IN THE SUPREME COURT OF THE STATE OF ALASKA

ROSYLYN WETHERHORN,

Appellant,

v.

ALASKA PSYCHIATRIC INSTITUTE,

Appellee.

Supreme Court No. S-11939

Case Number 3AN-05-0459 PR

RESPONSIVE SUPPLEMENTAL BRIEFING RE: APPLICATION FOR FULL REASONABLE FEES

In its May 22, 2007 Order, this Court requested supplemental briefing addressing the effect of its recent decision in *State v. Native Village of Nunapitchuk*, 156 P.3d 389 (Alaska 2007), including whether Ms. Wetherhorn's request for full fees was subject to apportionment. The Order also requested that Ms. Wetherhorn provide an accounting of the time her counsel spent on any successful constitutional claim. Ms. Wetherhorn filed her supplemental briefing and API now offers its response.

I. Background and Introduction.

Ms. Wetherhorn's original fee request was premised upon her claim of public interest litigant status. API responded to that request by arguing that the Court's original award of $1000 in fees was reasonable, as would be no fee award, given the lack of a clear victor in the case. In addition, API noted that the public interest litigant exception had been modified by changes to AS 09.60.010 that the legislature made in

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2003 through HB 145. Under the revised act, if Ms. Wetherhorn were deemed to be the prevailing party, she could only claim full fees as a public interest litigant for work related to a successful constitutional claim. Ms. Wetherhorn had argued that the new act was unconstitutional because HB 145 did not pass the legislature by the two-thirds majority required for legislative changes to court rules. API countered that the changes made were matters of substance rather than procedure, and that accordingly the legislature was not constrained by Article IV, section 15's requirement of a super-majority.

This Court held the motion for fees in abeyance pending its issuance of the *State v. Native Village of Nunapitchuk* decision. *Nunapitchuk* addressed the question of HB 145's constitutionality in the context of an award of public interest litigant fees before the trial court. This Court found that the public interest litigant exception was a court-made doctrine of substantive law that the legislature could modify as a matter of public policy, without adhering to the super-majority required for changes to court rules. 156 P.3d at 404. The Court also accepted the state's concession that "HB 145 does not modify [Civil Rule] 82 or [Appellate Rule] 508, but rather a common law doctrine that limited where those rules would be applied." *Id.* at 404-05. At the same time, the Court advised that a limiting interpretation should be given Rule 82:

> Specifically, although we recognize that subsection (b)(3)(K) gives courts discretion to consider a broad range of equitable factors in awarding fees, we believe that courts must take care to avoid using this equitable power as an indirect means of accomplishing what HB 145 has now disallowed-using awards of attorney's fees to encourage litigation of claims that can be characterized as involving the public interest.

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Id. at 405.

In Ms. Wetherhorn's supplemental briefing, she suggests that the public interest litigant exception as it pertains to fee awards on appeal might be textually based in Appellate Rule 508, in which case HB 145 would not be constitutional for failure to pass by a supermajority of votes. She also argues, for the first time, that she is entitled to an award of full reasonable fees under Rule 508 apart from the public interest litigant exception or any status as a prevailing party. She asserts that her claim to full fees is constitutionally based in the right to counsel, the court's interest in administration and justice, and the right of access to the courts.

As will be shown below, none of these arguments support Ms. Wetherhorn's claim to full reasonable fees for her volunteer counsel, beyond those apportioned to any constitutional issue successfully pursued.

II. *Nunapitchuk*'s Conclusion that the Court-Made Public Interest Litigant Exception is a Matter of Substantive law, Rather than Procedure, Applies Equally to the Doctrine as Applied to Fee Awards on Appeal.

As discussed above, this Court, in *Nunapitchuk*, concluded that "the public interest litigant exception is a rule of substantive law that can be changed by the legislature without a two-thirds vote." *Id.* at 395. While *Nunapitchuk* was decided in the context of the award of fees by the trial court, the conclusion that the public interest litigant exception is a matter of substantive law applies with just as much force to the award of fees on appeal. HB 145 alters that substantive law to conform to the legislature's policy preferences regarding the encouragement of public interest litigation. *See, e.g., id.*

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at 405. Because HB 145 did not amend Appellate Rule 508, but rather the court-developed common law doctrine establishing an exception to the court rule, it is of no constitutional moment that HB 145 failed to pass by a two-thirds majority. The changes enacted in HB145 apply to fee awards on appeal. Ms. Wetherhorn's suggestion that the law is not valid as applied to appeals must be rejected. Her claim to full reasonable fees as a public interest litigant is substantially reduced as a result of the operation of the new law.

A. The public interest litigant exception is substantive law, not textually based in Appellate Rule 508.

This Court's conclusion that the public interest litigant exception is a matter of substantive law is not reasonably limited to the award of fees before the trial court. This Court relied on the similarities in purpose and operation of intertwined fee-shifting provisions, which are substantive in nature, and the public interest litigant exception to conclude that the public interest litigant exception is matter of substantive law as well. *Id.* at 403-05.[1] The Court explained:

> Like intertwined fee-shifting provisions, we believe that the public interest litigant exception is a doctrine of substantive law. It is, to use the *Nolan* language, "closely related to ... matters of public policy properly within the sphere of elected representatives." As such, the exception is within the power of the court to develop in the process of the adjudication of cases. But, like other doctrines that are case law based, it is

[1] This Court did not limit its examples of intertwined fee-shifting statutes to instances affecting trial court fee awards. It also included a reference to such statute limiting a fee award on appeal. *See id.* 404, n. 64 (citing *Whaley v. Alaska Workers' Compensation Board*, 648 P.2d 955, 960 (Alaska 1982) (award of fees against injured employee on appeal improper absent showing appeal was frivolous, unreasonable or in bad faith.))

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> subject to legislative control. The purpose of section 2 of HB 145 is "to expressly overrule" the decisions of this court establishing the public interest litigant exception. We conclude that this purpose falls within the legislature's authority. HB 145 therefore is valid insofar as it abrogates the public interest litigant exception developed by the decisions of this court.

Id. at 404 (footnotes omitted).

There is no reasonable basis for concluding that the legislature acts within its sphere of policy-making authority to alter the award of fees to and against public interest litigants at the trial level but not on appeal. By its terms, HB 145's amendments to AS 09.60.010 apply to both "civil actions and appeals."[2] And the legislature's express purpose is to overrule decisions of this Court relating to the award of costs or fees to or against public interest litigants in future civil actions and appeals.[3] This Court's decision

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[2] *See* sec. 2 of HB 145, amending AS 09.60.010(b), (c).

[3] Section 1 of HB 145 sets forth the purpose of the new law:

> The uncodified law of the State of Alaska is amended by adding a new section to read:
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> PURPOSE. (a) The judicially created doctrine respecting the award of attorney fees and costs for or against public interest litigants has created an unbalanced set of incentives for parties litigating issues that fall under the public interest litigant exception. This imbalance has led to increased litigation, arguments made with little merit, difficulties in compromising claims, and significant costs to the state and private citizens. More importantly, application of the public interest litigant exception has resulted in unequal access to the courts and unequal positions in litigation.
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> (b) The purpose of sec. 2 of this Act to provide for a more equal footing for parties in civil actions and appeals by

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extending the public interest litigant exception to matters on appeal is one of the cases expressly overruled: *Thomas v. Bailey*.[4]

Moreover, the basis for the decision in *Thomas v. Bailey* provides further support for the conclusion that the nature of the public interest litigant exception does not change if a matter is a civil action versus an appeal. To the contrary, this Court announced that "[i]n determining the amounts of attorney's fees on appeal in public interest litigation, we believe that the same considerations are applicable as at the trial level." 611 P.2d at 539.[5] At the trial level and on appeal, the doctrine is one of substantive law, grounded in

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> abrogating the special status given to public interest litigants with respect to the award of attorney fees and costs. It is the intent of the legislature to expressly overrule the decisions of the Alaska Supreme Court in *Dansereau v. Ulmer,* 955 P.2d 916 (Alaska 1998); *Southeast Alaska Conservation Council, Inc. v. State,* 665 P.2d 544 (Alaska 1983); *Thomas v. Bailey,* 611 P.2d 536 (Alaska 1980); *Anchorage v. McCabe,* 568 P.2d 986 (Alaska 1977); *Gilbert v. State,* 526 P.2d 1131 (Alaska 1974), and their progeny, insofar as they relate to the award of attorney fees and costs to or against public interest litigants in future civil actions and appeals.

[4] *See* HB 145 sec. 1 text, quoted *supra* n.3.

[5] Ms. Wetherhorn acknowledges this same language, but posits that the discretion afforded the court under Appellate Rule 508 sets the public interest litigant exception on appeal apart from the exception as applied to trial matters normally subject to the more constrained Civil Rule 82. Wetherhorn Supp. Br. at 4-5. Ms. Wetherhorn's discretion-distinction is unconvincing as it appears to ignore both what this Court said in *Thomas,* as well as the significant discretion allowed at the trial level to vary awards under Civil Rule 82. *See Nunapitchuk*, 156 P.3d at 405 (recognizing trial court's discretion to consider a broad range of equitable factors under Civil Rule 82.)

In addition, the Court has looked to the standards applied in trial-level public interest litigant exception cases to guide its consideration of fee awards on appeal. *See Oceanview Homeowners Ass'n, Inc. v. Quadrant Const. and Engineering*, 680 P.2d 793,

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policy considerations which the legislature may overrule. To paraphrase this Court, HB 145 "modifies a policy-based nontextual exception [to the court rules and] is an appropriate subject for legislative action." *Nunapitchuk*, 156 P.3d at 392.[6] And as in *Nunapitchuk*, API's position is "supported by the rule of construction that statutes should be construed, if possible, to avoid the risk of unconstitutionality." *See id.* at 405.

Moreover, because the nature of the public interest litigant exception is the same on appeal as before the trial court, the same limiting interpretation that this Court offered as applying to Civil Rule 82 should be applied to Appellate Rule 508. Accordingly, this Court or the superior court when acting as an appellate court should "take care to avoid using [its discretion under Rule 508] as an indirect means of accomplishing what HB 145 has now disallowed." *Nunapitchuk*, 156 P.3d at 405.

B. Apportionment is a central feature of the substantive policy changes the legislature made in HB 145.

The stated purpose of HB 145 is to overrule a number of court decisions

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799 (Alaska 1984) (relying on *Kenai Lumber Co. v. LeResche,* 646 P.2d 215 (Alaska 1982) for four criteria for identifying public interest suits not subject to fee awards under Civil Rule 82, also citing *Anchorage v. McCabe,* 568 P.2d 986 (Alaska 1977)). This reliance reinforces that the exception is premised on broad policy considerations rather than the text of any court rule.

[6] Under Appellate Rule 508, full fees are not available to a successful party unless the court determines an appeal or cross appeal is frivolous or brought for purposes of delay, or if the case falls within the express exemption for workers' compensation appeals. R. App. P. 508 (e), (g). Actual attorney's fees may also be awarded where authorized by statute. *Kenai Peninsula Borough v. Cook Inlet Region, Inc.*, 807 P.2d 487, 501 (Alaska 1991).

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relating to the award of attorney's fees to or against public interest litigants.[7] In place of the judicially created doctrine, which the legislature found had created an "unbalanced set of incentives" resulting in "increased litigation, arguments made with little merit, difficulties in compromising claims, and significant costs to the state and private citizens,"[8] the legislature provided new standards reflecting its policy choices regarding the encouragement and reward for public interest litigation. Under HB 145, full fees as a public interest litigant are available only for services devoted to constitutional claims upon which the party prevailed.[9]

This makes two major changes in the operation of the public interest litigant exception. First, the exception only applies to constitutional claims; and second, it requires apportionment of fee awards, overruling *Dansereau v. Ulmer,* 955 P.2d 916 (Alaska 1998). Ms. Wetherhorn separates the two main changes made by HB 145 and argues that this Court ought to consider the legislature's overruling of the apportionment rule announced in *Dansereau* to be a change to procedure. Wetherhorn Supp. Br. at 20-21. This position must be rejected.

There is nothing to indicate that *Dansereau* is different than the other "case law based" doctrine that this Court recognized is subject to legislative control. *Nunapitchuk*, 156 P.3d at 404. Whether to reward success on a constitutional claim with

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7 *See* sec. 1 of HB 145, quoted *supra* n.3.

8 HB 145, sec. 1(a).

9 *See* sec. 2 of HB 145, amending AS 09.60.010(b)-(d).

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full fees for the entire case, including losing issues, or to award full fees only for services devoted to successful constitutional claims reflects a public policy call as to how best to encourage meritorious litigation. It is part of the creation of a right, not merely the method of enforcing it.

This central feature of HB 145 is operative against Ms. Wetherhorn and significantly reduces any potential fee award to her as a public interest litigant.

C. Ms. Wetherhorn may only claim full fees as a public interest litigant for services provided in this case related to the gravely disabled issue.

The only constitutional issue upon which Ms. Wetherhorn claims to have prevailed is the gravely disabled issue.[10] Ms. Wetherhorn reports that only approximately one-eighth of her attorney's fees incurred were associated with this issue. Wetherhorn Supp. Br. at 22. Ms. Wetherhorn candidly acknowledges that her focus in this case was the issue of ineffective assistance of counsel. *Id.* at 21. This Court declined to address the claim because it was first raised on appeal, and thus there was no record established concerning counsel's challenged acts or omission that would permit the Court's effective review without "engag[ing] in the perilous process of second-guessing." *Wetherhorn*, 156 P.3d 371, 384 (Alaska 2007).

API does not challenge the reasonableness of the time spent on the gravely

[10] In its initial response to Ms. Wetherhorn's application for fees, API questions whether Ms. Wetherhorn actually prevailed on this issue. *See* API's Response to Application for Full Reasonable Fees at 1-5.

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disabled issue,[11] but it does contest Ms. Wetherhorn's attempt to claim fees for work done by her attorney in entirely separate cases for different clients. Ms. Wetherhorn seeks to double her potential fee award by claiming work done before the trial court in Myers and other cases that related to the gravely disabled issue. Wetherhorn Supp. Br. at 21-22. While Ms. Wetherhorn cites two cases providing support for an award of fees for work incurred outside of the actual appeal, those cases do not support her claim. The legal work in those two cases was directly related to and necessary to the appeal. One party was not claiming fees for work her attorney had done for other clients, in unrelated cases.

In the first case, *Cook Inlet Pipeline v. APUC*, 836 P.2d 343, 354 (Alaska 1992), the prevailing party was allowed to claim fees for the time its counsel spent researching how to intervene in an appeal when it had not been a party in the administrative proceeding. That research was done for that party, for use in that case.

In the second case, *Aloha Lumber Corp. v. Univ. of Alaska*, 994 P2d 991, 1003 (Alaska 1999), Aloha had instituted a superior court action seeking injunctive and declaratory relief. It named Wasser and others as parties. *Id.* That action was remanded to the University for further administrative consideration, and the case continued later as an administrative appeal. *Id.* This Court found that because Aloha's lawsuit forced Wasser to incur substantial fees to monitor the administrative proceedings, and because Aloha had

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[11] API argues in its initial response to Ms. Wetherhorn's fee application that the reasonable rate that should be applied to a public interest litigant fee award should be one comparable to that awarded state government attorneys, rather than the rate a private attorney would charge private clients. *See* API's Response to Application for Full Reasonable Fees at 15-18.

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chosen to interject extraordinary complexity onto what should have been a straightforward administrative appeal, the superior court had discretion to award Wasser fees in addition to those for services provided exclusively in the superior court, to the extent such fees were "closely related and made necessary by" the superior court proceeding. *Id.*

These cases provide no support for Ms. Wetherhorn's claim to fees incurred by different clients in different actions. The work her counsel did for Ms. Myers and others in the trial court was not done to serve Ms. Wetherhorn in this appeal. For instance, at the time the Myers' work was done, Ms. Wetherhorn was not represented by her present counsel and the events and proceedings at issue in this action had not occurred. Just as Ms. Wetherhorn could not use this appeal as a vehicle to claim fees for work her attorney had done and billed to some other paying client, this appeal is not a vehicle to recoup fees for work her counsel did previously on a pro bono basis for other clients in other cases.

III. The Constitution Does Not Mandate the Award of Full Reasonable Fees to Private Counsel Who Volunteer to Displace Appointed Counsel on Appeal.

Ms. Wetherhorn argues that an award of full reasonable attorney's fees are "required to vindicate Ms. Wetherhorn's right to effective representation by counsel on appeal." Wetherhorn Supp. Br. at 6. She develops this in the context of her related arguments that a full fee award is proper to vindicate her right to representation on appeal, this Court's authority over the administration of justice, and the right of access to the courts. *Id.* at 6-19. In fact, Ms. Wetherhorn is not championing the right to representation or even the right to effective representation. What she seeks to establish is a right to

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representation at state expense by her private counsel.[12]

No one disputes that due process requires representation on appeal, the appointment of counsel to those who cannot afford it, and for such representation to be effective. However, such rights–which are already protected–do not translate into a mandate to order state payment of full reasonable fees to private counsel who choose to displace state paid and provided appointed counsel. Ms. Wetherhorn's request is particularly unmoving given that the pervasive failures upon which she grounds her request for full fees have failed once already to prompt this Court's intervention. *See Wetherhorn*, 156 P.3d at 384.

A. Wetherhorn and other respondents are afforded a right to counsel under present practice and procedure.

The right to counsel in civil commitment proceedings is not in doubt. In these civil proceedings, the right to counsel is guaranteed by the due process clauses of both the Alaska and United States constitutions. *Id.* at 383-84. The right to counsel is recognized by statute, which also provides for appointment of counsel within forty-eight hours.[13] For individuals that are indigent, counsel is provided at public expense by the state.[14] The Public Defender Agency appointment statute, AS 18.85.100, covers persons

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[12] As Ms. Wetherhorn notes, her counsel, the Law Project for Psychiatric Rights (PsychRights) is a private firm, formed in 2002 "to mount a strategic litigation campaign against unwarranted forced psychiatric drugging and electroshock around the country." Wetherhorn Supp. Br. at 17.

[13] *See* AS 47.30.725(d) (right to counsel); AS 47.30.700(a) (appointment within forty-eight hours).

[14] *See* 47.30.905(b)(2); Administrative Rule 12; AS 18.85.100(a). This Court has

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subject to commitment proceedings and is not limited to trial level proceedings. Appeals are not mentioned in the text, but the statute is not reasonably interpreted to exclude representation for that purpose. Where representation is limited, the statute makes express provision.[15] Appeals are not excluded. Moreover, this Court can take judicial notice of the fact that the Public Defender routinely appears in appeals in matters where eligible indigent persons are appointed counsel under AS 18.85.100(a), including criminal matters, and delinquency and child in need of aid cases. That capacity to provide representation on appeal extends to eligible persons subject to commitment proceedings as well.[16]

Given that the right to counsel and state payment for appointed counsel is provided for persons subject to commitment proceedings, Ms. Wetherhorn must take a

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stated that:

> The constitutional guarantee (of assistance of counsel) would have little meaning if it did not also encompass the right of the poor person to have counsel appointed at public expense to represent him in a criminal action when he could not afford a lawyer.'

Alexander v. City of Anchorage, 490 P.2d 910, 913 (Alaska 1971).

[15] *See* AS 18.85.100(c) (providing that representation is not provided for the pursuit of successive or untimely post conviction relief or for certain other discretionary review.)

[16] Near the end of her supplemental briefing, Ms. Wetherhorn questions for the first time whether the Public Defender Agency believes it has the authority to appeal and suggests that such belief provides more reason to grant her request for full fees. Wetherhorn Supp. Br. at 18, n.37. Neither premise stands up. First, as discussed above there is no reason to believe that the Public Defender considers its appointments under AS 18.85.100(a) to be limited to trial level proceedings. Second, if the Public Defender were deliberately withholding representation on appeal to its eligible clients, the solution would be to direct them to provide it, not to offer full fees to private counsel.

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logical leap to connect the right to representation to her claim for state payment of her volunteer private counsel's full reasonable fees.[17] That leap does not bridge the gap.

Ms. Wetherhorn relies on generalities to argue that because doctors and family members routinely lie, many people are erroneously committed or medicated. Wetherhorn Supp. Br. at 9-11.[18] She continues that the best way to overturn such erroneous decisions is to appeal. Therefore, the state should be required to pay for at least certain appeals.[19] *Id.* at 11. To support this conclusion, she cites to caselaw noting the

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[17] The fee rate claimed by Ms. Wetherhorn exceeds the reasonable rate routinely used for fee awards to state attorneys ($150/hour). It is also grossly in excess of the rate paid by the court to private counsel appointed in cases where appointment is not authorized under AS 18.85.100 or AS 44.21.410, but is constitutionally required. *See* Admin. R. 12(e). In such cases, willing attorneys are paid at a rate of $40 per hour. Admin R. 12(e)(5)(B).

[18] Such generalities are not premised on experience in Alaska and have absolutely no resonance in this case in particular. Ms. Wetherhorn came to the attention of API not due to overzealous family intervention, but from reports by disinterested but concerned third parties. *See* Ae. Br. at 3 (reciting facts relied upon for API intervention and citing to Exc. 1-3, Tr. 3). And there is nothing in the record to provide support for the supposition that any doctor at API lied about Ms. Wetherhorn in order to secure her commitment or medication. Such baseless attacks on the integrity of the API doctors should not be tolerated, let alone used to justify an award of full fees.

Moreover, to better protect the interest of persons subject to petitions for medication, the Court now requires several additional findings. *See Wetherhorn*, 156 P.3d at 382 (discussing the additional findings required after *Myers*.)

[19] Ms. Wetherhorn asserts that the risks of an erroneous decision are greater in the context of civil commitments than in criminal proceedings. *Id.* at 13. At best the stakes are even, considering that a criminal conviction can result in a life-long loss of liberty, that the right to counsel in criminal matters is explicitly guaranteed in the Alaska and United States constitutions, and that convictions must be based on findings of guilt beyond a reasonable doubt.

If the stakes are even, Ms. Wetherhorn's argument that the right to counsel compels state payment of private attorneys' full reasonable fees would likely apply to criminal

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need for the indigent to have representation on appeal. *See id.* at 14-15. But Ms. Wetherthorn's argument for a full fee award to her volunteer counsel under Appellate Rule 508, as a means of ensuring indigent have counsel on appeal, ignores the fact that Ms. Wetherhorn already had counsel provided and paid for by the state through the Public Defender Agency.

Where a person chooses to replace her appointed counsel with private counsel, due process does not require the state to subsidize that decision by being made subject to an award of full reasonable fees. The weakness of the claim is revealed by use of the three-part balancing test from *Matthews v. Eldridge* to determine what process is due. This court recently applied that test in *Grinols v. State*, 74 P.3d 889, 894 (Alaska 2003) (footnote omitted):

> Identification of the specific dictates of due process generally involves consideration of three distinct factors: the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

For purposes of this argument, the private interest affected is assumed to be the right to representation, which provides protection against unwarranted commitment or administration of medication consistent with the dictates of due process. The second factor looks to the risk of erroneous deprivation of that interest and the probable value of,

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appeals as well.

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in this case, additional procedures. The additional procedure sought here is the award of full fees on appeal to private counsel who voluntarily displace appointed counsel. The final factor is the government's interest, considering the burden created by the additional procedures sought.

Payment of full reasonable fees to private counsel who displace state provided and paid appointed counsel does not advance the right to representation as the indigent person already had counsel. Ms. Wetherhorn cites no authority which concludes that the right to counsel requires the payment of full fees to private counsel who volunteer to represent an indigent client.[20] Alaska, together with many other jurisdictions, relies upon appointed counsel to satisfy the constitutional obligation to provide representation to indigent persons. To the extent that appointed counsel does not provide effective representation in a given case, safeguards are in place permitting a client to challenge any resulting erroneous order on the grounds of ineffective assistance of counsel. *See Wetherhorn*, 156 P.3d at 383-84.

To the extent that some consider private counsel superior to appointed counsel, any marginal advantage gained is overshadowed by the immense burdens requiring full payment of private attorney's fees would place on the state. The state already pays for appointed counsel, which in most cases is provided in an agency setting,

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[20] This Court has recognized that it may not force an attorney to provide representation to an indigent person without payment of just compensation. *Delisio v. Alaska Superior Court*, 740 P.2d 437, 442-43 (Alaska 1987). But that is not this case. Counsel here volunteered.

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comparable to the Department of Law, and able to achieve certain economies of scale. If instead, an indigent person eligible for appointed counsel could force the state to pay private counsel, at private counsel rates, the budgetary impact would be daunting. And as discussed above, *supra* n. 19, if Ms. Wetherhorn's argument is accepted, the impact would not necessarily be limited to the civil commitment arena. Criminal cases may also be affected, thus magnifying the burden on the state. Many indigent clients could be expected to choose more costly private counsel at state expense. But whatever cachet is associated with private counsel may not translate to better representation than that provided by the experienced professionals serving the public agencies.

For these reasons, Ms. Wetherhorn's argument that the right to counsel requires the award of full fees to her private counsel must be rejected. Her right to counsel guarantees the provision and payment of her appointed counsel. It does not guarantee her a right to private counsel of her choosing at state expense. Nor does it require the state to become PsychRights main benefactor as it pursues its strategy of impact litigation.

B. The Court need not award full fees to volunteer private counsel to fulfill its supervisory role over the administration of justice.

Ms. Wetherhorn invokes the court's supervisory power over the administration of justice as a basis for her demand for the award of full reasonable fees to private counsel who volunteer to displace a person's appointed counsel. Wetherhorn Supp. Br. at 16-19. Though Ms. Wetherhorn presents argument under the rubric of

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administration of justice, Wetherhorn Supp. Br. at 16-19, her arguments seem to relate more directly to due process concerns.[21] Regardless of how the arguments are characterized, API contends that Ms. Wetherhorn fails to establish a predicate for the relief she requests.

As discussed above, the award of full reasonable fees to privately retained counsel who displace state paid for and provided appointed counsel is not required to ensure the right to counsel or due process. Similarly, the Court's interest in the administration of justice is not challenged when state provided and paid for counsel is made available to indigent persons subject to commitment proceedings. If that representation falls short in a given case, any resulting orders may be challenged due to the ineffectiveness of counsel. But as the Court reinforced in its opinion in this case, the Court must have a record to review to assess any such claim of ineffectiveness. *Wetherhorn*, 156 P.3d at 384. In this case, the Court declined to consider Ms. Wetherhorn's claim of ineffective assistance of counsel due to the lack of a record that would permit adequate review. *Id.*

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[21] Ms. Wetherhorn cites to a passage in *Grinols*, 74 P.3d at 893, that quotes a concurrence by Justice Rabinowitz in which he relied on the court's supervisory powers as an alternative ground for finding indigent defendants have a right to appointed counsel. Wetherhorn Supp. Br. at 16. In *Grinols* itself, the Court relied on the due process clause as the constitutional underpinning for the right to counsel in post-conviction relief litigation. 74 P.3d at 894. In the civil commitment setting, this Court has confirmed that due process guarantees the right to counsel, including the right to effective counsel. *Wetherhorn*, 156 P.3d at 383-84.

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Despite this, Ms. Wetherhorn casts her current request for an award of full reasonable fees to her privately retained counsel as something this Court needs to do in order to correct what she describes as the pervasive failures of the court and Public Defender Agency in commitment proceedings. *See* Wetherhorn Supp. Br. at 17-18. She made the same arguments in support of her claim of ineffective assistance of counsel in the briefing in support of her appeal. *See* Wetherhorn At. Br. at 36-37. The arguments are no more compelling in this context.

Ms. Wetherhorn argues that the Public Defender Agency's failure to file any appeals in the commitment setting must have "led to a number of evils," as she assumes that persons were committed or medicated who shouldn't have been. Wetherhorn Supp. Br. at 17. Such a generalized claim provides no basis for action as the Court has already explained that it will avoid "engag[ing] in the perilous process of second-guessing." *Wetherhorn*, 156 P.3d at 384. Indeed, there are any number of legitimate reasons why a party may chose not to appeal.[22] Ms. Wetherhorn's extraordinary request needs to be grounded on something more concrete than speculation and assumption, given the substantial burden it would place on the state and API.

Ms. Wetherhorn contends that two United States Supreme Court cases support her argument that the failure to appeal can demonstrate a systemic failure. Wetherhorn Supp. Br. at 18. Ms. Wetherhorn made the same argument in her briefing on

[22] For instance in this case, Ms. Wetherhorn stated at the hearing that she wanted to stay at API until she was "stabler." Tr. 10. Such sentiment, if genuine and not fleeting, can be expected to influence a public defender not to press his or her client to appeal.

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appeal. *See* At. Br. at 37, n.40. API responded then by addressing and distinguishing the cases.[23] In short, the cases cited involved instances of clearly deficient procedures. The decision whether to appeal is not open to the same sort of sweeping indictments. The merits of the decision to appeal in a given case must be examined before it can be judged.

Here, Ms. Wetherhorn has failed to establish any pervasive failures of representation or that the way commitment hearings are conducted is a travesty of justice. Having failed to establish the existence of grave problems, this Court should reject

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[23] API addressed the two cases at length at n.108 of its Appellee brief, the text of which is repeated below:

> Wetherhorn cites to two cases as supporting her claim that the failure to utilize available procedures may be grounds to find systemic problems. *See* At. Br. 37 n.40. The first case, *Fuentes v. Shevin*, does not support her claim. Fuentes found that due process was violated where state officials seized goods without a prior hearing. 407 U.S. 67 (1971). The seizure law contained a quick recovery provision that allowed for the recovery of goods upon the posting of security. *Id.* at 85. The fact that that provision was not used, *id.* at n.14, did not contribute to the Court's finding of a due process violation. Instead the Court found that when officials:
>
> > seize one piece of property . . . and then agree to return it if he surrenders another, they deprive him of property whether or not he [can] take advantage of the recovery provision. *Id.* at 85.
>
> The second case, *Streicher v. Prescott*, is distinguishable. In *Streicher*, a federal district court was called upon to provide relief to a class of persons who had been committed under a standard identified as unconstitutional. The court found that the class members were entitled to a hearing under the appropriate evidentiary standards to address this wrong. 663 F.Supp. 335, 336 (D.D.C 1987). In *Streicher* there was a clear wrong, affecting an identified class that needed redress. The procedures available to patients — but never used — were deemed constitutionally inadequate. *Id.* at 343. In this case, by contrast, Wetherhorn expects the Court to simply assume a wrong exists in potentially every case not appealed, without any specific showing that a class of respondents has been improperly represented.

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Ms. Wetherhorn's onerous proposed solution. The award of full reasonable fees for private counsel who chose to displace appointed counsel on appeal is not needed to assure the administration of justice.

C. Protecting access to the courts does not require an affirmative award of full fees.

This Court has never relied upon the need to protect a party's access to the courts as a justification for an award of full reasonable fees. The Court has expressed concern that an award of fees against a party may deter similarly situated litigants from accessing the courts. *Nunapitchuk*, 156 P.3d at 405-06. But the need to shield litigants from onerous fee awards against them in a particular case does not translate into a need to order API to fully subsidize private attorneys who choose to displace state paid for and provided appointed counsel. If the possibility of some level of fee award against a party is not considered a denial of access to the courts, then the failure to affirmatively award full fees to a party is not either. *See id.* at 405.

CONCLUSION

For the foregoing reasons, API respectfully requests this Court to find that under HB 145 and this Court's decision in *Nunapitchuk*, Ms. Wetherhorn, as a public interest litigant, is limited to an award of full reasonable fees that is apportioned to reflect only the work related to any constitutional issue upon which she is deemed to have prevailed. Further, we request that the Court reject Ms. Wetherhorn's new request for full reasonable fees apart from her claim to public interest litigant or prevailing party status.

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As demonstrated above, no constitutional imperative mandates the award of full reasonable fees to Ms. Wetherhorn's private counsel. To the extent that her request for full fees rests in the Court's discretion under Appellate Rule 508, that too should be rejected consistent with this Court's admonition that courts should take care to avoid using their discretion "as an indirect means of accomplishing what HB 145 has now disallowed–using awards of attorney's fees to encourage litigation of claims that can be characterized as involving the public interest." *Nunapitchuk*, 156 P.3d at 405.

DATED this 29th day of June, 2007 at Anchorage, Alaska.

TALIS J. COLBERG
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CERTIFICATE OF SERVICE AND TYPEFACE

This is to certify that on this date, a copy of the foregoing is being mailed to:

James B. Gottstein
Law Projects for Psychiatric Rights
406 G Street, Suite 206
Anchorage, AK 99501

I further certify the font used in the aforementioned document is Times New Roman 13 point.

Margaret Watson 6-29-07
Law Office Assistant Date

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