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My turn

Deck stacked against poor in court

Vast majority of legal needs not being met

By JONATHAN P. BAIRD
For the Monitor

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Two years ago, the New Hampshire Citizens Commission on the State Courts issued a wide-ranging and visionary report about our justice system. The commission, a group of 103 New Hampshire citizens appointed by Chief Justice John Broderick, met for months gathering information before crafting a number of recommendations for change.

Among the recommendations: New Hampshire should examine the expansion of legal representation to civil litigants unable to afford counsel. The movement to create a right to legal counsel in civil cases has been called "civil Gideon."

More than 40 years ago, the U.S. Supreme Court recognized the right to counsel for indigent criminal defendants in the landmark criminal case of *Gideon v. Wainwright*. Civil Gideon would extend the premise of right to counsel to limited civil cases when essential rights are at stake.

The American Bar Association gave civil Gideon a big boost when it endorsed a resolution supporting a civil right to counsel. The ABA resolution, passed in 2006, urges federal, state and territorial governments to provide legal counsel as a matter of right at public expense to low-income people in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.

The dilemma for our justice system is that most people who need a lawyer in a civil case cannot afford one. Regardless of the merit of the case, the idea of retaining a lawyer will probably be considered out of the question as an unattainable luxury. It does not matter whether the matter at stake is custody of a child, loss of housing or access to needed medical care.

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 a wealthy elite.

Who gets a lawyer?

While there are many questions raised by civil Gideon, defining who would be entitled to counsel is probably among the most difficult. Consider these situations:

- A stay-at-home mother of two young children is served with divorce papers by her husband. In the past year, she underwent a total mastectomy, chemotherapy and radiation after being diagnosed with breast cancer. The husband is a wealthy businessman, and he has hired an expensive divorce attorney to represent him. Although he has been physically and emotionally abusive, he alleges his wife was an unfit parent. He seeks custody and he wants to minimize her visitation with the children. The wife cannot work and she is awaiting a decision on her disability claim. She is panicked about her income, her precarious health and the prospect of losing custody.
- A homeowner who has lived in his house for 17 years falls behind on his mortgage payments and faces foreclosure. Because of the bad economy, the homeowner has had his hours cut at work. A company that specializes in foreclosure rescues contacts the homeowner and advises that it can save the home. Company officials ask the homeowner to sign documents they have prepared. The homeowner believes he is signing a loan which will bring the mortgage current. Instead it turns out the documents surrender ownership of the home for a small fraction of its actual value. The foreclosure rescuer then proceeds to pursue eviction of the homeowner.
- An elderly man and his wife are sued by a hospital for non-payment of their medical bills after he undergoes major heart surgery. The couple has sold off many of their personal possessions to pay toward their bills. Their only major possession is their home. The hospital's lawyer places a lien on the home, tries to force the couple to sign over their income tax return and pressures the wife to allow garnishment of her \$200 a week wages from the fast-food restaurant where she is employed. The husband is so frightened that he

cancel further medical visits and tests because of his inability to pay on the bills he already owes.

All of these scenarios are typical of the type of situation where representation by counsel could make a critical difference in outcome.

No such right

If you believe that any of the individuals in the examples above would be guaranteed a right to counsel, you would be wrong. There is confusion in the public about when the right to counsel is guaranteed. In a national poll, 79 percent of citizens responded "yes" when asked whether a poor litigant would have a right to free counsel if sued in a civil court. There is no such right.

Legal aid and pro bono programs do address a significant portion of the need. They are, however, under-funded relative to the huge need for civil legal assistance in housing, health, employment and family safety. A study from the federal Legal Services Corp. found that 80 percent of the civil legal needs of low-income people are not being met.

Recognizing the unmet need in 2007, the New Hampshire Supreme Court established an Access to Justice Commission to develop and implement policy initiatives to address gaps in the civil justice system, especially for those unable to afford the cost of legal services.

In articulating the need, I do not mean to minimize the many serious questions around cost, funding and implementation. With money so tight and so many legitimate competing needs, questions must be asked.

Still, as we enter a time of political transition, it is appropriate to set a new agenda, including civil Gideon. Lack of fairness in our civil legal process is a different type of cost with a heavy price tag. Meaningful access to justice requires access to lawyers.

(Jonathan P. Baird of Wilmot is a lawyer at New Hampshire Legal Assistance and served on the New Hampshire Citizens Commission on the State Courts.)

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