceration led to more and swifter payment.

Generally speaking, to obtain study results which have significance, it is best to draw on the expertise of professionals dedicated to social science.

### Project

We propose a pilot program in two counties. As described more fully below, the goal will be to ensure that low-income defendants at risk of incarceration will be appointed counsel, to protect their procedural rights and to advocate on their behalves.

1. Notice: A notice will be included with the Summons, informing the defendant of the risk of incarceration and the right to appointed counsel if eligible. The notice will be brightly colored, on separate paper and will be specified as a document served in the Return of Service. Informational materials will



also be provided to the plaintiff, explaining the possibility of appointed counsel.

2. Defendant's Obligation to Take Action: The defendant will be required to appear in the Probate and Family Court and file a request for counsel, together with a sworn statement as to her/his financial situation. The defendant MUST do this prior to the answer date, which is seven days from service.
3. Assessment of Indigency: Upon arrival in the Clerk's Office, the defendant will be directed to the Probation Department. Probation makes an assessment of eligibility for free legal services, as is consistent with District Court practice. The Probation Officer will interview the defendant and formulate a recommendation, which will be given to an Assistant Judicial Case Manager.
4. Appointment: All defendants who request counsel, will appear before an Assistant Judicial Case Manager.
  - If the defendant is ineligible, s/he will inform the defendant and decline to appoint counsel. The matter will be referred to a judge if the defendant requests further hearing on the matter.
  - If the defendant is eligible, the Assistant Judicial Case Manager may appoint an attorney from a list developed for that purpose. OR
  - The Assistant Judicial Case Manager may determine that the defendant is unlikely to be incarcerated and refer him/her to a judge. The Court will then determine whether this defendant is at risk of imprisonment.
  - If the Court determines there is no risk of

the attorney to prepare for the hearing. This roughly parallels the automatic extension of an eviction hearing when the tenant files an answer and request for discovery. In many Courts, the time between filing a contempt action and the hearing is at least four weeks. In most instances, therefore, the hearing will not need to be continued.

8. In the event that the case is continued for a review, the client should continue to be represented unless the Court determines that the defendant is no longer at any risk of incarceration.

We considered whether there were any further means to reduce fairly the number of defendants to be represented. The current practice of appointing counsel on the day of likely incarceration does not allow an attorney to meet with the client to prepare, develop evidence or have complete mastery over the allegations.

#### Outcome Measures

Clearly the data would include the impact on the class to be protected: contempt defendants. The most important benchmark would be how many, or what percentage of, defendants were incarcerated. It is to be hoped that the number would decrease significantly.

It may be interesting to see whether lawyers increase compliance with court orders. In such cases, a study of payment histories would yield interesting results. Is the defendant who had an attorney more likely to pay regularly, to pay on time and to pay in full? ? If so, is there a net gain to the taxpayer (the cost of counsel being more than offset by an employed - not incarcerated - individual, current on their obligations).

## **APPENDIX 6 C**

### FAMILY LAW COMMITTEE APPENDICES

FAMILY LAW SURVEY: PROVIDING A LIST OF VARIOUS TYPES OF FAMILY LAW CASES AND REQUESTING INPUT AS TO WHERE COUNSEL IS MOST NEEDED TO ENSURE A JUST OUTCOME

## **BBA Task Force on Expanding the Right to Counsel in Civil Cases**

### **Probate & Family Court Survey**

The American Bar Association adopted a resolution calling for the appointment of counsel for persons of **low income** in civil matters where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody. Boston Bar Association President Tony Doniger has appointed a Task Force to find practical ways to explore expanding this right to counsel. The Task Force, which includes representatives from the Massachusetts Bar Association, the Access to Justice Commission, the Women's Bar Association, the legal services community, the private bar, the courts and academia, is interested in your opinion on the types of cases where counsel are most needed for a just outcome.

Since we assume parties generally would benefit from counsel, the challenge is to identify the greatest need in light of the BBA mission. Given your daily experiences, we want to benefit from your vantage point within the court system. Because the charge to the BBA Task Force is to encourage brainstorming, we ask that you not focus at the moment on the resources that might be necessary to provide counsel for the types of cases you propose. We are at this stage simply trying to identify where counsel is most needed.

Your answers are CONFIDENTIAL. Thank you for your help.

The survey is being sent to you both by regular mail and by email. To complete the survey, you may either fill out your answers in the Word Perfect Document sent to you by email and return it by email to:

ilene.mitchell@jud.state.ma.us or you may print out the survey, fill out your answers, and fax it to Ilene Mitchell at the Administrative Office of the Probate and Family Court, 617-788-8995.

**Please return the completed survey no later than December 14, 2007.**

**If you have any questions, please feel free to call or email Ilene Mitchell at the Administrative Office of the Probate and Family Court.**

**BBA Task Force on Expanding the Right to Counsel in Civil Cases**

**Probate & Family Court Survey**

Name: (Optional)

Date:

Court: (Optional)

Please identify your role:

- Judge
- Register
- Judicial Case Manager
- Chief Probation Officer
- Other \_\_\_\_\_

In your opinion what are the three most important types of family law/probate cases where representation is needed because nothing short of representation can prevent the forfeiture of fundamental rights? Please choose up to three.

- Contempt proceedings which may result in incarceration
- Divorce
- Custody
- Abuse prevention
- Guardianship of Minor
- Guardianship-all other
- Paternity
- Domestic relations matters in which DSS intervenes or participates
- Any proceedings involving children
- Other, please specify \_\_\_\_\_
- Other, please specify \_\_\_\_\_
- Other, please specify \_\_\_\_\_

**FOR EACH OF THE CASE TYPES CHOSEN, PLEASE ANSWER THE FOLLOWING QUESTIONS:**

**(The questions are repeated for each case type)**

Type of case (choice **one**) \_\_\_\_\_

1. Please explain why you believe legal representation is required?

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2. At what stage of this proceeding should counsel be appointed to avoid the forfeiture of fundamental rights?

- Filing pleadings
- Referral to the Probation Department
- Temporary orders
- Status conference
- Pretrial conference
- Trial
- Other \_\_\_\_\_
- Other \_\_\_\_\_
- Other \_\_\_\_\_

2.a. Would you limit the representation to cases where the opposing party is represented? If yes, would this depend on the stage of the proceeding?

3. If possible, please estimate the volume of cases (weekly, monthly or yearly) that would be involved, at least in your court, for the matter you have identified?

4. Should a particular feature, condition or characteristic of a party be considered a high priority when determining the need for counsel? Please check all those that apply.

- For a party who has custodial responsibility for children
- In cases where both parties are pro se
- For parties with language barriers
- For parties with cultural barriers
- For parties with mental disabilities
- For the elderly
- For parties who are victims of domestic violence
- Other \_\_\_\_\_
- Other \_\_\_\_\_
- Other \_\_\_\_\_

5. Please indicate whether there are features of the claims which should be considered high priority for the need to appoint counsel.

- Custody Dispute
- Violations of a court order are claimed, e.g., civil contempt cases
- Allegations of domestic violence
- Child support
- In cases where one or both parties have unusual financial situations, e.g., self-employed
- Other \_\_\_\_\_
- Other \_\_\_\_\_
- Other \_\_\_\_\_

Type of case (choice **two**) \_\_\_\_\_

1. Please explain why you believe legal representation is required?

2. At what stage of this proceeding should counsel be appointed to avoid the forfeiture of fundamental rights?

- Filing pleadings
- Referral to the Probation Department
- Temporary orders
- Status conference
- Pretrial conference
- Trial

- Other \_\_\_\_\_
- Other \_\_\_\_\_
- Other \_\_\_\_\_

2.a. Would you limit the representation to cases where the opposing party is represented? If yes, would this depend on the stage of the proceeding?

3. If possible, please roughly estimate the volume of cases (weekly, monthly or yearly) that would be involved, at least in your court, for the matter you have identified?

4. Should a particular feature, condition or characteristic of a party be considered a high priority when determining the need for counsel?

- For a party who has custodial responsibility for children
- In cases where both parties are pro se
- For parties with language barriers
- For parties with cultural barriers
- For parties with mental disabilities
- For the elderly
- For parties who are victims of domestic violence
- Other \_\_\_\_\_
- Other \_\_\_\_\_
- Other \_\_\_\_\_

5. Please indicate whether there are features of the claims that should be considered high priority for the need to appoint counsel.

- Custody Dispute
- Violations of a court order are claimed, e.g., civil contempt cases
- Allegations of domestic violence
- Child support
- In cases where one or both parties have unusual financial situations, e.g., self-employed
- Other \_\_\_\_\_
- Other \_\_\_\_\_
- Other \_\_\_\_\_

Type of case (choice **three**) \_\_\_\_\_



1. Please explain why you believe legal representation is required?

2. At what stage of this proceeding should counsel be appointed to avoid the forfeiture of fundamental rights?

- Filing pleadings
- Referral to the Probation Department
- Temporary orders
- Status conference
- Pretrial conference
- Trial
- Other \_\_\_\_\_
- Other \_\_\_\_\_
- Other \_\_\_\_\_

2.a. Would you limit the representation to cases where the opposing party is represented? If yes, would this depend on the stage of the proceeding?

3. If possible, please estimate the volume of cases (weekly, monthly or yearly) that would be involved, at least in your court, for the matter you have identified?

4. Should a particular feature, condition or characteristic of a party be considered a high priority when determining the need for counsel?

- For a party who has custodial responsibility for children
- In cases where both parties are pro se
- For parties with language barriers
- For parties with cultural barriers
- For parties with mental disabilities
- For the elderly
- For parties who are victims of domestic violence
- Other \_\_\_\_\_
- Other \_\_\_\_\_
- Other \_\_\_\_\_

5. Please indicate whether there are features of the claims which should be considered high priority for the need to appoint counsel.

- Custody Dispute
- Violations of a court order are claimed, e.g., civil contempt cases
- Allegations of domestic violence
- Child support
- In cases where one or both parties have unusual financial situations, e.g., self-employed
- Other \_\_\_\_\_
- Other \_\_\_\_\_
- Other \_\_\_\_\_

If you would like to further explain your responses, please provide your contact information:

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Thank you.

# **APPENDIX 6 D**

## FAMILY LAW COMMITTEE APPENDICES

PROPOSAL FOR PILOT PROJECT REGARDING THE  
GUARDIANSHIP OF ELDERS

## **PROPOSAL FOR PILOT PROJECT REGARDING THE GUARDIANSHIP OF ELDERS**

### **INTRODUCTION**

As a recent *Boston Globe* article (*Courts strip elders of their independence*, January 13, 2008) reveals, cases involving the guardianship of adults are replete with risk for the proposed wards. The ward often faces the complete loss of his or her independence, the loss of control over his or her financial affairs, and the loss of significant personal and civil rights which can be given over to the plenary control of a Court-appointed guardian.

At the initial hearing where an order of temporary guardianship is sought, this risk is especially significant because the proposed ward has received *no* prior notice and is therefore not present. Without notice and an opportunity to be heard, the ward is at a distinct disadvantage because the Court has access only to the often-biased information provided by the petitioner.

### **NEED**

The elder population of the United States is expected to grow from an estimated 31.5 million in 2000 to a projected 70 million by 2030. Of this astronomical number, a significant proportion of these individuals are likely to be “unbefriended elders,” those who have no living relatives or friends upon whom to rely, or who could potentially be appointed as guardians in the event that the elderly person can no longer care for him or herself.

In 2007, over 3500 guardianship petitions were filed in the Probate and Family Courts statewide, petitioning the court for guardianship of persons who were allegedly mentally ill or incapacitated. Although the exact figure of unrepresented individuals is unknown, it is highly likely that a vast majority of these individuals do not have benefit of counsel.

Without appointment of counsel and notice to the ward prior to the temporary guardianship hearing, the ward’s involvement in this process which will drastically impact his or her daily life and decision-making power is severely limited right from the start. Guardianship cases are often complex and require investigation into the unique circumstances of the particular ward. While a proposed ward may indeed have some incapacity, determining the level of that incapacity requires a close evaluation of medical evidence that is almost always complex and voluminous.

## **CURRENT SCOPE OF RIGHT TO COUNSEL**

There is currently a Uniform Probate Code (UPC) bill pending in the Massachusetts legislature that would provide for the appointment of counsel in guardianship matters. The Probate and Family Court has recently revised the Medical Affidavit to require more detailed and specific information from a treating physician to support the need for guardianship and the Court has instituted a pilot project providing counsel to a limited number of individuals. This proposal substantially mirrors the proposed legislation with respect to guardianship proceedings and it is hoped that the Pilot Project will provide further substantive support for enactment of the UPC.

## **POTENTIAL FOR EXPANSION**

## **METHODOLOGY**

## **OUTREACH**

## **DATA**

## **PROPOSED SOLUTIONS/RECOMMENDATIONS**

The most comprehensive solution is the enactment of the pending UPC legislation that would provide the court with authority to appoint counsel to proposed wards prior to the entry of any temporary order of guardianship. In the interim, the Pilot currently in place in \_\_\_\_\_ and \_\_\_\_\_ counties Program and the proposed project below could be expanded to all counties.

## **PROPOSAL**

- I. At the time of filing of a Petition, the Court shall determine whether appointment of counsel is in the interests of the proposed ward. In circumstances where the proposed ward or someone on his or her behalf requests appointment, the Court shall appoint counsel.

- II. Notification to the proposed ward concerning the procedure and opportunity for appointment of counsel will be on a brightly-colored document using large font size, and shall be provided in advance of the initial hearing. The Return of Service shall reflect that such notification has been served.
- III. Under all circumstances, when the proposed ward seeks counsel from the Court or the Court determines that appointment of counsel is appropriate, the case will be continued for two weeks in order to ensure that the ward and counsel can adequately prepare for the initial hearing.
- IV. In circumstances where the ward has adequate resources, Counsel shall be compensated from the estate. Where the ward is indigent, Counsel shall be compensated by the Commonwealth (or by such other resources as the pilot program procures). Where the ward is incompetent to obtain counsel, incapable of locating or contracting with an attorney or incapable of obtaining access to funds with which to compensate Counsel, the Court shall authorize the continued services of appointed counsel at public expense. If the Court subsequently determines that the party is not indigent, assigned counsel shall continue to represent the party and the party may be ordered to reimburse the Commonwealth.
- V. The statistics from the Administrative Office indicate that Suffolk and Middlesex Probate and Family Courts have the highest number of guardianship petitions filed, and the proposal is that pilot programs be instituted in these two courts initially.

## **OUTCOME MEASURES**

## **BUDGET**

## **AVAILABLE RESOURCES/FUNDING SOURCES**

**ADDENDUM A**

***Proposed UPC: ARTICLE V***  
***PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY***

*Part 1*  
*GENERAL PROVISIONS AND DEFINITIONS*

Section 5-101. [General Definitions.]

As used in Parts 1, 2, 3 and 4 of this Article:

- (1) "Claims," in respect to a protected person, includes liabilities of the protected person, whether arising in contract, tort, or otherwise, and liabilities of the estate which arise at or after the appointment of a conservator, including expenses of administration.
- (2) "Conservator" means a person who is appointed by a Court to manage the estate of a protected person and includes a limited conservator, temporary conservator and special conservator.
- (3) "Court" means the Probate and Family Court Department of the Trial Court and includes the District Court and Juvenile Court Departments of the Trial Court in proceedings relating to the appointment of guardians of minors when the subject of the proceeding is a minor and there is proceeding before such District or Juvenile Court.
- (4) "Disability" means cause for a protective order as described in Section 5-401.
- (5) "Estate" includes the property of the person whose affairs are subject to this Article.
- (6) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to court appointment and includes a limited guardian, special guardian and temporary guardian, but excludes one who is merely a guardian ad litem.
- (7) "Guardian-ad-Litem" means a person or organization appointed under Sections 1-404 and 5-106 of this Code.
- (8) "Health care proxy" means a health care proxy executed pursuant to chapter two hundred one D, a durable power of attorney for health care executed prior to the enactment of chapter two hundred one D and similar instruments for appointment of health care agents executed in accordance with the laws of other jurisdictions.
- (9) "Incapacitated person" means an individual who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

- (10) "Lease" includes an oil, gas, or other mineral lease.
- (11) "Letters" includes Certificate of Guardianship and Certificate of Conservatorship.
- (12) "Mentally retarded person" means an individual who has a substantial limitation in present functioning beginning before age 18, manifested by significantly subaverage intellectual functioning existing concurrently with related limitations in two or more of the following applicable adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functioning academics, leisure, and work.
- (13) "Minor" means a person who is under 18 years of age.
- (14) "Mortgage" means any conveyance, agreement, or arrangement in which property is used as collateral.
- (15) "Nursing facility" means an institution (or a distinct part of an institution) which is primarily engaged in providing to residents:
- (A) skilled nursing care and related services for residents who require medical or nursing care,
  - (B) rehabilitation services for the rehabilitation of injured, disabled or sick persons, or
  - (C) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities,
- and is not primarily a mental health facility or mental retardation facility.
- (16) "Organization" includes a corporation, business trust, estate, trust, partnership, association, 2 or more persons having a joint or common interest, government, governmental subdivision or agency, or any other legal entity.
- (17) "Parent" means a natural or adoptive parent other than a parent whose parental rights have been terminated or a parent who has signed a voluntary surrender.
- (18) "Person" means an individual or an organization.
- (19) "Petition" means a written request to the Court for an order after notice.
- (20) "Proceeding" includes action at law and suit in equity.
- (21) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.



(22) "Protected person" means a minor or other person for whom a conservator has been appointed or other protective order has been made as provided in Sections 5-407 and 5-408.

(23) "Protective proceeding" means a proceeding under the provisions of Part 4 of this Article.

(24) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase any of the foregoing.

(25) "Ward" means a person for whom a guardian has been appointed solely because of minority.

Section 5-102. [Facility of Payment or Delivery.]

(a) Any person under a duty to pay or deliver money or personal property to a minor may perform the duty, in amounts not exceeding \$5,000 a year, by paying or delivering the money or property to:

- (1) the minor;
- (2) any person having the care and custody of the minor with whom the minor resides;
- (3) a guardian of the minor;
- (4) a custodian under the Uniform Transfers to Minors Act or a custodial trustee under the Uniform Custodial Trust Act; or
- (5) a financial institution as a deposit in a state or federally insured interest bearing account or certificate in the sole name of the minor with notice of the deposit to the minor.

(b) If the person making payment or delivery knows that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending, the person may make payment or delivery only to the conservator.

(c) Persons, receiving money or property for a minor under subsection (a)(2) are obligated to apply the money to the support, care, education, health or welfare of the minor, but may not pay themselves except by way of reimbursement for out-of-pocket

expenses for necessary goods and services. Any excess sums must be preserved for future support, care, education, health or welfare of the minor and any balance not so used and any property received for the minor must be turned over to the minor when majority is attained.

(d) A person who pays or delivers money or property in accordance with provisions of this section is not responsible for the proper application thereof.

#### Section 5-103. [Delegation of Powers by Parent or Guardian.]

(a) A parent or parents of a minor, other than a parent or parents whose parental rights have been terminated or a parent who has signed a voluntary surrender, or a guardian or guardians of a minor or incapacitated person may appoint a temporary agent for a period not exceeding 60 days, and may delegate to such agent any power that the parent or guardian has regarding the care, custody or property of the minor child, ward or incapacitated person, except the power to consent to marriage or adoption of a minor; provided, however, that no parent or guardian shall appoint a temporary agent when a court has ordered that the minor child be placed in the custody of a person other than the parent or guardian.

(b) Any delegation under this Section shall be by a writing signed by, or at the direction of, the parent(s) or guardian(s) and attested by at least 2 witnesses 18 years of age or older, neither of whom is the temporary agent together with the written acceptance of the temporary agent.

(c) A parent or guardian may not appoint a temporary agent of a minor if the minor has another living parent whose whereabouts are known and who is willing and able to provide care and custody for the minor unless the nonappointing parent consents to the appointment in writing. A parent may not appoint a temporary agent if the appointing parent's parental rights have been terminated or a parent who has signed a voluntary surrender.

(d) Any delegation under this Section may be revoked or amended by the appointing parent(s) or guardian(s) and delivered to all interested persons. The authority of the temporary agent may be limited or altered by the Court.

#### Section 5-105. [Venue.]

(a) Provided that the Court has jurisdiction:

(1) venue for a guardianship proceeding for a minor is in the Court at the place where the minor resides at the time the proceedings are commenced, or, in the case of a nomination of a guardian by the will of a parent or guardian, in the Court of the county in which the will was or could be probated except venue for a guardianship proceeding for a minor in

District Court of Juvenile Court shall be in the Court where the underlying proceeding was filed;

(2) venue for a guardianship proceeding for an incapacitated person is in the Court at the place where the incapacitated person resides at the time the proceedings are commenced, or, in the case of a nomination of by the will of a parent or spouse, in the Court of the county in which the will was or could be probated. If the incapacitated person has been admitted to a facility referred to in chapter one hundred eleven, section 70E pursuant to an order of a court of competent jurisdiction, venue is also in the county in which that facility is located; and

(3) venue for a protective proceeding is in the Court at the place where the person to be protected resides at the time the proceedings are commenced, whether or not a guardian has been appointed in another place or, if the person to be protected does not reside in this commonwealth, in the Court at the place where property of the person is located.

(b) If a proceeding under this Code is brought in more than one place in this commonwealth, the Court at the place in which a proceeding is first brought has the exclusive right to proceed unless that Court determines that venue is properly in another Court or that the interests of justice otherwise require that the proceeding be transferred.

Section 5-106. [Appointment of Counsel; Guardian ad Litem.]

(a) After filing of a petition for appointment of a guardian, conservator or other protective order, if the ward, incapacitated person or person to be protected or someone on his or her behalf requests appointment of counsel; or if the Court determines at any time in the proceeding that the interests of the ward, incapacitated person or person to be protected are or may be inadequately represented, the Court shall appoint an attorney to represent the person, giving consideration to the choice of the person if 14 or more years of age. If the ward, incapacitated person or person to be protected has adequate resources, his or her counsel shall be compensated from the estate, unless the Court shall order that such compensation be paid by the petitioner. Counsel for any indigent ward, incapacitated person or person to be protected shall be compensated by the commonwealth. This section shall not be interpreted to abridge or limit the right of any ward, incapacitated person or person to be protected to retain counsel of his or her own choice and to prosecute or defend a petition under this Article.

(b) The Court may appoint as guardian ad litem, an individual or any public or charitable agency to investigate the condition of the ward, incapacitated person or person to be protected and make appropriate recommendations to the Court.

(c) The incapacitated person or person to be protected is entitled to be present at any hearing in person. A ward, if 14 or more years of age, is entitled to be present at any hearing in person unless the Court, upon written findings, determines that the best interest of the ward will not be served thereby. The person is entitled to be represented by

counsel, to present evidence, to cross-examine witnesses, including any physician or other qualified person and any guardian ad litem. The issue may be determined at a closed hearing if the person or counsel for the person so requests.

(d) Any person may apply for permission to provide information in the proceeding and the Court may grant the request, with or without hearing, upon determining that the best interest of the person to be protected will be served thereby. The Court may attach appropriate conditions to the permission.

# **APPENDIX 7**

## RESEARCH AND LITIGATION COMMITTEE APPENDICES

LISTING OF ALL FEE SHIFTING STATUTES

LIA MARINO, SUFFOLK LAW STUDENT

FEBRUARY 21, 2008

To: BBA Task Force Subcommittee on Research  
From: Lia Marino, Suffolk University Law Student  
Re: List of all fee shifting statutes  
Date: February 21, 2008

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This is a list of the Massachusetts General Laws that provide for attorney's fees as of February 2008. The list is divided into those statutes mentioned in the article "Attorney fees provided by statute" by Martin W. Healy in the Massachusetts Bar Association Law Journal, June 1998 and those adopted as of February 2008.

### Statutes Mentioned in Article

#### **Impairment of Civil Rights; Private Remedy.**

GL c 12 § 11I

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable **attorneys' fees** in an amount to be fixed by the court.

#### **Long Term Care Ombudsman - Retaliation Against Complainants.**

GL c 19A § 33A

No long term care facility or other entity shall retaliate against any resident or employee of such facility or entity who in good faith filed a complaint with, or provided information to the state long term care ombudsman, his or her designees, or any certified local ombudsman. A long term care facility which retaliates against such resident or employee for having filed a complaint with, or having provided information to the state long term care ombudsman, his or her designee, or any certified local ombudsman shall be liable to the person so retaliated against by a civil action for up to treble damages, costs, and **attorneys fees**.

#### **Retaliation Against Reporting Party Prohibited; Penalties.**

GL c 19c § 11

No person shall discharge or cause to be discharged or otherwise discipline or in any manner discriminate against or thereafter take any other retaliatory action against any employee, client or other person for filing a report with the commission or testifying in any commission proceeding or providing information to the commission, the general counsel or the secretary of health and human services or any department, office, commission or other agency within the executive office of health and human services in the course of an investigation of alleged abuse of a disabled person. Any person who willfully violates this section shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 1 year, or both.

In addition, any person who takes such prohibited action against an employee, client or other person may be liable to that employee, client or other person for treble damages, costs and **attorney's fees**.

**Motor Vehicle Withholding Certificate; Bond.**  
**GL c 90D § 12**

If the registrar is not satisfied as to the ownership of the vehicle or that there are no undisclosed security interests in it, the registrar may register the vehicle but shall either:

(a) Withhold issuance of a certificate of title until the applicant presents documents reasonably sufficient to satisfy the registrar as to the applicant's ownership of the vehicle and that there are no undisclosed security interests in it; or

(b) As a condition of issuing a certificate of title, require the applicant to file with the registrar a bond in such form as the registrar shall prescribe executed by the applicant, and either accompanied by the deposit of cash with the registrar or also executed by a person authorized to conduct a surety business within the commonwealth.

The bond shall be in an amount equal to one and one half times the value of the vehicle as determined by the registrar and conditioned to indemnify any prior owner and lienholder and any subsequent purchaser of the vehicle or person acquiring any security interest in it, and their respective successors in interest, against any expense, loss or damage, including reasonable **attorney's fees**, by reason of the issuance of the certificate of title of the vehicle or on account of any defect in or undisclosed security interest upon the right, title and interest of the applicant in and to the vehicle.

**Actions for Damages; Injunctions; Class Actions; Settlement; Attorneys' Fees and Costs.**

GL c 93A § 11

Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under paragraph (c) of section two may, as hereinafter provided, bring an action in the superior court, or in the housing court as provided in section three of chapter one hundred and eighty-five C, whether by way of original complaint, counterclaim, cross-claim or third-party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

... A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim or third-party action, for money damages only. Said damages may include double or treble damages, **attorneys' fees** and costs, as hereinafter provided, with provision for tendering by the person against whom the claim is asserted of a written offer of settlement for single damages, also as hereinafter provided. No rights to equitable relief shall be created under this paragraph, nor shall a person asserting such claim be able to assert any claim on behalf of other similarly injured and situated persons as provided in the preceding paragraph. The provisions of sections ninety-five to one hundred and ten, inclusive, of chapter two hundred and thirty-one, where applicable, shall apply to a

claim under this section, except that the provisions for remand, removal and transfer shall be controlled by the amount of single damages claimed hereunder.

**Unconscionability.**  
**GL c. 106 § 2A-108**

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) If the court finds unconscionability under subsection (1) or (2), the court shall award reasonable **attorney's fees** to the lessee.

(b) If the court does not find unconscionability, the court shall award reasonable **attorney's fees** to the party against whom the claim is made if the criteria of sections six E to six G, inclusive, of chapter two hundred and thirty-one are met.

(c) In determining **attorney's fees**, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling.

**Liquidation of Damages.**  
**GL c. 106 § 2A-504**

(1) Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

(2) If the lease agreement provides for liquidation of damages, and such provision does not comply with subsection (1), or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this Article.

(3) If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (Section 2A-525 or 2A-526), the lessee is entitled to restitution of any amount by which the sum of his payment exceeds:

(a) the amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with subsection (1); or

(b) in the absence of those terms, twenty percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or five hundred dollars.

(4) A lessee's right to restitution under subsection (3) is subject to offset to the extent the lessor establishes:

(a) a right to recover damages under the provisions of this Article other than subsection (1); and

(b) the amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.



### **Transfer Warranties.**

GL c. 106 § 2-416

**(b)** A person to whom the warranties under subsection (a) are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.

#### **Comments:**

**6.** Subsection (b) states the measure of damages for breach of warranty. There is no express provision for **attorney's fees**, but **attorney's fees** are not meant to be necessarily excluded. They could be granted because they fit within the phrase "expenses... incurred as a result of the breach." The intention is to leave to other state law the issue as to when **attorney's fees** are recoverable.

#### **Remedies.**

**GL c. 106 § 5-111**

**(a)** If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

**(e)** Reasonable **attorney's fees** and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article.

### **Collection and Enforcement by Secured Party.**

**GL c 106 § 9-607**

**(d)** Expenses of collection and enforcement. A secured party may deduct from the collections made pursuant to subsection (c) reasonable expenses of collection and enforcement, including reasonable **attorney's fees** and legal expenses incurred by the secured party.

### **Application of Proceeds of Collection or Enforcement; Liability for Deficiency and Right to Surplus.**

**GL c 106 § 9-608**

**(a)** Application of proceeds, surplus, and deficiency if obligation secured. If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

**(1)** A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under Section 9-607 in the following order to:

(A) the reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable **attorney's fees** and legal expenses incurred by the secured party;

**Application of Proceeds of Disposition; Liability for Deficiency and Right to Surplus.**

**GL c. 106 § 9-615**

(a) Application of proceeds. A secured party shall apply or pay over for application the cash proceeds of disposition under Section 9-610 in the following order to:

(1) the reasonable expenses of retaking, holding, preparing for disposition, processing

**Explanation of Calculation of Surplus or Deficiency.**

**GL c. 106 § 9-616**

(4) the amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and **attorney's fees** secured by the collateral which are known to the secured party and relate to the current disposition;

**Action in Which Deficiency or Surplus is in Issue.**

**GL c. 106 § 9-626**

(3) Except as otherwise provided in Section 9-628, if a secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of this part relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and **attorney's fees** exceeds the greater of:

**Limited Partnership - DERIVATIVE ACTIONS'**

**GL c 109 § 59**

If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable **attorney's fees**, and shall direct him to remit to the limited partnership the remainder of those proceeds received by him.

**Protection and Care of Children, and Proceedings Against Them – report**

**GL c 119 § 51A**

No employer of those persons required to report pursuant to this section shall discharge, or in any manner discriminate or retaliate against, any person who in good faith makes such a report, testifies or is about to testify in any proceeding involving child abuse or neglect. Any such employer who discharges, discriminates or retaliates against such a person shall be liable to such person for treble damages, costs and **attorney's fees**.

**Child Support Enforcement**

**GL c 119A § 1A**

"Support order", a judgment, decree, or order, whether temporary, final, or subject to modification, issued by a court or an administrative agency of competent jurisdiction, for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing state, which provides for monetary support, health care coverage, arrearages, or reimbursement, and which may include related costs and fees, interest and penalties, income withholding, **attorneys' fees**, and other monetary relief. For purposes of enforcement only, "support order" includes an order for the support of a parent with whom the child is living.

### **Mobile Home Parks**

#### **GL c. 140 § 32N**

Any manufactured housing community licensee or his agent who threatens to or takes reprisals against any manufactured housing community resident or group of residents for reporting a violation or suspected violation of section thirty-two L or section thirty-two M or any applicable building or health code to the board of health of a city or town in which the manufactured housing community is located, the department of public health, the department of the attorney general or any other appropriate government agency, shall be liable for damages which shall not be less than one month's rent or more than five months' rent, or the actual damages sustained by the manufactured housing community resident or group of residents, whichever is greater, and the costs of the court action brought for said damages including reasonable **attorney's fees**.

### **Labor Relations - Persons in Domestic Service as Employees; GL c 150A § 3A**

Anything contained in this chapter to the contrary notwithstanding as regards sections one, two, three, four (1), four (4), ten, eleven and twelve, the term "employee" shall include any individual, over the age of seventeen, employed in the domestic service of any family or person at his home for not less than sixteen hours per week. In the event of a violation of section four (1) or four (4) by an employer of any such individual, the department of labor and workforce development shall have all necessary and appropriate powers to conduct an investigation of such violation. The discharge of any such individual, within three months after the making of a report or complaint of any violation of section four (1) or four (4), known to the employer, shall create a rebuttable presumption that such discharge is a reprisal against such individual. In such case, the employer of such individual shall be liable for damages which shall not be less than one month's wages nor more than two months' wages of such individual, and the costs of the suit, including a reasonable **attorney's fee**.

### **Minimum Fair Wages**

#### **GL c 151 § 19**

**(1)** Any employer and his agent, or the officer or agent of any corporation who discharges or in any other manner discriminates against any employee, including any employee in the domestic service of any family or person at his home for not less than sixteen hours per week, because such employee has complained of a violation of the provisions of this chapter, or has testified or is about to testify in any investigation or proceeding under or related to this chapter, or because such

employer believes that said employee or individual may complain of a violation of the provisions of this chapter, shall have violated this section and shall be punished or shall be subject to a civil citation or order as provided in section 27C of chapter 149, and shall be liable for damages which shall not be less than one month's wages nor more than two month's wages of such individual, and the costs of the suit, including a reasonable **attorney's fee**.

**Unlawful Discrimination Because of Race, Color, Religious Creed, National Origin, Ancestry or Sex – Establishment of Commission**

GL c. 151B § 3

**15.** To set, charge and retain fees and costs, subject to section 3B of chapter 7, including, but not limited to, training fees and costs incurred responding to requests under the commonwealth's public records law; provided, that the commission may, where appropriate, provide for the waiver of the fees; to retain reasonable **attorney's fees** and costs awarded to a prevailing complainant, under section 5, when one of its attorneys presents the charge of discrimination before the commission on behalf of the prevailing complainant. All amounts received under this clause shall be deposited to the General Fund.

**Workers' Compensation**

**GL c 152 § 15**

The expenses of **attorney's fees** shall be divided between the insurer and the employee in proportion to the amounts received by them respectively.

**Electronic Branches and Electronic Fund Transfers**

GL c 167B § 20

any person who fails to comply with any provision of this chapter with respect to any consumer, except for an error resolved in accordance with section seventeen, is liable to such consumer in an amount equal to the sum of... **(3)** in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable **attorney's fee** as determined by the court.

**Penalty on Lessor for Failure to Furnish Water, Heat, etc.; Waivers by Tenant Prohibited.**

**GL c. 186 § 14**

Any person who commits any act in violation of this section shall also be liable for actual and consequential damages or three month's rent, whichever is greater, and the costs of the action, including a reasonable **attorney's fee**, all of which may be applied in setoff to or in recoupment against any claim for rent owed or owing.

**Void Provisions of Residential Leases; Lessor's Right of Entry; Rent in Advance for Last Month of Tenancy; Security Deposit; Interest or Penalty for Failure to Pay Rent, etc.**

**GL c. 186 § 15B**

If the lessor fails to pay any interest to which the tenant is then entitled within thirty days after the termination of the tenancy, the tenant upon proof of the same in an action against the lessor shall be awarded damages in an amount equal to three

times the amount of interest to which the tenant is entitled, together with court costs and reasonable **attorneys fees**.

**Residential Lease Provisions; Tenant's Waiver of Right of Jury Trial;  
Constructive Eviction; Liability of Landlord.  
GL c. 186 § 15F**

If a tenant is removed from the premises or excluded therefrom by the landlord or his agent except pursuant to a valid court order, the tenant may recover possession or terminate the rental agreement and, in either case, recover three months' rent or three times the damages sustained by him, and the cost of suit, including reasonable **attorney's fees**.

**Recovery of Attorneys' Fees in Actions for Proceedings Involving Leases of Residential Property.  
GL c. 186 § 20**

Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover **attorneys' fees** and expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable **attorneys' fees** and expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy.

**Compensation and Expenses of Executor, etc.  
GL c. 206 § 16**

An executor, administrator, guardian, conservator or trustee shall be allowed his reasonable expenses, costs and counsel fees incurred in the execution of his trust, and shall have such compensation for services as the court may allow. Such compensation, expenses, costs and counsel fees may be apportioned between principal and income as the court may determine.

**Actions to Recover Actual or Punitive Damages for, or for Injunctions or Mandamus against, Disclosure of Personal Data by Holder.  
GL c. 214 § 3B**

Any holder, as that term is defined in chapter sixty-six A, which violates any provision of said chapter sixty-six A, shall be liable to any individual who suffers any damage as a result of such violations, and the individual damaged may bring an action against such holder to recover any damages sustained. Notwithstanding any liability for actual damages as may be shown, such holder shall be liable for exemplary damages of not less than one hundred dollars for each violation together

**Transfer of Civil Actions Brought in Wrong Court.**  
**GL c. 218 § 2A**

Each district court shall have civil jurisdiction of actions local or transitory begun in such court which should have been brought in some other district court, to the extent that the court in which the action is begun may try and dispose of the case if the question of venue is waived or, if not waived, the court may, on motion of any party, order the action, with all papers relating thereto, to be transferred for trial or disposition to any other district court in which the action might have been commenced. The defendant in said action shall be entitled to costs and such reasonable **attorney's fees** as may be allowed by the court. Said action shall thereupon be entered and prosecuted in such court as if it had been originally commenced therein, and all prior proceedings otherwise regularly taken shall thereafter be valid. An additional entry fee for entry in the court to which the case is transferred shall be paid to the clerk of the transmitting court for transfer with the papers.

**Finality of Judgment; Removal.**  
**GL c 218 § 23**

Every cause begun under the procedure shall be determined initially in the district court department. No such cause may be removed for trial in the superior court department. In any action for property damage caused by a motor vehicle where the action is transferred to the regular civil docket in the district court department by the insurer and the unpaid party recovers a judgment for any amount due and payable by the insurer, the court shall assess against the insurer in addition thereto, costs and reasonable **attorney's fees**.

**Attorney's Lien for Fees, etc.**  
**GL c 221 § 50**

From the authorized commencement of an action, counterclaim or other proceeding in any court, or appearance in any proceeding before any state or federal department, board or commission, the attorney who appears for a client in such proceeding shall have a lien for his reasonable fees and expenses upon his client's cause of action, counterclaim or claim, upon the judgment, decree or other order in his client's favor entered or made in such proceeding, and upon the proceeds derived therefrom. Upon request of the client or of the attorney, the court in which the proceeding is pending or, if the proceeding is not pending in a court, the superior court, may determine and enforce the lien; provided, that the provisions of this sentence [section] shall not apply to any case where the method of the determination of **attorneys' fees** is otherwise expressly provided by statute.

**Award of Costs and Counsel Fees in Frivolous, etc., Actions.**  
**GL c 231 § 6F**

If such a finding is made with respect to a party's claims, the court shall award to each party against whom such claims were asserted an amount representing the reasonable counsel fees and other costs and expenses incurred in defending against such claims. If the party against whom such claims were asserted was not represented by counsel, the court shall award to such party an amount representing his reasonable costs, expenses and effort in defending against such claims. If such a

finding is made with respect to a party's defenses, setoffs or counterclaims, the court shall award to each party against whom such defenses, setoffs or counterclaims were asserted (1) interest on the unpaid portion of the monetary claim at issue in such defense, setoff or counterclaim at one hundred and fifty per cent of the rate set in section six C from the date when the claim was due to the claimant pursuant to the substantive rules of law pertaining thereto, which date shall be stated in the award, until the claim is paid in full; and (2) an amount representing the reasonable counsel fees, costs and expenses of the claimant in prosecuting his claims or in defending against those setoffs or counterclaims found to have been wholly insubstantial, frivolous and not advanced in good faith.

**Civil Liability of Employer for Failure to Compensate Juror-Employee; Damages; Attorney Fees.**

GL c 234A § 60

Any employer who fails to compensate a juror-employee under the applicable provisions of this chapter and who has not been excused from such duty or compensation shall be liable to the juror-employee in tort. Upon the expiration of thirty days after the tender of the juror service certificate to the employer, the juror may commence a civil action in any superior or district court having jurisdiction over the parties. Extreme financial hardship on the employer shall not be a defense to this action. The court may award treble damages and reasonable **attorney fees** to the juror upon a finding of wilful conduct by the employer.

Statutes As of 2/2008

**Knowledge of False or Fraudulent Claims.**

GL c 12 § 5B

Any person who:

**(1)** knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval... shall also be liable to the commonwealth or any political subdivision for the expenses of the civil action brought to recover any such penalty or damages, including without limitation reasonable **attorney's fees**

**Release or Threat of Release of Oil or Hazardous Material; Apportionment of Costs; Treble Damages; Nullification of Indemnification, Hold Harmless, or Similar Agreements.**

GL c 21E § 5

1) the owner or operator of a vessel or a site from or at which there is or has been a release or threat of release of oil or hazardous material; (2) any person who at the time of storage or disposal of any hazardous material owned or operated any site at or upon which such hazardous material was stored or disposed of and from which there is or has been a release or threat of release of hazardous material ...

In cases where the department has issued an order pursuant to sections nine and ten to a person liable pursuant to this chapter and such person has unreasonably or in bad faith failed or refused to comply with such order, the court shall award the

commonwealth not less than two times nor more than three times the full amount of its response costs, plus litigation costs and reasonable **attorneys' fees**, against such liable person

**Department May Make Non-Interest Bearing Advances to Housing Authorities for Defrayal of Development Costs of Low Rent Housing; Reimbursement.**

GL c 23B § 10A

The department may enter into a contract with a local housing authority for the purpose of assisting housing development by expending such monies as may be appropriated for the purpose of making non-interest bearing advances to housing authorities organized under the provisions of chapter one hundred and twenty-one B to enable them to construct low rent housing projects, as defined in said chapter one hundred and twenty-one B, provided the department shall, pursuant to regulations made by it, make the following findings:... (b) legal and organizational expenses including payment of **attorney's fees**, project manager and clerical staff salaries, office rent and other incidental studies; advances for planning, engineering and architectural work; and, (c) such other expenses incurred by the authority as the department may deem appropriate to effectuate the purposes of this section. The housing authority shall reimburse the commonwealth for all monies advanced under this section from the proceeds of any bonds or notes issued under sections thirty-four or forty-one of said chapter one hundred and twenty-one B of the General Laws.

**Application for Approval. Smart growth district**

**(a)** A city or town may incorporate provisions within the smart growth district zoning ordinance or by-law that prescribe contents of an application for approval of a project. The ordinance or by-law may require the applicant to pay for reasonable consulting fees to provide peer review of the applications for the benefit of the approving authority. Such fees shall be held by the municipality in a separate account and used only for expenses associated with the review of the development application by outside consultants and any surplus remaining after the completion of such review, including any interest accrued, shall be returned to the applicant forthwith. The smart growth zoning district ordinance or by-law may provide for the referral of the plan to municipal officers, agencies or boards other than the approving authority for comment. Any such board, agency or officer shall provide any comments within 60 days of its receipt of a copy of the plan and application for approval... **(h)** A plaintiff seeking to reverse approval of a project under this section shall post a bond in an amount to be set by the court that is sufficient to cover twice the estimated: (i) annual carrying costs of the property owner, or a person or entity carrying such costs on behalf of the owner for the property, as may be established by affidavit; plus (ii) an amount sufficient to cover the defendant's **attorneys fees**, all of which shall be computed over the estimated period of time during which the appeal is expected to delay the start of construction. The bond shall be forfeited to the property owner in an amount sufficient to cover the property owner's carrying costs and legal fees less any net income received by the plaintiff from the property during the pendency of the court case in the event a plaintiff does not substantially prevail on its appeal.



### **Taxpayer Suits.**

GL c 62F § 7

The Supreme Judicial Court or Superior Court may, upon the petition of not less than twenty-four taxable inhabitants of the Commonwealth, not more than six of whom shall be from any one county, enforce the provisions of this chapter. If successful, said taxable inhabitants shall be entitled to recover reasonable **attorneys' fees** and other costs from the Commonwealth incurred in maintaining such suit.

### **Cigarette Excise**

Any manufacturer, wholesale dealer, agent or any other person or entity who knowingly sells cigarettes, other than through retail sale, in violation of section 2B shall be subject to a civil penalty not to exceed \$10,000 per each such sale of such cigarettes for a first violation and a civil penalty not to exceed \$25,000 per each such sale of cigarettes for a second or subsequent violation. Any retail dealer who knowingly sells cigarettes in violation of section 2B shall be subject to the following:...

**(d)** In addition to any other remedy provided by law, the attorney general may file an action in state court for a violation of sections 2B to 2E, inclusive, including petitioning for injunctive relief or to recover any costs or damages suffered by the commonwealth due to a violation of such sections, including enforcement costs relating to the specific violation and **attorney's fees**. In any such action, the attorney general shall have the same authority to investigate and to obtain remedies as if the action were brought under chapter 93A. Each violation of sections 2B to 2E, inclusive, or of regulations adopted under this section constitutes a separate civil violation for which the attorney general may obtain relief.

### **Petition for Relief Upon Refusal to Furnish Transcript of Student's Record.**

GL c 71 § 34B

In case any person subject to section thirty-four A shall refuse or neglect for thirty days after such request to furnish such a written transcript, the student or former student requesting the same or, if a minor, his guardian or next friend, may present to the superior court for the county within which such person so subject resides or such institution is located, or for the county of Suffolk, a petition addressed to said court and praying for such relief as it may deem proper in the circumstances; and thereupon such court shall have jurisdiction of such petition and may issue such orders relative thereto as it may deem proper, and any failure or refusal to obey any such order may be treated by the court as a contempt thereof. Upon any such petition the court may award costs and reasonable **attorney's fees** to the petitioner.

### **Racial Imbalance by School Committees.**

GL c 71 § 37D

The supreme judicial and superior courts shall have jurisdiction in equity over actions commenced by the board or by or on behalf of any pupil to enforce the provisions of this section; provided, however, that in any such action commenced by or on behalf of any pupil to enforce his right, as provided by this section, to be transferred to and to attend any school, which action is concluded in favor of such pupil, the school committee or regional district school committee having jurisdiction over such school

shall be liable to such pupil or the person commencing such action on his behalf for his costs and reasonable **attorney's fees**.

**Recovery by Pupil Misled by Representations; Limitation on Liability; Joint and Several Liability.**

**GL c 75C § 10**

Any pupil of a correspondence school, who is misled by a representation made by an officer or representative of the school, or by any advertisement or circular issued by the school, which representation was untrue, deceptive, or misleading, and which the person responsible for such representation knew, or might on reasonable investigation have known to be untrue, deceptive, or misleading, may recover for damages sustained, or five hundred dollars, whichever is the greater, plus court and reasonable **attorney's fees** provided, however, that the liability of the surety on the bond shall be limited to indemnifying the claimant only for his actual damages.

**Operation of Vessel Under Influence of Liquor or Drugs; Water Skiing; Reckless Operation.**

**GL c 90B § 8**

**(B)** Any person whose license, permit or right to operate motor vehicles has been suspended or whose certificate of number has been revoked under this paragraph shall be entitled to a hearing before the registrar which shall be limited to the following issues: (i) did the officer have reasonable grounds to believe that such person had been operating a vessel while under the influence of intoxicating liquor on the waters of the commonwealth, (ii) was such person placed under arrest and (iii) did such person refuse to submit to such test or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall reinstate such license, permit or right to operate motor vehicles of such person and shall notify the director of such reinstatement. Upon receipt of such notification, the director shall reinstate such certificate of number to the vessel of such person.

Notwithstanding any of the foregoing, any person whose certificate of number has been revoked under this paragraph may at any time apply for and shall, within fifteen days, be granted a hearing before the director for the purpose of requesting the issuance of a certificate of number on the grounds of hardship and the director may, in his discretion, issue such certificate of number under such terms and conditions as he deems appropriate and necessary.

If a person fails to pay a civil administrative penalty assessed pursuant to this section within ninety days of the time it becomes final, such person shall be liable to the commonwealth for up to three times the amount of such penalty, together with the costs, plus interest from the time the civil administrative penalty became final, including all costs and **attorney's fees** incurred directly in the collection thereof. The rate of interest shall be the rate set forth in section six C of chapter two hundred and thirty-one. The director shall refuse to issue an original certificate of number or to renew the certificate of number for any boat owned by a person who fails to pay such civil administrative penalty and any related penalties or costs, until such payment is made in full.

**Complaint Against Lienholder.**

**GL c 90D § 24A**

**(h)** Each lienholder who fails to pay a civil administrative penalty on time, and each lienholder who issues a bond pursuant to this section and who fails to pay to the registrar on time the amount required hereunder, shall be liable to the registrar for up to 3 times the amount of the civil administrative penalty, together with costs, plus interest from the time the civil administrative penalty became final and **attorneys' fees**, including all costs and **attorneys' fees** incurred directly in the collection thereof. The rate of interest shall be the rate set forth in section 6C of chapter 231.

**Prohibited Uses of Watersheds; Informational Hearings; Exceptions; Penalties.**

**GL c 92A1/2 § 5**

**(a)** Any alteration, or the generation, storage, disposal, or discharge of pollutants is prohibited within those portions of the watersheds that lie within 200 feet of the bank of a tributary or surface waters or within 400 feet of the bank of a reservoir.

**(k)** The division, after consultation with the department of environmental protection, shall issue regulations pursuant to section 6 for appealing the inclusion of a location in the areas regulated by this section. It shall be the responsibility of the appellant to prove that the location was improperly included. If the appeal is decided in the appellant's favor, a court of competent jurisdiction shall award to appellant reasonable **attorney fees**, costs and expenses incurred in the action.

**Action by Attorney General; Parens Patriae Action; Jurisdiction of Superior Court.**

**GL c 93 § 9**

The attorney general may bring a civil action in the name of the commonwealth to prevent and restrain violations of section four, five or six of this chapter; as parens patriae on behalf of natural persons residing in the commonwealth, to secure monetary relief for damages sustained by such natural persons to their property by reason of any violation of section four; and on behalf of the commonwealth and its public agencies and political subdivisions for damages sustained, together with costs of suit, for injuries to their property by reason of violations of section four, five or six; provided, however, that unless the attorney general has brought a criminal complaint pursuant to section ten, the attorney general may bring a civil action in the name of the commonwealth to recover a civil penalty of not more than twenty-five thousand dollars for any course of conduct, pattern of activity or activities which violate section four, five or six. In any action brought on behalf of the commonwealth and its public agencies and political subdivisions for damages sustained to their property, if the court finds that the violation was engaged in with malicious intent to injure the commonwealth, public agency or political subdivision, the court may award up to three times the amount of actual damages sustained together with the costs of suit, including reasonable **attorneys fees**.

**Public Health - Provisions for Competent Interpreter Services**

**GL c 111 § 25J**

Any non-English speaker, who is denied appropriate emergency health care services by an acute-care hospital by reason of such hospital's not having exercised reasonable judgment in making competent interpreter services available, as required by this section, or the attorney general upon receiving written notice from a regulating state agency that such hospital is substantially failing to comply with applicable interpreter requirements, shall have a right of action in the superior court

against such hospital for declaratory or injunctive relief. A non-English speaker bringing such action shall not be required to exhaust any administrative remedies that may be available to him and may be awarded damages for any actual harm suffered, but at least \$250 in damages shall be awarded for each violation, together with such costs, including expert **fees and attorney's fees**, as may be reasonably incurred in such action. Such action shall be brought within three years of any such failure to provide competent interpreter services.

### **Presentment Warranties.**

GL c. 106 § 3-417

**(a)** If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:

**(1)** the warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

**(2)** the draft has not been altered; and

**(3)** the warrantor has no knowledge that the signature of the drawer of the draft is unauthorized.

**(b)** A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in this subsection.

5. The measure of damages for breach of warranty under subsection (a) is stated in subsection (b). There is no express provision for **attorney's fees**, but **attorney's fees** are not meant to be necessarily excluded. They could be granted because they fit within the language "expenses... resulting from the breach." Subsection (b) provides that the right of the drawee to recover for breach of warranty is not affected by a failure of the drawee to exercise ordinary care in paying the draft.

### **Cancellation and Amendment of Payment Order.**

GL c. 106 § 4A-211

**(f)** Unless otherwise provided in an agreement of the parties or in a funds transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds transfer system rule allowing cancellation or amendment without the bank's agreement, the sender, whether or not cancellation or amendment is effective, is liable to the bank for any loss and expenses, including reasonable **attorneys' fees**,

incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment.

**Liability for Late or Improper Execution or Failure to Execute Payment Order.**

GL c. 106 § 4A-305

(e) Reasonable **attorneys' fees** are recoverable if demand for compensation under subsection (a) or (b) is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under subsection (d) and the agreement does not provide for damages, reasonable **attorneys' fees** are recoverable if demand for compensation under subsection (d) is made and refused before an action is brought on the claim.

**Obligation of Beneficiary's Bank to Pay and Give Notice to Beneficiary.**  
**GL c. 106 § 4A-404**

(b) If a payment order accepted by the beneficiary's bank instructs payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds transfer business day following the payment date. If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order. Notice may be given by first class mail or any other means reasonable in the circumstances. If the bank fails to give the required notice, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank. No other damages are recoverable. Reasonable **attorneys' fees** are also recoverable if demand for interest is made and refused before an action is brought on the claim.

**Remedies.**

**GL c. 106 § 5-111**

(a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.

(e) Reasonable **attorney's fees** and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article.

**Mental Health- provisions for competent interpreter services**  
**GL 123 § 23A**

Any non-English speaker, who is denied appropriate acute psychiatric services by a hospital or separate unit of a hospital which provides acute psychiatric services by reason of the hospital's not having exercised reasonable judgment in making competent interpreter services available, as required by this section, or the attorney general upon receiving written notice from a regulating state agency that such hospital is substantially failing to comply with applicable interpreter requirements, shall have a right of action in the superior court against such hospital for declaratory or injunctive relief. A non-English speaker bringing such action shall not be required to exhaust any administrative remedies that may be available to him and may be awarded damages for any actual harm suffered, but at least \$250 in damages shall be awarded for each violation, together with such costs, including expert **fees and attorney's fees**, as may be reasonably incurred in such action. Such action shall be brought within three years of any such failure to provide competent interpreter services.

**Regulation of Home Improvement Contractors - Consumer Claims Against Fund; Qualification; Limits on Awards from Fund; Payments Upon Depletion of Fund Monies**  
**GL c. 142A § 7**

The fund administrator may not award: (1) more than ten thousand dollars or any amount necessary to compensate the owner for his actual loss, whichever is less to any one claimant or; (2) more than seventy-five thousand dollars to claimants on account of the conduct of any one registered contractor or subcontractor within a twelve month period, unless after the fund administrator has paid out said seventy-five thousand dollars the registrant has repaid the fund the full amount; provided, however, that it is within the discretion of the fund administrator to waive the limit with cause; or (3) any amount for consequential damages, except as may be allowed under section four, or for personal injury, punitive damages, **attorney's fees**, court costs or interest.

**PUBLIC EMPLOYMENT – Rate of Wages**

GL c. 149 § 27

Any employee claiming to be aggrieved by a violation of this section may, at the expiration of ninety days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing, and within three years of such violation, institute and prosecute in his own name and on his own behalf, or for himself and for others similarly situated, a civil action for injunctive relief and any damages incurred, including treble damages for any loss of wages and other benefits. Any employee so aggrieved and who prevails in such an action shall be entitled to an award of the costs of the litigation and reasonable **attorneys' fees**.

**Employment and Training [Unemployment Insurance] - EMPLOYMENT SECURITY ADMINISTRATION ACCOUNT**  
**GL c 151A § 58A**

An employer shall not take any adverse action against an individual because the individual has reported such information to the department. Any employer who takes such adverse action shall be liable in a civil action, action for contempt or other appropriate proceeding to such employee for all wages and employment benefits lost by the employee as a result of such action, litigation costs and reasonable **attorney fees**.

**Telemarketing Solicitation**  
**GL c 159C § 8**

**(b)** A person who has received more than 1 unsolicited telephonic sales call within a 12-month period by or on behalf of the same person or entity in violation of this chapter may: (i) bring an action to enjoin the violation; (2) bring an action to recover for actual monetary loss from such knowing violation or to receive not more than \$5,000 in damages for such knowing violation, whichever is greater; or (iii) bring both such actions.

**(c)** In a civil proceeding resulting from a transaction involving a violation of this chapter, the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, shall be awarded reasonable **attorney's fees** and costs from the nonprevailing party.

**Insurance - POWERS AND DUTIES OF COMMISSIONER OF INSURANCE**  
**GL c. 175 § 4**

**(17)** No cause of action shall arise nor shall any liability be imposed against the commissioner, the commissioner's authorized representatives or any examiner appointed by the commissioner for any statements made or conduct performed in good faith while carrying out the provisions of this section. No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the commissioner or the commissioner's authorized representative or examiner pursuant to an examination made under this section, if such act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive. This section shall not abrogate or modify a common law or statutory privilege or immunity heretofore enjoyed by such person identified. Such person shall be entitled to an award of **attorney's fees** and costs if such person is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this section if the party bringing the action was not justified in doing so. For purposes of this section a proceeding is justified if it had a reasonable basis in law or fact at the time it was initiated.

**Health Insurance Consumer Protections**  
**GL c. 1760 § 5**

No contract between a carrier, including a dental or vision carrier, and a health, dental or vision care provider for the provision of services to insureds may require the provider to indemnify the carrier for any expenses and liabilities, including, without limitation, judgments, settlements, **attorneys' fees**, court costs and any associated charges, incurred in connection with any claim or action brought against the carrier based on the carrier's management decisions, utilization review provisions or other policies, guidelines or actions.

**Alienation of Land - DISCHARGE OF MORTGAGES**  
**GL 183 § 54D**

**(e)** A mortgagee, mortgage servicer or note holder who fails without reasonable cause to provide a timely payoff statement as required by this section shall be liable to the mortgagor, as that term is defined in section 54, for the greater of \$500 or the

mortgagor's actual damages caused by the failure, plus reasonable **attorney's fees** and costs.

**TITLE TO REAL PROPERTY - Condominiums**  
**GL 183A § 6**

**(b)** The unit owner shall be personally liable for all sums assessed for his share of the common expenses including late charges, fines, penalties, and interest assessed by the organization of unit owners and all costs of collection including **attorneys' fees, costs, and charges.**

**TITLE TO REAL PROPERTY - Real Estate Time-Shares**  
**GL 183B § 25**

If the tort or breach of contract occurred during any period of developer control, the developer shall be subject to liability for all unreimbursed losses suffered by the association or time-share owners as a result, including costs and reasonable **attorney's fees.**

**TITLE TO REAL PROPERTY - Predatory Home Loan Practices**  
**GL 183C § 15**

**(b)** Limited to amounts required to reduce or extinguish the borrower's liability under the high-cost home mortgage loan plus amounts required to recover costs, including reasonable **attorneys' fees,** a borrower acting only in an individual capacity may assert claims that the borrower could assert against a lender of the home loan against any subsequent holder or assignee of the home loan as follows:

**General Provisions Relative to Real Property - Proceedings Affecting Title to Realty Binding on Third Party; Memorandum of Lis Pendens; Contents, Recording, Endorsement by Court.**  
**GL 184 § 15**

If the court allows the special motion to dismiss, it shall award the moving party costs and reasonable **attorneys fees,** including those incurred for the special motion, any motion to dissolve the memorandum of lis pendens, and any related discovery.

**Conservation, Preservation, Agricultural Preservation, Watershed Preservation and Affordable Housing Restrictions; Acquisition and Effect of Restrictions; Approvals and Releases, Etc.**  
**GL c. 184 § 32**

Such conservation, preservation, agricultural preservation, watershed preservation and affordable housing restrictions are interests in land and may be acquired by any governmental body or such charitable corporation or trust which has power to acquire interest in the land, in the same manner as it may acquire other interests in land. The restriction may be enforced by injunction or other proceeding, and shall entitle representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance. If the court in any judicial enforcement proceeding, or the decision maker in any arbitration or other alternative dispute resolution enforcement proceeding, finds there has been a violation of the restriction or of any other restriction described in clause (c) of section 26 then, in addition to



any other relief ordered, the petitioner bringing the action or proceeding may be awarded reasonable **attorneys' fees** and costs incurred in the action proceeding.

**Tax Escalation Provisions in Leases; Return of Overcharge with Interest.  
GL c. 186 § 15C**

No lease relating residential real estate shall contain a provision which obligates a lessee to make payments to the lessor on account of an increased real estate tax levied during the term of the lease, unless such provision expressly sets forth (1) that the lessee shall be obligated to pay only that proportion of such increased tax as the unit leased by him bears to the whole of the real estate so taxed, (2) the exact percentage of any such increase which the lessee shall pay, and (3) that if the lessor obtains an abatement of the real estate tax levied on the whole of the real estate of which the unit leased by the lessee is a part, a proportionate share of such abatement, less reasonable **attorney's fees**, if any, shall be refunded to said lessee. Any provision of a lease in violation of the provisions of this section shall be deemed to be against public policy and void.

**Reprisals Against Tenants; Damages; Presumption; Waiver.  
GL c. 186 § 18**

Any person or agent thereof who threatens to or takes reprisals against any tenant of residential premises for the tenant's act of, commencing, proceeding with, or obtaining relief in any judicial or administrative action the purpose of which action is to obtain damages under, or otherwise enforce, any federal, state or local law, regulation, by-law or ordinance, which has as its objective the regulation of residential premises; or exercising the tenant's rights pursuant to section one hundred and twenty-four D of chapter one hundred and sixty-four; or reporting to the board of health or, in the city of Boston to the commissioner of housing inspection or to any other board having as its objective the regulation of residential premises a violation or a suspected violation of any health or building code or of any other municipal by-law or ordinance, or state or federal law or regulation which has as its objective the regulation of residential premises; or reporting or complaining of such violation or suspected violation in writing to the landlord or to the agent of the landlord; or for organizing or joining a tenants' union or similar organization, or for making or expressing an intention to make, a payment of rent to an organization of unit owners pursuant to paragraph (c) of section six of chapter one hundred and eighty-three A shall be liable for damages which shall not be less than one month's rent or more than three month's rent, or the actual damages sustained by the tenant, whichever is greater, and the costs of the suit, including a reasonable **attorney's fee**.

**The Massachusetts Principal and Income Act - DESCENT AND  
DISTRIBUTION, WILLS, ESTATES OF DECEASED PERSONS AND ABSENTEES,  
GUARDIANSHIP, CONSERVATORSHIP AND TRUSTS**

GL c. 203D § 6

(ii) paying from income or principal, in the fiduciary's discretion, **fees of attorneys**, accountants and fiduciaries, court costs and other expenses of administration, and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax, marital or charitable deduction only if the payment of those expenses from income will not cause the reduction or loss of the deduction; and

## **Divorce – Costs**

### **GL c. 208 § 38**

In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them.

## **Abuse prevention**

### **GL c. 209A § 3**

**(f)** ordering the defendant to pay the person abused monetary compensation for the losses suffered as a direct result of such abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, costs for restoring utilities, out-of-pocket losses for injuries sustained, replacement costs for locks or personal property removed or destroyed, medical and moving expenses and reasonable **attorney's fees**;

## **Massachusetts Child Custody Jurisdiction Act**

### **GL c. 209B § 7**

**(6)** assess any or all of the costs of the custody proceeding in this state, having due regard for the purposes of this chapter, including the reasonable travel and other expenses of any party and his or her witnesses, the reasonable **attorneys' fees** of any party, the costs of the court's communications and information exchanges with other courts and the fees and costs of any person entitled to appear before the court as the representative of a child

## **Uniform Interstate Family Support Act - CIVIL PROVISIONS OF GENERAL APPLICATION**

### **GL c. 209D § 3-313**

**(b)** If an obligee prevails, a responding tribunal may assess against an obligor filing fees, reasonable **attorney's fees**, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the initiating or the responding state, except as provided by other law. **Attorney's fees** may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs and expenses.

## **Commission on Judicial Conduct**

### **GL c. 211C § 7**

**(15)** With the approval of the supreme judicial court, a judge shall be entitled to the payment of reasonable **attorneys' fees** by the commonwealth in any case where the matter is dismissed by the commission at any stage after the filing of a sworn complaint or statement of charges, where the supreme judicial court determines despite a commission recommendation for discipline that no sanction is justified, or where the supreme judicial court determines that justice will be served by the payment of such fees.

### **Actions for Contempt in Support Proceedings; Capias.**

GL c. 215 § 34A

In entering a judgment of contempt for failure to comply with an order or judgment for monetary payment, there shall be a presumption that the plaintiff is entitled to receive from the defendant, in addition to the judgment on monetary arrears, all of his reasonable **attorney's fees** and expenses relating to the attempted resolution, initiation and prosecution of the complaint for contempt. The contempt judgment so entered shall include reasonable **attorney's fees** and expenses unless the probate judge enters specific findings that such **attorney's fee** and expenses shall not be paid by the defendant.

### **Sums Recovered Under §§ 1, 2, 2B or 5A Subject to Charges of Administration, Funeral Expenses, Costs, etc.**

GL c 229 § 6A

All sums recovered under section one, two, two B or five A shall, if and to the extent that the assets of the estate of the deceased shall be insufficient to satisfy the same, be subject to the charges of administration and funeral expenses of said estate, to all medical and hospital expenses necessitated by the injury which caused the death, to reasonable **attorneys' fees** and reasonable costs and expenses of suit incurred in such recovery.

### **Appeal of Decision on Motion for Costs and Counsel Fees.**

GL c 231 § 6G

Any party aggrieved by a decision on a motion pursuant to section six F may appeal as hereinafter provided. If the matter arises in the superior, land, housing or probate court, the appeal shall be to the single justice of the appeals court at the next sitting thereof. If the matter arises in the appeals court or before a single justice of the supreme judicial court, the appeal shall be to the full bench of the supreme judicial court. The court deciding the appeal shall review the finding and award, if any, appealed from as if it were initially deciding the matter, and may withdraw or amend any finding or reduce or rescind any award when in its judgment the facts so warrant.

### **Limitation on Attorney Fees.**

GL c 231 § 60I

**Attorney fees** for services rendered on behalf of a claimant or defendant in a medical negligence case shall be fair and reasonable. An attorney representing a claimant may charge a client a contingency fee, which shall be subject to the rules and guidelines of the supreme judicial court. No contingent fee agreement, shall be enforced, and no attorney shall recover a fee thereunder, as a result of services rendered in an action against a provider of health care for malpractice, negligence, error, omission, mistake, or the unauthorized rendering of professional services if, at the time of judgment, the court determines that the amount of the recovery paid or to be paid to the plaintiff, after deduction of the attorney's reasonable expenses and disbursements for which the plaintiff is liable and the amount of the **attorney's fee**, is less than the total amount of the plaintiff's unpaid past and future medical expenses included in the recovery, unless the contingent **attorney's fee**: (a) is twenty per cent or less of the plaintiff's recovery; (b) is reduced to twenty per cent or less of the plaintiff's recovery; or (c) is reduced to a level which permits the

or retained, or to the city for reasonable **attorney's fees** and costs as determined by the court, plus liquidated damages in the amount of one hundred dollars, or not more than three times the amount by which the payment or payments demanded, accepted, received or retained exceed the maximum rent which could be lawfully demanded, accepted, received or retained, whichever is the greater; provided that if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation, the amount of such liquidated damages shall be the amount of the overcharge or overcharges.

**Water and Sewage Collection, Treatment and Disposal Services within Service Area on Exclusive Basis.**

ALM Spec L ch. S67, § 20 (2007)

It is expressly contemplated by this act that the Authority, to the extent deemed by it to be necessary and convenient to achieve its purposes under this act and under such supervision from agencies of the commonwealth as is expressly authorized in this act, shall provide water and sewage collection, treatment and disposal services within its service area on an exclusive basis. It is intended that this section shall not (i) diminish the powers or responsibilities of local bodies, (ii) override other provisions of this act regulating the procedures for abandonment of local water supplies, (iii) limit the lawful exercise of any local body, subject to applicable approvals by the department of environmental protection and the water resources commission, to continue to use any source of water used by it or to develop or reactivate any source of water to be used by it, or (iv) impose responsibility on the Authority for operation of the sewer and waterworks systems except as the Authority is charged with responsibility or may elect to exercise responsibility under other provisions of this act. In addition to and without limiting the generality of the foregoing, said Authority shall be a "local government" insofar as concerns immunity under sections (4), (4A) or (4C) of the Clayton Act; 15 U.S.C.A. §§ 15, 15A, and 15C from damages, interest on damages, costs or **attorneys fees** for a local government, for any official or employee thereof acting in an official capacity or for a person against whom a claim is based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

## **APPENDIX 8**

### RESEARCH AND LITIGATION COMMITTEE APPENDICES

STATISTICAL APPENDIX TO REPORT TO BOSTON BAR  
ASSOCIATION TASK FORCE ON EXPANSION OF THE CIVIL  
RIGHT TO COUNSEL, ON LEGAL REPRESENTATION IN PUBLIC  
BENEFITS AGENCY HEARINGS

BY ALLAN RODGERS

JULY 1, 2008 DRAFT

**Statistical Appendix to Report to Boston Bar Association  
Task Force on Expansion of the Civil Right to Counsel,  
On Legal Representation in Public Benefits Agency Hearings**

We attempted to gather information on four aspects of the legal representation (whether by a lawyer or a nonlawyer) of low-income persons at administrative agency hearings held within the state on public benefits programs. These are:

- The percentage of these hearings in which the low-income person had representation
- A breakdown on whether the representation was by a lawyer or a nonlawyer
- The success rate in hearing decisions in cases where there was representation and in cases where there was no representation
- The number of court appeals from agency hearing decisions in these public benefits cases.

In some instances where we sought this information, we were told it was not available, such as data on Massachusetts hearings held by the Social Security Administration (SSA) and a breakdown between representation by a lawyer and by a nonlawyer at hearings at the Department of Transitional Assistance (DTA). We obtained some information from Mass. Legal Assistance Corp. on representation in these hearings by grantees in its Disability Benefits (DBP) and Medicare Advocacy (MAP) Projects and some information from several legal services programs. We also received some detailed information from DTA and the Board of Review (the state agency which handles administrative appeals in unemployment cases from adjudicatory hearing decisions of the Division of Unemployment Assistance (DUA)).

Nevertheless, the information which we have received enables us to draw some general conclusions about the numbers of hearings held each year, the comparatively small percentages of those hearings (except at SSA) at which low-income persons have representation, the more favorable results when people have representation and some data on the breakdown between lawyer and nonlawyer representation. Here are some data which we have received. Many thanks to those in legal services programs who helped us gather it.

1) The Number of Agency Hearings Held Annually - There are tens of many thousands of these agency hearings held each year.

a) In unemployment cases, there are 22,916 agency hearings and 3,000 Board of Review appeals each year (projections based on March, 2008 statistics furnished by DUA).

b) The Department of Transitional Assistance held 7,098 hearings a year in TAFDC, EAEDC and Food Stamp cases (DTA figures for its most recent fiscal year).

c) Figures for SSA hearings in Massachusetts are not available, but it is estimated that many thousands are held each year.

d) In the MassHealth program, many thousands of requests for hearings are made, although a comparatively small percentage follow up on their appeals.

## 2) The Percentages of Hearings at Which the Low-Income Person is Represented

a) Legal services programs receiving DBP and MAP grants from MLAC provided representation in 464 appeals during the most recent grant year.

b) At Board of Review appeals in unemployment cases, two thirds of the appeals are by unemployment claimants. Fourteen percent of the claimants had representation (most by a lawyer) and 40% of the employers had representation (most by a nonlawyer agent).

c) At SSA Massachusetts hearings before an Administrative Law judge, legal services advocates estimate that 80% of the low-income people are represented.

d) At DTA hearings, around 10% have representation.

3) Lawyer v. Nonlawyer Representation - This varies widely, and probably it depends on what staff (lawyer, paralegal) legal services programs assign to these hearings. Some examples of this are:

a) At SSA, most legal services hearings are handled by paralegals, but program A handled 23 hearings during its most recent year, all by lawyers.

b) Program B handled 124 agency hearings during its most recent year, of which 92 were handled by lawyers and 32 by paralegals.

c) Program C handled 71 hearings during a recent year, and in 63 of these provided representation through a paralegal.

4) Success Rate When Representation is Provided - The Department of Transitional Assistance reports that during most years for which it has figures, there were the following results:

<u>Category of Benefits</u> <u>Program</u>	<u>% of Favorable</u> <u>Decisions - all</u> <u>Hearings</u>	<u>% of Favorable</u> <u>decisions, Where</u> <u>There was Representation</u>
TAFDC	27.6%	44.6%
EAEDC	49%	58%
Food Stamps	23%	34%

## **APPENDIX 9**

### RESEARCH AND LITIGATION COMMITTEE APPENDICES

COSTS OF THE PILOT PROPOSALS

BY GERRY SINGSEN



## THE COSTS OF THE PILOT PROPOSALS

The Task Force Committees developed first approximations of the costs of carrying out their proposals. These estimates were based on the delivery system the pilot used and on other available data. For delivery systems using staff lawyers, the Committees consulted salary scales of legal services programs and relied on their own experience. For delivery systems that employ private attorneys appointed on a case-by-case basis (similar to CPCS bar advocates), the Committees used CPCS data which showed about \$50/hour and 8 hours average for a bar advocate to handle a Rogers or CHINS hearing.

All proposals are presented as three year pilots in order to provide sufficient time to generate and evaluate reliable data. When funded, the proposals may vary from the estimates. The actual experience level of the attorneys hired, the salary schedules, benefit costs and overhead rates of a sponsoring agency and the going rate for bar advocates will replace the estimates.

The proposals' estimated annual costs are shown in Table I. The Immigration Impact Unit is treated separately because it is already operating as a CPCS unit with two attorneys; the Task Force proposal was to increase it from one attorney originally to four.

TABLE I PILOT PROPOSAL COST ESTIMATES			
PROPOSAL	FIRST YEAR COST	SECOND YEAR COST	THIRD YEAR COST
Evictions	\$350,000	\$350,000	\$350,000
Custody	\$360,000	\$360,000	\$360,000
Guardianship of Elders	\$120,000	\$120,000	\$120,000
Civil Contempt	\$620,000	\$620,000	\$620,000
DYS Revocations	\$80,000	\$80,000	\$80,000
School Exclusion	\$160,000	\$160,000	\$160,000
Asylum	\$360,000	\$360,000	\$360,000
Detainees	\$360,000	\$360,000	\$360,000
Total new initiatives	\$2,410,000	\$2,410,000	\$2,410,000
Immigration Impact Unit	\$530,000	\$530,000	\$530,000
Total	\$2,940,000	\$2,940,000	\$2,940,000

The proposals' basic budget data is in Table II. In the table, an (A) before the attorney cost estimate indicates an assigned counsel component and an (S) indicates a staff component (attorneys except in the DYS Revocations pilot). The number of cases to be assigned or the number of staff is indicated parenthetically. Benefits are generally calculated for the purposes of this presentation at 30% of salaries. Basic non-personnel costs include general support staff costs and are generally estimated at one-quarter of the budget. Hourly rates for bar advocates are their total payments; there are no benefits or overhead costs for delivery by assigned counsel.

TABLE II  
PILOT PROPOSAL BASIC BUDGET DATA

PROPOSAL	ATTORNEY COSTS			NON-PERSONNEL	TOTAL
	A or S	Salary	Benefits		
Evictions	A(50)	\$50,000	NA	NA	\$50,000
Guardianship of Elders	A(295)	\$118,000	NA	NA	\$118,000
Civil Contempt	A(1034)	\$620,000	NA	NA	\$620,000
DYS Revocations	S(1)	\$40,000	\$14,000	\$26,000	\$80,000
School Exclusion	S(2)	\$123,000	\$37,000	In Kind	\$160,000
Evictions	S(2.5)	\$173,000	\$52,000	\$75,000	\$300,000
Asylum	S(3)	\$208,000	\$62,000	\$90,000	\$360,000
Detainees	S(3)	\$208,000	\$62,000	\$90,000	\$360,000
Custody	S(3)	\$208,000	\$62,000	\$90,000	\$360,000
Immigration Impact Unit	S(4)	\$277,000	\$83,000	\$170,000	\$530,000