

ENVISIONING A CIVIL RIGHT TO COUNSEL



Where We've Been, Where We're Going: A Look at the Status of the Civil Right to Counsel, and Current Efforts

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As readers of the *MIE Journal* likely know, in 2006 the American Bar Association (ABA) unanimously adopted a resolution (112A) urging “federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety,



health or child custody, as determined by each jurisdiction.”² Resolution 112A is an apt summary of what is sought by the National Coalition for a Civil Right to Counsel (NCCRC), an informal association spanning thirty-five states and including over 230 participants. This article elaborates upon a presentation made at the NCCRC’s first-ever full-day conference in December 2011 about the status of the civil right to counsel and current efforts. The article will show that while there is a long road ahead of us before we meet the goals of this aspirational resolution, there is cause for true optimism, given the breadth and diversity of efforts being undertaken across the country to advance the right to counsel in civil cases as well as some of the gains already achieved.

A Brief History of U.S. Supreme Court Civil Right to Counsel Jurisprudence

Although the U.S. Supreme Court has not taken many cases addressing the right to counsel in civil

proceedings, a trend has emerged that explains why advocates have focused their efforts more on state constitutions than on the U.S. Constitution.

The first Supreme Court case to address the right to counsel in civil cases, and the high watermark for such, was *In re Gault*, 387 U.S. 1 (1967). There, the Court found a due process right to counsel for all juveniles in delinquency proceedings, relying not only on the liberty interest at stake but also on the fact that one-third of the states at the time provided such a right. Next, the Court held in *Vitek v. Jones*, 445 U.S. 480 (1980), that prisoners being involuntarily transferred to a mental health facility have a liberty interest at stake, notwithstanding the fact that their liberty is already constrained, due to “the stigmatizing consequences of a transfer ... coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness...” The Court held that this liberty interest entitled such prisoners to “competent help” in the form of a “qualified and independent adviser;” but the plurality decision fell one vote short of requiring such help to be an attorney.

Only one year after *Vitek*, the Court addressed the right to counsel for parents in termination of parental rights cases in *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981). Despite the Court’s concessions that the case involved an “extremely important” fundamental right, that thirty-three states plus D.C. provided a statutory right to counsel (a greater number than *Gault*), that courts had “generally held” that the constitution required counsel in termination proceedings, and that

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the state had a “relatively weak” pecuniary interest at stake, the Court found no automatic right to counsel, but rather that appointment of counsel must be determined on a case-by-case basis. The Court then established the general approach to determining whether to appoint counsel in any new category of civil case: weigh the three *Mathews v. Eldridge* factors (personal interest at stake, state’s interest, and risk of erroneous deprivation) against a presumption that cases lacking a threat to physical liberty do not require appointment of counsel.

Finally, this past year the Court held in *Turner v. Rogers*, 131 S.Ct. 2507 (2011), that parents jailed for civil contempt due to failure to pay child support are not categorically entitled to counsel, provided three factors are true: 1) the state employs other procedural safeguards, such as fully questioning the litigant to determine ability to pay and using clearer financial forms (the lack of such safeguards in South Carolina necessitated a reversal of Mr. Turner’s contempt adjudication); 2) the alleged contemnor’s opponent is neither the state nor represented by counsel; and 3) the matter is not “unusually complex.” In reaching this conclusion, the Court considered whether there is a presumption in favor of counsel when physical liberty is at stake (a question left open by *Lassiter*), and answered in the negative. The Court did leave open the possibility that counsel might be categorically required in contempt cases where the opponent is either the state or represented by counsel, or where the case has significant complexity.

The States Pick Up the Mantle

In an online symposium on the Concurring Opinions website occurring shortly after *Turner* was decided, I suggested that *the Turner Court was a day late and a dollar short* because civil right to counsel advocates have long since turned away from the federal constitution to focus on the state constitutions. Indeed, as this article will discuss, there has been much litigation in state courts on the right to counsel in civil cases, particularly in the last five years. One development really highlights the shift to state constitutions; at least eleven jurisdictions that had found a constitutional right to counsel in termination of parental rights cases prior to *Lassiter* reaffirmed that holding on state constitutional grounds subsequent to *Lassiter*. Some states have also found a state constitutional right

to counsel in proceedings involving dependency (i.e. abuse/neglect, and for both parents³ and children⁴), civil contempt,⁵ involuntary mental health commitment,⁶ guardianship,⁷ paternity,⁸ nonconsensual adoption,⁹ confinement of sexually violent/dangerous persons,¹⁰ private custody,¹¹ judicial bypass,¹² and domestic violence.¹³ While some of these advances have happened in states that might be less surprising (like California and New York), others have happened in states all over the country, like Montana, and Florida, and Minnesota.

As a consequence of both court decisions and legislative enactments, indigent litigants in a majority of states enjoy a right to appointed counsel in some types of cases, such as termination of parental rights, abuse/neglect, guardianship, civil contempt (at least prior to *Turner*), involuntary mental health commitment, quarantine, and proceedings to grant minors a judicial waiver of an abortion statute’s parental consent requirement. Moreover, in many (but not a majority) of states, indigent litigants are provided counsel in proceedings involving adult protection, paternity, nonconsensual adoption, sexually dangerous/violent person, and parole revocation. Finally, a few states provide a right to counsel in proceedings involving custody, domestic violence, special immigrant juvenile status, or certain types of benefits.

While the actions of these state legislatures and courts are laudable, the fact remains that of the five areas the ABA Resolution identified as “basic human needs,” no state provides a right to counsel in matters involving shelter or health (except for involuntary mental health commitment). And only a very few provide a right to counsel for at least some type of proceeding involving sustenance (and only for very limited benefits proceedings), safety, or child custody. Notwithstanding this fact, however, there is much cause to be optimistic, owing to the extensive efforts underway nationwide.

Advocates Press for Expansion

Litigation around the right to counsel in various types of family law cases has been extensive. In Washington State, there are active cases pressing the right to counsel for children in dependency and termination of parental rights cases, while in New Jersey, the right of children to counsel in dependency proceedings is currently being tested. Other current or very recent litigation in family law has occurred in New Hampshire (dependency), Massachusetts (contested adoptions), Montana (guardianship), Indiana (termination

of parental rights), Ohio (contested adoptions), and Alaska (private custody). But litigation has not been limited to family law matters. In the last year alone, there have been cases about truancy (Washington State), domestic violence (New Jersey and Ohio), civil contempt (Georgia), sex offenders (Kansas), and immigration (federal court in California). As demonstrated by the states listed, right to counsel litigation is being pursued all over the country, not in just one or two states.

Advocates in some states have pursued legislation rather than litigation. In New York City, a bill has been introduced for the last several years that would provide a right to counsel for seniors in eviction and foreclosure proceedings. Texas advocates attempted a bill to provide a right to counsel in appeals of eviction cases from justice court to county court (which ultimately became a law permitting judges to appoint attorneys willing to provide pro bono services in such cases), while Massachusetts advocates succeeded in enacting a right to counsel in guardianship proceedings. Bills in Montana, Connecticut, Florida, and Georgia addressed rights to counsel for either children or parents in dependency proceedings, while Tennessee added a right to counsel for parents in certain adoption proceedings. While some of these bills originated from the legal services communities, others came from the private bar, or in one instance, from a state Department of Health and Human Services.¹⁴

Another approach has been to study the results of providing counsel in civil cases, such as financial benefits, effect on outcomes, and impact on whether litigants perceive they received justice in their litigation. In Massachusetts, the Boston Bar Association Task Force recently completed an eviction pilot project that was funded through private foundations and that operated in one housing court and one district court.¹⁵ Eviction and foreclosure pilots funded by the Texas Equal Access to Justice Foundation recently ended as well. This year, California will embark on a comprehensive, multiyear pilot project created through legislation and funded to the tune of roughly \$10 million a year via an increase in court fees. It will encompass eight sites that will provide counsel in a number of different civil areas.

Finally, there are efforts that do not fit neatly into any category but that show the diversity of approaches being taken to advance the civil right to counsel. In Wisconsin, advocates filed a petition with over 1,300 signatures urging the Wisconsin Supreme Court to create rules requiring trial courts to appoint counsel whenever the judge determines that such appointments

are necessary to protect basic human needs.¹⁶ Although the court denied the petition, it reminded that it had previously declared the inherent power of Wisconsin courts to appoint counsel, and the Court is considering endorsing a pilot project. The ABA recently endorsed a Model Act¹⁷ that calls for appointment of client-directed counsel for all children in both dependency and termination of parental rights proceedings. The Dignity in Schools Campaign is hard at work on a Model Code for Education¹⁸ that includes, among other things, a right to counsel for students in disciplinary and other education-related proceedings. And in New York, Chief Judge Lippman has called for a right to counsel in important civil cases¹⁹ and has held hearings throughout the state on the crisis of civil legal representation.

Although the legal services community has been instrumental in many of the advances listed above, leaders have also emerged from other areas. For instance, the private bar has been a powerful force. Besides its 2006 resolution, the ABA also created a Model Access Act²⁰ and Basic Principles²¹ to help guide future implementations of rights to counsel, and the California Bar Association created similar model acts.²² The ABA 2006 Resolution had ten state bar co-sponsors, and eight state or local bar associations have formed civil right to counsel subcommittees. Bar officials have written countless articles in support of a right to counsel,²³ and bar associations have held moot courts to help debate the question. Access to Justice Commissions have been very active as well, with four endorsing the ABA 2006 Resolution and nine forming civil right to counsel subcommittees. And last year the Maryland Access to Justice Commission released an implementation plan²⁴ that is one of the first to provide cost estimates for a statewide implementation of the right to counsel in certain civil cases.

Looking to the Future

While the U.S. Supreme Court has set up roadblocks to Fourteenth Amendment progress, those of us in the civil right to counsel movement have much to be excited and hopeful about at the state level. As dialogue about the civil right to counsel continues to increase, we have seen not only gains of new rights to counsel, but more players from different corners become involved in and enthusiastic about the issue. And while progress may be incremental, we remind ourselves that Rome was not built in a day with respect to the right to counsel in criminal cases; *Gideon* was not the first step, nor was it the last. Prior to *Gideon* came *Powell v.*

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Alabama (right to counsel in capital cases) and *Johnson v. Zerbst* (right to counsel in federal court felony cases), and after *Gideon* came *Argersinger v. Hamelin* (extending right to counsel to misdemeanors), and those cases occurred over the span of 40 years. While we have a ways go, we also should be proud of the achievements thus far and hopeful about making similar progress in the upcoming years.

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- 2 American Bar Association, *Resolution 112A* (2006), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.
- 3 See e.g. *S.B. v. Dep't of Child. & Fam.*, 851 So. 2d 689, 692 (Fla. 2003) (finding constitutional right to counsel for parents in dependency if proceeding could lead to criminal charges).
- 4 See e.g. *Kenny A. ex rel v. Perdue*, 356 F.Supp.2d 1353 (N.D. Ga. 2005).
- 5 See e.g. *Pasqua v. Council*, 892 A.2d 663 (N.J. 2006).
- 6 See e.g. *Matter of Simons*, 698 P.2d 850, 851 (Mont. 1985).
- 7 See e.g. *Matter of Guardianship of Daley*, 473 N.Y.S.2d 114, 115-116 (N.Y. Sur. Ct. 1984).
- 8 See e.g. *Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn. 1979) (based on inherent power of courts); *Lavertue v. Niman*,

- 493 A.2d 213 (Conn. 1985) (due process).
- 9 See e.g. *In re K.L.J.*, 813 P.2d 276 (Alaska 1991) (due process); *In re S.A.J.B.*, 679 N.W.2d 645 (Iowa 2004) (equal protection).
- 10 See e.g. *Jenkins v. Director of Virginia Center for Behavioral Rehabilitation*, 624 S.E.2d 453 (Va. 2006).
- 11 See e.g. *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979) (right to counsel provided opponent represented by "public agency," which includes state-funded legal services organizations).
- 12 See e.g. *In re T.W.*, 551 So.2d 1186 (Fla. 1989) (state law requires minors to obtain parental consent prior to obtaining abortion, but provides judicial bypass of parental consent requirement; court finds right to counsel for bypass proceeding).
- 13 See e.g. *Leone v. Owen*, 937 N.E.2d 1042 (Ohio App. 2010) (right to counsel for juvenile respondent in protection order proceeding brought by another juvenile).
- 14 For the history of some recent efforts, including the story behind the Montana law that originated from the state DHHS, see Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 *LOY. L.A. L. REV.* 1087, 1102 (2010).
- 15 While the Boston Bar Association Task Force has not yet released its report, there are two statistical analysis studies of the pilots available. See D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* (Oct. 24, 2011) (draft), available at <http://ssrn.com/abstract=1880078>. See, also, D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future* (Oct. 23, 2011) (draft), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948286.
- 16 For more information on the petition, visit <http://wisgideon.org/>.
- 17 American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (101A)* (2011), available at http://apps.americanbar.org/litigation/committees/childrights/docs/aba_model_act_2011.pdf.
- 18 See <http://www.dignityinschools.org/our-work/model-school-code>.
- 19 Chief Judge Jonathan Lippman, *Justice, Justice, Shall You Pursue* at 13-14 (speech delivered at Central Syna-

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and launched a \$108 million endowment effort and completed a \$126 million capital campaign. Working in several communities, he also has extensive expertise in cause-marketing and social-entrepreneurial strategies, leading in many cases to significant earned income for strained non-profit budgets. David received his Bachelor of Arts in Social Welfare from the University of California, Berkeley; his Masters in Social Work, with a concentration in Community Organization, Planning and Administration from the University of Southern California and his Masters and Honorary Doctorate in Jewish Communal Service from Hebrew Union College-Jewish Institute of Religion, Los Angeles. David may be reached at dbubis@bettzedek.org.

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- gogue in New York) (Feb. 5, 2010), available at http://www.centralsynagogue.org/downloads/20100205-jethro_lippman_speech.pdf.
- 20 American Bar Association, *Model Access Act* (104) (2010), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.
 - 21 American Bar Resolution, *ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings* (105) (2010) http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf.
 - 22 The California Basic Access Act is at http://www.brennancenter.org/content/resource/state_basic_access_act/. The California Equal Justice Act is at http://www.brennancenter.org/content/resource/state_equal_justice_act/.
 - 23 For just a few examples, see Bary Toohey, *A Civil Right to Counsel: Inevitable or Unrealistic?* PRECEDENT at 20 (Winter 2010), available at <http://members.mobar.org/pdfs/precedent/feb10/civil.pdf>; Gene R. Nichol, *Access to Civil Justice in North Carolina*, THE NC STATE BAR JOURNAL at 12 (Winter 2009), available at http://www.ncbar.com/journal/archive/journal_14,4.pdf; Dean Kellye Y. Testy, *Civil Legal Representation and Access to Justice in Washington - An Invitation to an Important Conversation*, BAR NEWS (Feb. 2010), available at <http://www.wsba.org/media/publications/barnews/feb10-civillegalrepresentation.htm>.
 - 24 Maryland Access to Justice Commission, *Implementing a Civil Right to Counsel in Maryland* (2011), available at <http://mdjustice.org/node/1539>.

