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IN THE SUPREME COURT OF

**FILED**

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CLERK, SUPREME COURT

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CASE NO. 72,671

MATTER OF INTEREST ON TRUST )  
ACCOUNTS: A PETITION TO AMEND )  
THE RULES REGULATING THE )  
FLORIDA BAR )  
\_\_\_\_\_ )

RESPONSE OF THE ASSOCIATION  
FOR RETARDED CITIZENS/FLORIDA

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appear for  
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STATEMENT OF INTEREST

The Association for Retarded Citizens/Florida is a private, non-profit corporation formed to represent the interests of persons with mental retardation in Florida. Created in 1957, the Association for Retarded Citizens/Florida [hereinafter ARC/Florida], has, for more than thirty (30) years, advocated on behalf of persons with mental retardation for equal rights under the law.

This history of advocacy has taken many forms. In cooperation with the Washington office of its national affiliate, the Association for Retarded Citizens/US, ARC/Florida has sought, through federal legislation, to strengthen the rights of disabled Floridians to a quality education,<sup>1</sup> to equal access to employment<sup>2</sup>, to equal access for governmental treatment<sup>3</sup> and to housing.<sup>4</sup>

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<sup>1</sup> Education for All Handicapped Children Act, Pub. L. 94-142, 89 Stat. 773 (1975) [codified at 20 U.S.C. secs. 1232, 1401, 1405-06, 1411-20 & 1453 (1982 & Supp. 1988)].

<sup>2</sup> Rehabilitation Act of 1973, Pub.L. 93-112, 87 Stat. 355 (1973) [codified at 29 U.S.C. secs.701-794 (1982 & Supp. 1988)].

<sup>3</sup> The Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988).

<sup>4</sup> The Fair Housing Amendments Act of 1988, H.R. 1158, 100th Cong., 2d Sess., 134 Cong. Rec. 6491 (1988).



Similarly, in Florida, ARC/Florida has been an active participant in the Florida legislative process, instrumental in the passage of legislation affecting the disabled<sup>5</sup> and in the appropriation of monies to fund community-based residential and treatment programs.

When advocacy to the legislative and executive branches of government was ineffective ARC/Florida has taken the appropriate steps to advocate for persons with mental retardation in the courts. As an example, in the case of Florida Association of Retarded Citizens v. Martinez, Case No. 79-418-Orl-Civ-EK (M.D. Florida), ARC/Florida was successful in its lawsuit to close the Orlando Sunland Residential Center and, in its place, to initiate the implementation of community-based services for hundreds of persons with mental retardation.

Because of its involvement with litigation, ARC/Florida is acutely aware of the need of competent legal counsel to represent the interests of persons with mental retardation and other disabilities. All too often the disabled person is subject to subtle forms of discrimination. Without the availability of counsel, persons with mental disabilities are unable to press their claims for protection under the appropriate state and federal laws.

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<sup>5</sup> Retardation Prevention and Community Services Act, Ch. 77-335, Laws of Fla. (as amended) [codified at Chapter 393, Florida Statutes (1987)].

Yet neither ARC/Florida nor the any of the currently funded public interest legal services programs [ie. the Center for Advocacy for Persons with Disabilities, programs funded by the federal Legal Services Corporation Act<sup>6</sup> and IOTA funded programs] can supply the quantity of needed legal counsel for all those low-income persons with disabilities requiring legal assistance. What is needed is an infusion of funding to support an increased system of legal counsel for persons with mental disabilities.

Because of its legacy of advocacy, ARC/Florida files this brief in support of the Petition of the Florida Bar Foundation. ARC/Florida requests this Court to amend the Rules Regulating Trust Accounts; to modify the present voluntary IOTA program to become a comprehensive IOTA program. As evidence of its commitment to these principals, the official Resolution of the Board of Directors of ARC/Florida is attached to the brief as Appendix A.

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<sup>6</sup> Legal Services Corporation Act, Pub. L. 93-355, 88 Stat. 378 (1974) [codified at 42 U.S.C. secs. 2996 to 2996(1) (1983)].

## RESPONSE TO THE PETITION

Pursuant to Rule 1-12.1 of the Rules Regulating the Florida Bar, more than fifty (50) active members of The Florida Bar, on behalf of the Florida Bar Foundation, filed a Petition in this Court requesting an Order modifying the Rules Regulating Trust Accounts by amending Rule 5-1.1(d) of the Rules Regulating the Florida Bar. The Association for Retarded Citizens/ Florida files this response in support of the Petition filed by the Florida Bar Foundation.

### I. INTRODUCTION

ARC/Florida files this response in support of the Florida Bar Foundation's Petition for a specific reason. It does not do so simply to duplicate those other briefs which restate the need for the assistance of counsel for low-income Floridians. There is a well documented need for civil legal services to economically disadvantaged persons in Florida and ARC/Florida does not need to file repetitious briefs in support of that proposition. Indeed, as this Court, in Florida Bar v. Furman, 376 So.2d 378, 382 (Fla. 1976), In Re Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981) and In re Emergency Delivery of Legal Services to the Poor, 432 So.2d 39, 40-41 (Fla. 1983), the

commentators<sup>7</sup> and other respondents<sup>8</sup> have made amply clear, there continues to exist an unmet need for the assistance of counsel for the low-income citizens of Florida. This need can not be met without increased funding for programs devoted to the representation of such persons.

What ARC/Florida wishes to impress upon the Court is the unique legal needs of that special population among us, persons with mental disabilities. The Comment section is divided into four parts. Part A will describe the population of mentally disabled persons in Florida, principally the mentally ill and persons with mental retardation. Part B will discuss the legal needs this client population brings to the legal profession. Part C discusses the legal delivery systems to the mentally disabled. Finally, Part D describes the funding sources for delivering legal services to the mentally disabled.

ARC/Florida's research and analysis of this subject leads it to the conclusion that the most efficient, comprehensive advocacy for the mentally disabled is delivered by specialty programs, staffed by full-time attorneys, funded with public funds. To that end, ARC/Florida urges the Supreme Court to approve the Petition of the Florida Bar Foundation in order that more monies may be available for the delivery of legal assistance to persons with mental disabilities.

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<sup>7</sup> Maher, No Bono: The Efforts of the Supreme Court of Florida to Promote Full Availability of Legal Services, 41 Miami L. Rev. 973 (1987).

<sup>8</sup> See e.g., Brief of Florida Legal Services.

II. COMMENTS

A. The Population of Mentally Disabled

There exists in Florida a sizable population of citizens who are mentally disabled. Whether by mental illness, mental retardation, birth defect or injury, there are thousands of Floridians whose lives are limited, in some respect, by their mental disability.

While the magnitude of the problem is national, there is little reason to look beyond Florida's statistics to understand the size of this special class of legal needy. For instance, as of June 30, 1988 the Florida Department of Health and Rehabilitative Services [HRS] reports that the Developmental Services office of HRS has identified the following number persons receiving services from HRS in their own home:

|                    |                     |
|--------------------|---------------------|
| Mental Retardation | 10,685              |
| Cerebral Palsy     | 641                 |
| Autism             | 81                  |
| Spina Bifida       | 369                 |
| Other              | <u>49</u>           |
| Total              | 11,825 <sup>9</sup> |

In addition, the following figures represent HRS clients who live in a community residential facility or institution:

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<sup>9</sup> Florida Department of Health and Rehabilitative Services, Monthly Data Report 1 (June 30, 1988) [hereinafter Monthly Report].

|   |              |    |
|---|--------------|----|
| Foster or Group Homes                                     | 4,252        |    |
| Intermediate Care Facility/<br>Mentally Retarded (ICF/MR) | 1,930        |    |
| Other Community   | 960          |    |
| Retarded Defendant  | 86           |    |
| DS Institutions   | <u>1,933</u> |    |
| Total   | 9,161        | 10 |

And to this is added yet another 4,515 persons who are identified as in need of services but are on a waiting list awaiting services.<sup>11</sup> Thus the total persons with developmental disabilities in Florida is at least 25,501.

The available data is similar for persons with mental illness. Statistics from the Alcohol, Drug Abuse and Mental Health Program Office of HRS shows that in 1986-87, 6,772 persons were served in mental health institutions while another 181,849 persons were served in community mental health centers.<sup>12</sup> From these published figures it is evident that there is a sizable population of persons with mental disabilities.

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<sup>10</sup> Monthly Report, supra note 9, at 1.

<sup>11</sup> Monthly Report, supra note 9, at 16.

<sup>12</sup> Telephone call with Dennis Temple, Data Section, Alcohol, Drug Abuse and Mental Health Program, Florida Department of Health and Rehabilitative Services, August 24, 1988. Statistics show that the average census for use of operating beds in mental health institutions for 1986-87 was 2,844 for civil commitments and 935 for forensic commitments, for a total daily average of 3,819. Munsingo and Temple, Statistical Report of Hospitals for the Year Ending June 30, 1987 25 (Florida Department of Health and Rehabilitative Services 1987) [Table 2C].

## B. The Legal Needs of the Mentally Disabled

Not surprisingly, persons with mental disabilities, as citizens of Florida and the United States, have many of the exact same legal needs as do the non-disabled population. This is particularly true for the increasing number of persons with disabilities who live in the community. Whether in their parents' home, in their own home or in group or foster homes, the disabled live lives not unlike the non-disabled. As a study sponsored by the Florida Bar discovered, the mentally disabled have legal needs which are virtually indistinguishable from those of the so-called "normal" people.<sup>13</sup> Examples of these legal problems include: housing, banking, public benefits and entitlements, estate planning, family law and employment.<sup>14</sup>

In addition to these problems, persons with mental disabilities present special legal problems which stem from their

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<sup>13</sup> See, Nelson, Miller and Schmidt, The Legal Needs of the Mentally and Developmentally Disabled Citizens of Florida 10 (The Florida Bar 1982) (hereinafter cited as Nelson) [in addition to their unique legal needs, the disabled share the legal problems of the general citizenry]. Indeed, as one author commented, persons with mental disabilities "... have at least as many legal problems as the non-disordered." Miller, Involuntary Civil Commitment of the Mentally Ill in the Post-Reform Era 71 (1987) [hereinafter Miller].

<sup>14</sup> Nelson, supra note 13, at 17-19. For a more detailed description of examples of problems common to the disabled and non-disabled, see, Brakel, Parry & Weiner, The Mentally Disabled and the Law (3rd ed. 1985)[hereinafter Brakel] (Family Laws, 507-558; Immigration Laws, 466-68; and the Privileges and Duties of Citizenship, 445-47).

medical condition. They have unique advocacy needs which arise from the laws and legal decisions that bestow special status or impose special intervention, such as civil commitment, guardianship and special education laws.<sup>15</sup>

The recognition of these "unique" legal rights is relatively new. Beginning in 1972, federal and state courts first began to enunciated the legal rights to which residents of institutions were entitled.<sup>16</sup> These rights included, among others, the right to treatment and habilitation, to refuse treatment, to humane care, to communicate, to religious freedom and to be free from unnecessary restraint.<sup>17</sup>

Following the court decisions, state legislatures and the Congress moved to expand the rights of the mentally disabled. To start, they passed statutes which gave greater protection to the patients of the institutions, to ensure that each patient

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<sup>15</sup> Herr, The Future of Advocacy for Persons with Mental Disabilities, 39 Rutgers L. Rev. 443, 447 (1987) [hereinafter Herr I].

<sup>16</sup> see e.g., Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), aff'd sub nom., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

<sup>17</sup> A detailed description of the residential and treatment rights of persons in institutions can be found at Brakel, supra note 14, at 251-325 and 327-351. See also, Herr, The New Clients: Legal Services for Mentally Retarded Persons, 31 Stanford L. Rev. 553, 569-70 (1979) [hereinafter Herr II]; see generally, Perlin, Ten Years After: Evolving Mental Health Advocacy and Judicial Trends, 15 Fordham Urban L. Rev. 335 (1987) [hereinafter Perlin].



received humane care and appropriate habilitation.<sup>18</sup> In Florida, for instance, the legislature enacted the "Retardation Prevention and Community Services Act, Chapter 393, Florida Statutes (1987)<sup>19</sup> and its counterpart for the mentally ill, the Baker Act, Chapter 394, Florida Statutes (1987).<sup>20</sup>

The principal impetus of the case decisions and the new statutes was, however, "deinstitutionalization". Deinstitutionalization is an ideology supporting community-based noninstitutional care and a realignment of the service delivery system to provide a continuum of care from the home to the institution as well as to depopulate institutions.<sup>21</sup> Deinstitutionalization is a two step process. It involves, first, the removal of inappropriately placed patients from the institution. The person is then placed in the "least restrictive" living environment in the community.<sup>22</sup> In practical

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<sup>18</sup> Brakel, supra note 14, at 251-325; Perlin, supra note 17, at 339-42.

<sup>19</sup> Ch. 77-335, Laws of Fla. Also passed was the Bill of Rights of Retarded Persons, Ch. 75-259, secs. 1-7, Laws of Fla.

<sup>20</sup> Ch. 71-131, Laws of Fla.

<sup>21</sup> Brakel, supra note 14, at 618, citing Bachrach, Commentary, 34 Hosp. & Community Psychiatry 105 (1983). See also, Herr II, supra note 17, at 554-65.

<sup>22</sup> Removing persons with developmental disabilities to the community is designed to improve the quality of life for these persons. As was stated recently, "... no matter how competent the institutional staff may have been, the quality of life offered [in the institution] was seen as increasingly limited." Comprehensive Services Plan for People with Developmental Disabilities: 1988-1992 11-12 (Florida Department of Health and Rehabilitative Services 1988). For a description of the legal basis of deinstitutionalization and community placement, see

terms, this meant new living environments such as group or foster homes or clusters known as intermediate care facilities for the mentally retarded [ICF/MR].<sup>23</sup> As this trend gained momentum in the late 1970's and early 1980's, courts and legislatures began to spell out the rights and entitlements the mentally disabled enjoyed in these community settings. These rights included the rights to education,<sup>24</sup> to vocational services and freedom from discrimination in employment,<sup>25</sup> to treatment,<sup>26</sup> to housing and appropriate zoning,<sup>27</sup> to community placement in the least

generally, Brakel, supra note 14, at 619-629.

<sup>23</sup> As Justice Marshall stated in City of Cleburne, "... as deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 461 (1985) (Marshall, J., concurring and dissenting).

<sup>24</sup> e.g., Education for All Handicapped Children Act, Pub. L. 94-142, 89 Stat. 773 (1975) [codified at 20 U.S.C. secs. 1232, 1401, 1405-06, 1411-20 & 1453 (1982 & Supp. 1988)]; Florida Educational Equity Act, sec. 228.2001, Fla. Stat. (1987). See also Brakel, supra note 14, at 630-48.

<sup>25</sup> e.g., Rehabilitation Act of 1973, Pub.L. 93-112, 87 Stat. 355 (1973) [codified at 29 U.S.C. secs. 701-794 (1982 & Supp. 1988)]; Florida Human Rights Act, sec. 760.10, Fla. Stat. (1987). See also, Brakel, supra note 14, at 648-60; Note, From Wanderers to Workers: A Survey of Federal and State Employment Rights of the Mentally Ill, 45 Law & Contemp. Probs. 41 (Summer 1982).

<sup>26</sup> e.g., Costello & Preis, Beyond Least Restrictive Alternatives: A Constitutional Right to Treatment for Mentally Disabled Persons in the Community, 20 Loy. L.A. L. Rev. 1527 (1987).

<sup>27</sup> e.g., Florida Fair Housing Act, secs. 760.23, 760.24 & 760.25, Fla. Stat. (1987); City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985). See also Brakel, supra note 14, at 660-77.

restrictive alternative,<sup>28</sup> and to increased incentives to participate in activities "normal" to the non-disabled population.<sup>29</sup>

C. Delivery Systems of Legal Services  
to the Mentally Disabled

The growing empowerment of the mentally disabled has not automatically been transformed into better living conditions. Though in theory persons with mental disabilities have, at least, the same basic legal rights as other persons, their legal rights were often abrogated without due process of law.<sup>30</sup> When people are confronted with such circumstances they normally turn to lawyers to correct the illegalities; either to take legal steps to halt the conduct or to plan future steps which will avoid unnecessary confrontation. For the mentally disabled, however, the legal profession has been an empty promise. As one authority on the delivery of legal services to the mentally disabled has stated,

[u]ntil very recently, the history of the  
legal profession's service to retarded persons

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<sup>28</sup> e.g., Brakel, supra note 14, at 626-629. For a detailed explanation of the rights and entitlements of persons with mental disabilities in the community, see, Brakel, supra note 14, at 607-691.

<sup>29</sup> Persons with mental disabilities in Florida qualify for a number of other, non-monetary benefits because of their disability. These include: exemptions from certain wildlife, fishing and hunting stamps, sec. 372.57 (6)(b), Fla. Stat. (1987) and educational opportunities, see note 23, supra.

<sup>30</sup> Herr II, supra note 17, at 554

was one of apathy and neglect. Retarded people received no legal help at all in many types of situations crucial to their rights; decisions about the retarded person's life and liberty were left to parents or custodians, regardless of any conflict of interest. Even when available, legal assistance was often nominal ...<sup>31</sup>

The past two decades of law reform have not made the task of the legal profession easier; if anything it has made it harder. Instead of providing a viable remedy to the lack of legal representation, all too often the new court decisions and statutes have tended to establish rights without the means for their daily enforcement.<sup>32</sup>

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<sup>31</sup> Herr II, supra note 17, at 567-68; Perlin & Sadoff, Ethical Issues in the Representation of Individuals in the Commitment Process, 45 Law & Contemp. Probs. 161 (Summer 1982) [hereinafter Perlin & Sadoff] [lawyers provide grossly inadequate representation]. An example of this is the terrible history of the representation of the mentally disabled at civil commitment proceedings. Though the persons had the "right" to counsel, in practice there were few attorneys available to represent them at commitment hearings; and when they were available, the attorneys took little time to prepare and lacked specialized training in the nature of the proceedings. Miller, supra note 13, at 66-69; Perlin & Sadoff, at 164 [a pathetic record of representation by attorneys at commitment hearings]. Mentally disabled clients are, thus, often provided with substandard representation. ABA/BNA, Lawyers Manual on Professional Conduct 31:601, 603 (1984).

<sup>32</sup> Herr II, supra note 17, at 570. An example of this can be found in the expanding rights of children with disabilities to a free, appropriate education. The original Education for All Handicapped Children Act did not provide for attorney's fees to enforce the statute, see, Pub. L. 94-142, 89 Stat. 773 (1975); Smith v. Robinson, 468 U.S. 992 (1984). It was not until 1986 that the United States Congress amended the statute to correct this deficiency. Handicapped Children's Protection Act of 1986, Pub. L. 99-372, sec. 2, 100 Stat. 796 (1986) [codified at 20 U.S.C. sec. 1415 (e)(4)(B) (Supp. 1988)]. Florida, on the other hand, has been more generous in providing incentives for representing persons with mental disabilities. e.g., sec. 760.35 (2), Fla. Stat. (1987) [award of attorney's fees for enforcement of Florida Fair Housing Act]; sec. 760.10 (13), Fla. Stat. (1987)

The traditional method for delivering legal services to the public has been the fee-for-service, private attorney model. This private attorney-client relationship model, however, has failed to deliver adequate legal services to the mentally disabled.<sup>33</sup> It has proven to be an inefficient method to deliver high quality, low cost legal services to persons with mental disabilities. A number of reasons have been advanced for this failure.

One of the principal problems for attorneys is simply the inability of attorneys to communicate with their clients. The traditional attorney-client model relies on a cooperative venture between attorney and client. In conventional private practice the client identifies the nature and scope of his or her interest while the attorney uses legal skills to achieve those goals.<sup>34</sup> That model, however, presents great difficulty for the mentally disabled client. Large numbers of these clients lack the skill and capacity to communicate to provide guidance to the

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of Florida Fair Housing Act]; sec. 760.10 (13), Fla. Stat. (1987) [award of attorney's fees for enforcement of Florida Human Rights Act] and sec. 228.2001 (8), Fla. Stat. (1987) [award of attorney's fees for enforcement of Florida Educational Equity Act].

<sup>33</sup> Herr, The New Clients: Legal Services for Mentally Retarded Persons 118 (Legal Services Corporation 1979) [hereinafter cited as Herr III].

<sup>34</sup> Mickelberg, The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals, 31 Stanford L. Rev. 625 (1979). It is further assumed that the client has the information, mobility and perseverance to locate, retain and guide a lawyer to resolve the legal problem. This is an assumption which has little relevance for the mentally disabled. Herr III, supra note 33, at 118.

lawyer.<sup>35</sup> As the court in Brewster v. Dukakis,<sup>36</sup> recognized, persons with mental disabilities have unique problems in recognizing and asserting their legal rights due to their cognitive limitations and impaired ability to communicate.<sup>37</sup> This inability to communicate with their client hinders the attorney-client relationship. Attorneys often perceive mentally disabled persons as the most troublesome and difficult of clients so that there is every reason to be concerned that they will receive less legal services than other low-income clients.<sup>38</sup>

A second recurring problem of private bar initiatives on behalf of the mentally disabled is the lack of professional expertise in the area of mental health law.<sup>39</sup> Cases representing the mentally disabled generally do not generate fees to fairly

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<sup>35</sup> Mickelberg, supra note 34, at 625; Brakel, supra note 14, at 681-83; Herr III, supra note 33 at 121-22; ABA/BNA, Lawyers Manual on Professional Conduct 31:601, 603 (1984). Mickelberg does point out that the gravity of the communication barrier is often exaggerated by attorneys. The barriers do exist when representing the profoundly and severely retarded. But he also noted that the same concern for adequate communications was not warranted when attorneys communicated with the mildly and moderately retarded. These persons were often able to express themselves. Mickelberg at 626.

<sup>36</sup> 520 F. Supp. 882 (D. Mass. 1981), vacated and remanded on other grounds, 675 F.2d 1 (1st Cir. 1982).

<sup>37</sup> 520 F. Supp. at 889.

<sup>38</sup> Brakel, supra note 14, at 683.

<sup>39</sup> Brakel, supra note 14, at 683.

compensate the attorney, which in turn results in a lack of expertise on these issues in the private bar.<sup>40</sup>

Added to the problems generally applicable to all mentally disabled persons are those related to "access" to legal assistance. For residents of state and private institutions and residential facilities access to an attorney is particularly difficult. Separated from the rest of society, patients in these facilities do not have the opportunity of ready availability to legal counsel, in a setting where lawyers rarely venture.<sup>41</sup>

The net result of the application of the traditional

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<sup>40</sup> Herr I, supra note 15, at 455; Brakel, supra note 14, at 683; Brewster, 520 F. Supp. at 888 [persons with mental disabilities suffer the normal handicap of economically disadvantaged persons; they can not purchase legal assistance]. What has been stated about fee-for-service delivery, is also true for many pro bono efforts. Pro bono by individual attorneys has been extremely limited with prospects for improvement uncertain. Brakel, supra note 14, at 683. Organized pro bono panels have been more successful. These panels have tended to operate as a supplement to existing staff attorney programs with support to the pro bono attorneys supplied by the staff for intake, training and technical assistance. Brakel, supra note 14, at 682. Overall, the intervention by pro bono attorneys, including the opportunity to collect attorney's fees, has had little impact on legal services to the mentally disabled. Nelson, supra note 13, at 33; Herr I, supra note 15, at 456. Consequently, pro bono programs are not a substitute for the public legal services in representing persons with mental disabilities. See, Herr I, supra note 15, at 455-56.

<sup>41</sup> Herr III, supra note 33, at 122-30; Nelson, supra note 13, at 32-33; Brakel, supra note 14, at 683 [mentally disabled clients living in institutions are the most isolated from even existing advocacy programs]; Brewster, 520 F. Supp. at 888 [geographical distribution of class makes legal representation difficult]. In Florida there are four (4) Developmental Services Sunland Centers and seven (7) state hospitals operated by the Alcohol, Drug Abuse and Mental Health Program Office. The institutions are distributed throughout the state.

delivery model of legal services is that "... disabled clients often are provided with substandard representation.<sup>42</sup>

To correct the failings of the fee-for-service model, alternative forms of delivery systems were devised to address the specific needs of legal services for the mentally disabled. The principal delivery model developed was the staff-attorney, specialty law project.

These disability law projects were designed as separate programs, or units within larger low-income, staff attorney delivery programs, to employ people to exclusively represent the mentally disabled. The concept envisioned that the attorneys would have the requisite education, experience and time to focus solely upon the legal needs of the mentally disabled. Further, the programs were to be located either at, or very near, to the institutional population. By combining a "continuum" of legal services within the ambit of one agency, the specialty law project was planned to be the most efficient delivery system available.<sup>43</sup>

By the end of the 1970's a number of such programs

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<sup>42</sup> ABA/BNA, Lawyers Manual on Professional Conduct 31:601, 603 (1984).

<sup>43</sup> Herr III, supra note 33, at 138-42 [specialist projects are essential]. The "continuum" of services would include direct representation, legislative advocacy, affirmative outreach and back-up and technical assistance to consumer groups and lay advocacy organizations. Id at 139.



existed. But, for the most part, they were small<sup>44</sup> and relied heavily on public funds.<sup>45</sup> In total, the projects represented only a handful of attorneys providing assistance to the mentally disabled. These attorneys could, therefore, barely touch the most important mental retardation issues and were unable to provide representation to all retarded persons who required assistance.<sup>46</sup>

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<sup>44</sup> Herr II, supra note 17, at 576 [only a handful on a regular basis]. By 1987 the number of attorneys nationwide providing such assistance ranged between 350 and 550. Herr I, supra note 15, at 452-53.

<sup>45</sup> Herr II, supra note 17, at 571. Though many of the programs were established with public funds provided by the Legal Services Corporation and the Protection and Advocacy System [see notes 49-60 and accompanying text] a number of other programs were established and funded by bar associations, state governments [e.g., New Jersey Department of Public Advocacy and the Ohio Legal Rights Service] and law schools [law school clinics representing the mentally disabled have been established at the University of Maryland, University of Toledo, Yale University and the University of Virginia]. Herr I, supra note 15, at 454-55; Herr II, supra note 17, at 571-72. In Florida, the Florida State University Law School has established an "extern" clinic placement at Florida State Hospital in Chattahoochee. Spitzer, Clinical Education in Florida, 12 Nova L. Rev. 797, 816 (1988). By 1987, approximately 2/3 of all such programs were funded by public funds. Herr I, supra note 15, at 452-53.

<sup>46</sup> Herr II, supra note 17, at 574. Protection and Advocacy systems either turned clients away or established waiting lists for service to clients. See note 58, infra.

D. Legal Resources for the Mentally Disabled and the Need for Additional Funding for Legal Assistance to the Mentally Disabled

The specialty disability law project has proven itself to be a success.<sup>47</sup> But its successes have been limited and the programs have not grown in the numbers that its advocates had desired. As stated above, the programs have tended to be small in size with limited staff. Without sufficient staff the projects could address but a fraction of the legal needs of the mentally disabled. The single culprit for restraining the growth of these programs has been money. Stated succinctly, "[t]he advocacy movement [for the mentally disabled] is squeezed by expanding needs in the face of dwindling resources."<sup>48</sup>

The lack of sufficient resources, alone, has forced persons with mental disabilities into second class citizenship. Without increased public funding, the mentally disabled will continue to be without the tools necessary to vindicate their rights.

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<sup>47</sup> Undisputedly, counsel is best provided through a regularized system of legal services, established in regularized offices, staffed with full-time attorneys whose sole job it is to represent the handicapped. Perlin & Sadoff, supra note 31, at 173-74 [citing also the recommendations of the President's Commission on Mental Health (1978)].

<sup>48</sup> Herr I, supra note 15, at 450. In describing the ideal advocacy system for the mentally disabled at the Northampton State Hospital, the court in Brewster said the system must have three essential characteristics: legally trained advocates, independence from governmental interference, and sufficient funds for financial and professional stability. Brewster, 520 F. Supp. at 890.

Much of the legal advocacy in the last two decades for the mentally disabled has been undertaken by staff attorneys funded under either the federal Legal Services Corporation Act,<sup>49</sup> or the Protection and Advocacy system created by the Developmentally Disabled Assistance and Bill of Rights Act of 1975.<sup>50</sup> These two staff attorney models have provided the bulk of the representation of persons with mental disabilities.<sup>51</sup>

Even at the height of federal funding for legal services, however, programs directed to the mentally disabled were "woefully underfunded" with only a "handful" of attorneys available to regularly represent their clients.<sup>52</sup> All too often the programs were required to rely on funds which were limited in amount and of short term duration.<sup>53</sup>

Recently both of these programs have suffered from a lack of adequate funds to perform the tasks which they have been legislatively mandated to do.

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<sup>49</sup> Pub. L. 93-355, 88 Stat. 378 (1974) [codified at 42 U.S.C. secs. 2996 to 2996(1) (1983)]. The Legal Services Corporation is mandated to address the needs of the disabled. 42 U.S.C. sec. 2996f (a)(2)(C)(i).

<sup>50</sup> Pub. L. 94-103, 89 Stat. 486 (1975). The Act has been extensively amended. The Protection and Advocacy system sections are now codified at 42 U.S.C. secs. 6041-43 (Supp 1988).

<sup>51</sup> Brakel, supra note 14, at 285 and 680. See also note 45, supra.

<sup>52</sup> Herr III, supra note 33, at 58-67; Nelson, supra note 13, at 31-32.

<sup>53</sup> Herr II, supra note 17, at 577-79.

The most significant damage to the publicly funded legal services programs has been to the federal Legal Services Corporation. In the early 1980's the Corporation had its appropriations cut by 25%.<sup>54</sup> Despite subsequent increases, the Corporation is presently funding programs in an amount which is 30% below that which distributed in 1980.<sup>55</sup>

The Protection and Advocacy System has fared somewhat better. The P & A system is specifically designed to bring advocacy services to the mentally disabled.<sup>56</sup> As the Congress reiterated in its 1984 amendments to the Developmentally Disabled Assistance Act, it views the

... State P & A Systems to be of critical importance in the expanding effort by Congress to assure disabled persons both protection of their rights under law and full access to federally funded programs.<sup>57</sup>

There have been no cuts in the systems' federal allocation, but the increases have been small. The Congress attempted to address its responsibility to the mentally disabled by recognizing that providing "the resources necessary to match

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<sup>54</sup> Herr I, supra note 15, at 453.

<sup>55</sup> What happened to the Legal Services Corporation has also been reflected in other federal funding schemes. During the 1970's a number of advocacy programs for the mentally disabled were funded as "demonstration projects" by the National Institute for Mental Health [NIMH]. After 1980, these projects were no longer funded by NIMH. Herr I, supra note 11, at 453-54.

<sup>56</sup> 42 U.S.C. sec. 6042 (a)(2)(A)(i) [the state P & A system must have the authority to pursue legal, administrative and other appropriate remedies to ensure the protection of, and advocacy for, the rights of the developmentally disabled].

<sup>57</sup> S. Rep. No. 493, 98th Cong., 2d Sess. 28, reprinted in 1984 U.S. Code Cong. & Ad. News 4334, 4361.

the mandate of the P & A systems is essential if the job is to be done."<sup>58</sup> Despite this statement in 1984, less than four years later, the Congress was forced to acknowledge that additional appropriations were necessary because the P & A's were "turning away large numbers of eligible clients due to a lack of funding."<sup>59</sup> The Congress thus increased its funding for the P & A systems through fiscal year 1990. It is important to note, however, that the total appropriation for all P & A Systems, combined, is less than \$25 million dollars.<sup>60</sup>

In light of the current political climate in Washington, the only viable alternative for publicly funded specialty law projects for the mentally disabled remains in state funding mechanisms. If action for low-income legal representation is not advanced at the state level, then services to the poor and disabled will be frozen at current levels.

One of the principal sources for state legal services funding is the attorney's Interest on Trust Accounts [IOTA] program. Since the establishment of the Florida program in 1981,

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<sup>58</sup> S. Rep. No. 493, 98th Cong., 2d Sess. 29, reprinted in 1984 U.S. Code Cong. & Ad. News 4334, 4362.

<sup>59</sup> S. Rep. No. 113, 100th Cong., 1st Sess. 24, reprinted in 1987 U.S. Code Cong. & Ad. News 781, 804. The P & A's had also resorted to "waiting lists" as a method of allocating services to the next in line. Id at 790-91. Further, this lack of funding "resulted in underserving several populations such as minorities and persons with developmental disabilities in the criminal justice system and nursing homes and ICF/MR's." Id at 804.

<sup>60</sup> The appropriation for fiscal year [FY] 1989 is \$22 million dollars and \$24.2 million dollars for FY 1990. 42 U.S.C. § 6043 (Supp. 1988).

numerous states have created IOTA programs. As allocations have been distributed, programs specifically representing the mentally disabled have participated, along with other civil legal services programs, in the receipt of publicly generated IOTA funds to provide legal representation to the disabled.<sup>61</sup>

#### CONCLUSION

The Petition filed by the Florida Bar Foundation addresses a legal need which can not be ignored. Equal access to justice is a meaningless promise without attorney representation. While this is true for all low-income and disadvantaged citizens, it is particularly true that " [t]he right to counsel is hollow if no attorneys are available to provide the services [to the mentally disabled]." <sup>62</sup> Though new statutes and case law give the mentally disabled expanded rights, those entitlement often go unclaimed without assistance of counsel.<sup>63</sup>

The mentally disabled make up a class of persons who are regularly without sufficient funds to afford private legal counsel. They are dependent on publicly funded staff attorneys

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<sup>61</sup> As an example, in 1984, the Maryland IOTA program distributed \$840,000 to local legal services programs. The state P & A program, the Maryland Disability Law Center, was one of the recipients. Herr I, supra note 15, at 479.

<sup>62</sup> Brakel, supra note 14, at 285.

<sup>63</sup> Herr III, supra note 33, at 108-09. Without trained advocates, persons with mental disabilities suffer chronic and substantial deprivation of their rights. Brewster, 520 F.Supp. at 890.

to provide the legal assistance they need. Because of funding restraints, the programs generally available to the mentally disabled have either closed their doors or been reduced in size.

This Court can reverse this pattern in Florida. The Florida Bar Foundation's Petition pointedly argues that the adoption of a comprehensive IOTA program will offer great benefits to the public without loss of protection to clients. At the same time it will also benefit those Floridians who are presently unable to pay for legal services. No single group can benefit from the results of comprehensive IOTA more than the mentally disabled. After years of neglect, the legal programs which offer hope to these clients deserve, not merely to exist, but to expand to allow greater access by persons with mental disabilities to the legal system.

Mr. Justice Oliver Wendell Holmes once stated, "[t]axes are what we pay for a civilized society."<sup>64</sup> In the same way that taxes can better the citizens' welfare, so too can the lawyer's trust funds be used to improve the quality and quantity of legal services to the poor. These funds are desperately needed to expand programs for the mentally disabled. The mandate of a comprehensive IOTA program will, in no small way, improve the administration of justice for persons with mental disabilities.

For the reasons stated above, the Association for Retarded Citizens/Florida respectfully requests this Court to

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<sup>64</sup> Compania General de Tabacos de Filipina v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927).

grant the Petition of the Florida Bar Foundation. Without this source of expanded public monies, the mentally disabled will not enjoy the equal access to justice to which they are entitled.

Respectfully submitted,

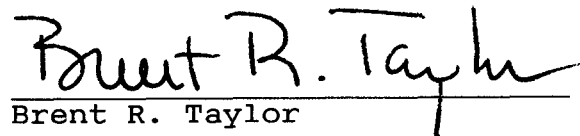
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Brent R. Taylor  
Attorney for ARC/Florida



CERTIFICATE OF SERVICE

I, BRENT R. TAYLOR, HEREBY CERTIFY that a true and correct copy of the Response of the Association for Retarded Citizens/Florida was mailed, postage paid, to WILLIAM O.E. HENRY, Esquire, The Florida Bar Foundation, Suite 102, 880 North Orange Avenue, Orlando, Florida, 2801-1023, RODERICK N. PETREY, Esquire, The Florida Bar Foundation, 3400 One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33133 and JOHN F. HARKNESS, JR., Esquire, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 30th day of August, 1988.

  
Brent R. Taylor

APPENDIX "A"

ARC/FLORIDA RESOLUTION SUPPORTING THE  
FLORIDA BAR FOUNDATION'S PETITION REQUESTING  
COMPREHENSIVE IOTA

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WHEREAS, the Association of Retarded Citizens/Florida [ARC/Florida] is an association representing thousands of Floridians with mental retardation and their families; and

WHEREAS, ARC/Florida is aware that many of these citizens are persons who, like other citizens of Florida, have problems and questions which need the assistance of an attorney for their resolution; and

WHEREAS, ARC/Florida is also aware that many of these citizens are persons who are low-income persons whose only source is often governmental benefits for the disabled; and

WHEREAS, these persons with mental retardation cannot afford the services of an attorney without the assistance of legal advocacy providers whose attorneys are funded in part by the Florida Bar Foundation's Interest on Trust Accounts [IOTA]; and

WHEREAS, there is a need for legal services to persons with mental retardation greater than that currently provided by these legal advocacy groups, and

WHEREAS, the need is especially acute for those Floridians, like many persons with mental retardation, who are residing in institutions and community residential facilities and have the additional problem of physical access to an attorney and the court system; and

WHEREAS, the public interest of all citizens of Florida would be enhanced by allowing persons with mental retardation greater access to equal justice through the judicial system of Florida; and

WHEREAS, ARC/Florida is aware of the Petition filed by the Florida Bar Foundation in the Supreme Court of Florida requesting the Court to modify the current IOTA program to become a comprehensive program, thereby generating more funds from specified client trust accounts which would become available to the Florida Bar Foundation's Legal Assistance to the Poor [LAP] for distribution to legal service providers who will provided the need legal assistance to Floridians with mental retardation;

NOW, THEREFORE, be it resolved that ARC/Florida hereby supports the position of the Florida Bar Foundation in its filing of the Petition in the Florida Supreme Court and urges the Florida Supreme Court to amend the Florida IOTA program to become a comprehensive program.

APPROVED BY THE BOARD OF DIRECTORS FOR ARC/FLORIDA AT ITS REGULARLY SCHEDULED BOARD MEETING, FRIDAY, JULY 22, 1988 IN TAMPA, FLORIDA.



*Malcolm MacKenzie*  
Malcolm MacKenzie  
President of the Board  
ARC/Florida