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INSIDE:

Right to Counsel in Civil Cases
The Scholarship
A Model Statute
Overcoming the Supreme Court's
Lassiter Ruling
Advocacy in
Maryland
Ohio
Washington
Wisconsin
Canada
Disparate Impact of
Lack of Counsel
Judges on Impact of
Unrepresented Litigants
Existing Right-to-Counsel Statutes
The Defender Experience
International Human Rights Law

A RIGHT TO A LAWYER? MOMENTUM GROWS



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Thinking About a Civil Right to Counsel Since 1923

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In 1923 John MacArthur Maguire, a Harvard law professor, called for establishing a comprehensive *in forma pauperis* system—a system that was to include a right to counsel in some civil cases. His article, *Poverty and Civil Litigation*, 36 HARVARD LAW REVIEW 361 (1923), is a good read and a better reminder that a significant amount of critical thinking has preceded contemporary advocacy efforts.

Maguire traces the development of the right to civil counsel at common law. He also surveys state and federal statutes, equal protection and due process principles, international law, and even Massachusetts' open courts provision. He outlines general principles to follow in implementing the system but recommends that specifics be left to experimentation in individual states. And, to reach his ideal, he discusses the relative merits of litigation and legislation.

The article is no isolated event, to be invoked dutifully for legitimacy or inspiration. Since Maguire put pen to paper, a tremendous amount of ink, typewriter ribbon, and hard-drive space has been devoted to discussing the right to representation in civil matters. Casual inspection of the amassed literature written since Maguire's article, much of which is categorized below, shows that the theoretical terrain has been well explored.

Scholars have argued that, as a general proposition, a right to counsel should attach in at least some civil cases. Many others have made the case in regard to particular areas of substantive law, such as housing, termination of parental rights, child neglect, immigration, custody disputes, paternity, and civil contempt. Still others have argued that because of vulnerabilities in the dispute process, a right to civil counsel should be extended to particular populations of litigants, including people with disabilities, children, women, domestic violence victims, and civil defendants. Yet another branch of this discourse focuses on developing legal justifications for the right and variously invokes due process, equal protection, the first amendment, a right of access to the justice system, international law, the common law, and state constitutional law.

And there has been a lot of litigation.

Reading much of this material creates the impression that proponents have found every available position from which to argue the case for a civil right to counsel. Where Maguire was less than thorough, those who have followed appear to have covered the remaining ground. Yet the concept still seems daring—a quality that is palpable each time the idea is introduced in a new setting,

Some portion of this reaction derives from a general lack of awareness of our legal tradition's commitment to open accessible courts. Some, too, is due to the low profile of the writing devoted to a civil right to counsel. More, I suspect, comes from the sheer dissonance of the concept with the conditions that prevail for most indigent civil litigants.

While calls for a basic right to appointed legal counsel in civil cases have been voiced for many decades, in recent years efforts to advance the idea have developed significant new momentum. Innovative legal arguments may have added some steam, but the breadth and depth of the scholarly work already devoted to the topic suggest that something rather more substantial is happening. Without conjecturing here about what precisely that “something” is, it finally seems plausible that we may see recognition of principles that have been articulated at least since 1923 (or, for the more historically minded, since 1495 or 1215).

See Maguire's article for an explanation of those last two dates. Some of that old-time thinking may prove very useful.

Articles Discussing the Right to Counsel in Civil Cases

As a General Proposition

Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, 32 HUMAN RIGHTS 8 (Summer 2005)

Jim Bamberger, *Confirming The Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE JOURNAL FOR SOCIAL JUSTICE 383 (2005)

Bruce Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL 363 (2005)

John Nethercut, “*This Issue Will Not Go Away...*”: *Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REVIEW 481 (Nov.–Dec. 2004)

Jonathan Smith, *Civil Gideon*, 18 MIE JOURNAL 4:3 (2004)

Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 571 (2004)

Robert Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE LAW AND POLICY REVIEW 503 (1998)

Robert Sweet, *Civil Gideon and Justice in the Trial Court (the Rabbi's Beard)*, 52 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 915 (1997)

William Dick, *Note: The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WILLIAM AND MARY LAW REVIEW 627 (1989)

Earl Johnson Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOYOLA OF LOS ANGELES LAW REVIEW 249 (1978)

Note: Indigents' Right to Appointed Counsel in Civil Litigation, 66 GEORGETOWN LAW JOURNAL 113 (1977)

Jeffery Mandell, *Note: The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 554 (1976)

Thomas Knox, *Comment: Current Prospects for an Indigent's Right to Appointed Counsel and a Free Transcription Civil Litigation*, 7 PACIFIC LAW JOURNAL 149 (1976)

Lester Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 NEW YORK UNIVERSITY LAW REVIEW 595 (1973)

Lee Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPARAISO UNIVERSITY LAW REVIEW 21 (1968)

Thomas Grey, *Note: The Indigent's Right to Counsel in Civil Cases*, 76 YALE LAW JOURNAL 545 (1967)

Francis O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO STATE LAW JOURNAL 1 (1967)

Note: The Right to Counsel in Civil Litigation, 66 COLUMBIA LAW REVIEW 1322 (1966)

In Particular Substantive Areas of Law

Housing

Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUBLIC LAW POLICY AND ETHICS JOURNAL 699 (2006)

Rachel Klienman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URBAN LAW JOURNAL 1507 (2004)

Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARVARD CIVIL RIGHTS—CIVIL LIBERTIES LAW REVIEW 557 (1988)

Frances Werner, *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, 17 HOUSING LAW BULLETIN 65 (1987)

Termination of Parental Rights and Child Neglect

Rosalie Young, *The Right to Appointed Counsel in Termination of Parental Rights: The States' Response to Lassiter*, 14 TOURO LAW REVIEW 247 (1997)

Douglas Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After Lassiter v. North Carolina*, 15 FAMILY LAW WEEKLY 205 (1981)

Comment: The Indigent Parent's Right to Appointed Counsel in Actions to Terminate Parental Rights, 43 UNIVERSITY OF CINCINNATI LAW REVIEW 635 (1974)

Note: Child Neglect: Due Process for the Parent, 70 COLUMBIA LAW REVIEW 465 (1970)

Note: Representation in Child Neglect Cases: Are Parents Neglected?, 4 COLUMBIA JOURNAL OF LAW AND SOCIAL PROBLEMS 230 (1968)

Immigration

Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MPI Insight No. 4 (April 2005)

Beth Werlin, *Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings*, 20 BOSTON COLLEGE THIRD WORLD LAW JOURNAL 393 (2000)

Elizabeth Glazer, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUMBIA LAW REVIEW 1157 (1985)

Robert Black, *Due Process and Deportation—Is There a Right to Assigned Counsel?* 8 UNIVERSITY OF CALIFORNIA DAVIS LAW REVIEW 289 (1975)

Custody Disputes

Mary Helen McNeal, *Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point*, 66 MONTANA LAW REVIEW 81 (2005)

John Nethercut, *"This Issue Will Not Go Away...": Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REVIEW 481 (Nov.–Dec. 2004)

Paternity Actions

Mark Estrelle, *Gideon's Trumpet Revisited: Providing Rights of Indigent Defendants in Paternity Actions*, 29 JOURNAL OF FAMILY LAW 1 (1985)

Hartung, *The Right to Appointed Counsel in Paternity Actions*, 19 JOURNAL OF FAMILY LAW 497 (1980–81)

Civil Contempt

Kurt Hausler, *The Right to Appointment of Counsel for the Indigent Civil Contemnor Facing Incarceration for Failure to Pay Child Support—McBride v. McBride*, 16 CAMPBELL LAW REVIEW 127 (Winter 1994)

Comment: Indigent Defendant's Right to Court-Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support, 50 UNIVERSITY OF CHICAGO LAW REVIEW 326 (1983)

Edward Mascolo, *Procedural Due Process and the Right to Appointed Counsel in Civil Contempt Proceedings*, 5 WESTERN NEW ENGLAND LAW REVIEW 601 (1983)

For Particular Populations of Litigants

People with Disabilities

Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 609 (2004)

Children

Jacob Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAMILY LAW QUARTERLY 485 (2003)

David Peterson, *Judicial Discretion Is Insufficient: Minor's Due Process Right to Participate When Divorce Custody Disputes Involve Allegations of Child Abuse*, 25 GOLDEN GATE UNIVERSITY LAW REVIEW 513 (1995)

Jennifer Bellah, *Appointing Counsel for the Child in Actions to Terminate Parental Rights*, 70 CALIFORNIA LAW REVIEW 481 (1982)

Women

Colene Flynn, *In Search of Greater Procedural Justice: Rethinking Lassiter v. Department of Social Services*, 11 WISCONSIN WOMEN'S LAW JOURNAL 327 (1996)

Victims of Domestic Violence

Lisa Martin, *Comment: Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 GONZAGA LAW REVIEW 329 (1998)

David Peterson, *Judicial Discretion Is Insufficient: Minor's Due Process Right to Participate When Divorce Custody Disputes Involve Allegations of Child Abuse*, 25 GOLDEN GATE UNIVERSITY LAW REVIEW 513 (1995)

Civil Defendants

Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEORGETOWN JOURNAL ON POVERTY LAW AND POLICY 1 (2003)

Robert Catz & Nancy Lee Firak, *The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard*, 19 HARVARD CIVIL RIGHTS—CIVIL LIBERTIES LAW REVIEW 397 (1984)

Legal Theories

First Amendment

Coleman Casey & Stewart Rosenblum, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE LAW JOURNAL 1055 (1973).

Equal Protection

Earl Johnson Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOYOLA OF LOS ANGELES LAW REVIEW 249 (1978)

A Right of Access to the Justice System

Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 571 (2004)

Colene Flynn, *In Search of Greater Procedural Justice: Rethinking Lassiter v. Department of Social Services*, 11 WISCONSIN WOMEN'S LAW JOURNAL 327 (1996)

Lee Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 NEW YORK UNIVERSITY LAW REVIEW 595 (1973)

International Law

Earl Johnson Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 201 (2003)

Joan Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASHINGTON UNIVERSITY LAW QUARTERLY 317 (2001)

Earl Johnson Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *FORDHAM INTERNATIONAL LAW JOURNAL* 83 (2000)

Common Law

John Nethercut, *"This Issue Will Not Go Away...": Continuing to Seek the Right to Counsel in Civil Cases*, 38 *CLEARINGHOUSE REVIEW* 481 (Nov.–Dec. 2004)

Earl Johnson Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 *LOYOLA OF LOS ANGELES LAW REVIEW* 249 (1978)

State Constitutional Law

Mary Helen McNeal, *Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point*, 66 *MONTANA LAW REVIEW* 81 (2005)

James Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 *SEATTLE JOURNAL FOR SOCIAL JUSTICE* 383 (2005)

Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 *SEATTLE JOURNAL FOR SOCIAL JUSTICE* 571 (2004)

Earl Johnson Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 *LOYOLA OF LOS ANGELES LAW REVIEW* 249 (1978)

See also the 23rd Annual Edward V. Sparer Symposium, *Civil Gideon: Making the Case*, 15 *TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW* (forthcoming 2006), which will have several articles discussing the civil right to counsel.

Civil Gideon Fundamentals: Basic Resources on the Right to Counsel in Civil Cases

[Editor's Note: The supply of scholarly analyses of the right to counsel in civil cases is extensive and growing. Readers seeking a basic introduction to the concept of a civil right to counsel might consult the following resources.]

Jim Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE JOURNAL FOR SOCIAL JUSTICE 383 (2005)

Simran Bindra, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEORGETOWN JOURNAL ON POVERTY LAW AND POLICY 1 (2003)

Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL 363 (2005)

Lisa Brodoff et al., *The ADA: One Avenue to Appoint Counsel Before a full Civil Gideon*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 609 (2004)

Robert Echols, *The Rapid Expansion of "State Access to Justice Commissions,"* MANAGEMENT INFORMATION EXCHANGE JOURNAL 41 (Summer 2005)

Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 FORDHAM LAW REVIEW 1987 (1999)

Frase v. Barnhart, 840 A.2d 114 (2003)

Gideon v. Wainwright, 372 U.S. 335 (1963)

Michael S. Greco, *Court Access Should Not Be Rationed: Defined Right to Counsel in Civil Cases Is an Idea Whose Time Has Come*, ABA JOURNAL (Dec. 2005)

Earl Johnson Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INTERNATIONAL LAW JOURNAL S83 (2000)

Earl Johnson Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 201 (2003)

Rachel Kleinman, *Comment: Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URBAN LAW JOURNAL 1507 (2004)

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Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUBLIC LAW POLICY AND ETHICS JOURNAL 699 (2006)

Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW AND SOCIETY REVIEW 419 (2001)

Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, YALE LAW AND POLICY REVIEW 503 (1998)

23rd Annual Edward V. Sparer Symposium, *Civil Gideon: Making the Case*, 15 TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW (forthcoming 2006) (to obtain symposium papers, contact Susan Feathers, assistant dean, Penn Law Public Service Program, at sfeathers@law.upenn.edu)